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Enforcement frameworks and employees' rights of access to enforcement procedures

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1. Introduction

In this chapter we complement the analysis of implementation of the new rights provided by EWC Directive 2009/38/EC with an examination of procedural rules of enforcement. To this end we discuss selected aspects of enforcement frameworks:

- collective (EWC) and individual (worker representative) legal status and capacity (*locus standi*) in courts;
- cost of legal proceedings applicable in EWC court cases;
- sanctions for breach of EWC rights and provisions.

We argue that implementation of the Directive's procedural enforcement provisions is not merely a subsidiary technical complement to the substantive rights provided to EWCs, but an important element of the overall fundamental principle of '*effet utile*'.

The situation of workers' representatives in terms of protection and vindication of their rights has changed significantly in recent years. First, the new EWC Recast Directive contains important new provisions in this area (see below). Second, the general context and understanding of enforcement provisions has evolved, too. With the adoption of the EU Charter of Fundamental Rights some scholars argue that 'the more fundamental the Community right which is infringed, the more intrusive should be the remedial structure' (Fitzpatrick 2003) and pose the question 'Should it be a factor in Community law enforcement that the level of scrutiny of national remedies, and wider judicial process, should be stricter where fundamental social rights are at issue?' (Fitzpatrick 2003). This question is once again particularly rele-

vant in the context of the forthcoming review of national implementation measures with regard to the EWC Directive and in view of the recognition of workers' rights to information and consultation as fundamental rights (Art. 27 of the EU Charter).

The new EWC Recast Directive has brought substantial improvements in terms of enforcement provisions and the means that have to be put at EWCs' disposal to enable their effective functioning. The 'calibre' of the Directive's provisions in these respects varies, though: the issue of means is dealt with by Art. 10 (and Art. 4.1 with regard to setting up an EWC), while the matter of sanctions is considered in the Preamble (Recital 36).

Art. 10.1 states that:

'Without prejudice to the competence of other bodies or organisations in this respect, the members of the European Works Council shall have the means required to apply the rights arising from this Directive, to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings.'

Sanctions remain (predominantly¹) a matter for national law,² but as a result of the recast, the preamble of the Directive expressly refers to the general principle of EU law that sanctions must be 'effective, dissuasive and proportionate in relation the seriousness of the offence [...] in cases of infringement of the obligations arising from the Directive'.³

The authors' understanding of 'enforcement' with regard to EWCs rests on two pillars. First, EWCs must have the means they need to apply the rights stemming from the Recast Directive. Second, in line with the Recast Directive's amendments national implementation must respect the requirement that the sanctions available to EWCs must be effective, proportionate and such that employers will be deterred from ignoring the law and/or from preventing employees from exercising their rights to information and consultation (in accordance with the notion of legal deterrence). In turn, the first pillar of means can be subdivided into two categories: statutory and material means. The former revolves around the idea that the legal status of EWCs should be such that it allows them to stand up effectively for their rights and, if necessary, pursue litigation. This is a direct requirement stemming from the right to collectively represent the interests of the workforce (Art. 10.1 of the Recast Directive). The latter ensures that EWCs are provided with financial means that allow them to apply the formal statutory rights provided to them (see Chapter 3 for details). Both pillars have been considered by the Recast Directive as a result of numerous uncertainties in and lack of effectiveness of the 1994 Directive. The vagueness and incompleteness of the original 94/45/EC Directive was reproduced at national level, giving rise to a *de facto* paralysis of EWCs in their pursuit of justice. Contrary to the understanding presented above, national case-law showed

1 For a discussion of this topic see Jagodzinski 2015 (forthcoming).

2 The European Commission has consistently refused to regulate sanctions in the Recast Directive 2009/38/EC, arguing more specifically that such a legislative approach would be incompatible with the nature of directives.

3 Recital 36.

that some courts were not familiar with the EWC Directive's spirit and objectives and the practicalities of EWC operations, involving employee representatives and management.⁴

It should be emphasised that the statutory and the material-means pillars are complementary, not alternatives or substitutes; in consequence, only when both aspects are ensured and sufficiently safeguarded by national law can one consider a member state's obligation to comply with the Directive with regard to enforcement issues fully satisfied.

This chapter focuses on the two pillars of 'means' and 'sanctions', with particular emphasis on the former and considering the changes brought to national law in light of the formulation adopted in Art. 10.1. The aim is to identify whether transposing measures have helped to meet the objective of 'modernising Community legislation on transnational information and consultation', by 'resolving problems encountered in the practical application' of the original Directive, reducing legal uncertainty and increasing the effectiveness of information and consultation'.⁵

2. Means of enforcement

2.1 EWCs' legal status and capacity

2.1.1 State of debates and views

Art. 47 of the EU Charter of Fundamental Rights provides that everyone whose rights are guaranteed by EU law and subsequently infringed has the right to an effective remedy. This principle is 'particularly germane to the debate over the sanctions available for breach of the EU directive on information and consultation of workers' representatives' (Bercusson 1992; Bercusson 2009). This right alone is, arguably, a sufficient requirement in relation to member states to provide effective means of access to courts for workers' representatives in general (*ibid.*) and, more specifically, for EWCs collectively and/or for their members individually.

Going to court requires two things: (i) legal capacity (whether in the form of full legal personality or its functional equivalents); and (ii) recognised judicial interest. Art. 10 of the Recast Directive clearly covers both elements and requires the member states to provide these legal means to EWCs.

EWCs' recognised judicial interest in matters of transnational information and consultation is beyond question. Therefore, in discussions about possibilities of standing up for one's rights in court the principal question seems to be the claimant's formal capacity to submit an application, start proceedings, perform actions with legal effects and to be subject and object of rights and duties. In other words, before studying the question of a party's rights in court one needs to ascertain that the party can actually go to court.

⁴ See the P&O case, for example, discussed in P. Lorber 2010: 214.

⁵ Recital 7.

Questions of the transposition of EU directives into national law, with a specific focus on principles of enforcement of European labour law, have obviously been dealt with in research (Bercusson 1996b; Bercusson 2004; Bercusson 2009; Malmberg 2003; Hartlapp 2005; Supiot 1991). In this body of research Alain Supiot and Brian Bercusson both proposed a general distinction between national jurisdiction systems depending on whether they apply administrative, judicial (through courts) or industrial relations (through social partners) mechanisms of enforcement of EU labour law. Indeed, all the above cited authors considered questions such as the efficiency of enforcement frameworks, the applicability of the '*effet utile*' in this domain, enforcement of rights of workers in the context of fundamental labour law and human rights and interventions (jurisprudence) by the Court of Justice of the European Union (CJEU) in national judicial enforcement.

At the same time, debate on the legal capacity and right of EWCs to go to court has been taking place mainly at the margin of analyses of other aspects of EWC operation, such as financial means for EWC operation, the validity of Art. 6 and Art. 13 agreements⁶ or the legal effectiveness of transnational agreements signed by EWCs.⁷ Academics and experts are split on these issues. The majority of discussants⁸ have argued in favour of legal personality on principle for EWCs as a precondition for the validity and binding effect of agreements signed by these bodies and the managements of multinational companies.⁹ According to these views either a form of a restricted legal personality¹⁰ or 'capacity to execute its rights and duties, including in courts'¹¹ are considered necessary for special negotiating bodies (SNBs) and/or EWCs to ensure workers' representatives' access to courts.¹² Following Blanpain's approach (Blanpain 1999) legal personality is sometimes considered in relation only to the SNB rather than in regard to the subsequent EWC¹³ and is limited only to the necessary competence to conclude or terminate an agreement establishing an EWC or an information and consultation procedure (ICP).¹⁴ Most specifically, the question of EWCs' legal personality was debated in a project initiated by Romuald Jagodzinski (ETUI) and coupled with the current analysis dealing with EWC-related case law.¹⁵ The legal standing of EWCs (including legal personality) was explored and discussed with regard to specific countries in which EWC-related case law occurred. It presented a varied picture across the EU, with some countries ensuring much broader prerogatives to EWCs than others.

Other scholars have investigated the legal personality of EWCs in connection with the question of the effectiveness of national sanctions for breaches of information and consultation rights.¹⁶ On the other hand, some lawyers have argued that in

6 Bercusson 1996b: 298.

7 Blanke and Köstler 2006: 438–439.

8 Blanke and Köstler 2006; Bercusson 1996b.

9 Blanke 2004: 426.

10 Blanpain 1999: 11: 'The SNB has in a sense a restricted legal personality, with the necessary competence to conclude or to terminate an agreement, establishing an EWC or a procedure. By the same token, the SNB should have the legal competence to introduce actions before the courts in case of dispute relating to matters covered by the Directive.'

11 Ibid: 13.

12 See also ETUC 2008a: 8.

13 Compare Engels and Salas 1998: 25.

14 Blanpain 1999: 11.

15 Dorssemont and Blanke 2010.

16 Blanke and Köstler 2006: 435–441.

particular countries legal personality is a potentially risky empowerment of EWCs.¹⁷ In general, however, the available literature on this formal characteristic of EWCs' legal anchorage is scarce and definitely not conclusive. One reason for this research deficiency might be the fact that the knowledge of EWC jurisprudence is limited and without a summary overview such as presented in Dorssemont and Blanke (Dorssemont and Blanke 2010) the link with judicial procedures as relevant for EWCs' operations was not posed either as a pragmatic or as a research question.

2.1.2 Provisions of Directive 94/45 concerning legal status and capacity of EWCs and SNBs

The ambiguity of conclusions arising from the legal debate on the status of EWCs stems from the imprecision, or, indeed, the lack of any clear provision of Directive 94/45 in this regard.¹⁸ Under these circumstances attempts have been made to close that loophole by means of interpretation of the Directive and inference of certain powers or competences (functions) of EWCs from its general provisions.

Seeking hints concerning the legal personality of EWCs one finds the provision of Art. 8.2 on confidential information. This article stipulates that a dispensation not to disclose information, granted optionally by the member states to enterprises on the basis of a confidentiality clause, can be (optionally) subject to prior administrative or judicial authorisation. Even though the Directive does not explicitly mention EWCs as parties entitled to take advantage of this entitlement, it seems obvious that it is the EWC as a collective body that is the beneficiary of information and consultation and thus subject to confidentiality restrictions. As a consequence, in case of infringements, it is the EWC as a collective body that has a direct interest in contesting any limitation on sharing information based on the management's confidentiality prerogative. One can therefore infer that it is the EWC, as a collective body, that is entitled to effectively participate in court (or administrative) proceedings as a party. In order to be able to assume this right, EWCs have to be granted, at least, some specific aspect of legal personality. At the same time, Art. 11.4 of the Directive specifies that 'Where member states apply Article 8, they shall make provisions for administrative or judicial appeal procedures which the employees' representatives may initiate (...)'. The provision of Art. 11.4 should, however, in our view, not be considered a limitation of the right to effectively act in courts stipulated in Art. 8, but rather as an indication that EWCs are entitled to pursue such lawsuits by either a mandated representative agent or proxy. In both cases such representation should be selected and mandated in line with internal rules of procedure adopted by the EWC or other regulations in place.

Furthermore, assuming that an agreement between the SNB and the management includes '*financial and material resources*' to be allocated to the EWC for its operations,¹⁹ it can be inferred that those resources are made available in the form of a budget. This presupposes that the EWC has the capacity to manage those funds autonomously and on its own behalf. Consequently, it can be inferred that the EWC was therefore tacitly acknowledged by the EU lawmaker as capable of entering into civil contracts with third parties delivering services (for example, transla-

¹⁷ Biagi's intervention in: Blanpain and Biaggi 1998:25–26.

¹⁸ Blanpain 1999: 13.

¹⁹ Art. 6.2.e.

tors, interpreters, experts) or goods. This would result in an eligible conclusion that EWCs as collective bodies are also capable of collectively assuming rights and obligations, as well as of taking part in legal transactions. The above argumentation is clearly of a very formal nature and consequently vulnerable to criticism in cases in which EWCs have not been granted a separate budget by the company,²⁰ but where instead the company binds itself to cover all the expenses linked to the operations of an EWC. Such an arrangement would suggest that the particular EWC would not be intended to be an autonomous body with collective rights to pursue legal actions or assume obligations. This conclusion, however, should in our view not be adopted hastily as it would suggest that legal personality (or other forms thereof) are bound to parties' will or lack of it, which clearly cannot be a criterion in systemic statutory arrangements. If the latter were the case, EWCs without autonomous budgets would automatically be deprived of the possibility to defend their rights in courts, which in view of the quoted provisions and the Directive's general goals and the principle of effectiveness does not hold true.

2.1.3 Modifications of the Recast Directive 2009/38/EC and the legal status of EWCs and SNBs

The ambiguity or indeed silence of Directive 94/45/EC with regard to the legal standing of EWCs has caused numerous difficulties and inconsistencies across the EU.²¹ Probably the most blatant example of the consequences of this lacuna was displayed in the P&O case, in which a mixed-type EWC (employers with employees) based on British law sought in vain to initiate a lawsuit against the management. The EWC was refused this right and a legal standing in pre-court proceedings due to its mixed composition and, reportedly, the impossibility for the EWC to initiate legal actions against management, which was part of the EWC.²²

As explained earlier, 'resolving the problems encountered in the practical application of Directive 94/45/EC and remedying the lack of legal certainty resulting from some of its provisions or the absence of certain provisions'²³ was one of the reasons for adopting the Recast Directive. This is a clear reference to identified case law and legal obstacles experienced by EWCs.²⁴ Art. 10.1 was intended as the solution and remedy to the practical difficulties and legal uncertainty experienced.

The authors consider that the Recast Directive should be interpreted as providing two separate categories of means to EWCs by two different actors. The first category (pillar) contains the most obvious financial and material means to be provided to EWCs by management in order to allow EWCs to operate and to exercise rights arising from the EWC Directive. This general obligation has a specific dimension in cases of legal conflicts in which the EWC should be provided by the management

20 The ongoing analysis of EWC agreements conducted by the ETUI, as it stands at the moment (January 2015) lists 131 EWCs currently existing to which an autonomous budget was granted and further 30 EWCs that no longer exist used to benefit from this right in the past.

21 See COM 2000 (188) final Report from the Commission to the European Parliament and the Council on the application of the Directive on the establishment of a European works council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, p. 4.

22 For details see Lorber 2010: 214.

23 Preamble, Recital 7.

24 See, for example, Jagodzinski, Kluge and Waddington 2009; Dorssemont and Blanke 2010: 225 ff.

with the resources and means it needs to exercise the right to seek justice (such as money to finance a lawyer to represent it and provide legal advice). The addressee of this obligation is the central management.

The second category of obligations imposed by the Directive comprises, arguably, means of an institutional nature (provisions of national law) that are required to apply the rights stemming from this Directive and to collectively represent the interests of employees. Implicitly, the institutional measures represent a part of the general term ‘means’ as defined in Art. 10.1, for without appropriate legal (or administrative) procedures members of EWCs have no possibility of fully exercising their rights (the principle of effectiveness of the *acquis communautaire*). The requirement to provide for effective legal (court or administrative) means directly formulated by Art. 11.2,²⁵ not only mentions ‘appropriate measures’ in general, but specifies ‘adequate administrative or judicial procedures’. The latter provision of Recast Directive 2009/38/EC represents an important, but often overlooked and underplayed improvement, or a clarification compared with Directive 94/45/EC and leaves no doubt about EWCs’ capacity to go to court and participate in legal proceedings. At the same time, as indicated above, monitoring of national transpositions (see below) of the Recast Directive to date suggests that the member states have considered their existing provisions in this regard to be sufficient. Therefore it remains to be seen how scrupulously and with what degree of thoroughness the European Commission in a future report on implementation of the Recast Directive²⁶ will evaluate implementation of this provision. In many cases, improvement of the factual legal standing of EWCs and their right to apply the rights stemming from the Directive in national law depends solely on proper transposition of Art. 11.2.

2.1.4 Overview of solutions applied in the member states concerning legal status of EWCs and SNBs

Across the EU member states an array of solutions is applied as regards granting EWCs (and SNBs) legal status or, alternatively, equivalent specific powers in courts or legal procedures. The large majority of solutions remain unchanged since the implementation of Directive 94/45/EC (see section (a) below) demonstrating that the member states consider these originally adopted solutions sufficient to guarantee the standards of Art. 10.1 of the Recast Directive. In the second part of the section particular attention will be devoted to countries that decided to modify provisions governing the legal status of EWCs in the wake of transposition of Recast Directive 2009/38/EC.

In the following section, three solutions with regard to the legal status of EWCs and SNBs are differentiated, from the fullest to the most limited: (i) legal personality as the fullest status granted to EWCs and SNBs; (ii) capacity to act in court defined as a set of rights and powers granted by the given national law to EWCs and SNBs (either specifically or by default to all employee representative bodies) empowering them to proceed in courts as a collective body, and *mutatis mutandis* acquire,

²⁵ ‘Member States shall provide for appropriate measures in the event of failure to comply with this Directive; in particular they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced’.

²⁶ In November 2014 the European Commission announced an internal call for tender to prepare the implementation report which, reportedly, should be completed by the end of 2015.

as a collective body, rights and obligations, yet without the formal status of a legal person; and (iii) capacity to address a court with applications and to start legal proceedings (occurring mainly in cases of confidentiality disputes).

(a) *National provisions transposing Directive 94/45/EC*

First, only in four EU member states (Austria,²⁷ France,²⁸ Romania and Sweden²⁹) since the adoption of the transposition laws of Directive 94/45/EC have EWCs enjoyed the fullest form of the initially implicit, and with the Recast Directive, explicit right (Art. 10.1) to represent workers' interests; in other words, legal personality that allows them to claim obligations and duties on behalf of EWCs.³⁰ Consequently, EWCs in these countries have the necessary capacity to lawfully act and represent employees' interests towards third parties. This legal status allows EWCs to approach courts as well as to deal with, for instance, banks (where they can open accounts or even take out loans) or conclude contracts (with experts, lawyers and so on) collectively, that is, as a body and not as individual natural persons (EWC members). However, because the possible legal personality is granted by national laws, in principle it remains binding only within the specific country's authority. Consequently, a question arises concerning the legal capacity of such EWCs with nationally granted legal personality to conclude contracts with third parties abroad, which is a relevant question for EWCs as bodies for transnational information and consultation. To date, no such litigation has been reported, but it is a potential consequence of differing national provisions that EWCs' legal capacity will be denied by a court in a country that does not recognise EWCs' legal personality.

Second, it should be noted that in other member states the fundamental entitlement to take actions with legal effects and the power of lawful effective representation towards third parties, in any of its forms, is not always guaranteed to EWCs. As the analysis of the current project reveals, only in a further seven (Germany,³¹ Spain, Lithuania, the Netherlands, Norway, Poland, Slovakia and the United Kingdom) out of the 31 EEA countries (EU27 and Norway)³² in which the EWC Directive is applicable were those employee representative bodies officially recognised

27 Although this is not explicit but can be inferred and presumed from the *Arbeits- und Sozialgerichtsgesetz* (the Labour and Social Security Courts Act); see D. Rief, 'Austria' in F. Dorsssemont and T. Blanke (eds), *The Recast of the European Works Council Directive*, Intersentia, 2010, p. 116.

28 Art. L-439-7 of the Labour Code.

29 Section 36 of Act. No. 359 of 9 May 1996 on European Works Councils. The law expressly grants legal capacity to the SNB and the EWC 'to acquire rights and assume obligations.'

30 Full legal personality for EWCs was reportedly considered also in the Luxembourg transposition of the Recast Directive. A bill concerning the Recast Directive (2009/38/EC) was submitted and the Luxembourg Chamber of Commerce published its opinion in conformity with the national legislative procedure. In the meantime, two other bodies (*chambres professionnelles*) finalised their opinions and recommended that the law should clearly emphasise that the members of the Works Council have the right to sue in court. (see: A report by the European Labour Law Network of 07-04-2012 at: http://www.labourlawnetwork.eu/national_labour_law/national_legislation/legislative_developments/prm/109/v__detail/id__1961/category__22/index.html)

31 Already the German transposition of Directive 94/45/EC (*EBR-Gesetz*) recognised the EWC's capacity to collectively represent employees' interests. Similarly, regulations concerning coverage of costs (§ 39 Abs. 1 EBRG) in the course of establishment and operation refer to EWCs as collective bodies. However, similar to national works councils, the EWC has no assets and the employee representatives' functions therein are not remunerated (honorary function). Thus according to German law EWCs have no automatic right to an autonomous budget (though management must assume all costs). Moreover, concerning the German case views are divided with regard to qualification.

32 The two remaining countries belonging to the European Economic Area, where the EWC directive is applicable – Liechtenstein and Iceland – were not included in the analysis.

in proceedings as collective organs. A good example is Germany where, similar to national works councils, an EWC has no general legal personality or capacity, although it can be a collective object of rights and duties within the scope of regulations on EWCs. Therefore it can be represented as a collective body in law by its president and has – within the scope of its rights provided by the national law – a (procedural) capacity to participate in proceedings. These rights are, however, not directly provided to EWCs in the transposition laws of the EWC Directive(s), but are stipulated in external (procedural) laws (labour courts procedure), as well as in national jurisprudence in the area of worker representation.

In some cases (for example, Spain³³ and Latvia since the transposition of Recast Directive 2009/38/EC) EWCs' and their members' capacity to act in courts is guaranteed or reinforced by the possibility of trade unions representing their interests under the rules of protection of collective agreements (for example, Art. 38(2) of the Spanish Act of 1997). It must be emphasised, however, that in some of these countries the conclusion about EWCs' capacity to go to court is inferred on the basis of the capacity to submit requests to courts challenging management decisions to label information 'confidential'. Such an interpretation or legal inference of rights is prone to conflicts and dissenting views. Similar potential problems arise with regard to countries such as Finland where only signatories of EWC agreements individually can approach courts in case of a dispute; consequently, in practice various types of EWCs might have differing capacities: EWCs established by means of subsidiary requirements as collective bodies in view of the lack of an agreement and its signatories individually when EWCs are established by agreement.

It should be noted, however, that in specific circumstances or systems the lack of a collective capacity to act in court does not automatically result in insufficient means for EWCs to approach courts. For instance in Estonia, where workers' representatives (employee trustees) individually have the capacity to initiate proceedings in case of dispute by notifying the labour inspectorate and no fees for launching such procedures apply it seems that such individual competence on the part of employee representatives might be sufficient to meet the requirements of the EWC Directive in the area of access to courts.

Despite the coincidence of specific circumstances, such as those in Estonia, in view of the findings presented above the conclusion seems to be that only in a limited number of the above mentioned member states and, in fact, arguably only in a limited number of cases (mainly referring to confidentiality of information) have EWCs been granted sufficient means to seek justice. In the remaining countries in which neither legal personality nor equivalents thereof – that is, forms of a functional legal personality or similar collective rights – were granted to EWCs legitimate doubts concerning complete and proper transposition of Directive 94/45/EC in this area could be raised already prior to adoption of the Recast Directive.

33 Art. 37 of the Law of 10 April 1997 on the right of employees in Community-scale undertakings and groups of undertakings to information and consultation.

(b) *Changes to national rules in consequence of transposition of Recast Directive 2009/38/EC*

The legal framework in the area of access to courts laid down by the original Directive 94/45/EC was significantly modified by Recast Directive 2009/38/EC, first and foremost, with Art. 10.1 granting EWCs the right to collectively represent workers' interests. Following the adoption of the modified Directive member states were responsible for transposing the extended rights into their national laws.

Table 17 Transposition of Directive 2009/38/EC with regard to the provision 'means necessary to apply rights stemming from the Directive' (in selected countries)

Country	No mention in transposition of Recast Directive 2009/38/EC	Copy-paste from Directive 2009/38/EC	No copy-paste from the Directive BUT equivalently general provision	Other transposition of Recast Directive 2009/38/EC	Remarks
Austria				X	Required to be specified by parties in EWC agreement.
Belgium		X			
Bulgaria			X		
Cyprus		X			
Croatia		X			Required to be specified by parties in EWC agreement.
Czech Republic	X				Yes
Denmark	X				
Estonia			X		Art. 40(3) 'The members of the European Works Council must have the means required to perform the functions arising from this Act, including to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings.'
Finland				X	Required to be specified by parties in EWC agreement.
France	X				
Germany				X	Art. 39(1) 'Any expenses arising from the training and functioning of the European Works Council and the Committee shall be borne by the central management. The central management shall, in particular, make available adequate rooms, material and human resources for the meetings and day-to-day business as well as interpreters for the meetings. (...)'
Greece		X			

Table 17 Transposition of Directive 2009/38/EC with regard to the provision 'means necessary to apply rights stemming from the Directive' (in selected countries) (cont.)

Country	No mention in transposition of Recast Directive 2009/38/EC	Copy-paste from Directive 2009/38/EC	No copy-paste from the Directive BUT equivalently general provision	Other transposition of Recast Directive 2009/38/EC	Remarks
Hungary				X	Includes the right to commence legal disputes.
Ireland			X		Amendment 13 Amendment of section 17 of Act of 1996 (...) central management shall provide the members of the European Employees' Forum or European Works Council, as the case may be, with the means required to apply the rights arising from the Directive, to represent the collective interests of employees (...).
Italy		X			
Lithuania				X	Art. 24(5) 'the financial and material resources allocated, and the services provided for the operation of the European Works Council' must be stipulated in the EWC agreement.
Luxembourg			X		Art. 432-1: The responsibility for establishment and operation of EWC/SNB lies with the central management which 'shall establish conditions and provide means necessary to this end'. + Art. 432-44 'the necessary material means'.
Latvia				X	Required to be specified by parties in EWC agreement.
Malta			X		Art. 11(1) 'The members of the European Works Council shall have the means required to apply the rights arising from these regulations, to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings'.
Netherlands				X	Amendment to Art. 18: '2. The third sentence in the third paragraph reads as follows: 'If a select committee is elected, the powers of that committee shall be set out in the rules of procedure, which shall also establish the resources necessary to enable it to pursue its activities.'

Table 17 Transposition of Directive 2009/38/EC with regard to the provision 'means necessary to apply rights stemming from the Directive' (in selected countries) (cont.)

Country	No mention in transposition of Recast Directive 2009/38/EC	Copy-paste from Directive 2009/38/EC	No copy-paste from the Directive BUT equivalently general provision	Other transposition of Recast Directive 2009/38/EC	Remarks
Norway				X	The management is responsible for arranging and paying for the negotiations, including ensuring the necessary translation of documents and interpreting services, and for implementing and financing the permanent cooperation mechanism the parties establish, cf. §3 and § 6 (6). + experts and means of communication mentioned.
Poland	X				

Source: Compilation by Romuald Jagodzinski, 2014.

As already mentioned, during the transitory period devoted to transposition of the Recast Directive some member states raised questions about the nature of Art. 10.1 of the Directive and its extent. Clear explanations and consensus were given to the extent that the provision of Art. 10.1 of the Recast Directive should not only be understood in the narrow sense as a provision referring only to financial means for the operation of EWCs (European Commission 2010a). For example, the European Commission indicated that Art. 10.1 was designed to ensure means which 'include the ones required to enable EWC members to launch court proceedings in the event of violations of transnational information and consultation rights' (European Commission 2010a): 39). Despite common arrangements in the course of preparations for the transposition conducted under the auspices of the European Commission, implementation of this provision in national systems varies, sometimes considerably. National provisions implementing Art. 10.1 of the Recast Directive can be grouped into the following categories:³⁴

- (i) Countries applying the narrow (limited to financial means) interpretation (Denmark, Estonia, Finland, Greece, Iceland, Italy, the Netherlands, Sweden, the United Kingdom and, by implication, Belgium):

A good example here may be Belgium, where Collective Agreement No. 101 of 21/12/2010 (Art. 44) stipulates:

³⁴ This is inferred in parallel with the competence bestowed by Belgian law on members of (national/local) works councils (see, for example, Dorssemont 2013).

‘The operating expenses of the European Works Council shall be borne by the central management located in Belgium. This management shall provide the members of the European Works Council with such financial and material resources as enable them to perform their duties in an appropriate manner.’

This wording refers only to *‘financial and material resources’* and gives no consideration whatsoever to non-financial aspects of the obligation to provide the necessary means to EWCs³⁵ and, against the advice of the Expert Report (European Commission 2010a), does not address the question of providing legal means, such as legal status, enabling EWCs to fully apply rights stemming from the Directive. In the given example of Belgium (though not exclusively), it is a serious shortcoming in transposition and an obstacle to the practical operations³⁶ of EWCs³⁷ as, according to our research, they do not have a collective right to act in courts (only individual members of EWCs have that right, see Table 18a and 18b).

- (ii) The second group of countries (Cyprus, Estonia, Finland,³⁸ Ireland, Italy, Malta, Slovenia, Spain and Greece) adopted the strategy of copy-pasting the exact (more or less) wording of Art. 10.1 of Directive 2009/38/EC without specifying concretely what are the ‘means necessary to collectively represent the interests of employees’. There are two possible explanations:
 - (a) an improbable (in view of the existence of the Expert Group Report 2010³⁹) state of unawareness that *‘the means necessary’* should also comprise legal status guarantees for EWCs, providing them with improved access to courts;
 - (b) deliberate failure to specify the definition and content of this rule in order to avoid stating clearly what the legal status of EWCs is.

Some examples of cosmetic – in the sense that they do not bring more clarity to the wording of the Directive – changes to the original wording of the Recast Directive can be mentioned. The Slovenian transposition act changes the wording of Art. 10.1 of Recast Directive 2009/38/EC slightly by stipulating

35 Admittedly, the Belgian transposition in order to be complete still requires a statutory act (law) to regulate the question of sanctions for breaches of a collective agreement. This is because deciding on sanctions for law infringements is beyond the competence of the social partners. It is, however, uncertain whether the law on sanctions will be modified at all in Belgium, and if so, whether Art. 10.1 will be considered to be part of it.

36 National court cases have highlighted legal uncertainties with regard to the right of employee representatives to pursue complaints, in particular where the EWC includes management representatives (Preliminary hearing on the issue of court costs, *P&O* (Employment Appeal Tribunal, 28.6.2002); *Panasonic* (Appeal against Bobigny TGI, 4.5.1998).

37 This view was shared by the European Commission itself in the Impact Assessment SEC(2008)2166, in which – with reference to the Court of First Instance of the European Communities’ acceptance of the Legrand European Works Council’s intervention in the dispute over competition law arising from the merger with Schneider – the Commission recognised the capacity of the EWC to represent workers and act in legal proceedings: ‘The European Courts do recognise the competence of European Works Councils to represent employees, which is not restricted to the internal matters of the company in question’ (CFI, T-77/02, *Schneider Electric*, Judgment of 6.6.2002).

38 The Finnish transposition act 620/2011 (Act amending the Act on cooperation in Finnish groups of undertakings and Community-scale groups of undertakings, adopted: Helsinki, 10 June 2011) replaced the term ‘means’ with ‘possibilities’. This modification, however, does not seem to change the meaning of this provision that appears limited to material and not legal means to perform EWC functions.

39 European Commission 2010a.

that members of the EWC ‘shall have the means required to exercise the rights arising from this Act and shall collectively represent the interests of employees’, but the wording does not specify what the collective representation of interests does entail and what means it might require. Similar uncertainties with regard to the ‘means required’ were raised by the Greek expert,⁴⁰ who explained that neither Art. 64 of Law 4052 nor any relevant external acts contain clear cut rules on the legal status of EWCs. According to the Greek laws, neither EWC members nor the EWC as a collective body have legal personality (EWC members seem to have this right, see explanation on Greece in Table 18a and 18b), but according to the expert, EWCs could attempt the solution of approaching courts as an ‘association’ that, according to Art. 69 of the Greek Code of Civil Procedure (*Kodika Politikis Dikonomias*), has such competence.

- (iii) A third group of countries has not introduced any new provisions of the Recast Directive modifying the existing framework for EWCs (Czech Republic, France, Lithuania, Portugal, Poland, Malta, Netherlands, Norway, Romania, Sweden and Germany). This decision demonstrates a conviction that EWCs in these countries are already equipped with sufficient rights ensuring fulfilment of the standards laid down by the Expert Group Report (European Commission 2010a) with reference to the ‘means required to represent collectively the interests of employees’. While in countries in which EWCs already have legal status, which allows them to approach courts as collective bodies (France, Germany, Netherlands, Romania, Sweden and Lithuania; see Table 18a and 18b) it can be accepted that no modifications were necessary, that approach is questionable with regard to other countries in this group that had no regulations in place within the framework of Directive 94/45/EC or had introduced regulations on EWC status of insufficient quality under the transposition of Directive 94/45/EC.
- (iv) A fourth group of countries (Estonia and Finland) applies a solution granting employee representatives the right to seek legal redress as individual members of the EWC (rather than granting such rights to the EWC collectively). Such individual rights might be further differentiated between a general competence to seek legal redress and a right applicable only in specific cases (for example, refusal of information/consultation based on the confidentiality clause).
- (v) The fifth legislative approach to transposing the ‘right to collectively represent the interests of employees’ can be classified as an implicit granting of collective capacities to the EWC. This strategy was adopted only in the British transposition instrument.⁴¹ Regulation 19D stipulates that the EWC may become subject to sanctions if it fails to inform the employees of the content or outcome of the information and consultation procedure. It is clearly stipulated that the failure to inform and the sanction refer to the EWC as a collective body, not only to its members. One can argue that this particular capacity of an EWC to be an object of legal sanctions is an expression of the general new capacity given to EWCs to ‘represent collectively the interests of the employees’.⁴² Con-

40 Panos Katsampanis, Federation of Industrial Workers Unions (OBES).

41 The Transnational Information and Consultation of Employees (TICE) Regulations 1999 amended by the Transnational Information and Consultation of Employees (Amendment) Regulations 2010 (SI 2010/1088).

42 Art. 10.1 Recast Directive 2009/38/EC.

sequently, in the case of the UK transposition one can argue that if the statutory instrument recognises the collective legal responsibility of EWCs (their passive collective capacity), it must also recognise their collective rights and capacity to collectively assume rights and obligations and to act as a subject of law (the positive collective capacity). This understanding is in line with the Expert Group Report⁴³ that made explicit reference to the British context.⁴⁴

This interpretation will have to be confirmed in litigation, but it seems there is no escape from recognising EWCs' collective rights to seek legal redress under the new regime, even if it is based on the principle of implied powers. Further support for this argument is found in cases accepted by the Central Arbitration Committee (the body responsible for hearing disputes about the application of the regulations)⁴⁵ even before the Recast Directive was drafted. The conclusion could be drawn that even though it is not explicitly recognised, the British transposition of the Recast Directive sufficiently ensures the rights of EWCs to seek redress in judicial proceedings.

- (vi) Finally, there are countries that modified the previous legislation on EWCs by explicitly granting them legal status or legal competencies that ensure access to courts in cases of conflict (Hungary, Latvia, Slovakia).

A good example of this approach is the Hungarian transposition act, which stipulates in Art. 67 (2) that:

‘Without prejudice to the competence of other employee representation and participation organisations in this respect, *the members of the European Works Council shall represent collectively the interests of the employees* of the Community-scale undertaking or Community-scale group of undertakings and *shall have the means required* to exercise the rights provided to the European Works Council, *including the commencement of legal disputes relating to the violation of the rights to information and consultation of employees*’ (authors’ emphasis).

While the above clear statement regarding EWCs' capacity to act in court is praiseworthy, according to Hungarian expert information,⁴⁶ under the 2012 reforms of the Labour Code the protection against dismissal of EWC members (and other national-level workers' representatives) has been significantly reduced or removed altogether. Such deprivation of protection for workers' representatives is starkly at odds with the Recast Directive's requirement in Art. 10 to provide EWC members with means to exercise rights stemming from the Directive.

43 European Commission 2010a: 37.

44 Court case concerning P&O alleging that the EWC suffered hindrance in accessing justice due to the lack of clear provisions in the British transposition act, the TICE Regulations of 1999; For more details see Dorssemont and Blanke 2010.

45 The list can be found at <http://webarchive.nationalarchives.gov.uk/20140701192834/http://www.cac.gov.uk/index.aspx?articleid=2304> (consulted on 15/08/2015), and especially the case of Haynes and the British Council tried by the Central Arbitration Committee in 2012 (<http://webarchive.nationalarchives.gov.uk/20140701192834/http://www.cac.gov.uk/index.aspx?articleid=4312> consulted on 15/08/2015).

46 Presentation given by Tamás Gyulavári of the Faculty of Law and Political Sciences of the Pázmány Péter Catholic University, Budapest, at an EWC Seminar on 20–21 January 2015. See also: <http://www.worker-participation.eu/National-Industrial-Relations/Countries/Hungary/Workplace-Representation>.

In this group, Latvia should also be mentioned. This country, under the Act of 29/03/2001 transposing Directive 94/45/EC, had no specific provisions on sanctions or access to justice for EWCs. Under the new act transposing Directive 2009/38/EC this area was regulated by reference to the Labour Dispute Act that provides for mediation, conciliation or arbitration (depending on whether the dispute has an individual or a collective character and whether it concerns interests or rights) by a Labour Dispute Commission (consisting of employers' and employees' representatives or a Conciliation Commission or Mediator). No specific mention of EWCs is made in this act, but they are explicitly covered by its provisions on the basis of Section 32 of the Act of 19/05/2011 transposing the Recast Directive. The Labour Dispute Act grants the parties the capacity to submit applications for adjudication and, in case of dispute over the outcome of proceedings by the Labour Dispute Commission (or the Conciliation Commission or Mediator, depending on the nature of the dispute) empowers the parties to seek further redress with the courts or the Arbitration Court(s). Importantly, in case of individual disputes regarding rights, Section 8 of the Labour Dispute Act empowers unions to represent their members and individual EWC members to act in courts. Consequently, both the collective and individual capacity of EWCs and their members to have resort to justice seem well guaranteed.

Similarly to the Latvian transposition, the Slovak implementation of the Recast Directive⁴⁷ explicitly introduces legal capacity for EWC and SNB members (and employee representatives) to participate in judicial proceedings ('capability to be party to court proceedings') as a competence stemming from Art. 10.1 of the Recast Directive.⁴⁸ In this way the Slovak implementation (and other transposition acts in this category) leaves no doubts about EWCs' and their members' capacity to seek legal redress, as would have been the case if the only provision of these transpositions referring to EWCs' access to courts had been Section 249 (1) of the Slovak Act of 8 February 2011 granting the right to 'parties concerned to turn to courts to determine the lawfulness of application (by company management) of the confidentiality of information clause'. Such questions concerning the derivation of the general right to start legal proceedings and/or act in court from the competence to address courts to ascertain or challenge the designation of information as confidential can be raised with regard to national transpositions of the EWC Recast Directive in Poland, Estonia⁴⁹ and Romania where EWCs' capacity is mentioned only with regard to specific confidentiality disputes. It seems thus that in the latter group of countries the Recast Directive's Art. 10.1 was not transposed properly as it grants no general right to represent workers' interests collectively at courts.

47 Act of 8 February 2011, amending Act No. 311/2001, the Labour Code, as amended and amending certain other laws.

48 Section 250(3) of the Act of 8 February 2011, amending Act No 311/2001, the Labour Code, as amended and amending certain other laws: 'Members of a special negotiating body, members of a European Works Council and employees' representatives implementing another procedure for informing and consulting employees shall have resources made available for the performance of their role in the collective representation of the interests of employees of an employer operating on the territory of the member states or group of employers operating on the territory of the member states in relation to the exercise of the right to supranational information and consultation and for this purpose they shall be authorised to take part in judicial proceedings.'

49 In Estonia the Act of June 2011 transposing (among other things) the EWC Recast Directive (along with SE and SCE regulations) in Art. 82 provides for recourse to courts only for SCE and SE members or employees' representatives in these types of companies, but not for EWC members.

Table 18a Characteristics of legal status of EWCs in national law: legal standing, extrajudicial proceedings and court costs

	Legal status					Extrajudicial proceedings (mediation, conciliation, arbitration)		Court costs	Remarks [concerning implementation of Recast Directive 2009/38/EC in italics]
	Legal personality	Capacity to act in courts collectively	Capacity to act in courts individual EWC members	Trade unions eligible to represent/participate	EWC entitlement to start proceedings	Compulsory	Optional / voluntary		
Austria	x	x ¹			x		x	Each party pays its own costs ²	
Belgium			x	x ³	x		x	Usually the losing party pays. Each party pays its own costs	
Bulgaria					x			Free of charge	<i>Court order to disclose information classified as confidential by management added</i>
Cyprus								Not known	<i>Court order to disclose information classified as confidential by management added</i>
Czech Republic		x ⁴						Normally paid by plaintiff (the Court Fees Act)	
Denmark			x ⁵				x ⁶	EWC members individually ⁷ / trade union	<i>Fines added for infringement of some rights</i>

1 Under Article 53 in combination with Article 40 paragraph 4b, Labour and Social Courts Act, EWCs established on the basis of Article 6 agreements and statutory EWCs are capable of taking part in and conducting legal action as bodies (Büggel 2002).

2 Each party meets its own costs; an EWC has no claim to the reimbursement of costs by the company, irrespective of whether the EWC wins or loses. As a rule, the EWC's costs are paid by a trade union or workers' chamber under the existing regulations on the provision of legal protection. However, any agreement to pay costs depends on a prior assessment of the prospects for success. In situations where the evidence is unfavourable, for example, it is to be assumed that not all costs will be met (Büggel 2002).

3 In line with Art. 4 of the Law of 23 April 1998 setting out various measures for the establishment of an EWC or an information consultation procedure provides that the representative workers' organisation within the meaning of the Works Councils Constitution Act may bring an action before the Labour Courts. For more on the issue see Dorsssemont 2010: 128 ff.

4 'Capacity to participate in civil proceedings', Section 276.8 of the Labour Code.

5 No explicit regulations on this issue. On the basis of general law, therefore, it can only be supposed that the EWC is capable of taking part in and conducting legal action as a body, while in confidentiality disputes probably only individual members are eligible. If Article 13 agreements are viewed as agreements under civil law, only individual members may take part in and conduct legal actions (Büggel 2002).

6 EWC legislation does not provide for arbitration as a compulsory procedure (but otherwise in collective disputes concerning rights and interests conciliation is compulsory, see Valdés Dal-Ré 2002: 22). Parties must agree on all details of the form taken by such a procedure, its duration and the (*see next page*)

Table 18a Characteristics of legal status of EWCs in national law: legal standing, extrajudicial proceedings and court costs (cont.)

	Legal status					Extrajudicial proceedings (mediation, conciliation, arbitration)		Court costs	Remarks (concerning implementation of Recast Directive 2009/38/EC in italics)
	Legal personality	Capacity to act in courts collectively	Capacity to act in courts individual EWC members	Trade unions eligible to represent/participate	EWC entitlement to start proceedings	Compulsory	Optional / voluntary		
Estonia			x		x		x ⁸	Not specified directly / not applicable due to procedure before Labour Inspectorate	EWCs' right to address court with regard to confidentiality disputes (Art. 39) directly in the EWC implementation act (before in Employee Trustee Act 2006). Otherwise state supervision by Labour Inspectorate.
Finland		x ⁹	x ¹⁰				x ¹¹	The losing party ¹²	
France	x	x		x	x		x ¹³	If EWC wins employers claim costs	
Germany		x			x		x	Company	
Greece		o ¹⁴	x ¹⁵				x ¹⁶	Each party pays its own; court fees upon application	

6 (Denmark, from previous page) appointment of the arbitrator. The outcome of conciliation is binding, but it can be appealed against and challenged in court (Büggel 2002).

7 (Denmark, from previous page) The trade union makes an expert available to the EWC.

8 Under the transposition of Directive 94/45/EC.

9 Based on the possibility provided for by Art. 26.2 of the Employee Trustee Act of 2006 referring to extrajudicial proceedings concerning misdemeanours.

10 Büggel (2002) argues that it is not possible to ascertain whether (and if so what kind of) a distinction and difference in legal status exists between the judicial assertion of claims under Article 13 and Article 6 agreements. Büggel draws the conclusion that 'The supplementary provisions of the implementing legislation indicate that in the case of an Article 13 agreement only individual EWC members can take legal action'.

11 Only signatories to the agreement are entitled to take legal action. It is unclear what happens in the case of statutory EWCs (Büggel 2002).

12 Arbitration Act (Act 1992/967) provides for voluntary conflict resolution in the form of arbitration. Its application is optional and subsidiary in the case of a conflict between an EWC and a company. The nature of the arbitration procedure and the appointment of the arbitrator can be chosen by the parties. Arbitration awards can be challenged only in case of serious formal or procedural errors, or in the event of contempt.

13 The costs of an arbitration procedure are very high and the party that loses the arbitration procedure as well as in court pays the costs. In practice, however, because trade union representatives have always co-signed the EWC agreement trade unions meet these costs (Büggel 2002).

14 (Greece, next page) A hypothetical possibility, since neither Article 64 of Law 4052 nor relevant external acts contain clear-cut rules on EWCs' legal status. According to the Greek expert, under (see next page)

Table 18a Characteristics of legal status of EWCs in national law: legal standing, extrajudicial proceedings and court costs (cont.)

	Legal status					Extrajudicial proceedings (mediation, conciliation, arbitration)		Court costs	Remarks (concerning implementation of Recast Directive 2009/38/EC in italics)
	Legal personality	Capacity to act in courts collectively	Capacity to act in courts individual EWC members	Trade unions eligible to represent/participate	EWC entitlement to start proceedings	Compulsory	Optional / voluntary		
Hungary					▲ ¹⁷			Court fees payable in advance by plaintiff/applicant	Introduction of extrajudicial proceedings by court concerning violations of EWC establishment and functioning ¹⁸
Iceland		x ¹⁹	x ²⁰				x ²¹		<i>Rules of Act on Trade Unions and Industrial Disputes, No. 80/1938 apply</i>
Ireland		x			x			Each party bears its own costs; court fees payable upon application	
Italy			+ ²²	+ ²³				Applicant upon starting procedures	

14 (Greece, from previous page) Greek law neither EWC members nor an EWC as a collective body have legal personality, but they could attempt the solution of approaching the court as an 'association' that, according to Art. 69 of the Greek Code of Civil Procedure (KODIKA POLITIKIS DIKONOMIAS), has such competence.

15 (Greece) The author's own conclusion based on an analysis of Article 21 (and other articles which address individuals, that is, members of an EWC or workers' representatives) of the Presidential Decree transposing Directive 94/45/EC, in relation to which the commentary stipulates that 'Anyone issued with a capacity to act as referred to above shall have the right to seek to have it quashed by the Magistrates' Court (Irinodikio) in the place where the authority is located'. It should be noted that in contrast Büggel (2002) arrived at a conclusion that the capacity to act in courts is a collective capacity.

16 (Greece) The legislation provides for an arbitration procedure only where the special negotiating body and the management of the company cannot agree on the text of the agreement (Büggel 2002).

17 Art. 67 of the Amendment of Act XXI of 2003.

18 Article 69 of the Amendment of Act XXI of 2003 stipulates: Article 23(1) of the Eüüt. shall be replaced by the following provision: '(1) The court shall decide within fifteen days in an extrajudicial procedure with regard to any disputes in connection with the agreement on the establishment of the European Works Council or the procedure of informing and consulting employees, and, furthermore, in connection with the legal regulations on the European Works Council and on the rights and obligations regulated by this Act of the special negotiating body, the European Works Council and members thereof incurred between those referred to in Article 1(3) and the European Works Council, the members thereof, employees, the works council or the trade union.'

19 According to Art. 45 of the Act on Trade Unions and Industrial Disputes, No. 80/1938 if a party is represented by trade unions the right to approach the Labour Code is collective.

20 According to Art. 45 of the Act on Trade Unions and Industrial Disputes, No. 80/1938 parties unaffiliated to trade unions may submit their cases on their own.

21 State Conciliation and Mediation Officer based on Section III, Art. 20 of the Act on Trade Unions and Industrial Disputes, No. 80/1938.

Table 18a Characteristics of legal status of EWCs in national law: legal standing, extrajudicial proceedings and court costs (cont.)

	Legal status					Extrajudicial proceedings (mediation, conciliation, arbitration)		Court costs	Remarks (concerning implementation of Recast Directive 2009/38/EC in <i>italics</i>)
	Legal personality	Capacity to act in courts collectively	Capacity to act in courts individual EWC members	Trade unions eligible to represent/participate	EWC entitlement to start proceedings	Compulsory	Optional / voluntary		
Latvia		x			x			Stipulated by court procedural law. Free in the Labour Dispute Committee/Mediator/Conciliation	Changes concerning competent courts and dispute settlement (by reference to Labour Dispute Act)
Lithuania		x			x			Not known	
Luxembourg								Upon order of court at the end of proceedings	Implementation of the Recast Directive 2009/38/EC brought with it a slight change of financial penalties.
Malta								Not known	
Netherlands		x ²⁴	x ²⁵		x			EWCs, SNBs and members thereof exempted from costs of proceedings ²⁶	
Norway		x			x			Not known	
Poland		x ²⁷			x			Not stipulated / but EWC has its own budget (by law)	

22 (*Italy, from previous page*) In the event of a breach of employee representatives' rights, those representatives can use a general procedure regulated by the Code of Civil Procedure. An individual worker can use a general procedure (for example, urgency procedure regulated by Art. 700 of the Code of Civil Procedure) to defend his or her right to be informed and to have fair representation. Local entities of a national trade union can activate the procedure under Art. 28 (Tribunal of Bari, 13 April 2004).

23 (*Italy, from previous page*) Only local entities of national trade unions can sue on the basis of Art. 28 of the 1970 Statuto dei Lavoratori: the judges have not recognised the right to sue to employees' representatives in the workplace.

24 Based on Section 5 of the Act of 23 January 1997.

25 Section 5 of the European Works Councils Act of 23 January 1997 with later amendments: any interested party to apply to the Enterprises Division of the Court of Appeal in Amsterdam in case of any infringement on the rights of the law or the EWC agreement, except the provisions of Art. 4 (the so-called national rights such as workers' protection and secrecy and confidentiality). It is added that the SNB and the EWC cannot be ordered to pay the costs of the process.

26 Section 5 of the European Works Councils Act of 23 January 1997 with later amendments.

27 Limited to cases concerning confidentiality of information and consultation (Section 5.4 of the Law on European Works Councils dated 5 April 2002).

Table 18a Characteristics of legal status of EWCs in national law: legal standing, extrajudicial proceedings and court costs (cont.)

	Legal status					Extrajudicial proceedings (mediation, conciliation, arbitration)		Court costs	Remarks (concerning implementation of Re-cast Directive 2009/38/EC in italics)
	Legal personality	Capacity to act in courts collectively	Capacity to act in courts individual EWC members	Trade unions eligible to represent/participate	EWC entitlement to start proceedings	Compulsory	Optional / voluntary		
Portugal								Not stipulated / Court fees payable in instalments (first instalment payable upon application)	<i>Infringements classified as administrative offences.</i>
Romania	x	+			x ²⁸			Not stipulated but EWC has own budget (by law) and is exempt from court fees	
Slovakia		▲			▲			Applicant / plaintiff upon starting procedures	According to Büggel (2002) EWCs had the capacity to act in courts and to start legal proceedings already under transposition of Directive 94/45/EC
Slovenia								Upon application / the losing party	Change in fines for infringement.
Spain		x ²⁹		x ³⁰	x	x ³¹	x ³²	No court fees apply	
Sweden	x ³³	x ³⁴	x		x		x	Applicant upon starting procedures	
UK		x ³⁵	x		x ³⁶	○ ³⁷	x	Not stipulated / usually the losing party	

28 Limited to abuses of confidentiality.

29 Title III Chapter II of the Law of 10 April 1997 on the right of employees in Community-scale undertakings and groups of undertakings to information and consultation implementing Directive 94/45/EC.

30 Conclusion on Art. 37 of the implementation law (Law of 10 April 1997).

31 Obligatory conciliation: Art. 154 of the Law on Labour Procedure: 'In order to process the lawsuit, a prior requirement shall be that conciliation will have been attempted before the corresponding administrative department or before the conciliation bodies that may be assigned according to inter-professional agreements or the CBAs referred to in Art. 83 of the Revised Text of the Workers' Statute (RCL 1995, 997).'

32 Optional (voluntary) arbitration according to the Arbitration Act of 2003 (State Official Gazette No. 309 -Ley 60/2003 de 23 de diciembre, de Arbitraje).

33 The author's conclusion about the equivalence of the capacities of EWCs to those of parties to a collective agreement based on Articles 40 and 41 (including footnote 7) of Act 359 of 9 May 1996.

34 Art. 40 of the implementation law of Act 359 of 9 May 1996.

35 Legal standing in courts arguably limited to employee-only EWCs, not granted to mixed EWCs (only under implementation of Directive 97/74/EC).

36 Court obliged to issue judgments within 15 days.

37 Voluntary unless the Employment Appeal Tribunal (EAT) refers the disputed case to the Advisory, Conciliation and Arbitration Service (ACAS) or Central Arbitration Committee (CAC).

Notes:

x – a facility / solution exists

o – no facility / solution is in place, but see footnote

▲ – change introduced by national bill/law transposing Recast Directive 2009/38/EC

+ – inferred based on external legislation other than EWC transposition laws or based on case law

Italics – remarks referring to changes introduced in the wake of adoption of the EWC Recast Directive 2009/38/EC
Countries in grey background – countries where legislation in the area of legal status and/or sanctions was in any way modified following the EWC Recast Directive.

Source: Jagodzinski 2015.

Table 18b Characteristics of legal status of EWCs in national law: character of breach and sanctions

	Category of breach				Possible sanctions						Sanctions for breach of confidentiality in EWC law ¹	
	No crime	Offence/infringement	Criminal	Not specified	Injunctions/summary procedures	Fine/financial compensation	Imprisonment	Null and void	Immediate suspension of infringement	NA/defined in court		
Austria		x				▲ ² /x					x	
Belgium		x	x ³		x ⁴	x ⁵	x					Imprisonment ⁶
Bulgaria	x				▲ ⁷				x	x ⁸		Civil liability for damages; court order to disclose info
Cyprus		x			▲ ⁹	x	x ¹⁰					
Czech Rep.		o ¹¹		x							x	

- 1 For more detailed information on confidentiality and sanctions for its breach see Table 4 in this volume.
- 2 Fines raised to 20,000 euros for a single breach of EWC rights, raised to 40,000 euros for repeat breaches.
- 3 A criminal sanction (*sanction pénale*) can be imposed if the employer fails to comply with the deadlines in accordance with Art. 21 of the Act of 14 February 1961 (European Commission 1998). Criminal sanctions are also imposed based on the Code Pénal Social stipulating that a violation of a collective agreement (*La violation de la partie normative d'une convention collective*) is sanctioned by Art. 189: 'An employer will be punished by a level 1 sanction if, in breach of the law of 5 December 1968 on collective labour agreements and joint committees, it has committed an infringement of a collective labour agreement that has been made compulsory and that is not already sanctioned by another article of the present Code. With regard to the infringement referred to in the first paragraph, the fine will be multiplied by the number of workers concerned.' (For more information see: Dorssemont 2012).
- 4 A distinction is made between: 1) fast-track proceedings concerning confidential information: the president of the labour court decides alone; as a rule, the verdict takes 2 days, but where it is possible to prove special urgency the decision is handed down immediately; 2) other fast-track cases: chamber ruling on the matter comprises the president of the court, one workforce representative and one employer representative. In both cases, actions may be prohibited or ordered (injunctions). Decisions issued under summary proceedings can be challenged (Büggel 2002).
- 5 Under Article 1(14) of the *Loi relative aux amendes administratives applicables en cas d'infraction à certaines lois sociales* of 30 June 1971 [Act governing administrative fines imposable in the event of infringement of certain social legislation], each case of failure to comply with a rule in a collective agreement is subject to an administrative fine (*amende administrative*) ranging from BFR 2 000 to 50 000.
- 6 Criminal prosecution is also possible (Art. 4). Under Art. 11, this administrative fine is imposed separately for each employed worker, up to a total of BFR 800 000 (European Commission 1998). Criminal penalties can be applied according to the law setting out support measures for the establishment of a European Works Council or a procedure in Community-Scale undertakings and groups of Community-Scale undertakings for the purposes of informing and consulting employees. [C – 2011/00140] *Moniteur Belge* – 23.03.2011 – Ed. 3 – *Belgisch Staatsblad* 18321, Chapter VI.
- 7 Court order to disclose information classified as confidential by management.
- 8 Art. 404 of the Labour Code.
- 9 Possible only with regard to an injunction for management to disclose information classified earlier as confidential (art. 17(2) b of the Law 106(I)/2011, No 4289, 29.7.2011).
- 10 Imprisonment of up to 2 years (+ a fine) (Art. 22 of the Law 106(I)/2011, No 4289, 29.7.2011).
- 11 Breaches of EWC regulations may be considered 'Breaches of the legislation and administrative offences' under the Labour Inspection Act of 3 May 2005.

Table 18b Characteristics of legal status of EWCs in national law: character of breach and sanctions

	Category of breach				Possible sanctions						Sanctions for breach of confidentiality in EWC law
	No crime	Offence/infringement	Criminal	Not specified	Injunctions/summary procedures	Fine/financial compensation	Imprisonment	Null and void	Immediate suspension of infringement	NA/defined in court	
Denmark		x			x	x	+ ¹²				As stipulated by separate acts
Estonia				x	x ¹³					x	Penal sanctions (penal and misdemeanour code) ¹⁴
Finland				x	x ¹⁵ / ▲ ¹⁶	x					Fine
France			x ¹⁷		x ¹⁸	x	x	+			Civil and penal sanctions
Germany		x			+ ¹⁹	x ²⁰	x				Penal sanctions (offence)

12 Based on Sections 4 and 5 of the Criminal Code of Finland (39/1889, amendments up to 927/2012 included; available at: <http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf>).

13 Termed 'precept' by the Employees' Trustee Act of 2006 making reference to procedures under the Occupational Health and Safety Act of 16.06.1999 (with subsequent amendments) RT I 1999, 60, 616.

14 The Estonian Employee Trustee Act 2006 Art. § 264, 'Failure to perform obligations of elected members of trade unions in relations with employers', stipulates that 'An elected shop-steward who fails to ensure avoidance of disruption of work during a period prescribed by law or a collective agreement shall be punished by a fine of up to 100 fine units'. Different sanctions (§§ 267) are laid down for violation of the obligation to maintain the confidentiality of information, which 'shall be punished under the conditions and pursuant to the procedure prescribed in §§ 25 and 26 of the Employee Trustee Act.'

15 Responsibility to use summary proceedings lies with the local district court. It is not possible to say whether a measure already introduced by the company can be suspended until the verdict is handed down. No experience has been gathered to date. Duration of these proceedings: between 6 months and 1 year in the first instance; up to 3 years for appeal proceedings. Decisions delivered in fast-track proceedings may be challenged in higher instance courts (Büggel 2002).

16 The employee representatives may demand that a tribunal rule on cases in which the employer is obliged to give this information; the employer shall then be subject to a conditional fine (Eurofound 2009).

17 Violations of EWC law fall under a general category of '*délict d'entrave*' which describes violations of worker representatives', trade union and works councils' rights. More information at: <http://infosdroits.fr/le-delit-dentrave-au-droit-syndical-chstet-et-comite-dentreprise-definition-sanctions-penales-procedure/>

18 EWCs can apply for the company's decision to be suspended until the EWC has been properly consulted. These proceedings last between 2 and 3 weeks. Where special urgency can be demonstrated, the verdict can be issued immediately (within hours). These proceedings may be conducted orally, but it is standard for written preparatory submissions. Representation by a lawyer is not compulsory, but is usual, on account of the complexity of the issues.

If the judge rules that fast-track proceedings are inadmissible due to a lack of urgency, they may order the institution of ordinary proceedings (Büggel 2002).

19 Article 85 II Labour Courts Act. The issue has reportedly been broadly debated: the Landesarbeitsgericht (Regional Labour Court) in Cologne in Case 13 TA267/11 (point 30 of the judgment) stated that concerning the Works Constitution Act (Betriebsverfassungsgesetz) the Federal Labour Court confirmed the principle of applicability of the general injunction to suspend actions causing infringement in cases of employers' violations of the codetermination rights (Mitbestimmungsrechte) provided for in § 87 Abs. 1 BetrVG. A commentary on this case (Hayen 2012) explains the limitations of applicability of the injunction (*next page*)

Table 18b Characteristics of legal status of EWCs in national law: character of breach and sanctions

	Category of breach				Possible sanctions						Sanctions for breach of confidentiality in EWC law
	No crime	Offence/infringement	Criminal	Not specified	Injunctions/summary procedures	Fine/financial compensation	Imprisonment	Null and void	Immediate suspension of infringement	NA/defined in court	
Greece				X		X	X ²¹				
Hungary				X	+	X				X ²²	
Iceland						X	NO ²³				
Ireland		X			X	X	X				Penal sanctions (offence)
Italy		X			+ ²⁴	X	+ ²⁵	+ ²⁶	+ ²⁷		Disciplinary sanctions and fine ²⁸

- 19 (*Germany, from previous page*) to the infringement of information and consultation rights of EWCs. The applicability of injunctions in the German law depends on their applicability in relation to infringements of national works councils, which differs according to topic: on some issues where the latter have true codetermination rights the courts have recognised an *Unterlassungsanspruch* (claim to injunctive relief) until the prescribed procedures are adhered to; in other instances where national works councils have weaker rights (right to give an opinion, right of information and consultation) there is no generally recognised ‘*Unterlassungsanspruch*’ (however, this issue has been under legal debate since the 1990s; see *Bauchhage 2006: 164 ff.*). § 87 BetrVG contains a catalogue of issues where national works councils must agree to company policy—in the event of disagreement, there can be recourse to arbitration.
- 20 (*Germany*) In Germany courts are free to determine the sanction (see *Bauchhage 2006: 155*).
- 21 Imprisonment of up to two years.
- 22 No specific sanctions (apart from a ‘fine’) defined in the transposition of the EWC directives acts or in the Labour Code (*Simon 2007*).
- 23 Explicitly excluded in Art. 70 of the Act on Trade Unions and Industrial Disputes, No. 80/1938.
- 24 Inferred based on the literature (e.g. *European Commission 1998: 5; Borelli 2011: 5*) arguing that a breach of information and consultation obligations violates Art. 28 of the 1970 *Statuto dei Lavoratori* (Act No. 300 of 20 May 1970 on Workers’ Protection, also known as the Workers’ Statute, as last amended by Decree Law 196 of 2003) allowing Italian trade unions to sue the employer on the grounds of any anti-union behaviour.
- 25 In the event of a breach of a judge’s order to management (injunction) to fulfil its duty on information and consultation, the sanction is a custodial sentence of up to 3 months or a fine of up to 206 euros (Art. 650 of the Criminal Code). The decision of a criminal court can also be published in journals chosen by the judge (Art. 36 Criminal Code).
- 26 Inferred based on a ruling by the Corte di cassazione on collective redundancy procedures under Art. 4 of Statute No 223/1991, which lays down the employer’s obligations to inform and consult the regional employment office and the in-company union representatives, states that dismissals based on Art. 4 are null and void if the statutory procedure has not been followed (Judgment No 6759 of 26 July 1996). (*European Commission 1998: 5*).
- 27 On the basis of Art. 28, the judge should decide within 2 days, considering summary information, and if the violation is verified, he shall order the employer to stop the illegal behaviour and to remove its effects. The court decree is immediately executable and it can be withdrawn only by a decision that concludes the trial activated by the employer’s appeal.
- 28 Based on violations of national information and consultation act implementing Directive 2002/14/EC it may be inferred that a breach of the confidentiality clause incurs an administrative fine ranging from 1033 to 6198 euros, but only for the experts assisting the workers’ representatives. For the latter, the decree does not foresee any type of administrative sanction, but refers to the disciplinary measures established by collective agreements (*Eurofound 2009*).

Table 18b Characteristics of legal status of EWCs in national law: character of breach and sanctions

	Category of breach				Possible sanctions						Sanctions for breach of confidentiality in EWC law
	No crime	Offence/infringement	Criminal	Not specified	Injunctions/summary procedures	Fine/financial compensation	Imprisonment	Null and void	Immediate suspension of infringement	NA/defined in court	
Latvia				X						X	
Lithuania		X		▲		X				▲	Fine between 1033 € and 6198 € ²⁹
Luxembourg				X		X / ▲ ³⁰	X				Fines and imprisonment up to 3 months
Malta		X				X					
Netherlands				X	+ ³¹					X	
Norway				X		X					
Poland		X				X	X				Criminal sanctions
Portugal		▲/X				X					Civil penalties
Romania		X				X					Sanctions for offences as in other breaches of EWC law
Slovakia		X								X	
Slovenia				X		X					
Spain		X			Yes ³² /X ³³	X ³⁴		+ ³⁵	X		

29 Art. 17, para. 1, Law 74/2002 (National Multi-industry Agreement).

30 Art. L 433-8 of the Bill amending Title III of Book IV of the Labour Code.

31 Inferred based on the Works Councils Act: 'If, however, the works council has expressed an opinion which the employer has disregarded, Article 26(1) of the Act authorises it to challenge the employer's decision before the Ondernemingskamer (Commercial Chamber). The Chamber may, for example, enjoin the employer to refrain from implementing his proposed decision (Article 26(5)(b)). The employer may not violate such an injunction (Article 26(6)).' (European Commission 1998: 26).

32 Art. 39 of the implementation law (Law of 10 April 1997).

33 In labour or ordinary courts, special summary proceedings are designed to safeguard union freedom of association and collective bargaining rights. Art. 157 of the Law on Labour Procedure: 'This lawsuit [concerning collective dismissals] shall be processed as urgent. It shall enjoy absolute preference over any other matters that are processed, except for those related to the protection of trade union freedom and other basic human rights.' The parties will be summoned within 5 days (Art. 158) and judgement delivered within the next 3 days (Art. 158, para. 2). Due to restrictive preconditions for applying summary proceedings in practice they may be hardly accessible for EWCs.

34 Art. 4 of the Real Decreto Legislativo 5/2000, 4 agosto, Ley sobre Infracciones y Sanciones en el Orden Social (Legal Decree 5/2000, 4 August, Law on Infractions and Sanctions in the Social Order).

35 According to collective research under the coordination of Susan Fanning (2012) the competent court can issue a declaration that the company's actions are null and void for failing to consult.

Table 18b Characteristics of legal status of EWCs in national law: character of breach and sanctions

	Category of breach				Possible sanctions					Sanctions for breach of confidentiality in EWC law	
	No crime	Offence/infringement	Criminal	Not specified	Injunctions/summary procedures	Fine/financial compensation	Imprisonment	Null and void	Immediate suspension of infringement		NA/defined in court
Sweden				x	o ³⁶	x					
UK		x			x ³⁷	x					x ³⁸

Notes:

x – a facility / solution exists

o – no facility / solution is in place

▲ – change introduced by national bill/law transposing Recast Directive 2009/38/EC

+ – inferred based on external legislation other than EWC transposition laws or based on case law

Italics – remarks referring to changes introduced in the wake of adoption of the EWC Recast Directive 2009/38/EC

Countries in grey background – countries where legislation in the area of legal status and/or sanctions was in any way modified following the EWC Recast Directive.

Source: Jagodzinski 2015.

36 In disputes on the confidentiality of information, 'cases shall be dealt with promptly' (Art. 40 of the implementation law of Act 359 of 9 May 1996). Moreover, by implication from the Co-determination Act of 1976 (Act on Employee Consultation and Participation in Working Life) it could be possible to derive the applicability of 'interim remedies' to instances of transnational information and consultation by EWC.

37 No mention of urgent/fast-track injunctions comparable to those available in the French system.

38 Sanctions for breach of confidentiality and breach of obligation to report back to employees about the EWC information and consultation outcomes.

2.1.5 Conclusions on EWCs' legal status

The issue of EWCs' legal status is much more fundamental than just a formal question of proper or incomplete transposition.

Acting in court requires two things: (i) legal capacity (whether in the form of full legal personality or its functional equivalents); and (ii) recognised judicial interest. Art. 10 of the Recast Directive clearly covers both elements and requires the member states to provide these legal means to EWCs.

While a recognised judicial interest of EWCs in litigation on transnational information and consultation is indisputable, legal status represents a complex and, as we have shown, often problematic issue. Various forms of legal status are necessary to allow EWCs to effectively function and exercise their rights and duties. Moreover, if needed, they allow EWCs to participate in the conduct of legal transactions and thus make them a genuine partner of management, independent of the latter's good will or obstructionism and able to stand up for their rights in case of violations. In consequence, these credentials enable meaningful information and consultation and allow employee representatives at transnational level to present views that the management must take into account. Conversely, if deprived of those legal attributes EWCs are often helpless and vulnerable objects in corporate governance, only seeming to participate on an equal footing with the managements of multinationals. Consequently, the question of legal personality or its equivalents seems decisive for the *effet utile* of the EWC directives.

The study of national acts transposing Directive 94/45/EC as amended (where relevant) by Recast Directive 2009/38/EC, as well as analysis of external acts referred to by the transpositions (labour codes, codes of penal procedure, codes of infringements) undertaken above reveals that in as many as nine member states (Bulgaria, Cyprus, Czech Republic, Hungary, Italy, Luxemburg, Malta, Portugal and Slovenia, as well as possibly Belgium⁵⁰) EWCs have neither legal personality nor any of its functional basic rights that allow recourse to justice. Due to the complexity of national systems of law and limited resources to study them in their entirety, it is not possible to categorically conclude that EWCs in these countries are entirely deprived of access to courts or equivalent administrative procedures; at the same time it is safe to conclude that access to justice for EWCs in these countries is not regulated in a transparent, straightforward and legally clear way. It can also be safely concluded that if rights referring to access to justice do not appear transparent in the framework of this study where the authors have had access to national laws and experts, they are likely to be at least equally (if not more) unclear to members of EWCs or trade union officers where there is a dispute with company management. Consequently, if workers' representatives in an EWC cannot be certain whether they have the formal competence to launch and conduct legal disputes with management, they are likely to be generally discouraged from seeking justice. It can be also concluded that in the case of these countries Directive 2009/38/EC's requirement towards the member states to ensure 'proportionate, dissuasive and effective' sanctions is hardly met, because sanctions are outcomes of court procedures

50 It is unclear because in Belgium the right to recourse to justice is extrapolated/inferred from the competence of acting in courts granted to members of national/local works councils.

to which access needs to be secured in the first place. In this sense sanctions are to be understood as a crowning of efficient procedures that lead to their conclusion, and clear procedural rules for seeking justice are to be considered prerequisites and necessary ingredients of sanctions.

Hence, whether EWCs in these countries have legal status may ultimately depend on some distant – indirectly linked – acts or, alternatively, on a court’s evaluation in individual cases,⁵¹ leading in extreme situations to incoherence in jurisprudence. Given the proven gravity of this matter for EWCs’ ability to defend their rights to information and consultation, a legitimate suspicion arises that the eight aforementioned countries have not fully and properly transposed the EWC Recast Directive. Because in all these member states the original provisions transposing Directive 94/45/EC on the legal status of EWCs have not changed in the wake of transposition of Recast Directive 2009/38/EC the above finding also corroborates the critical assessment regarding the cursory character of the Commission’s Implementation Report of 2000 (European Commission 2000) and its lack of a far reaching reflection on the operation of EWCs. The European Commission neither considered this to be a fault at the time, nor noticed it as a possible shortcoming, nor discerned the gravity of its consequences for the enforcement of provisions of the EWC directive. In fact, the Commission did not deal with the issue at all, looking only at implementation of ‘penalties’ and ‘remedies’ (competent courts) available to EWCs (see further sections of this study). Consequently, no measures were taken against the member states for improper transposition of Directive 94/45/EC.

A related conclusion is thus that either the Commission’s report was insufficiently thorough in these respects, and/or it did not consider such detailed and specific elements of transposition measures to be capable of causing distortions in the attainment of the goals of Directive 94/45/EC. It may be partly explained by the then limited experience with EWCs, as well as the time pressure to deliver the implementation report within the Directive’s deadline. Moreover, admittedly, a deep analysis of national implementation systems, especially in the area of enforcement, requires an analysis that goes beyond national EWC acts and stretches into other domains of law. Nevertheless, criticisms of the Implementation Report’s ((European Commission 2000) insufficient thoroughness seem valid. It is to be hoped that the forthcoming Implementation Report on Recast Directive 2009/38/EC foreseen for 2016 will handle the legal status of EWCs with greater perspicacity and attention.

3. Costs of legal proceedings as part of the enforcement framework

3.1 Provisions of Recast Directive 2009/38/EC

As outlined in the introduction to this chapter Art. 10.1 can be understood not only as safeguarding financial and material resources for the operation of EWCs, but also as a kind of general obligation imposed on the member states to provide EWCs

51 See Blanke and Dorsemont 2010.

and their members with whatever ‘means’ are necessary to apply the rights and obligations stemming from the Directive. Undeniably, the right of EWCs to defend their right to information and consultation is one of the rights stated explicitly in the EWC Recast Directive. The evidence can be found in Art. 11.2, which refers to an entitlement to adequate administrative or judicial procedures to be made available by the member states to enable the obligations deriving from this Directive to be enforced. It can be thus deduced that costs linked to legal actions and disputes between the EWC and management must be covered (Picard 2010a).

An important aspect of any legal dispute is expert advice from a lawyer. Such advice is almost always necessary even before formal proceedings commence, as it is necessary to evaluate the infringement, its circumstances and the viability of and strategy for the prospective case. Understanding Art. 10.1 as covering legal expertise is further confirmed by paragraph 5 of the Subsidiary Requirements, which grants the EWC or a select committee recourse to experts of their choice as far as it is necessary to carry out their tasks. Representing the interests of employees collectively is one of the statutory rights of any EWC and thus Art. 5 of the Subsidiary Requirements serves to reinforce the claim to provide EWCs with financing for legal counsel/expertise in preparation of legal proceedings.

3.2 Recommendations of the Report of the group of experts on the implementation of Recast Directive 2009/38/EC on European Works Councils

Reading the Recommendations of the Expert Group (European Commission 2010a) concerning Art. 10.1 and its interpretation, it appears that there are two possible views on the matter, a broad one and a narrow one. Advocates of a narrow, literal interpretation argue that Art. 10.1 refers only to financial means necessary for the operations of EWCs (for example, financial resources to be guaranteed by management to convene meetings, means of communication for EWC members and so on). By contrast, supporters of broad (extensive) interpretation insist that the ‘means required’ are to be understood as measures not only of a financial or material nature, but also, for example, rights enabling EWCs to make full use of their rights (Picard 2010a; Blanpain 2009). The Expert Report explains the scope of ‘means’ by stipulating that they ‘include the ones required to enable EWC members to launch court proceedings in the event of violations of transnational information and consultation rights’ (European Commission 2010a). The Report reiterates further that ‘the EWC should have the financial means to represent employees’, and there is no denying that defending one’s rights in court is to be classified as interest representation.

The contentious part of the debate concerns the question of who should provide those means. The Report of the Expert Group contains statements by representatives of the ETUC and BusinessEurope who were invited to one of the sessions devoted to this topic. For the ETUC the question of the source was a straightforward one; it argued that because EWCs are to be created in undertakings and act in favour of those undertakings’ interests and rights to information and consultation, it should be primarily the company’s central management that provides the means for their operation. The ETUC representative added that ‘other sources [of financing]

are possible'. With regard to the scope of 'means' the BusinessEurope representative noted that the means include travel, accommodation, facilities and so on, but expressed doubts whether costs linked to financing of court proceedings, while not excluded, are to be considered 'means required' (European Commission 2010a). He also suggested that this question should be clarified in the course of national transpositions. The Report confirmed that it 'depends on national law and practice whether the need for EWC members to have the means to enable them to launch court proceedings to defend the rights of employees to transnational information and consultation implies that central management is to bear the costs of legal action taken by employee representatives' (European Commission 2010a). The Report further lists various solutions at national level concerning covering of the costs linked to legal actions:

- (i) each side (trade union and company) bears its costs;
- (ii) means to be borne by management include legal costs;
- (iii) the works council cannot be condemned to any cost in legal procedures;
- (iv) the party losing the case normally pays both parties' expenses' (European Commission 2010a)

While interesting, the enumeration of national regimes is both incomplete and superficial, in that it is not followed by explanations, commentary or analysis of the implications of individual solutions for EWCs. The first solution does not seem to reflect the fact that EWCs are not trade union bodies, but assemblies of nominally unaffiliated workers' representatives, a differentiation that is retained in the EWC Directives and national laws.⁵² Consequently, the fact that in some instances of litigation expenditures on legal action were covered by trade unions is a testimony to the lack of clear-cut, transparent provisions concerning the means for EWCs, which has forced the latter to seek provisional solutions to defend their statutory rights. It seems that in this case the Expert Report confuses the outcome of incomplete law, for which practice has found emergency solutions, with what is considered legal tradition or a characteristic of a given national regime. Second, the record of regimes based on the principle of the losing party covering the expenses of all parties to the dispute can, again, be qualified as nothing more than a cursory record of solutions applied at national level, as the Report does not contain any further remarks or explanations about the implications of such solutions for non-commercial actors, such as EWCs. The ramifications of such legal frameworks can be such that EWCs may be effectively discouraged from defending their rights in courts if they face the potential outcome of being declared liable for the legal expenses of the company, on top of their own. It is surprising that no explanation from the European Commission was recorded on this point; after all, rather than simply listing solutions, the Commission should assume the statutory role of guardian of the treaties and analyse solutions in light of the objectives of the Directive and the overarching principle of effectiveness. The Commission is obliged to conduct monitoring of implementation of the EU *acquis* and, where necessary, to undertake steps to ensure proper implementation by the member states. In this case, if no remarks from the Commission

⁵² In terms of this logic, for instance in Poland and the Czech Republic the original transposition laws of Directive 94/45/EC granting representative trade unions the right to nominate (as opposed to elect) SNB and EWC members were declared unconstitutional by the respective Constitutional Tribunals.

were recorded, the impression might be that it approves of regimes in which EWCs, without their own budgets or a statutory default obligation to be provided with such a budget, might be held liable for either their own costs or even the litigation costs of the company management. It should be recalled that while enterprises in which EWCs are operating, naturally, pursue economic objectives and profit, EWCs are instances of non-profit representation of workers, have no sources of income and were introduced to defend and represent workers' fundamental rights.

Finally, the conclusions of the Expert Report, among other things, highlight that 'flexibility is needed to determine who is to bear the costs related to legal actions or how they should be shared: national practice is to be taken into account and the EWC agreement may provide for practical arrangements in that area' (ibid.). It is again doubtful whether relying on national practice is a good solution in the case of EWC-related litigation that so far has been relatively scarce⁵³ and limited to some member states only. Keeping in mind the guardian-of-the-treaties role of the European Commission, one would rather expect it to analyse the national transposition laws and verify whether the right of access to courts is truly safeguarded, also from the financial point of view. It should also be emphasised that in many countries EWCs were a 'foreign' body, previously unknown in national industrial relations and thus, contrary to the European Commission's assumption, in many countries the practice has not produced any 'national traditions' yet. Consequently, it would be more than natural to expect that with the introduction of EWCs as transnational, Europe-wide bodies of employee interest representation, standard rules for financing court disputes should be introduced.

Last but not least, the Report recorded a statement by the BusinessEurope representative admitting that the requirement to bear the costs related to judicial action by EWCs against companies is 'a clear concern for employers' as it would (allegedly) 'constitute an incentive to litigation' (ibid.). The latter argument, however, seems to be based on a fallacious assumption that legal proceedings are driven not by the desire to defend one's rights, but by some other interests of EWCs. The fallacy in this reasoning seems to stem from the underestimation of financial and practical challenges a court case poses for an EWC and, supposedly, from a lack of awareness of the amount of resources, time and work-investment preceding a decision to launch court proceedings. It cannot be emphasised enough in this context that EWCs are bodies grouping non-remunerated workers' representatives who usually lack prior experience in matters of law and thus likely to be at a loss when faced with a court confrontation requiring legal knowledge and experience. One should also not forget that it is both a general European rule and a specific Recast Directive obligation to provide for recourse to justice in case of breaches of law. In this context, the misinformation and fallacious assumption on the basis of which the BusinessEurope representative made their statement become evident.

53 Dorssemont and Blanke 2010.

3.3 Provisions regarding financial and material resources for the operation of EWCs⁵⁴

The original Directive 94/45/EC clearly provided much leeway for national legislators with regard to defining the financing of EWCs' operations. Despite this often excessive lack of precision in many countries the implementation of the Recast Directive changed little: the original provisions implementing Directive 94/45/EC rather than being replaced have been retained, either completely unchanged, only slightly modified or complemented with amendments. Table 17 presents an overview of the currently binding provisions applicable to EWCs (either transpositions of the original Directive 94/45/EC where they remain unchanged, or, where applicable, of the modifications introduced in the area following Directive 2009/38/EC).

Below, we present an overview of the national frameworks determining financial conditions for EWCs' access to courts. This overview combines analysis of provisions directly transposing Art. 10.1 of the Recast Directive (the means to be provided to EWCs) as well as, where relevant, references to general (that is, acts not directly or solely related to EWCs⁵⁵) national regimes regulating industrial or labour dispute resolution (procedural laws, such as labour law procedure, civil law procedure and so on) and other acts covering industrial relations.

Concerning transposition of Art. 10.1 of the Recast Directive the following legislative approaches have been adopted:

- (i) Countries in which Art. 10.1 of the Recast Directive was transposed by means of provisions using the (general) wording of the Recast Directive (Belgium, Cyprus, Spain, Greece, Italy, Slovenia). In this category one should also mention countries that applied almost exactly the same wording as that of Art. 10.1 (Romania, Estonia), as well as countries in which there is a differentiation between the 'means to apply the rights stemming from the Directive' and means 'to collectively represent the rights of employees' (Malta, Ireland). With regard to the latter group, despite the semantic differentiation, it is difficult to explain whether the national legislator had a particular reason for taking this approach and whether any concrete legal outcome attached to the differentiation was intended. Similarly, without deep analysis of further provisions of national law it is difficult to tell whether there is any substantial content-related difference between the two. It seems that it will be necessary to wait for experience to show any implications of such differentiation.
- (ii) Countries in which no changes concerning operational means for EWCs were introduced in the transposition of Recast Directive 2009/38/EC (Czech Republic, Denmark, France, Poland).
- (iii) Member states requiring specification of the financial means for EWCs in the agreement (Austria, Finland, Lithuania, Latvia, Sweden, Portugal).⁵⁶

⁵⁴ See also considerations on the nature and transposition of Art. 10.1 of Recast Directive 2009/38/EC in the previous section of this report with regard to EWCs' legal status.

⁵⁵ These regimes must, however, be fit to comply with the standards of Art. 11.2 of the Recast Directive requiring the national lawmaker to provide for access to efficient juridical procedures.

⁵⁶ This category could also include Poland where the law has continuously required that EWCs be provided with a budget.

- (iv) Countries in which some modifications going beyond (Slovakia, Germany) or falling short of (United Kingdom) the standard of Directive 2009/38/EC were adopted.

Art. 10.1 of the Recast Directive does not specify *how* those means are to be provided for EWCs and further examination of national regimes to analyse whether EWCs are granted more specific means (such as the right to a budget) was necessary. This revealed the following practices:

Countries with statutory release from court/legal fees for European Works Councils

The most transparent solution with regard to financing EWCs' access to courts seems to be a statutory release of EWCs from any court fees that might be applicable when pursuing justice, combined with clear regulations concerning the financing of EWCs' operations. This solution has been applied in only nine countries: Latvia, Lithuania, Spain, Bulgaria, France, Germany,⁵⁷ Romania,⁵⁸ Sweden and the Netherlands.⁵⁹

In Estonia, the costs of possible EWC-related proceedings in legal institutions were not specified, but it is unclear whether it amounts to no fees being required.

In the Netherlands, the transposition (Act of 23 January 1997 on the implementation of Council Directive 94/45/EC of 22 September 1994) of the original EWC Directive 94/45/EC stipulated in Section 5 that

'[a]ny interested person may request the Companies Division of Amsterdam Court of Appeal to order implementation of the provisions of this Act, with the exception of section 4, subsections 1 to 8, or of an agreement as referred to in section 11 or 24. A special negotiating body or the members thereof and a European Works Council established under this Act may not be ordered to pay the costs of such proceedings. Articles 429a to 429t of the Code of Civil Procedure shall apply.'

Countries with a general regulation concerning the operating costs of EWCs

In the vast majority of countries regulations on the means available to EWCs are limited to general provisions. It is difficult to make a general (not applying to a concrete case) statement whether this is a sufficient safeguard, as the ultimate test of the viability and extent of the general obligation to provide means for EWC operation is practice. The practical test of the robustness and aptness of statutory frameworks usually manifests itself all too clearly, although not exclusively, in cases of conflict in which the EWC agreement does not provide for arrangements specifically guaranteeing an autonomous budget or financing in case of litigation.⁶⁰ In many cases of such conflict EWCs reported to the European trade union federations that they were cornered as neither the agreement nor the law gave them the right to independent financing in cases of conflict. It is thus misleading to consider that only the cases actually brought before a court are fully representative and prove that

⁵⁷ Art. 2 Abs. 2 GKG.

⁵⁸ Reported by the Romanian expert, but no confirmation could be found in legal acts available in English.

⁵⁹ Information according to (Büggel 2000) and own research (Jagodzinski 2015 (forthcoming)).

⁶⁰ The ETUI's EWC database currently (January 2015) records 25 agreements (out of a total of 1,883) containing provisions guaranteeing EWC financing by management in case of litigation.

EWCs do have sufficient legal guarantees; it is actually unknown in how many cases employee representatives were discouraged from pursuing justice due to a lack of resources to make an application to a court. Nevertheless, despite the impossibility of quantifying these occurrences the problem of too general statutory regulation on financing of EWC operation remains valid.

In some countries it has been explicitly asserted that EWCs cannot use trade union budgets. That was the case in Sweden where, when the draft bill was presented, the Swedish government stated that an EWC could not ask either the workers or a trade union for financial support.⁶¹ In other countries (Poland and the Czech Republic) when analysing provisions on the preference for trade unions in nominating EWC members instead of popular elections the national constitutional tribunal declared that EWCs are not trade union bodies, but independent forms of worker representation. This view, despite the fact it was expressed by tribunals with competence limited to an individual member state, highlights the distinction made in the EWC Directive itself between workers' representatives and trade unions and should be accepted with all its consequences: namely that trade unions cannot be relied on and de facto forced to finance EWC litigation because this seems the only practical solution to assert workers' rights. In other words, the fact that there is a practical work-around in place should not be accepted as a substitute for proper statutory guarantees of means for EWCs as required by the EWC Directive.

Countries with a de iure budget for EWCs

A contrasting approach facilitating EWC financing with regard to access to courts has been adopted in countries that introduced a legal obligation to provide EWCs with a budget for operation. By implication one can thus infer that such a budget could be also used to cover any court fees.

A statutory budget is a solution applied by the Polish transposition act that includes a de iure obligation to provide EWCs with an autonomous budget. Such a budget is to be made available by the management of a Community-scale undertaking. Such provisions requiring an EWC to be provided with its own financial means seem to ensure access to courts, including seeking independent legal advice. Nonetheless, it is obviously the application of this requirement in individual agreements – for example, the competence to manage the budget independently of management's consent – that will be key to EWCs' real autonomy in this regard.⁶²

In Romania, a similar approach was adopted, at least in the case of EWCs based on the Subsidiary Requirements: management is obliged to agree on a budget with the EWC⁶³ and to provide it, covering resources necessary for EWCs to carry out their statutory responsibilities.⁶⁴

61 Büggel 2002.

62 There is currently only one EWC established based on the Polish transposition.

63 Art. 41– (1) of Law 217/2005: 'The expenses for the functioning of the European Working Council shall be borne by the central management in Romania, which shall establish its annual budget in cooperation with the Council.'

64 Art. 42-1(2): 'The central management shall provide to the European Works Council financial and material resources in order to carry out their responsibilities according to this law' in conjunction with Art. 41 introduced by the amendment law of 2011 implementing Recast Directive 2009/38/EC.

In the case of countries in which the law – either the old transposition of Directive 94/45/EC or amendments implementing Recast Directive 2009/38/EC – does not clarify the question of financing for EWCs, unless the European Commission intervenes it will be up to the courts to decide and close loopholes (provided that a case on this matter is submitted by an EWC, which, in light of the above analysis, sounds viable only in the case of external financing, either by trade unions or national works councils). It will thus depend on the judiciary to interpret the new provisions on ‘means necessary’. In case of too general provisions and unclear national practice or industrial relations tradition, the obstacle remains and threatens to distort legal certainty, the principle of effectiveness and, specifically, EWCs’ access to courts, as such ‘means’ are necessary even to launch legal proceedings (legal capacity to act collectively in courts, financial resources to obtain legal advice and representation by a lawyer). It cannot be expected that in cases of uncertainty, employers will be willing to assume any litigation costs, be it legal advice for EWCs or their representation in lawsuits against the company.

Countries without a statutory right to budget for EWCs, but with powers implied from external legislation/sources and/or practice

In some countries, although statutory frameworks on EWCs do not provide these bodies with a right to an autonomous budget, practical solutions based on national industrial relations traditions and/or powers implied from other pieces of legislation have been applied. Despite the limited evidence based on EWC court cases – circumstances under which those implied budgetary rights have been confirmed – some observations can be made based on practices and traditions in national industrial relations. In some countries – such as Spain, Belgium and France – the problem of a lack of autonomous budgets for EWCs is often resolved in practice by cooperation with trade national union organisations that have the statutory right to represent EWCs in court proceedings (see Table 18) and provide EWCs with legal representation at their cost. Alternatively, European trade union federations occasionally support EWCs in cases of legal disputes with management: the European Public Services Union has had such a fund since 2008.⁶⁵

In France an alternative practical solution has been found by using statutory entitlements enjoyed by national works councils, which have a *de iure* guarantee of a budget depending on the company’s financial results. By means of agreement with the EWC and company management, the local works council can cover the expenses incurred by EWC litigation. It is also relatively more common in French multinational companies than elsewhere to find arrangements on a budget for EWCs (see below).

In Germany under Art. 30 of the Act on European Works Councils transposing Directive 94/45/EC (EBR-Gesetz of 1996) extended by the 2011 Act transposing the Recast Directive, only general provisions are in place.⁶⁶ In practice, however, by analogy with the general regulations for works councils in Germany, there has been

65 See website article ‘EPSU Executive approves rules for use of EPSU EWC legal fund’ at http://epsu.org/a/3764%3Fvar_recherche%3DEWC.

66 Art. 39 of the EBR Gesetz vom 14/06/2011 I 1050; ‘the costs arising from the establishment and operation of the European Works Council and the Committee (§ 26 (1)) shall be borne by the central management’.

common recognition of a company's obligation to reimburse a statutory EWC the costs of any necessary judicial proceedings. This also includes the costs of EWC legal representation and counsel, provided that the judicial steps taken are deemed necessary. In practice, before the case is brought to court, its viability and the subject of the dispute are assessed by a lawyer, who then decides whether to pursue the litigation or not. Normally, EWCs are supported by their trade unions both with counsel as well as with financial guarantees in case of a court decision to cover the cost of litigation.⁶⁷

In Italy, on the other hand, agreements are almost always co-signed by national trade unions, which subsequently cover the costs of legal proceedings if a case involving EWC rights arises. Moreover, already in the implementation the act transposing Directive 94/45/EC (Decree-Law No. 74/2002) a similar provision to Art. 10.1 of the Recast was included. Art. 16 of Act No. 74/2002 stipulates that

‘the operating expenses of the European Works Council shall be borne by the central management. The central management concerned shall provide the members of the European Works Council with such financial and material resources as are necessary to enable them to perform their duties in an appropriate manner.’

In the transposition of the Recast Directive (Decreto Legislativo No. 113 of 22/06/2012, Art. 16.12) virtually identical wording is used.

As the costs of conciliation procedure are significant in Italy (see further in this chapter), such clear provisions ensuring that the EWC's costs are always met by the company, irrespective of whether it wins or loses, are a necessary facility safeguarding the right of access to courts (however, this has not yet been tested in practice, as no legal disputes concerning EWCs have been recorded in Italy so far).

In Denmark the practical solution has been for trade unions to support individual EWC members in legal disputes. Therefore if the legal dispute concerns individual EWC members who are also members of a trade union, the latter will assume the costs of the litigation in court. If they are not union members, they have to meet the costs themselves.⁶⁸ It is supposed⁶⁹ by analogy that the fact that the employer has to cover all the EWC's expenses probably means that they also have to meet the costs of judicial proceedings conducted by the EWC as a body. In the absence of legal disputes in court in Denmark under the transposition of Directive 94/45/EC this could not be verified; however, currently under the extended provisions of Art. 10.1 of Recast Directive 2009/38/EC there should be no further doubts about assuming litigation costs incurred by the EWC collectively. Nevertheless, the lack of clear provisions and precision in transposition of the EWC Recast Directive cannot be justified by the above practice.

⁶⁷ The levels of both court and lawyers' fees are determined by the 'value' of the dispute, as determined by the court.

⁶⁸ Büggel 2002.

⁶⁹ Conclusion reached by the national expert in Büggel's 2002 report. It was not possible to clarify whether the employer has a statutory duty to pay these costs.

Contractual arrangements on financial resources in EWC agreements

In cases in which neither the national provisions nor the industrial relations tradition are clear enough final recourse might be offered by EWC agreements. For the sake of precision, it should be re-emphasised that both EWC Directives (94/45/EC and 2009/38/EC), in line with the principle of subsidiarity, impose on central management only a general obligation to finance the functioning of EWCs, but leave the arrangement of specific questions up to the parties. This includes laying down budgetary rules regarding the financial and material resources to be allocated to the EWC or ICP.⁷⁰ These provisions highlight the meaning of solutions negotiated and codified in individual EWC agreements. It seems that ideally the contractual arrangements should deal with the issue of the costs of possible litigation in the most efficient way, giving the parties the liberty to adapt solutions to their specific needs. This must be, however, done in the context of Brian Bercusson's '*shadow of the law*' guaranteeing appropriate fall-back solutions or automatically applicable (*de iure*) minimum standards in case of lack of agreement on financing by the management of, among other things, litigation costs. The '*shadow of the law*' is necessary here, as parties do not have equal standing in negotiations: employee representatives are bargaining for resources that are in the possession of management, which, on top of that, in the case of a legal dispute, may be regarded by the latter as likely to be used to the detriment of the company. Understanding and acceptance of this inherent imbalance of power seems a *sine qua non* of recognising the need to introduce statutory fall-back provisions in this respect.

There are at least two possibilities for arranging the means of operation for EWCs in case of litigation. First, agreements can contain an obligation on the management to cover costs of litigation by the EWC against the company. This arrangement is, however, not a widely applied standard. According to the ETUI database of EWCs (www.ewcdb.eu; January 2015) arrangements on budgets for EWCs (both those indicating a specific annual budget, which is a minority of cases, and those containing only a general clause) occur only in 209 agreements (out of 1,883). Clearly, the sample is too limited to draw any express inferences, although the predominance of agreements based on Dutch and French law may suggest a link between the national tradition of industrial relations based on strong works councils and extensive facilities available to institutions of worker representation. On the other hand, at least six agreements explicitly preclude the possibility of providing EWCs with a budget (Zumtobel European Forum, De la Rue European Employee Forum, Agrolinz Melanin EWC, Quelle EWC, Dyckerhoff EWC and BMW EWC). The option of excluding a separate budget may, however, also be a form (albeit unfavourable) of agreement, as referred to and allowed by Art. 6.2 e) of Directive 94/45/EC or Art. 6.2 f) of Directive 2009/38/EC.

The second possibility is to include in an agreement, independently of arrangements on the budget, a specific clause guaranteeing coverage of costs by management in case of legal disputes. According to the ETUI database of EWCs,⁷¹ there are

⁷⁰ Art. 6.2e of Directive 94/45/EC; Art. 6.2f in conjunction with Art. 10.1 of the Recast Directive and Recital 19 of the Preamble.

⁷¹ As of January 2015.

only 25 agreements guaranteeing financing for litigation for 24 EWCs and SE works councils.⁷²

In view of the above figures on contractual arrangements in EWC agreements with regard to budgets, it is clear that they are very infrequent. However helpful it seems when worst comes to worst and a conflict escalates to a lawsuit parties to EWC agreements do not commonly resort to establishing contractual arrangements guaranteeing either an explicit autonomous budget for EWCs or guarantees of coverage of legal costs in case of litigation. A far more frequent practice in EWC agreements (and in statutory acts implementing the EWC Directives) is a general clause stipulating that the management will provide the necessary resources for the operation of EWCs. Such a general clause is, however, in the majority of litigious situations or disputes no more helpful or precise than the general provisions of the Directives and/or of national implementation acts. The reason for the infrequent application of contractual arrangements on budgets might be that the bargaining relationships between management and EWCs are characterised by the intrinsic imbalance of power between the parties,⁷³ in which one of them (the management) has all the resources (financial, legal advice and so on) sought by the other party. Workers' representatives negotiating an EWC agreement do not have strong leverage in this area: managements often argue that a general clause on the provision of means is sufficient as this is the standard laid down in the Directive. As a result and as statistics show, workers' representatives usually agree to a general clause.

3.4 Costs of litigation and court fees

It is important to emphasise the importance of comprehensive provisions to safeguard sufficient financing for EWCs as one of the preconditions for their access to courts. In this section we look at the costs of legal disputes and present examples of national regimes governing court fees.

First, problems with financing EWC litigation were discerned in the course of implementing EWC Directive 94/45/EC into British law, in respect of which the Department for Trade and Industry (DTI) recommended that '[a]s the EWC will have no financial resources of its own, it is proposed that costs should be borne by the undertaking (excluding frivolous applications)'.⁷⁴ Although an important proposal it was only a non-legally binding recommendation. Consequently, the issue of financing has commonly been shifted onto the negotiating partners. This shift inevitably resulted in an unbalanced bargaining position, in which workers' representatives had to ask the management to provide the necessary material means and to commit itself to financing court litigation against itself. The costs of appearing before the Central Arbitration Committee (CAC) in EWC-related litigation was estimated at

72 Examples include: Laiki Group, agreement of 14/02/2007, Art. 9; Akzo Nobel European Employee Forum, agreement of 01/04/2009; Euronext of 6/11/2002; Elektrolux of 16/06/2001; Deutsche Post World Net of 23/07/2003; Credit Suisse 18/01/2002; BNP Paribas 03/05/2010; BCD Travel 06/03/2008; Elanders of 14/09/2007.

73 Wills 2000: 274.

74 DTI, *Implementation in the UK of the European Works Council Directive. A Consultative Document*. July 1999 (URN 99/926), available at: <http://www.berr.gov.uk/files/file20651.pdf>, pp. 37–38.

£11,900 (approximately 14,500 euros in 2012).⁷⁵ At an Employment Tribunal the estimated costs as of 2012 were £2,540 (approximately 3,000 euros).⁷⁶ Such sums suggest that enterprises are unlikely to agree to cover costs. Possibly as a result of this, no known British EWC agreement includes a provision specifically guaranteeing coverage of costs linked to litigation (and only few such agreements have been signed in any case: see previous section).⁷⁷ Thus it was not long before this financial problem surfaced, namely in the proceedings initiated by the Dubai Ports EWC (P&O).⁷⁸ Regardless of its admissibility – commonly highlighted in reports on the case – the EWC’s complaint was withdrawn also because the employee side at P&O had no financial resources of its own to pursue the litigation. Moreover, it proved impossible for the EWC to raise the necessary funding.⁷⁹ Although the problems that have emerged in cases of litigation have been predominantly in the United Kingdom, in this section we argue that this problem is not a specifically British one.

When considering the costs of court litigation, in the authors’ view, one should differentiate between three kinds of possible expenditure:

- (i) court fees – charges, in the form of an administrative fee, payable for registration and processing of a case in court;
- (ii) costs of legal representation and advice – payable by each party to the court proceedings;
- (iii) subsidiary costs of gathering evidence, communicating with other members of the EWC, trade unions and other stakeholders potentially affected by the litigation.

While these costs may differ they all need to be covered in various proportions by the parties to a case. It should also be emphasised that they are also required when the parties opt for an alternative dispute resolution system (ADR), although in some cases charges for such proceedings are lower than in standard court proceedings. A case in point is Ireland, where since implementation of EWC Directive 94/45/EC Section 20.2 of the transposing law stipulates that in case of disputes over confidentiality and/or withholding of sensitive information by company management referred to an arbitrator designated by the Minister of Labour ‘[t]he parties to an arbitration under this section shall each bear their own costs’. Fees in Ireland, however, are not limited only to confidentiality disputes, but extend also to all other issues ‘concerning interpretation or operation of agreements’ (Section 21 of the Irish transposition act). In such cases, in line with Section 21 para 3, fees also apply:

‘An arbitrator to whom under subsection (2) a dispute is referred shall be paid such fees as the Minister, with the consent of the Minister for Finance,

⁷⁵ This includes the cost to the CAC of £10,234 (about 12,000 euros) and the cost to the employer of around £1,700 (about 2,000 euros) caused by two days of management time and one day of employee representative time.

⁷⁶ This consists of £2,000 (2,400 euros) for the employer and £540 (660 euros) for the Employment Tribunal Service. Source: DELNI 2003: 74).

⁷⁷ One supposes that in EWCs that have an autonomous annual budget (for example, for experts), autonomous legal advice would be possible (as, for example, expenses for external expertise). With this assumption the number of EWCs with a facility to cover legal costs would rise to ten (source: Jagodzinski’s own analysis of EWC database of ETUI, 2008–2014). See also below in this section.

⁷⁸ See Lorber 2010.

⁷⁹ Altmeyer and Hahn 2008: 12.

may determine, which fees shall be paid by the parties or a party to the arbitration as directed by the arbitrator ... [and] the parties to an arbitration under this section shall bear their own costs.’

The Irish transposition, at the same time, does not, however, provide any general obligation for companies to cover the operational costs of EWCs. It only requires that such arrangements be included in the EWC agreement. Only in the Subsidiary Requirements section does it repeat the general wording obliging the management to provide the EWC with such financial and other resources as are necessary for them to perform their duties in appropriate manner. As a result, an EWC for which an agreement has been negotiated, but without arrangements on financial resources for its operation, is not covered by the Subsidiary Requirements and thus is effectively deprived of any possibility to appeal to a court or state arbitrator, as costs may be applicable. Even more shockingly, the provisions regulating the management’s obligation to cover ‘reasonable expenses relating to the negotiations ... to enable the Special Negotiating Body to carry out its functions in an appropriate manner’ (Section 11.7) explicitly do not cover expenses related to any potential dispute before an arbitrator.⁸⁰ In consequence, plainly and simply, SNBs are practically deprived of the right to seek justice. Admittedly, the law (Section 7) foresees that

‘The Minister may make such regulations as are necessary for the purpose of giving effect to this Act and in particular in relation to : (a) expenses to be borne by the central managements in relation to undertakings and groups of undertakings [and] subject to the Second Schedule in relation to a European Works Council, the funding by central managements of the expenses of the operation of Special Negotiating Bodies, European Works Councils, European Employees’ Fora or information and consultation procedures,’

but as far as it was possible to establish within the framework of this project, no such regulation has ever been issued.⁸¹ The example of Ireland clearly shows how crucial the combination of national court/administrative fees and lack of financing for EWCs may be for EWCs’ recourse to justice. It is a blatant, indeed symptomatic example of the inconsequentiality and internal inconsistency of EWC transposition frameworks. Last but not least, it is a clear example of gross negligence and refusal to take counter-measures by the European Commission, as this situation has persisted since the very beginning of EWC legislation in 1996.

Finally, the above costs are required also in the case of summary (fast-track) court proceedings. This is the case, for example, in Luxembourg where in 2002 they amounted to approximately 497–619 euros.⁸²

80 Section 11.8 stipulates ‘For the purposes of subsection (7), reasonable expenses shall include the cost of meetings of the Special Negotiating Body, whether with the central management or otherwise, including the cost of materials, the venue, translations, travel and accommodation, and the equivalent cost of one expert per meeting.’

81 Based on information provided by the Industrial Relations Section of the Irish Department of Jobs, Enterprise and Innovation, at <http://www.djei.ie/employment/industrialrelations/work.htm> (accessed on 13/02/2015).

82 LUF 20,000–25,000, depending on the lawyer appointed; Büggel 2000).

All in all, in the member states in which court fees are required for any proceedings undertaken by EWCs it must be verified whether the national provisions provide for proper guarantees that ensure financing for EWC operations, explicitly including coverage of such legal costs as may arise when EWCs seek to pursue their right to go to court.

Countries in which no court fees are required

In the case of countries in which EWCs have no default right to be provided with an autonomous budget and those in which where no practical solution to this problem has evolved, expenses linked to seeking justice are a serious, if not insurmountable, obstacle. Court fees (as well as, usually, file preparation and representation costs), normally payable in advance upon submitting an application to the court, can amount to an insuperable hurdle on the way to justice. As EWCs do not have legal personality, they cannot open a bank account for the purpose of seeking external financing for litigation costs (for example, from trade unions). Therefore the requirement of covering court fees in advance seems to represent a serious challenge, or even a significant practical limitation of the right to judicial or administrative establishment of rights.

The latter applies in particular in countries in which such court fees apply. There is, however, a group of member states in which no court fees are required. According to Jagodzinski's investigation (based, among other things, on input from NETLEX and European Judicial Network in Civil and Commercial Matters, as well as (Büggel 2000), only eight countries do not require payment of court charges to start proceedings (Spain, Bulgaria, France, Germany, Romania, Lithuania, the Netherlands, Sweden⁸³). In these countries, the obligation to provide means for EWC operation including litigation is no less important than in the others, but such costs may be somewhat lower than in the other member states and thus the deterrent effect on EWCs considering launching a case might be less significant.

Spain abolished court fees for judicial proceedings in 1986 and, additionally, remuneration for barristers is normally payable at the end of proceedings. The court has the competence to order managements to cover an EWC's costs of legal representation or the employee representatives are able to make the claim based on Art. 11.4 (c) of the Spanish transposition Act of 10 April 1997.

In France, as a rule no charges are payable to the state for acts of procedure, except in the Commercial Courts where there is a scale of registry charges.⁸⁴ Nonetheless, costs of court proceedings can be awarded by the court to one of the parties, corresponding to the sum incurred in conducting the proceedings. It is customary that EWCs may be supported by local works councils and trade unions which often assist them financially in litigation.

In Romania, EWCs are recognised as bodies that collectively represent the interests of employees on a par with trade unions and they therefore enjoy the same legal

⁸³ Information according to Büggel 2000.

⁸⁴ In fast-track (summary) proceedings involving EWCs court fees amount to approximately FRF 500 = approximately 75 euros (Büggel 2000).

guarantees as trade unions in courts, in other words, they are exempt from paying fees.⁸⁵

In Latvia, no fees are required to refer a case to the first instance level, which is mediation, conciliation or arbitration. In Sweden, court fees are not imposed on EWCs, although the court might order that the legal costs of the defendant (the company's legal costs) are to be covered by the plaintiff.

For Cyprus, Lithuania, Malta and Norway it was not possible to verify what costs are applicable and when they are payable; in Estonia, the costs of EWC-related proceedings before law enforcement institutions were not specified, but by reference to the Employment Contracts Act of the Republic of Estonia, which designates the Labour Inspectorate as the institution responsible for the enforcement of EWC rights, it can be inferred that court costs are applicable to these administrative proceedings. In Estonia, the Employee Trustee Act of 2006⁸⁷ (Art. 26) with regard to the Labour Inspectorate specifies that it exercises state supervision over compliance with the requirements provided for in this Act under the conditions and pursuant to the procedure provided for in the Occupational Health and Safety Act. Additionally, the Labour Inspectorate conducts extra-judicial proceedings concerning misdemeanours.

Fees may apply, however, in the above listed countries if the case is referred to ADR systems (usually courts of arbitration), which is regulated by procedural court law (usually Civil Procedure Law). It must be kept in mind that in this case procedural fees or court charges might, in principle, be applicable to EWCs. For this reason the Dutch transposition act from the very beginning includes an exemption of EWCs, SNBs and their members from any costs of court proceedings.⁸⁸

Free access to courts – that is, not requiring a registration charge and/or any other fees for proceedings or legal representation – is without doubt crucial for anyone seeking to pursue their rights in court.⁸⁹ In Spain and Bulgaria, the statutory exemption from court fees has far-reaching consequences for EWCs: even though they do not have legal personality and consequently cannot open a bank account,⁹⁰ the lack of court charges means that their access to the judicial system is ensured (however, in Bulgaria EWCs do not seem to be entitled to launch legal proceedings). In Germany and France the release from court charges is an important facility, even though it would in any case probably have been possible for EWCs to mitigate this problem, as they do possess legal personality and can thus acquire and dispose of the financial means necessary to start litigation.

85 This was reported by the Romanian expert, although no confirmation could be found in legal acts available in English.

86 Büggel 2000.

87 Passed 13.12.2006 RT I 2007, 2, 6 Entry into force 01.02.2007.

88 Art. 5 of the Dutch European Works Councils Act authorises any interested party to apply to the Enterprises Division of the Court of Appeal in Amsterdam in case of any infringement of the rights provided for by law or an EWC agreement, except the provisions of Art. 4 (so-called 'national rights' such as workers' protection and secrecy and confidentiality). It is added that the SNB and the EWC cannot be ordered to pay the costs of the proceedings.

89 It should not be forgotten, however, that the lack of common court fees in a given country resolves only the question of financial resources for pursuing a judicial action by an EWC; as already mentioned, legal advice and representation costs still apply and need to be borne by EWCs.

90 Blanpain 1998: 26.

4. Sanctions

4.1 Sanctions and Recast Directive 2009/38/EC

The role of sanctions as a motivation to comply with the law has been known in legal philosophy and modern political science at least since the time of John Locke.⁹¹ The theory of legal positivism teaches that (statutory) sanctions, though not the sole reason, are often the most effective motive to obey the law.⁹² Of more direct relevance there has been important research on the proper implementation of sanctions and enforcement frameworks in general by, among others, Malmberg (Malmberg 2003), Bercusson (Bercusson 2009) and Hartlapp (Hartlapp 2005).

It is obvious that it is not sufficient to lay down rules that allow the relevant actors resources to implement their rights and access justice; it is also necessary to ensure that party which is found to be in breach of the law should be held responsible, be asked to remedy the breach and/or to compensate the injured party, and/or be 'punished' for not respecting the rules. The punishment should also be such that any party would not feel immune from applying the law because the potential effects are inconsequential (dissuasiveness). The present chapter offers the hypothesis that the profile and effectiveness of the transnational right to information and consultation could be substantially improved if clear, effective and dissuasive sanctions were ensured.

Traditionally, EU law has left the implementation of penalties and remedies to member states, providing at the same time as a general principle that sanctions must be proportionate, dissuasive and effective. Therefore, 'the success of enforcement of EU labour law has perhaps been greatest where EU legal technique meshes with the national tradition' (Bercusson 2009).

Directive 94/45/EC was fully in line with this principle and did not contain a reference to sanctions. The only reference to enforcement in Directive 94/45/EC can be found in the obligation to ensure remedies for EWCs (Art. 11.3⁹³).

This legislative approach has, however, caused a lot of problems in the past, especially in the area of labour law: 'national enforcement of labour law has been criticised in a number of areas: from the adequacy of tribunal procedures to the sanctions available for breaches, including the compensation awarded for damages suffered' (Bercusson 2009). Some national measures, such as reduction of 'protective awards' for failure to consult workers' representatives as required by EU law by means of set-offs have been presented to and condemned by the CJEU⁹⁴ (ibid.).

91 In his *Essays on the Law of Nature* (1664), Locke wrote: 'Those who refuse to be led by reason and to own that in the matter of morals and right conduct they are subject to a superior authority may recognise that they are constrained by force and punishment to be submissive to that authority and feel the strength of him whose will they refuse to follow (Locke 1663–64, 117).

92 Dating back to John Austin 'The Province of Jurisprudence Determined' (1832).

93 Art. 11. 3: 'Member States shall provide for appropriate measures in the event of failure to comply with this Directive; in particular, they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.'

94 *Commission of the EC vs. UK*, Cases 382/92 and 393/92, [1994], ECR I-2435.

In its review of the Directive in 2000 (European Commission 2010a), the Commission did not highlight any difficulties with sanctions, simply explaining that penalties are imposed in all countries, even though they differ in nature (fines or penal sanctions). It was further stated, however, that national legislative systems do not spell out systematically how penalties are to be applied for a breach of EWC laws. Based on these general conclusions it can be inferred that the rules at the time were not systematically transparent, thus hindering legal certainty and effectiveness.

In the period preceding Recast Directive 2009/38/EC, it was highlighted that in order to achieve effectiveness of employees' information and consultation rights, sanctions must be clarified in cases of non-compliance (European Commission 2008). The ETUC called for stronger sanctions to be inserted in the revised Directive. The European trade unions insisted that management decisions must be abandoned (declared 'null and void') if they violate information and consultation rights.⁹⁵

Understandably, the demand to introduce such uniform sanctions across all the member states has been strongly and consistently opposed by European employers.⁹⁶ It was also the source of debates between Council, Parliament and Commission when negotiating the text of the Recast Directive.⁹⁷ The outcome was the insertion of the EU legal principle of proportionate, dissuasive and effective sanctions in the recitals but not in the body of the text. The Commission explained the latter by the incompatibility of uniform sanctions with the legal nature and objectives of directives. The abovementioned Recital 36 represents progress in comparison with Directive 94/45 and provides an explanation for Art. 11.2, which requires member states to 'provide for appropriate measures in the event of failure to comply with this Directive'.

The requirements of dissuasiveness, proportionality and efficiency of sanctions have two flaws: they are referred to only in the Preamble to the Directive and they concern only sanctions, instead of the entire body of enforcement. Nevertheless, their introduction into the EWC Directive is crucial as, implicitly, it finally introduces the principle of effective enforcement of EU law into the EWC domain. As Malmberg (Fitzpatrick 2003) and Bercusson (Bercusson 2009) point out, the accumulation of these three principles (equivalence, effectiveness and proportionality) is the cornerstone of the emergence of the 'principle of effective enforcement'.

As we shall see in our analysis of transposing measures,⁹⁸ only a small number of countries seem to have reviewed their laws in relation to sanctions as a consequence of adopting Recast Directive 2009/38/EC.

95 ETUC demands for Recast Directive available at: <http://www.worker-participation.eu/European-Works-Councils/Recast-Directive/Table-ETUC-demands-and-Commission-proposal>

96 BusinessEurope, CEEP (Jagodzinski 2008).

97 Informal Trialogue, December 2008, reported in European Commission 2010a: 65.

98 See Table 17 in this chapter.

4.2 Overview of solutions applied by member states concerning breaches of EWC laws and possible sanctions

Due to the generality of the Implementation Report on Directive 94/45/EC (European Commission 2000; Jagodzinski 2015 (forthcoming) and the extension of the scope of Directive 94/45/EC, it seems worth looking anew at this aspect of transposition. Such a review seems valuable also because the lack of or limited sanctions in member states have been heavily criticised.⁹⁹ Finally, sanctions have been one of the most intensively debated aspects of the revision/recast of Directive 94/45.¹⁰⁰

Following the Impact Assessment Study's (European Commission 2008) recommendations, the only modification concerning sanctions introduced by Recast Directive 2009/38/EC was the addition of two Recitals:

(35) The Member States must take appropriate measures in the event of failure to comply with the obligations laid down in this Directive.

(36) In accordance with the general principles of Community law, administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations arising from this Directive.

The obvious shortcoming of such a solution is that in the majority of member states the preambles of EU directives are not transposed into national law and are considered to be non-binding parts of legislation. This may be one explanation of why there has been no modification of provisions on sanctions in the majority of the member states¹⁰¹ (see also sections below).

Group of Experts' Report on Implementation of Recast Directive 2009/38/EC on European Works Councils (December 2010)

In its overview of the provisions of Recast Directive 2009/38/EC, the Expert Report reiterates Recitals 35 and 36 of the Recast Directive by restating that appropriate

99 ETUC demands for Recast Directive available at: <http://www.worker-participation.eu/European-Works-Councils/Recast-Directive/Table-ETUC-demands-and-Commission-proposal>

100 BusinessEurope, CEEP (Jagodzinski 2008).

101 For instance the Greek trade union OBES involved in the transposition of the directive as a social partner proposed inclusion of the following passage in the implementation act: 'In case the central management does not provide the members of the EWC or the members of the select committee the necessary information to fulfil the obligation for information and the preparation of potential consultation, or it provides wrong or incomplete information or rejects the obligation to conduct consultation, the EWC legally represented or the members of the select committee have the right to appeal before the First Instance Court of the central administration office and request, through an application for interim measures, to be provided with the information required on specific transnational issues and ask that the implementation of any decisions of the central management, concerning these transnational matters be suspended until the central management properly fulfils its obligation to consultation. The above application for interim measures shall be discussed on a priority basis within fifteen (15) days. The central management has the burden of proving that it has properly fulfilled its obligation to information and consultation. In case the central management infringes the requirement for appropriate consultation and proceeds to implement decisions relating to transnational matters, such decisions are to be declared void and cannot be enforced against employees for the modification or termination of individual contracts of employment. Similarly, those decisions do not constitute a legitimate reason for terminating collective bargaining agreements'. The Greek government refused to include this in the law, reportedly arguing that there was insufficient justification for such a modification either in the directive (non-binding character of the preamble) or in national Law 4052/12.

measures must be ensured in the event of failure to comply with the obligations laid down in the Directive. It also explains that ‘in accordance with the general principles of Community law, administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations arising from the Directive’ (European Commission 2010a: 9). In this way the requirement of ensuring effectiveness, proportionality and deterrence (dissuasive character) of the entirety of provisions guaranteeing access to justice is clearly reiterated, communicated and accepted by all member states sitting on the Group of Experts.

Further on, the Expert Report deals with specific questions concerning implementation of provisions on sanctions: first, the question of the executability of sanctions for non-compliance with the requirement to inform the European social partners about the composition of the SNB and of the start of the negotiations. The executability of sanctions is considered in relation to three possible options (*ibid.* 30). It is remarked by the Expert Group that in any case applicability of sanctions to employee representatives for not informing the European social partners is questionable because:

- they do not have a global picture of the SNB’s composition before the first meeting;
- they are not responsible for organising the first meeting;
- it would be difficult to provide for sanctions on individual employees’ representatives in the case of non-compliance.

The Expert Group concluded on this issue that ‘an information obligation on employees’ representatives towards European social partners or European trade unions could only be effective after the first meeting of the SNB. Giving the responsibility to inform to the SNB would, however, lead to delayed information and raises the question of the sanctions to be provided.’

Second, in the part of the Report that discusses the details of transposition, the Expert Group highlights the need for special attention when implementing (among other things) Recitals 35 and 36 dealing with judicial procedures and sanctions and recommends that they ‘should particularly be considered, given the clarifications they provide to the aim of the articles or their importance in the adoption process’ (*ibid.* 60).

Finally, the Expert Group report devotes a section (Section 19) to the question of compliance with the Recast Directive. When discussing the origin and objective of provisions on compliance it recalls the European Commission’s earlier statements on the application of provisions concerning sanctions in the transposition of Directive 94/45/EC. In this sense it takes note of, among other things, the following points from the Impact Assessment Study (European Commission 2008):

- Clarification with regard to sanctions as a requirement as an operational objective to ensure the effectiveness of workers’ rights to information and consultation;

- disseminating awareness of ‘the existence of the sanctions’ among the actors in order to improve compliance.¹⁰²

Considering the significant variety in the severity of sanctions applied in the member states and the fact that in case law the maximum penalties are rarely imposed, the latter recommendation of improving awareness of their existence seems a rather liberal or even lax approach to ensuring more ‘clarification on sanctions’ and the effectiveness of workers’ rights. This approach on the part of the European Commission leading the work of the Expert Group was, nevertheless, applied consistently and was manifest in the response to the central question on whether the existing sanctions have to be changed. The reply of the Expert Group made up of national specialists was ambiguous: ‘Not necessarily, but they may have to be updated with new obligations (such as principles, information of social partners of new negotiations, training) and checked by member states in order to ensure they are “effective, dissuasive and proportionate in relation to the seriousness of the offence”’ (ibid. 65). In other words, the responsibility for evaluating whether the sanctions in place fulfil the criteria of effectiveness, dissuasiveness and proportionality was delegated to the member states. Such an approach is consistent with the European Commission’s policy in all areas and other directives and therefore criticism-proof. However, the Commission continues to bear the responsibility for ascertaining that the transposition laws at the national level meet the requirements of the Directive and that the achievement of its goal is genuinely ensured (Commission’s role as the ‘Guardian of the Treaties’¹⁰³).

Changes to national regulations on sanctions following Recast Directive 2009/38/EC

The demand for introducing such sanctions across the member states (together with other claims by trade unions) has been strongly opposed by European employers’ representatives (BusinessEurope, CEEP; Jagodzinski 2009).

The employers’ resistance to the introduction of any (binding) supplementary precision, requirements or standards concerning the institution of penalties comes on top of the Commission’s consistent institutional reservations concerning the limits on the degree of invasiveness of directives into national legal orders (ibid.). A compromise solution, taking into account the insistence of the trade unions and other institutional actors (European Parliament, European Economic and Social Committee; for details see Jagodzinski 2009) on the introduction of more binding punitive regulations, resulted in a compromise, namely the inclusion of the requirements of proportionality, dissuasive character and effectiveness of sanctions in the preamble to Directive 2009/38/EC (Recital 36) rather than in the universally binding body of that Directive.

102 ‘As regards the clarification on sanctions, it is likely to make clearer to company actors the existence of sanctions in the event of violations of information and consultation rights, and therefore increase compliance. However, this would not necessarily require adding anything to the present Directive, as the need for Member States to provide for appropriate, dissuasive and proportionate sanctions is already a general principle in Community law’; and: ‘Clarifications regarding the protection of rights: in order to improve compliance by making clear to company actors the existence of sanctions in the event of violations of information and consultation rights and to address legal uncertainties regarding the capacity of the European Works Council to represent workers’ interests’ (ibid.).

103 Art. 258 TFEU.

Nonetheless, Recital 36 represents progress in comparison with Directive 94/45 and provides a supplementary explanation and specification of Art. 11(2) of the Recast Directive that obliges the member states to ‘provide for appropriate measures in the event of failure to comply with this directive’. It remains to be seen to what extent the obligations stemming from the preamble of Directive 2009/38/EC will be taken into account in the Commission’s evaluation of the transposition. Two groups of potential infringements could be conceived.

First, there is the relatively straightforward case of countries in which sanctions are not indicated in the transposition acts, either directly or by reference to other external acts, which represents a violation of Art. 11(2) of Recast Directive 2009/38/EC. In this category, an in-depth examination should be conducted with regard to the Czech Republic, Estonia, Hungary, Latvia, the Netherlands and Slovakia (and possibly also Lithuania), where, based on the EWC transposition act implementing Directive 2009/38/EC, no conclusions could be reached as to the potential consequences of violations of EWC rights, nor could references be traced to external acts regulating punitive measures for such violations. It may of course be possible to ascertain those sanctions by reference to other acts (for example, the Labour Code), even though they are not mentioned in the given EWC transposition; nonetheless, such solutions may fall short of meeting the criterion of transparency of law and legal security in its application.

Second, another group of cases of potential infringement of transposition obligations comprises national transpositions that do include regulations on sanctions, but whose quality does not correspond to the requirements of Directive 2009/38/EC (Recital 36 in conjunction with Art. 11(2)). For the purpose of identifying such possible instances of transposition of insufficient quality, the previous and the following sections in this chapter attempt to provide tools for this evaluation.

Classification of violations of EWC laws

As the Recast Directive introduced no major changes to Directive 94/45/EC with regard to sanctions, in many member states the provisions on sanctions remain unaltered (only in Austria, Bulgaria, Denmark, Estonia, Hungary, Lithuania, Latvia, Portugal, Slovakia, Slovenia and the United Kingdom were changes introduced to provisions regulating access to justice, including sanctions; see also the overview table in Annex 1). The majority of national transposition acts do not include provisions on sanctions, but make reference to other acts of national law. One result of those references to other existing acts of law is significant variation of solutions across the EU. One implication of the diverse legislative approaches is the practical difficulty for stakeholders in obtaining an overview and evaluating the possible outcome of litigation, especially in the context of the transnational composition and character of EWCs’ work.

In the first place it must be pointed out that none of the EWC Directives specifies the type of or gives an indication with regard to the branch of law in which sanctions are to be defined.¹⁰⁴ The analysis of the nature of references in the national acts im-

104 This is not always the case with the EU directives. Examples supporting the case in point include some of the environmental protection directives (for example, 2008/99) indicating criminal (*cont. on next page*)

plementing the EWC Directive(s) to external acts that has been undertaken within the framework of the current study reveals an array of solutions. First and foremost, sanctions threatening perpetrators for violating EWC rights and duties depend primarily on the category of 'breach' specified in the EWC transposition act. Therefore, to provide a fuller insight into the landscape of punitive measures applied in the EU, it would be worth examining how the violations of EWC laws are classified. A review of references from the EWC implementation acts to external laws resulted in the following classification:¹⁰⁵

- (i) countries in which the category of infringement of the respective EWC acts is considered an administrative/labour law offence (Austria, Cyprus, Ireland, Italy,¹⁰⁶ Germany,^{*107} United Kingdom, Lithuania,¹⁰⁸ Malta, Spain,^{*109} Slovakia, Bulgaria,^{*110} Czech Republic^{*111});
- (ii) countries in which the category of infringement of the respective EWC acts is considered a criminal offence (France, Poland, Germany,^{*} Estonia,^{*112} Belgium¹¹³);
- (iii) countries in which the category of infringement of the respective EWC acts is classified under other forms of breach, infringement or violation of rights (Portugal – infringement of rights;¹¹⁴ Finland – 'violation of the obligation to cooperate of a group of undertakings'; Greece – infringement of obligations; Italy – infringement; Latvia – violation of law; Romania – contravention; Bulgaria – non-observance of labour legislation¹¹⁵ and violation of labour legislation¹¹⁶);

104 (cont. from previous page) penalties as the preferred measure since they 'demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law' (Recital 3).

105 Countries appearing in more than one category are marked with an asterisk.

106 Offence in cases of breach of confidentiality.

107 A distinction is made between criminal and administrative offences. Violations of information and consultation stipulated by Art. 13 agreements are not considered to be offences.

108 Under the act of 29/03/2001 transposing Directive 94/45/EC, administrative offences are governed by the Code of Administrative Offences of the Republic of Lithuania.

109 Under the 1997 Act transposing Directive 94/45/EC, a distinction is made between serious and very serious administrative offences (Art. 32 and 33). This distinction is confirmed in Real Decreto Legislativo 5/2000, 4 agosto, Ley sobre Infracciones y Sanciones en el Orden Social (Legal Decree 5/200, 4 August, Law on Infractions and Sanctions on the Social Order) Section I, Subsection II Art. 9.

110 Art. 416, para. 6: 'The ascertainment of violations, the issuance, appeal and execution of penalty decrees shall follow the procedure established by the Administrative Violations and Sanctions Act, save insofar as another procedure is established by this Code.'

111 Breaches of EWC regulations may be considered 'Breaches of the legislation and administrative offences' under the Labour Inspection Act of 3 May 2005.

112 Not stipulated directly in the EWC transposition act, but by reference to the Employment Contracts Act and the Employee Trustee Act of 2006. Offences against EWC law are monitored and prosecuted by the Labour Inspectorate which, however, in this case applies the Penal Code and/or the Code of Misdemeanours Procedure (Art. 26, Employee Trustee Act).

113 Since in Belgium the EWC Directive is applied by means of a social partner (collective) agreement, the sanctions laid down for employers who violate collective bargaining agreements that are rendered generally binding are stipulated in the Parliament Act of 5 December 1968 with respect to Collective Bargaining Agreements and Joint Committees, Official Gazette, 15 January 1969, as amended.

114 Under transposition of Directive 94/45/EC. In Act No 171 of 3 September 2009 the classification was changed to that of 'serious administrative offence' (Art. 5.4; 8.3; 7.10; 9.5; 14.5; 15.8; 22.8) or 'very serious administrative offence' (Art. 9.5; 10.4; 15.8; 16.3; 17.5; 18.5; 20.6; 22.8; 24.4) or 'minor administrative offence' (Art. 11(4)).

115 The right to alert the General Labour Inspectorate Executive Agency for failure to observe labour legislation. (Art. 130b, Paragraph 6: Upon failure on the part of the employer to fulfil the obligation thereof under Paragraph (1), or where the employer fails to hold the consultations under Paragraph (4), the trade union organisations' representatives and the factory and office workers' representatives under Art. 7 (2) or the factory and office workers shall have the right to alert the General Labour Inspectorate Executive Agency of a non-observance of labour legislation.)

116 Art. 414 of the Labour Code.

- (iv) countries in which the category of infringement of the respective EWC acts is classified as a violation of collective agreements (Sweden,¹¹⁷ Denmark);
- (v) countries in which the category of infringement of the respective EWC acts is not specified in the EWC transposition act (Netherlands, Norway, Slovenia, Czech Republic,^{*118} Hungary, Latvia,¹¹⁹ Estonia¹²⁰).

Table 19 Category of EWC rights violations

	Administrative or labour law offence	Criminal offence	Other term used without further definition	Violation of collective agreements	Not specified
Austria	x				
Belgium		x ¹²¹		x	
Bulgaria	x		x		
Croatia	x ¹²²		x Alternatively, see footnote ¹²³		
Cyprus	x				
Czech Republic					x
Denmark				x	
Estonia					x
Finland			Violation of the obligation to cooperate of a group of undertakings		
France		x			
Germany	x	x			
Greece			Infringement of obligations		
Hungary				x	
Ireland	x				
Italy	x		Infringement (transposition of directive 94/45/EC) / violation (transposition of directive 2009/38/EC)		x
Lithuania	x		Violation of law	x	
Luxembourg	x				

117 In Sweden, any party that wishes to claim remedy according to the EWC law is obliged to demand negotiations within four months of becoming aware of the circumstances to which the claim relates and not later than two years after the occurrence of such circumstances (Footnote 06 to Art. 41 of the Swedish Act No 359 of 9 May 1996).

118 Breaches of EWC regulations may be considered 'Breaches of the legislation and administrative offences' under the Labour Inspection Act of 3 May 2005.

119 Under the Act of 22/06/2011 transposing Directive 2009/38/EC no classification of infringements of EWC rights is indicated.

120 Not stipulated directly in the EWC transposition act, but by reference to Employment Contracts Act and Employee Trustee Act of 2006.

121 Based on Art. 5 of the Parliament Act of 5 December 1968 (with respect to Collective Bargaining Agreements and Joint Committees, Official Gazette, 15 January 1969, subsequently amended) which foresees criminal sanctions for employers violating provisions of collective bargaining agreements (transposition of the EWC directives in Belgium are executed via collective bargaining agreements).

122 Based on Art. 35.2 of the EWC Act of 18/08/2014 it is inferred that in Croatia the violation is defined as a labour law offence (*prekršaj* – which is a term with multiple meanings, such as 'violation', 'infringement' and 'breach').

123 See note 257 above.

Table 19 Category of EWC rights violations (cont.)

	Administrative or labour law offence	Criminal offence	Other term used without further definition	Violation of collective agreements	Not specified
Latvia					
Malta	x				
Netherlands					x
Norway					x
Poland		x			
Portugal			Infringement of rights		
Romania			Contravention		
Slovakia	x				
Slovenia					x
Spain	x	x			
Sweden				x	
UK	x				

Source: Compiled by Romuald Jagodzinski, 2014.

As there is a direct link between the category of violation of law and sanctions, it is clear that this element constitutes an important component of the concept of EWCs' access to justice. Furthermore, the organisational solutions applied across the member states in the above classification gives rise to a number of considerations:

First, it should be pointed out that classification of national implementation acts based only on the legal term used to describe the type of violation of EWC law may sometimes be misleading and may not reveal the type of sanctions applicable to the given infringements.¹²⁴ It is not uncommon for a violation classified as an administrative offence against labour law (which comes under civil law) to be sanctioned according to the criminal code and code of criminal procedure (for example, Poland: administrative offence and petty offences code). The above classification should therefore be used for indicative purposes only and should not be considered a final listing of corresponding sanctions. Despite this, the classification of types of EWC law violations is useful because it shows that even in the preliminary stage of determining the infringement there are significant differences between the member states.¹²⁵ The fact that the same violations are often classified very differently by national legislation (for example, a crime versus an administrative misdemean-

124 In the current project, classification was based on the statutory terms used in individual implementation acts. A further analysis of the nature of sanctions may be an interesting research project, but due to its complexity this remains outside the scope of the present examination.

125 In the study not only sanctions mentioned explicitly in the national transposition act were analysed, but also sanctions in other acts (codes, laws) to which reference was made in the implementation acts. The latter are often key to a proper classification because they contain definitions of violations and specify the sanctions.

our) produces (or multiplies) discrepancies in the implementation of the obligation placed by the Directive on the national legislator to provide for effective sanctions (for example, criminal versus administrative sanctions). As a result, a legitimate question may arise as to the equality of rights of employee representatives sitting on the very same EWC, as well as consistency in the application of EU law. In fact, this question could be the subject of a broader debate on EWCs as vehicles of the Europeanisation of industrial relations in Europe (Waddington 2010), dealing with the question of balance between national variety originating in country-specific industrial relations and the need for common standards for common EU institutions. The thread of this discussion on the effectiveness of the directives is central. On the one hand, it must be recognised that specific labour relations and traditions deserve recognition and protection. On the other, excessive variety of legal solutions might confuse all the actors involved. When EWCs and their members are confronted with the challenge of transnationality, they often struggle with the question of whether it is worth starting a court case in a representative's home country where the maximum sanction is a relatively low fine for the company, or whether it might be more effective to try to launch it in another member state in which sanctions can be more severe, making the entire logistical effort or launching litigation more worthwhile. Such EWCs, faced by a significant legal diversity of solutions and limited resources, have to grapple with the ways of finding a common denominator for workers' representation and face problems with finding an internal common standard for their operations.

Second, with all its constraints, the above classification reveals several countries in which the category of infringement is not specified in the EWC implementation act. Where this approach is adopted in national transposition measures, it may generate legal confusion and lack of transparency. Furthermore, in light of the EWC Directive's obligations to provide for (effective) procedures and sanctions, as well as in the context of the recommendations of the Working Party of 1995 and the Expert Group of 2010, in cases where no sanctions are specified directly in the implementing act (or no references to other acts are made), serious doubts can justifiably be expressed as to whether the member states have fulfilled their obligation to introduce effective and efficient legal remedies.

Third, the fact that none of the EWC Directives offers guidance on the preferred type of sanctions for EWC law violations seems to be one of the reasons for the considerable latitude of national legislators and the wide variety of solutions applied. It is an open question whether such guidance should be offered by the EWC Directive in the future, but it should be pointed out that this is not uncommon in EU legislative practice (for example, in Directive 2008/99/EC; see also next section in this chapter).

Observations concerning general trends in sanctions applicable for violations of EWC rights (including the current post-recast Directive regulations)

At the end of an often arduous and demanding trial comes the court's decision, which usually, in a more straightforward sense, means sanctions for one of the parties. Sanctions can be considered the crowning of litigation and are thus the last aspect in the legal analysis of institutional safeguards for access to justice. Even though in the vast majority of discussions the question of sanctions has attracted

most attention, the punishment of violations of EWC laws is not something that stands alone. As attempted in the current chapter, the type of sanction applicable depends on the classification of the violation and is a corollary of the choice of the branch of national law governing EWC violations (labour law, criminal law, civil law). Sanctions do not exist in a vacuum, but are closely dependent on other variables. The choice of sanctions is left to the member states, which are in no way limited by the EWC Directive or guided by the Expert Group instructions in their choice. The only ultimate requirement is that sanctions be ‘effective, proportionate and dissuasive’ and that national procedures ensure an effective exercise of rights stemming from the Directive (*effet utile*). An inevitable consequence of this open-ended approach to regulating sanctions and the enforcement of EWC rights (and, generally, of the choice of directive) is a significant variety in the solutions applied by the member states. On one hand, such an approach allows for the necessary respect and scope with regard to national industrial relations and traditions. On the other, it might lead to an array of widely varying solutions that, in the end, are not comparable or compatible with each other and render the application of European-wide directives incoherent. One obvious implication of such a situation is an ambiguous legal situation in which the same transnational right is applied differently, entailing legal inequality and injustice with regard to a different ‘valuing’ of workers’ rights across the member states, depending solely on workers’ national origin. If this were the case, it could be a flagrant contradiction of the main reason for adopting EWC legislation at the EU level, namely the creation of common European rights and standards across countries and multinational companies.

The analysis undertaken in the current chapter maps selected aspects of national solutions in the area of enforcement frameworks as they appear in the member states. Study of the above listed solutions allows us to draw some general conclusions.

(i) *Injunctions and summary proceedings as an important safeguard of EWC rights to information and consultation*

First, courts’ right to issue injunctions or conduct summary proceedings pertaining to infringements of EWC rights is an important factor differentiating national implementation acts. The institution of summary court proceedings provides for a shortened and accelerated procedure that makes it possible to obtain a court decision within a relatively short time, ranging from hours – in exceptional circumstances where urgency can be proved, as in France – to approximately 14–15 days (for example, Italy or Hungary). In some countries – for example, Bulgaria¹²⁶ – summary proceedings are accompanied by a possibility to issue immediate court orders obliging the perpetrator – in the case of EWCs the management that is not respecting rights to information and consultation – to cease the actions that constitute the infringement or to undertake certain actions to rectify the violation. As some prominent cases – for example, the Gaz de France–Suez merger case or Renault Vilvoorde; for more information on case law see (Dorssemont and Blanke 2010) – have shown, the legal institution of summary proceedings touches upon the very core of *meaningful* employee rights to information and consultation, which aim at

126 Art. 404 of the Labour Code.

involving employees in decision-making before decisions are taken and measures implemented. Summary proceedings also greatly enhance access to courts¹²⁷ and the effectiveness of rights, especially when time is of the essence.¹²⁸

In this context, the question of the availability of summary procedures and the possibility to issue injunctions in national legislation seems to be one of the decisive issues determining compliance with Art. 11.3 and 11.4 of Directive 94/45/EC and Art. 11 of Recast Directive 2009/38/EC.

Recourse to the right to issue injunctions or conduct summary proceedings by courts is an important factor differentiating national implementation acts and a variable that strongly determines the efficiency of national enforcement frameworks. These two institutions of law are not sanctions, but rather they are provisional remedies to preserve a given state of affairs in its existing condition or to safeguard the plaintiff's rights. Injunctions are essentially swift court orders issued in emergency situations by which an addressee is required to perform, or is restrained from performing, a particular act; they are measures to prevent further damage that would otherwise happen if a violation persisted. Summary proceedings are a procedure or a simplified mode of trial allowing a case to be held before a judge without the usual full hearing, so that they are accelerated by comparison with a regular trial. Summary proceedings greatly enhance access to justice (Jacobs 2004) 40) and effectiveness, especially when time is of the essence (for example, (Bocken and Bondt 2001).

In providing for a shortened procedure, summary proceedings in EWC matters can be used to obtain a court decision within a period ranging from a few hours (in exceptional circumstances when urgency can be proved, as is the case in France) to approximately 14–15 days (as in Italy and Hungary). In some countries (for example, in Bulgaria), summary proceedings also make it possible for the court or monitoring institutions to issue orders obliging the offender (that is, in the case of EWCs, the management failing to respect rights to information and consultation) to stop the actions constituting the infringement, or to carry out certain actions to rectify the violation. As shown by certain prominent EWC litigation cases, such as the cases of *Gaz de France – Suez merger* or *Renault-Vilvoorde*, the legal institution of summary proceedings and/or court orders (injunctions) goes to the very core of *meaningful* guarantees for employee rights to information and consultation and safeguards the fundamental right of workers to be involved (that is, consulted) in the decision-making process before final decisions are taken and measures implemented. In some Member States (for example, Germany) the courts' competence to issue injunctive orders (*genereller Unterlassungsanspruch* based on Art. 111 ff. of the German Works Constitution Act, BetrVG) has been the subject of an ongoing and unresolved legal debate (Bauckhage 2006).

It should be pointed out that even if injunctions are available in a legal system they do not automatically guarantee swift summary proceedings or lead to immediate actions. A case in point here is the Lithuanian transposition law,¹²⁹ which provides

127 Jacobs 2004: 40.

128 For example, Bocken and de Bondt 2001: 110.

129 Law Amending Law of the Republic of Lithuania on European Works Councils, 22 June 2011, No. XI-1507.

a legal remedy against a management's refusal to provide information or in a dispute over the correctness of the information provided, in the form of the right of employee representatives to apply to a court within 30 days (Art. 12). The court subsequently hears the case, but no mention is made of the time-limit for the issue of the ruling. In the case of a ruling that the 'refusal to provide information is unjustified or incorrect information has been provided, the central management or any other level of management in question shall be obligated to provide correct information within a reasonable period of time' (Art. 11 and 12). In other words, even if an injunction is issued to provide information, the period in which the management must remedy its failure remains unspecified ('reasonable time'). This might diminish the impact of an injunction as a remedy, where the aim is to halt a violation or prevent damage.

It is logical and in line with the requirements of EWC Directive 2009/38/EC that if the right to timely information and genuine consultation is to be effectively safeguarded, courts – or other institutions, such as Labour Inspectorates – in each EU member state should have the competence to stop a violation from causing further harm to the sufferer (workers) or their interests. It should be pointed out that the effectiveness of sanctions and their capacity to deter potential perpetrators is considerably limited if the only consequences faced by multinationals, which often have vast financial resources, are relatively small administrative fines¹³⁰ (see below) or financial penalties.

Summary proceedings and court orders (suspensive injunctions) are not sanctions as such, but are a legal means that represent an important safeguard of parties' interests. In this sense they prevent further damage from happening as a result of continuation of one party's actions and address a serious shortcoming of sanctions of any type, namely delay. The European Commission endorses the introduction of this instrument as an obligatory minimum standard in the harmonisation of sanctions for violations of national transpositions of EU financial market regulations (European Commission 2010b) 12). The European Commission stresses that injunctions can be an effective countermeasure and deterrent, especially against offences committed repeatedly.¹³¹ Sanctions, be they financial or criminal in nature, take time to be decided on and executed and, despite their retributive character, they cannot perform the function of instantly safeguarding a party's valid rights or interests. It is obvious that this inherent deficiency of sanctions often applies to infringements of workers' rights to information and consultation, as they can hardly remedy implications of a managerial decision taken in violation of EWC rights.¹³² By contrast, the possibility of stopping a company from implementing projects or decisions taken without consulting the workers gives them a chance to be heard before the decision is executed, irreversible effects produced and damage done. On a more general level, court injunctions represent a means of safeguarding respect for the

130 For more detailed analysis of the dissuasive character of financial penalties in EWC enforcement frameworks see Jagodzinski 2015 (forthcoming).

131 'For example, cease and desist orders and court or administrative injunctions may be useful if there is a risk of certain types of violation being continued or repeated.' (European Commission 2010b: 12).

132 Employee representatives' involvement in meaningful information and consultation usually cannot be restored post-factum. However such examples are known, as in the *Gaz de France–Suez* merger case that ended with the merger being annulled; see Dorssemont and Blanke 2010.

law in general, as their availability excludes the possibility of cynical violations of law with the aim of ‘buying’ oneself out – at relatively low cost – of the legal consequences of petty financial penalties as compared with possible gains to be obtained by taking ‘shortcuts’, that is, actions that show a flagrant disregard for weakly sanctioned laws when the cost of violation is less than that of obeying the law. Finally, one should bear in mind that, in many EU member states, injunctions in industrial relations are used by employers in industrial disputes (for example, to compel a trade union to desist from organising industrial or strike action; see, for example, (Gall 2006)). When such injunctions are available to only one of the social partners – namely, the employers or, alternatively, against just one of the social partners – as is the case in the United Kingdom (see Regulation 19D of the Statutory Instrument 1088), and are explicitly denied to the workers’ representatives (for example, EWCs) in cases of infringement¹³³ of their key right to information and consultation, industrial relations are clearly out of balance. In the United Kingdom, this imbalance was noted in the House of Commons. When MPs were discussing the operations of private equity firms, they concluded that injunctions issued in summary proceedings are an effective means of enforcement of the obligation of a company management/the owners to inform and consult workers’ representatives before any decision involving, for example, a highly debt leveraged takeover and thus should be available to workers and trade unions (House of Commons 2007: 243).

Our analysis of national acts implementing the EWC Directive reveals that the effective measure of court injunctions is available and – potentially – applicable to infringements of EWC laws in only a few national legal orders (Belgium, Bulgaria, Estonia, Finland, France, Spain, Lithuania, Ireland, the United Kingdom¹³⁴ and, debatably, in Germany¹³⁵) and so far has been applied in court practice only in France (Brihi 2010). Sometimes injunctions are available only with regard to specific circumstances, as is the case in Cyprus, where such court orders are applicable to situations in which the management has (unlawfully) classified information as confidential (Art. 17(2)b of Law 106(I)/2011, No 4289, 29.7.2011). Alternatively, in some countries there exist sufficient theoretical premises for inferring the courts’ authority to issue injunctions in EWC cases, based on the courts’ analogous capacity with regard to other instances of information and consultation. One example is the Netherlands, where the Commercial Chamber of the appeal court (*Ondernemingskamer*) is competent to issue injunctions in the event of a breach of national-level information and consultation procedures stipulated in the Works Councils Act (European Commission 1998: 26).¹³⁶

133 Where the order is for the EWC to disclose the outcome of information and consultation to employees or employee representatives.

134 According to information provided by the CAC in a document instructing the public on possible applications and complaints that can be submitted to the CAC concerning EWC-related disputes (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/348757/EWC_Applications_Complaints_Version_3_January_2012_.pdf consulted on 15/08/2015) it is possible to obtain an order imposing statutory minimum requirements to an EWC.

135 Bauckhage 2006: 164 ff.

136 The Commission’s report on the implementation of Directives 75/129 and 92/65 on collective redundancies argues: ‘Non-fulfilment of the consultation requirement laid down in Art. 25(1)(a) of the Works Councils Act is not specifically penalised by the Act itself. If, however, the works council has expressed an opinion that the employer has disregarded, Art. 26(1) of the Act authorises it to challenge the employer’s decision before the *Ondernemingskamer* (Commercial Chamber). The Chamber may, for example, enjoin the employer to refrain from implementing his proposed decision (Art. 26(5)(b)). The employer may not violate such an injunction (Art. 26(6)).’

In the remaining countries of the EEA covered by the EWC legislation such a legal institution is not available in the case of breaches of EWC regulations.

Unfortunately, an attempt to introduce such a possibility into the Greek implementation law following Recast Directive 2009/38/EC ended without success.¹³⁷ Consequently, applications by EWCs aimed at halting managerial decisions, sometimes taken in deliberate infringement of EWC rights, are handled by courts in their normal course of business, which usually means that the court decision on the subject comes several months after an unlawful decision has been taken and implemented and has negatively impacted the workers, who remained uninformed and unconsulted, and the damage cannot be undone.¹³⁸ Such situations lead to a further complication of the workers' legal position – for example, in the case of *significant company change* – and make *post factum* claims for compensation by employee representatives (for example, after major restructuring entailing redundancies has been completed) almost purposeless and irrelevant. The absence of court injunctions in EWC matters also raises questions concerning the imbalance in the importance, value and protection of interests safeguarded by the judicial system: if, for instance, in the case of corporate environmental crimes¹³⁹ injunctions can be issued, why should not this also be an option with regard to fundamental workers' rights to information and consultation?

In the context of the above considerations, the question of the availability of summary procedures and the possibility of issuing injunctions in national legislation seems to be one of the decisive issues determining compliance with Art. 11(3) and 11(4) of Directive 94/45/EC and Art. 11(2) and 11(3) of Directive 2009/38/EC. These Articles do not limit the member states' obligation to providing sanctions; the European legislator has imposed the requirement of ensuring 'that *adequate* administrative or *judicial procedures* are available to enable the obligations deriving from this Directive to be enforced'. Without doubt, injunctions fall into the category of administrative or judicial procedures and contribute to effective enforcement of

137 Within the framework of consultative dialogue between the Greek Ministry of Labour and the trade unions, the OBES union had proposed that the following two paragraphs be included in the respective article of the transposition law, although they have in fact been omitted in the final text of Law 4052/12: 'In the event that the central management does not provide the members of the EWC or the members of the select committee the necessary information to fulfil the obligation for information and the preparation of potential consultation, or it provides wrong or incomplete information or refuses the obligation to conduct consultation, the EWC legally represented or the members of the select committee have the right to appeal before the First Instance Court of the central administration office and request, through an application discussed at the time of interim measures, to be provided with the information required on specific transnational issues and to ask that the implementation of any decisions of the central management concerning these transnational matters be suspended until the central management properly fulfils its obligation to consultation. The above application for interim measures shall be discussed on a priority basis within fifteen (15) days. The onus is on the central management to prove that it has properly fulfilled its obligation to information and consultation. If the central management infringes the requirement for an appropriate consultation and proceeds to the implementation of decisions relating to transnational matters, such decisions are liable to be declared void and cannot be enforced against employees for the modification or termination of individual contracts of employment. Similarly, those decisions do not constitute a legitimate reason for terminating collective agreements.'

138 Apart from Hungary, where the court is obliged to issue a ruling within 15 days of the EWC's application.

139 The term is used in the sense of Schrager and Short (1977) on organisational crimes and developed by (Box 1983: 20-22), who described them as 'illegal acts of omission or commission of an individual or group of individuals in a legitimate formal organisation, in accordance with the goals of that organisation, which have a serious physical or economic impact on employees, consumers ... the general public and other organisations' (Tombs 1995: 132).

obligations and protection of workers' interests under the EWC Directive(s). More importantly still, they are often the only measure capable of ensuring that the right to information and consultation before decisions are taken is effectively observed. Therefore it seems reasonable for the Commission to consider verifying national acts implementing Directive 2009/38/EC against the existence of such or equivalent measures and ensuring that remedies with effect similar to injunctions are provided for in every member state.

The scope of the present analysis did not allow for undertaking an in-depth EU-wide study of the use of suspensive injunctions in labour law, but this represents a relevant and interesting area for further research. It is not unfounded to seek parallels with the execution of, for example, environmental law in the EU, where the irreversibility of damage and impossibility of restitution to the original is of particular importance: in many EU countries, in order to prevent damage to the environment resulting from illegal corporate actions, suspensive injunctions are issued or the very fact of launching administrative or court proceedings triggers a suspension of any corporate actions in question (for an overview see (Epstein 2011: 86 ff).

Therefore it seems clear that if infringement of the rights to timely information and genuine consultation are to be effectively prevented and tackled, all EU member states should guarantee efficient measures that make it possible to halt a decision-making process conducted in contradiction of employees' right to be informed and consulted. It seems obvious that there is little use in applying other sanctions of relatively low severity (often small administrative fines; see below) a posteriori once the management has taken the decision and the situation cannot be remedied by employee representatives. Analysis of national acts implementing the EWC Directive reveals, however, that the effective measure of court injunctions is provided to safeguard EWC rights by only few national legal orders. Consequently, applications to courts by EWCs aiming to stop managerial decisions sometimes taken in deliberate infringement of EWC rights, are handled by courts in their normal course, which usually comes to a conclusion only several months after an unlawful decision has been taken and implemented.¹⁴⁰

(ii) Sanctions imposed by the Labour Inspectorate

In some countries sanctions can (also) be imposed by national Labour Inspectorates. Typically, powers of inspection, sanctions and administrative procedures are regulated by general labour laws, supplemented in some cases by separate provisions in occupational safety and health legislation. This is the case, for example, in Italy,¹⁴¹ where the regulation on the scope of competence of inspectors contains the main provisions on inspection sanctions. This is also the case with other European countries, such as the Czech Republic and Hungary (Vega and Robert 2013). In

140 See note 272 above.

141 The labour inspectors' scope of competence is regulated by Legislative Decree No. 124 of 23 April 2004. Labour inspection in Italy is also supported by the Tripartite Committee for the Support of Labour Inspection, which was established at the beginning of the 1980s with a view to assisting the labour inspectorates. At the national level, the most representative social parties (for example, CGIL, CISL, UIL, Confindustria, Confcommercio) are informed and consulted regularly on labour inspection policies and programmes. For more information see ILO online resource at: http://www.ilo.org/labadmin/info/WCMS_126019/lang--en/index.htm

Estonia, on the other hand, the Labour Inspectorate conducts general state supervision of the observation of laws, but applies sanctions according to the Penal Code.¹⁴²

(iii) *No sanctions*

Italy is a special case because, by agreement between the social partners, there were no sanctions for infringing EWC laws (stipulated in the collective agreement) and the only remotely relevant provision stipulated that ‘where an infringement has been ascertained, the possibility of fulfilling the obligations should be provided for’ (Point B.1 of the Joint Opinion attached to the 1996 social agreement¹⁴³). Only failing that should a fine be imposed (supposedly by the conciliation committee itself within the Ministry of Labour and Social Security). The amount of the fine was, however, not specified. Such a situation did not seem unusual in Italy and was already reported in the past with regard to the implementation of Directives 75/129 and 92/65 on collective redundancies. A European Commission report on the implementation of these Directives suggested that legal sanctions ‘can only be derived from the relevant court rulings and general labour law regulations’ (European Commission 1998: 5).¹⁴⁴

The recent joint social partners’ agreement that served as basis for the Italian Legislative Decree transposing Recast Directive 2009/38/EC did not make any amendments to the enforcement rules. Luckily, eventually in the Act 113 of 2012 (Decreto Legislativo di 22 giugno 2012, n. 113) financial penalties were introduced.

Similarly in Lithuania, the law amending the previous EWC implementation act¹⁴⁵ does not stipulate any sanctions for violation of the laws.

In Denmark, too, the transposition of the Recast Directive does not define sanctions. It merely stipulates that violation of certain provisions ‘shall be punishable by a fine’.¹⁴⁶ It has not been possible, however, to establish the amounts of fines applicable in the case of breaches of the law. Neither was any indication provided by the previous act transposing Directive 94/45/EC into Danish law (Act No. 371 of 22 May 1996).

In Hungary, the acts implementing the EWC Directives (of 2003 and the 2011 amendment) stipulate fines for breaches of EWC regulations, but set no concrete amounts. Reportedly, no amounts are set by the Hungarian Labour Code, either.¹⁴⁷ Last, but not least, sanctions are lacking also in the Finnish law on EWCs.

142 Estonia Employee Trustee Act 2006: ‘§ 26. Procedure (1) The provisions of the General Part of the Penal Code and the Code of Misdemeanour Procedure apply to the misdemeanours provided for in §§ 261, 262, 264 and 265 of this Act. (2) Extra-judicial proceedings concerning the misdemeanours provided for in §§ 261, 262, 264 and 265 of this Act shall be conducted by the Labour Inspectorate.’

143 National Multi-Industry Agreement of 6 November 1996 on the Transposition of Directive 94/45/EC.

144 The report (European Commission 1998) specifies further that, based on legal literature and case law, violation of the employer’s obligation to inform and consult the company union delegations (*rappresentanze sindacali aziendali*) is seen by some as anti-union conduct (*comportamento antisindacale*) within the meaning of Art. 28 of the *Statuto dei lavoratori* [Statute of Workers’ Rights] of 1970 and hence as subject to the penalty laid down therein (see also Borelli 2011: 5).

145 Law Amending the Law of the Republic of Lithuania on European Works Councils, 22 June 2011, No XI-1507.

146 ‘Any infringements of § 9, § 10 sub-para. (1), § 11 sub-para. (1), § 16, § 17a, § 20, § 23, § 24 sub-para (1), (2) and (4) and § 28 shall be punishable by a fine. Art. 31 of Act No 281 of 6 April 2011 amending the European Works Councils Act.

147 Simon 2007: ‘Trade unions also have workplace information and consultation rights. (...) As noted above, in practice, unions have had to rely on the courts to enforce these rights, but the Labour Code does not cite any possibility of a sanction.’

(iv) *In some countries financial penalties (fines) are accompanied by the possibility of applying criminal sanctions, including imprisonment*

This is the case, for example, in Belgium, France and Poland.

(v) *The severity of sanctions as a factor in the effectiveness, proportionality and dissuasive character of sanctions*

The severity of sanctions (resulting from the combined result of effectiveness, proportionality and dissuasive potential) for violations of EWC law is one of the key criteria in assessing the compatibility of national legislation with the Directive (Recital 36 of Directive 2009/38/EC). In this way, the individual features of sanctions determine the overall severity of sanctions. On the other hand, the individual features of the sanctions – that is, their effectiveness, proportionality and dissuasive potential – are themselves dependent variables. For instance, as discussed above, the type of sanctions applicable to infringements of EWC regulations is derived from the classification of violations according to a specific branch of law. By this token, the fact of whether infringements of EWC laws are regarded as violations of civil, administrative or criminal law strongly determines the severity of sanctions. The sanctions may also be influenced by the legislative technique adopted in implementation of the EWC Directive. In various countries sanctions are mentioned either directly in the act transposing the EWC Directive (see, for example, Table 18, and also Spain¹⁴⁸ and Slovakia) or by reference to external national acts governing infringements, sanctions and procedural matters linked to worker representation issues. As indicated, the majority of EU member states classify violations of EWC regulations as administrative or labour law offences punishable by a fine (Table 18) or, alternatively, by a financial penalty combined with incarceration (Cyprus, Germany, France, Greece, Ireland, Luxembourg and Poland). The latter sanctions-mix, which includes criminal penalties on top of corporate financial liability, also includes an element of personal criminal liability, which automatically seems more severe and thus may be argued to be more *dissuasive*. The issue, however, is contentious as the relations between severity, effectiveness, dissuasive potential and efficiency of sanctions represent a complex web of interdependencies.¹⁴⁹ In much of the research it is argued that financial penalties are the preferred option for corporate violations of law because, based on economic calculations, they are simply cheaper than incarceration, which incurs costs (Faure 2010; Polinsky and Shavell 1991; Polinsky and Shavell 1979). At the same time, it is difficult to set the levels of financial penalties in such a way as to make them effective. As a result, in the vast majority of cases financial penalties, even in their maximum levels, are too low and incommensurate with the degree of violation and damage caused by the perpetrator. Last but not least, financial sanctions are a means of retributive justice and lack the power to restore previous states of affairs or prevent damage from happening again, which is a serious limitation with regard to workers' rights.

As the final outcome of any litigation, sanctions clearly represent one of the most important aspects of the 'access to justice' framework. Considering the international character of EWCs' operations, as well as interactions between legislation governing

148 Provisions of Law 8/1988 of 7 April on infringements and penalties in the field of industrial relations.

149 For a more comprehensive discussion of these aspects with regard to EWCs see Jagodzinski 2015 (forthcoming) and Jagodzinski 2014.

the operation of EWCs (indicated in EWC agreements or by law) and the rights and duties of individual EWC members, any significant variations between legal frameworks in individual member states may have considerable impact on the workers' representatives' capacity to fulfil their obligations and/or to defend their rights.

Financial sanctions applicable to violations of EWC rights

The last aspect of institutional legal differences in national law concerns a specific form of sanction: the financial penalties applicable for breaches of EWC rights. This form of sanctions in particular shows the flagrant discrepancies in levels of punishment applied to multinational companies. Equally importantly, it does so in a way that allows direct comparisons because a common currency is in use. Furthermore, because lawsuits are usually started against the corporation rather than individual persons it is the sanction most commonly applicable. Therefore its degree is of paramount importance and practical relevance.

Because it is supposedly the most common sanction a debate on its effectiveness is particularly relevant. Because general discussions of the requisite characteristics of sanctions go beyond the scope of this study (for more detailed considerations see (Jagodzinski 2015 forthcoming)) we would like to focus on only one composite feature combining effectiveness and dissuasiveness, namely 'severity'. We argue that the 'severity' of sanctions for violations of EWC law should be considered a key criterion in assessing the compatibility of national legislation with the EWC Directive. As already discussed, the category of sanctions applicable to infringements of law is a derivative of the classification of violations. In various countries sanctions are mentioned directly in the act transposing the EWC Directive (see footnotes to Table 18 and specifically Spain¹⁵⁰ and Slovakia) or by reference to external national acts governing infringements, sanctions and procedural matters linked to workers' representation issues. As indicated, the majority of EU member states classify violations of EWC regulations as administrative or labour law offences punishable by a fine (Austria, Belgium, Cyprus, Germany, Denmark, Spain, Finland, France, Greece, Hungary, Ireland, Italy, Lithuania, Luxemburg, Malta, Norway, Poland, Portugal, Romania, Sweden, Slovenia and the United Kingdom) or alternatively by a combination of fine and incarceration (Belgium, Cyprus, Germany, Denmark, France, Greece, Ireland, Italy, Luxemburg, Poland¹⁵¹). It may be argued that complementing financial penalties with the sanction of imprisonment is more in keeping with the spirit of guaranteeing *dissuasive* sanctions. Arguably, financial sanctions alone can hardly be severe enough (especially at their current level, see Table 18), particularly when compared with the revenues multinational companies generate.¹⁵² We argue that when financial penalties for breaches of EWC laws are as low as they are in some member states any discussion about their dissuasive potential, proportionality, effectiveness or severity is futile: fines (or their minimal statutory threshold) as low as approximately 4 euros in Poland (lower limit for an offence) or 290 euros in Lithuania cannot be argued to meet the criterion of *dissuasive* (Recital 36, 2009/38/EC).

150 Provisions of Law 8/1988 of 7 April on infringements and penalties in the field of industrial relations.

151 In these countries incarceration may be applicable only in specific cases. See notes to Table 15.

152 Further considerations on the proportionality of sanctions in the context of the relationship between corporate turnover and the level of penalties in: Jagodzinski 2015 (forthcoming).

As regards maximum fine levels, even in countries that are considered to have set them relatively high (for example, the United Kingdom, Germany and Austria) these penalties are not sufficiently dissuasive and proportionate. In the recent case of EWC Visteon, the EWC chair involved in the proceedings called the maximum fine of 15,000 euros ‘ridiculous’.¹⁵³ Even such maximum fines (it is a separate debate whether and how often courts adjudicate maximum statutory punishment in standard cases), do not seem to be ‘proportionate in relation to the seriousness of the offence’ (Recital 36, 2009/38/EC), while in other countries in which the maximum severity of such fine is, for example, 1,100 euros, as in Poland, the lack of dissuasiveness of sanctions is blatant, given the financial resources of their addressees.

Table 20 Minimum and maximum thresholds of fines for breach of EWC laws (under regime of Directives 94/45/EC and 2009/38/EC), selected countries

Country	Transposition of Directive 94/45/EC		Transposition of Directive 2009/38/EC	
	Minimum fine	Maximum fine	Minimum fine	Maximum fine
Austria	None	Up to 2,180 euros ¹⁵⁴	None	20,000 euros or 40,000 in case of repeated infringements
Estonia ¹⁵⁵		50,000 kroons (approximately 3,195 euros)	None	Equivalent of 800 euros (200 fine units ¹⁵⁶) if committed by private person; equivalent of 3,200 euros if committed by legal person In confidentiality cases up to 383 euros ¹⁵⁷
France	FRF 25,000 (approximately 3,811 euros) ¹⁵⁸		3,750 euros or in case of repeated infringements 7,500 euros ¹⁵⁹	

153 <http://www.planetlabor.com/Articles/plonearticle.2012-05-30.4949489081>

154 In case of the employer’s violation of the duty to inform the EWC about transnational matters that have a ‘considerable effect’ on the interests of the workforce, Art. 207 (1) of the Labour Constitution Act.

155 The Community-scale Involvement of Employees Act (CSIEA), which transposes into Estonian law Directives 94/45/EEC, 2001/86/EC, and 2003/72/EC, as well as the cross-border mergers Directive (2005/56/EC), among other things provides for liability for violations of the prohibition on international informing and consulting and involvement of employees (§ 85), and for violation of the obligation of annual information and consultation and of information and consultation under exceptional circumstances (§87). In the event of such violations the extent of liability is the same as with regard to violation of the rules of the general framework of information and consultation (see note 46). Source: Muda 2008.

156 According to §47(1) of the Penal Code, a fine unit is the base amount of a fine and is equal to 4 euros.

157 Act amending the TKS § 85¹ provides for liability for a violation of the confidentiality obligation. Violation of the obligation not to reveal any confidential information by members of the SNB, of the RB, the involved experts and translators and the employees’ representatives participating in an information and consultation procedure, if, during negotiations, the parties decided to establish one or more information and consultation procedures instead of an RB, is punishable by a fine of up to 100 fine units, which is 6,000 kroons/383 euros. The fine is equal to the fine provided for violation of confidentiality information by employees’ representatives by national law. See Art. 25 of the Töötajate usaldusisiku seadus (Employees’ Trustee Act) of 13 December 2006 – RT (RT = Riigi Teataja = State Gazette) I 2007, 2, 6 with later amendments (consolidated version available in English at: <https://www.riigiteataja.ee/en/eli/510012014001/consolide>). Identical provisions apply to members of trade unions breaching, among other things, confidentiality (see Art. 264 of the Trade Unions Act of 14 June 2000 (RT I 2000, 57, 372).

158 Art. 4 of the French implementing legislation (Directive 94/45/EC). When an offence is repeated, both the custodial sentence and also the fine can be doubled.

159 Art. L-483-1 of the French Labour Code.

Table 20 Minimum and maximum thresholds of fines for breach of EWC laws (under regime of Directives 94/45/EC and 2009/38/EC), selected countries (cont.)

Country	Transposition of Directive 94/45/EC		Transposition of Directive 2009/38/EC	
	Minimum fine	Maximum fine	Minimum fine	Maximum fine
Germany		30,000 DM (approximately 15,000 euros) ¹⁶⁰	No change	No change
Greece		10,000,000 DR (equivalent to approximately 29,300 euros)		50,000 euros ¹⁶¹
Iceland	Fines, no level specified	Fines, no level specified		
Ireland	200 euros/day ¹⁶²	1,500 euros (summary proceedings) or 10,000 euros on conviction + 1,000 euros/day ¹⁶³	No change	No change
Italy	1,033 euros (for breach of confidentiality); 5,165 euros for other infringements ¹⁶⁴	6,198 euros (breach of confidentiality); 30,988 euros for other infringements ¹⁶⁵	No change	No change
Lithuania	Approximately 290 euros	Approximately 1,450 EUR ¹⁶⁶	No change	No change
Luxembourg	2,501 francs (approximately 62 euros); may be doubled ¹⁶⁷	150,000 francs (approximately 3,718 euros); may be doubled ¹⁶⁸	No change	No change
Malta	(i) Depending on type of breach: not less than 10 liri (approximately 23 euros) and not more than 50 liri (approximately 116 Euros) for each and every employee of the Community-scale undertaking or Community-scale group of undertakings (ii) Not less than 500 Liri (approximately 1,164 euros)	(i) not more than 5,000 liri (approximately 11,640 euros)	No change	No change
Poland	16 PLN (approximately 4 euros)	4,400 PLN (approximately 1,100 euros)	No change	No change

160 For infringement of information duties (withholding information, misinformation, incorrect information).

161 Fine of up 50,000 euros according to Art. 23 and 24 of Law 3996/2011. Law 3996/2011 has extensive regulations on fines and other penalties in various cases.

162 Per each day of continued infringement (S 19 of the Irish Transposition Act of 10/07/1996).

163 Per each day of continued infringement (Section 19 of the Irish Transposition Act of 10/07/1996).

164 If the orders made by the Ministry of Labour and Social Affairs under the Conciliation Procedure are not complied with within 30 days (Büggel 2002).

165 If the orders made by the Ministry of Labour and Social Affairs under the Conciliation Procedure are not complied with within 30 days (ibid.).

166 Inferred from other acts regulating workers' representation other than implementation of EWC Directives.

167 In case of repeated infringement within a period of four years (Art. 62 of the transposition act).

168 In case of repeated infringement within a period of four years (Art. 62 of the transposition act).

Table 20 Minimum and maximum thresholds of fines for breach of EWC laws (under regime of Directives 94/45/EC and 2009/38/EC), selected countries (cont.)

Country	Transposition of Directive 94/45/EC		Transposition of Directive 2009/38/EC	
	Minimum fine	Maximum fine	Minimum fine	Maximum fine
Portugal			Depends on the volume of business: ¹⁶⁹ (i) for smaller companies in case of serious infringements: from 630 euros in case of negligence; from 1,260 euros in case of fraud. (ii) for bigger companies: from 1,575 euros in case of negligence; from 5,250 euros in case of fraud (iii) in case of very serious infringements: ¹⁷⁰ (a) 2,100–4,200 euros for smaller companies in case of negligence (4,025–9,450 euros in case of fraud); (b) 9,450–31,500 euros for bigger companies in case of negligence and 31,500 in case of fraud	Depends on the volume of business: (i) for smaller companies in case of serious infringements: up to 1,260 euros in case of negligence; up to 2,520 euros in case of fraud. (ii) for bigger companies: up to 4,200 euros in case of negligence; up to 9,450 euros in case of fraud (iii) in case of very serious infringements: (a) up to 4,200 euros for smaller companies in case of negligence (up to 9,450 euros in case of fraud); (b) up to 31,500 euros for bigger companies in case of negligence and up to 63,000 euros in case of fraud
Romania	2,000 RON (approximately 446 euros)	4,000 RON (approximately 893 euros)	Unchanged	Unchanged
Slovenia	None	1,000,000 tollars (approximately 4,173 euros) for legal persons, or 80,000 tollars (334 euros) for individuals	20,000 euros for legal persons; 2,000 euros for individuals	100,000 euros for legal persons; 5,000 euros for individuals
Spain	626 euros to 1,250 euros ¹⁷¹	100,006 euros to 187,515 euros ¹⁷²	As previously	As previously
UK		75,000 GBP ¹⁷³		100,000 GBP

Note: Note was taken only of financial penalties and not of imprisonment, which in some cases can be imposed in parallel.

Source: Compiled by Romuald Jagodzinski, 2015.

169 Art. 554 of the Código do Trabalho (Labour Code) of the 12/02/2009 (Lei n.º 7/2009 de 12 de Fevereiro); UC (unidade de conta) = 105 euros (based on <http://www.ansr.pt/Default.aspx?tabid=82&language=pt-PT>).

170 Violations of confidentiality by worker representatives are considered 'a very serious administrative offence' (Art. 20.6 of the transposition act).

171 Art. 32 and 33 of the Law of 10 April 1997 as specified further by Real Decreto Legislativo 5/2000, 4 agosto, Ley sobre Infracciones y Sanciones en el Orden Social (Legal Decree 5/200, 4 August, Law on Infractions and Sanctions on the Social Order) Section I, Subsection II Art. 9 (as amended by the Ley 40/2006 of 14/12/2006), available at: http://noticias.juridicas.com/base_datos/Laboral/rdleg5-2000.html#a4; category of fine: serious infringements, minimum to maximum. Before the amendment by Act 40/2006 Büggel (2002) indicated that fines should range from 3,005 euros and 90,151 euros (ESP 500,001 and ESP 15,000,000). At the moment of adoption of the transposition of Directive 94/45/EC, the relevant provisions regulating sanctions were those of Law 8/1988 of 7 April on infringements and penalties in the field of industrial relations.

172 Category of breach: most serious infractions in their maximum extent (ibid.).

173 Part V, Regulation 22 of the implementing legislation (TICER 1999).

Admittedly, it is difficult to evaluate how much a sanction should amount to in order to be proportionate, dissuasive and effective, but in specific cases even the highest maximum fine available in all the countries (100,000 GBP in the United Kingdom, at the time of writing [July 2015] approximately 139,000 euros) might not fulfil this criterion when companies' revenues are considered. The question of proportionality of fines poses an additional problem of determining the point of reference: should fines be proportionate to company revenues or turnover (or any similar criterion linked to corporate wealth), as is often argued by trade unions and workers' representatives (Jagodzinski 2015 (forthcoming)); or, alternatively, should they be proportionate to other penalties stipulated in national legal systems and commensurate with what is considered reasonable in relation to the given country's cost of living or general level of corporate sanctions. Both approaches are not unreasonable. The first, postulating proportionality with companies' revenues, is based on the argument that a sanction of a couple of thousand euros is no burden for large multinational enterprises (according to the EU nomenclature, companies qualifying for an EWC do not meet the criteria for SMEs) whose turnover, in some cases, is among the highest in the world.

The disproportionality between financial penalties and corporate revenues means that sanctions do not usually meet the criterion of dissuasiveness. The problem with this argument is, however, that it would arguably require that the legislation set a very wide range of possible fines for violations of EWC law and/or necessitate broad discretionary powers for judges. Alternatively, a system allowing the setting of financial penalties for corporate wrongdoings in proportion to corporate declared revenue or turnover for the past year would be conceivable; it would also not be unprecedented as such a principle is broadly applied in the Single Market for violations of laws on company concentration, distortions of free market competition and abuses of dominant market position and financial market regulation endorsed by the European Commission itself (for more details see (Jagodzinski 2015 forthcoming)).

One thing seems certain: continuing with the current system without regard to companies' growing financial power will persistently weaken the effectiveness and dissuasive potential of fines. Consequently, with such low fines the effectiveness of the entire system of enforcement is flawed, which might result in enterprises being able to afford to violate information and consultation rights and in situations of ever more frequent and harsh company restructuring they may consider workers' fundamental rights negligible in relation to economic goals and grow disrespectful of workers' interests.

With the above reflections in mind, another form of sanction to boost the effectiveness of the current enforcement framework could be considered. A more dissuasive system could consist of fines calculable per each day of lack of information and consultation with workers' representatives. Additionally, as some scholars have been arguing,¹⁷⁴ companies benefiting from state or EU subvention schemes should be deprived thereof and forced to refund payments if they are found to be in breach of European legislation on information and consultation.

174 Rigaux and Dorsemont 1999: 378.

Policy considerations on effectiveness concerning court injunctions (orders) and declaration of nullity and invalidity of managerial decisions as the most effective deterrent

The limitations of traditional sanctions alluded to above (for a more extensive analysis see (Jagodzinski 2015 (forthcoming)) are not just the object of academic considerations, but have also been discerned by some governments. An example is the solution applied in the United Kingdom: the ‘EWC Consultation Document’¹⁷⁵ stated that in order to meet the requirement that the enforcement arrangements be ‘effective, proportionate and dissuasive’¹⁷⁶ the Employment Appeal Tribunal ‘may make an order requiring the management to remedy a failure to fulfil its obligations under the terms of an EWC agreement’.¹⁷⁷ At the same time, the DTI recognised that ‘such an order may not have the effect of suspending, overturning company transactions which management has already entered into.’¹⁷⁸ The current legislation generally allows the Central Arbitration Committee (CAC) to make orders requiring companies to suspend decisions in clear breach of law; however, with regard to EWCs an exception is made in Regulation 21A(9) of the Statutory Instrument 2010/1088 stipulating explicitly that

‘No order of the CAC under this regulation shall have the effect of suspending or altering the effect of any act done or of any agreement made by the central management or the local management’.

In other words, the EWC law explicitly excludes application of sanction of nullity on company decisions taken without consultation with the EWC. At the same time, by recommending a civil financial penalty of maximum £75,000 (now increased to £100 000 by implementation of the Recast Directive¹⁷⁹) exceeding the average estimated cost of an EWC meeting (£60,000) the government recommendations proposed a fine of £1,000 per each day of non-compliance with the Employment Appeal Tribunal’s order,¹⁸⁰ making, at least, the important link between the ‘summary’ court order (injunction), its timely execution and efficacy of a financial sanction. Such elements of enforcement or execution of sanctions, if implemented in the United Kingdom (the recommendation to fine corporations for each day of infringement never went beyond national recommendations and did not become part of binding legislation) seem to increase their effectiveness and to somewhat improve their proportionate, dissuasive and effective powers compared with other countries.

Due to the general limitations of financial sanctions for corporate violations of workers’ rights, as well as particular problems related to the insufficient (incommensurate) degree of penalties for violations of EWC rights to information and consultation, it appears that a more effective and dissuasive sanction would be a possibility to nullify measures implemented by management without respecting the procedures of information and consultation.¹⁸¹ Such a punishment was applied in

175 Department of Trade and Industry 1999 (Consultative Document).

176 Ibid.: 36.

177 Ibid.: 37–38. This is now the function of the Central Arbitration Committee (reg 21(4) Transnational Information and Consultations of Employees Regulations 1999, SI 1999/3323).

178 Ibid.

179 Transnational Information and Consultation of Employees (Amendment) Regulations 2010 (http://www.opsi.gov.uk/si/si2010/uksi_20101088_en_1).

180 Ibid.: 37.

181 Dorssemont and Rigaux 1999: 378.

the *Gaz de France–SUEZ* case,¹⁸² where a merger of the two companies taken by the management without respecting the employees' right to be consulted was put on hold by the French court via an injunction based on the principle that violation of those employees' rights may result in decisions being declared null and void. The decision was upheld by higher instances of the French judiciary and eventually by the Supreme Court, which ordered that the merger proceedings be restarted.

In the course of our analysis of national enforcement frameworks with regard to EWC Directives we were unable to find any other country apart from France in which the courts have the possibility to declare managerial decisions null and void. This can be partly explained by the fact that Directives 94/45/EC and 2009/38/EC do not explicitly mention this measure when referring to sanctions and, generally, are not clear on the legal effectiveness of decisions taken in breach of information and consultation rights.¹⁸³ In the absence of provisions directly embedded in the relevant directives, one could search for universal EU principles in the *acquis communautaire* in this regard. Such a common rule can be found in the case *Comité Central d'Entreprise de la Société Générale des Grandes Sources vs. Commission*,¹⁸⁴ decided by the European Court of First Instance. In this case the Court clearly and expressly stipulated that non-compliance with an information and consultation procedure vis-à-vis workers' representatives by the Commission according to the concentration regulation¹⁸⁵ is to be considered null and void.¹⁸⁶ Thus, by inference, it seems reasonable to take the position that the same principle shall, by analogy, apply to managerial decisions taken in violation of information and consultation procedures provided for by EWC law.¹⁸⁷

A similar view has been expressed by national-level ministerial authorities. A case in point is Hanna Schelz of Germany's Ministry of Labour who highlighted the importance of early involvement of the EWC and expressed the view that a possibility of penalties imposed after a violation has been committed is not as useful for the EWC as the use of legal means to protect damage from occurring in the first place. Ms Schelz expressed the belief that whether German labour courts would ever go as far as in France, where a court injunction was issued in the case of *Gaz de France*, remained to be seen.¹⁸⁸

Resistance of national-level authorities to the introduction of such legal means is, however, considerable. For instance, the Greek law (4052/12) did not follow proposals from the OBES trade union to include the following two paragraphs in the respective article of the transposition law implementing Directive 2009/38/EC:

182 Dorssement and Blanke 2010, Jagodzinski 2015 (forthcoming).

183 Directive 2009/38/EC only in the Preamble, Recital 36 insists that the member states provide for dissuasive, proportionate and effective sanctions. At the same time, the European Commission has explained on numerous occasions that it is common practice not to stipulate specific sanctions in directives and that they are part of national transpositions.

184 European Court of First Instance 27/04/1995 T-96/92 (*Comite central d'entreprise de la Societe generale des Grandes Sources vs. Commission*, Jur., 1995, II-1213, no. 465).

185 Regulation No. 2367/90.

186 Dorssement and Rigaux 1999: 378.

187 *Ibid.*

188 From: EBR Newsletter issue no. 2 / 2011 of EWC News, 8 August 2011 (available at: <http://www.ewc-news.com/en022011.htm>).

'If the central management does not provide the members of the EWC or the members of the select committee the necessary information to fulfil the obligation for information and the preparation of potential consultation, or it provides wrong or incomplete information or refuses the obligation to conduct consultation, the EWC legally represented or the members of the select committee have the right to appeal before the First Instance Court of the central administration office and request through an application discussed at the time of interim measures to be provided with the information required on specific transnational issues and ask that the implementation of any decisions of the central management concerning these transnational matters be suspended until the central management properly fulfils its obligation to engage in consultation. The above application for interim measures shall be discussed on a priority basis within fifteen (15) days. The central management has the burden of proving that it has properly fulfilled its obligation to information and consultation. If the central management infringes the requirement for an appropriate consultation and proceeds to implement decisions related to transnational matters, such decisions are liable to be declared void and cannot be enforced against employees for modification or termination of individual contracts of employment. Similarly, those decisions do not constitute a legitimate reason for terminating collective bargaining agreements.'

Based on our current research, due to the complexity of national legal frameworks (material and procedural) it is scarcely possible to ascertain with certainty whether injunctions issued in summary proceedings and having immediate power to put a decision on hold are available elsewhere than in France. Nevertheless, based on the analysis of EWC-related case law (see (Dorssemont and Blanke 2010) it is justified to conclude that only a specific sanctions-mix consisting of a combination of financial penalties (of an adequate amount) against corporate perpetrators, the possibility of incarceration as a form of individual sanction and, most importantly, the sanction of declaring decisions violating the relevant law null and void fully satisfies the requirement of providing effective, proportionate and dissuasive sanctions. The latter type of sanction (declaring null and void) seems to us the most efficient and dissuasive sanction of all and, indeed, the most effective means of protecting workers' interests. It is also the legal means that makes it possible, at least partly, to undo law-violating decisions. If such a guarantee is not in place, employee rights to information and consultation can be ignored relatively easily and/or cheaply (given the levels of sanctions foreseen by EWC national transposition acts currently in force). Moreover, introduction of such a sanction would increase the role of the EWC Directive as a means of genuinely (rather than merely paying lip-service to) protecting workers' interests, especially in situations of crisis or restructuring.

Understandably, the demand to introduce such sanctions across all the member states (together with other trade union demands) has been strongly opposed by European employers' representatives.¹⁸⁹ This resistance to the idea of effective penalties is reflected in the fact that proportionate, dissuasive and effective sanctions

189 BusinessEurope, CEEP; Jagodzinski 2009b.

were mentioned only in the recitals (no. 36) of the draft Recast EWC Directive¹⁹⁰ and not in the body of the text. This is unfounded because the preambles express the general spirit of directives and Recital 36 represents definite progress in comparison with Directive 94/45/EC as it provides an explanation for Art. 11.2 of the Recast Directive that obliges the member states to ‘provide for appropriate measures in the event of failure to comply with this directive’. One can only hope that in the absolutely crucial phase of evaluating the transposition acts of the new Recast Directive on EWCs the issue of the proportionality, efficacy and dissuasive character of sanctions will be closely and critically examined by the European Commission. It seems to us indispensable to include in considerations about the effectiveness and dissuasive character of sanctions the above considerations on injunctions and the possibility for courts to declare decisions null and void. Accepting the above evidence requires that, where applicable, infringement procedures be launched by the European Commission against those countries whose implementation acts do not meet these criteria.

5. Conclusions

Despite the clear aims of the Recast Directive to increase the effectiveness of EWCs and avoid legal uncertainty, our review of the national transposing measures suggests that several difficulties associated with the enforcement of information and consultation rights have remained.

First, despite the insertion of Art. 10.1 giving EWCs and employee representatives the means required to apply the rights arising from the Directive to represent collectively the interests of employees it appears that the majority of member states have either copied verbatim the relevant text without any adaptation (or explanation) to the national legal context, or have assumed that national law already provides for such means. In these countries it is difficult to establish how national laws have amended, formally and practically, their rules to ensure that EWC members can exercise the rights granted by the Recast Directive. The general principle expressly providing means – material and legal – to EWC members was welcome, but the spirit of this new obligation does not seem to have materialised in national laws. National and European case law will therefore need to be monitored to see whether the lack of practical measures or means will be argued before the courts. However, with regard to the latter, EWCs’ access to courts may be seriously hindered by the lack of clear rules on their legal status (legal personality, authority to go to court), defining what an EWC can or cannot do, and on the means available to them in such legal proceedings. It needs to be emphasised that, as long as there are doubts concerning whether an EWC has legal status or whether individual EWC member can seek redress, only a very limited number of cases will be brought before the courts. The same applies to the lack of clarity over financing by managements of necessary costs incurred by EWCs in preparation for court proceedings. This state of affairs will of course enable some stakeholders and commentators to argue that the lack of disputes is a sign of a well-oiled machinery and smooth transposition/integration of the modified Directive into national contexts. Those who feel inclined

190 Directive adopted by the Council on 17 December 2008, reference: P6_TA-PROV(2008)0602.

to argue against our findings that such a smooth transposition has indeed occurred are likely to do so from a particular political standpoint. It must be emphasised that European law (the EWC Recast Directive) could have been made more precise and directly ordered member states to apply a system in which the collective body – the EWC – is given legal personality or the means to have access to courts or dispute resolution systems. Furthermore, it could also be more pragmatic in requiring that national implementation frameworks include the obligation to provide EWCs with their own financial means or guaranteed access to financial means to obtain independent legal advice and recourse to lawyers if judicial proceedings are necessary. As – unfortunately for legal clarity and workers’ interests – more explicit references to the meaning of ‘means’ were not made in the Recast Directive EWC members remain in doubt concerning what they can do to enforce their rights in a significant number of countries. The forthcoming (2016) review of national implementation by the European Commission and the European Parliament seems the last chance to remedy this shortcoming.

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

Third, the variety of sanctions available in member states does not give workers equal redress. While the majority of sanctions involve financial penalties, even at the higher end of the spectrum they are unlikely to deter companies from breaching agreements or the subsidiary requirements. Without a strong lead from European draftsmen imposing a universal sanction, the effectiveness of information and consultation rights risks being seriously diluted. The European Commission within the framework of the forthcoming review of national implementation measures will be confronted in some member states with sanctions of almost negligible dissuasiveness and effectiveness, and, however difficult, it will be expected and required to openly state that these sanctions do not meet the criteria laid down in Recital 36 of the Recast Directive. Let us recall, following Brian Bercusson (Bercusson 2009) that the European Court of Justice has already laid down some basic principles regarding judicial protection of EU law rights, also specifically in the area of labour law when deciding on a case¹⁹¹ in the context of the EU Directive on sex discrimination, it stated that

‘[a]lthough (...) full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a member state chooses to penalise the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.’ (Paragraph 23)

191 *Von Colson and Kamann v. Land Nordrhein-Westfalen*, Case 14/83, [1984], ECR 1891.

Of particular interest is the choice of tools and methods that the European Commission will apply to translate the general criteria of effectiveness, proportionality and dissuasiveness into practice and evaluate national sanctions accordingly. Tough as it might be, given the above evidence from the mapping of sanctions, there simply seems to be no alternative to declaring that enforcement frameworks generally – and sanctions specifically – do not meet EU legal standards. One alternative could be a set of prescribed common sanctions. Hypothetically, if the forthcoming a review of the EWC Directive turns out to be favourable to a common European level of financial penalty, it would probably still not be sufficient. The most deterrent measure seems to be to deprive a management decision of its legal effect unless information and consultation obligations have been complied with by Community-scale companies. The resistance to such a proposal has historically been too strong and national measures rarely go so far. However, given the existing variety in the efficacy of national systems of enforcement, without such an incentive it is unlikely that information and consultation processes will ever play the role designated for them in the EWC Directive(s) and EWCs will remain toothless.

There is no doubt that ordering member states directly and specifically to bring their enforcement frameworks into line with the requirements of the Directive will be a very difficult political decisions to reach and execute. Nevertheless, in view of the evidence presented in this volume, there are reasonable doubts whether the member states, in line with Art. 10¹⁹² of the EC Treaty, have taken all appropriate measures to ensure the fulfilment of the enforcement objectives and requirements set by the EWC Recast Directive.

As renowned labour lawyer the late Brian Bercusson put it:

‘The consequence of the failure to develop a harmonised system of enforcement of EU labour law is, however, that there may be considerable diversity among member states with regard to the efficacy of enforcement of generally applicable EU labour law norms. Those member states with less efficacious remedies, more procedural restrictions, and weaker sanctions may better be able to avoid compliance with EU labour law by effectively reducing the likelihood of judicial redress for those benefiting from it, or the likelihood of liability of those subject to it.’ (Bercusson 2009)

With the above evidence concerning the sometimes all too blatant and all too common shortcomings of national enforcement frameworks for EWC rights and the risk of jeopardising application of the EU fundamental right to information and consultation it seems that the European Commission’s responsibilities as ‘Guardian of Treaties’ (Art. 258 TFEU) leave no room for laxness.

192 ‘Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community’.