

Chapter 2

Contestation: the parties to the Directive

This chapter addresses three themes that resonate throughout subsequent chapters. First, it identifies the issues at the heart of the contestation that has characterised the emergence of legislation on EWCs since the 1970s and practice within EWCs. To a degree, this contestation explains the specific features of the constitutional arrangements on which EWCs are based. Second, accompanying the shift away from ‘social market style’ economic and social policies towards a neoliberal orientation among many European-level policy-makers, particularly after the Delors Commission (1985–1994), were shifts in the character of social policy interventions, as the impact of ‘negative integration’ (Scharpf 1996) and the pursuit of an internal market underpinned by neoliberal internationalism led to the downgrading of the social dimension (Streeck 2019). In particular, ‘hard law’ social policy diminished and was increasingly accompanied by more voluntary elements exemplified by the introduction of non-binding instruments such as the open method of coordination and the European Semester (Streeck 2012, 2015; Fazi 2014; Crouch 2011). This shift towards neoliberalism generated changes in approaches to social policy in general (Falkner 1998; Majone 1993) and policies on employee participation in particular. Third, because EWCs are contested institutions, this ensures an uneven pattern in their development. The principle of autonomy of the parties was respected in the provisions of both the Directive and the Recast, thus enabling management and labour within each MNC to contest the form and practices of information exchange and consultation on a company-by-company basis. In the light of variations *inter alia* in power, expertise and objectives between the parties within each MNC, it comes as no surprise that the development of the institution has been uneven.

A further introductory remark concerns three different aspects of information exchange and consultation that are implicit in the Directive and the Recast. These are as follows: first, management initiatives to promote a corporate identity, value added and worker commitment to the objectives of the enterprise; second, the involvement of workers in strategic corporate decision-making and the implementation of these decisions; and third, the possibility for EWC representatives to exert power to secure benefits for those they represent (Boxall and Purcell 2003; Blanke and Rose 2010; Müller-Jentsch 1986). These three aspects of information and consultation originate in debates on human resource management (HRM), industrial democracy and industrial relations respectively (Wilkinson and Fay 2011). Although these aspects are difficult to delineate, it is apparent that managerial concerns centre on the first of these aspects, while the objectives of EWC representatives focus on the second and third aspects. This chapter reviews how the parties to EWCs pursue these different aspects of information and consultation.

To address these themes, the chapter comprises three sections that examine the Commission and European institutions; BusinessEurope and managers responsible for EWCs; and trade union organisations. It is remarkable that the same issues figure large in the debates on employee participation from the 1970s to the present day. In many cases, it is only the detail attached to these issues that changes in the light of legislative amendments. Similarly, the respective positions of the social partners have, in principle, not changed throughout the whole period, with the consequence that debates are repeated at different points in time. In assessing both the contentious issues and the content of the debates between the Commission and the social partners, this chapter situates the current debate on the performance of the legislation on information exchange and consultation and ‘set up’ the analysis of its efficacy included in Chapters 4 to 9.

European Commission and European institutions

The economics of the social market-oriented policies of the 1960s and 1970s were accompanied by the extension of systems of indirect employee participation throughout most Member States of the EU in the form of board-level employee representation and increased coverage of works councils. The Treaty of Rome (1957) granted the EU only rudimentary social policy options and required a unanimous vote among Member States to ratify social policy proposals. Although these constitutional obstacles were significant, the pursuit of European social integration led to a series of Commission-driven proposals on employee participation similar to national arrangements before 1990, prominent among which were the European Company Statute (1970), the draft Fifth Directive on Company Structure and Administration (1972), and the proposed Vredeling Directive (1980).¹

It is not the purpose here to examine the history and content of these proposals. It is important to note three points regarding these proposals.² First, the debates and political processes surrounding these proposals stretched into the 21st century. Only after the introduction of qualified majority voting on a wider range of social policy issues, however, was legislation on participation adopted. Opposition from employers and some Member States precluded the adoption of earlier proposals.³ Second, each proposal comprised diluted recommendations compared to its predecessor. Only the European Company Statute (ECS), for example, included a codetermination right and proposed EWCs with a brief that covered two or more establishments at which 50 or more people were employed in at least two Member States (European Commission 1975a, 1975b); the Fifth Directive envisaged a dual board structure with employee representatives comprising a minimum of one third of the supervisory board, latterly diluted to allow a choice from a range of participation systems (European Commission 1983); and the Vredeling Directive required a period of 40 days to elapse between the

-
1. The Directive was named after the then Commissioner for Social Affairs who was involved in its development.
 2. For details on the history and content of these proposals, see George 1991; Springer 1992; Cressey 1993; and Schwimbersky and Gold 2009.
 3. Opposition from the UK to the proposal was consistent, while that from Portugal and Spain influenced developments at specific points in time.

submission of a management proposal for corporate restructuring and implementation of the proposed decision in order to allow information exchange and consultation to take place (European Commission 1980). As becomes apparent below, the process of dilution that effectively weakened successive proposals continued into the 1990s and beyond. Third, initial proposals aimed at the upward harmonisation of participation arrangements were abandoned in favour of proposals with restricted minimum standards. In the light of these contextual factors, the remainder of this section examines the issues surrounding the adoption of the Directive, the subsequent debates surrounding the adoption of the Recast, and reviews of the operation of the Recast.

After 1990: diluted legislation adopted

Debate on the terms associated with the introduction of the European single market, the implementation of the Single European Act (1987), the emergence of the European Company (*Societas Europaea*, SE) and anticipated high rates of corporate restructuring as companies adjusted to the single market (Cressey 1993; Marginson 2000) acted to generate a political realisation that a ‘social dimension’ was required to accompany economic developments if the EU was to retain public support (Scharpf 1996). Although the Conservative Government of the UK did not share this political realisation, other Member States explored a range of social options,⁴ the initial outcome of which was the Community Charter of Fundamental Social Rights of Workers, adopted in 1989, together with its accompanying Social Action Programme (European Commission 1990a). The Community Charter covered a range of social issues,⁵ but, on the issue of participation, it was explicit:

Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in the various Member States.

This shall apply especially in companies or groups of companies having establishments or companies in two or more Member States of the European Community (point 17).

At the Maastricht Summit of December 1991, a Protocol on Social Policy was agreed. The UK opted out of this Protocol, thereby increasing the political room for manoeuvre for the remaining 11 Member States. Article 2 of the Social Policy Protocol introduced qualified majority voting for a range of social policy issues including ‘the information and consultation of workers’.⁶ Codetermination, however, remained a matter requiring unanimity of the Council (Article 2(3) of the Agreement annexed to the Protocol). The Social Policy Protocol enlarged the scope of social dialogue in requiring the Commission

4. Among the options discussed were directives on health and safety, collective redundancies and transfer of undertakings, and recommendations on financial participation.
5. Among the issues covered by the Community Charter of the Fundamental Social Rights of Workers were freedom of movement, improvement of living and working conditions, social protection, freedom of association and collective bargaining, equal treatment for men and women, health and safety, and vocational training.
6. Among the other issues subject to qualified majority voting were the working environment, equality between men and women at work, the integration of people excluded from the labour market, and health and safety.

to consult the social partners at EU level prior to making formal proposals on social policy or submitting a proposal to the Council, and enabled the social partners to draft legislation. The economic circumstances associated with the European single market, the framework changes associated with the Community Charter, its accompanying social programme and the Social Policy Protocol combined with the political impetus towards the social dimension generated by the Delors-led Commission created a different dynamic in information and consultation practices compared to before 1990, out of which emerged a revival of discussions on the ECS in 1989 (for details, see Waddington 2011: 5–13; Schwimbersky and Gold 2009) and a draft EWC Directive in 1990.

The 1990 Commission proposal for a Directive on the establishment of EWCs included information and consultation rights, and was to be applied to MNCs with a minimum of 1,000 employees within the Member States and with at least two establishments in different Member States, each employing at least 100 employees, while the composition of an EWC was to be negotiated between management and employee representatives organised as a special negotiating body (SNB) (European Commission 1990b). Similarly to the pre 1990 proposals, a set of minimum conditions were to apply if management and the SNB failed to reach agreement within a year.⁷ Compared to earlier proposals, however, the 1990 draft excluded issues in an attempt to secure agreement among Member States. A codetermination right was absent, for example. Similarly, the proposal excluded companies operating within a single Member State, unlike the Vredeling Directive. The negotiated element of the 1990 proposal was also more wide-ranging in covering the structure, composition and many of the practices of any established institution. It was also envisaged that EWCs would be established only following a written request from employees or their representatives or following an initiative taken by central management. The legislation would thus be ‘triggered’ rather than apply uniformly.

Although the 1990 draft was a compromise born of the rejection of earlier employee participation proposals, it was met by the same hostile reaction from some Member States, particularly the UK, and employers’ associations. Reflecting on these hostile reactions, the Employers’ Group of the European Economic and Social Committee (EESC) saw the draft as bureaucratic and likely to slow corporate decision-making (European Economic and Social Committee 1994). The majority position within the EESC and that of the European Parliament, however, was to support the draft in principle while proposing amendments to lower the workforce size threshold to 500, to clarify the meaning of information and consultation by reference to timeliness, to increase the number of EWC meetings per year, to specify the role of trade unions, and to enable EWC representatives to halt the implementation of a management decision if consultation had not taken place (European Parliament 1991). The Commission revised the draft in September 1991 in order to link the secondary workforce size threshold (100

7. The minimum conditions that were to apply in the case of a failure to agree included that at least one meeting of the EWC should be held per year; consultation should take place on any management proposal likely to have ‘serious consequences’ for employees; information exchange and consultation should take place on issues that concern the undertaking, the group as a whole or two or more establishments; an EWC should comprise between three and 30 employee representatives with a minimum of one representative from each Member State within which the enterprise has operations; and management should meet the expenses of the EWC.

employees) with the Member State rather than with the establishment and to guarantee a pre-meeting for EWC representatives (European Commission 1991).

These amendments failed to move the employers' associations and Member States that opposed the draft from their previously held positions. In consequence, when the proposal was put to the Council in April 1993, the UK effectively vetoed the measure, as unanimity was required. Taking advantage of the newly implemented framework arrangements arising from the Maastricht Treaty, the Commission then submitted the draft to the social partners with a remit to negotiate appropriate provisions. The failure of these negotiations prompted the Commission to table two further drafts in April and June 1994. The content of these drafts was influenced by lobbying from BusinessEurope with the consequence that the coverage of the measure was restricted by increasing the secondary workforce size threshold from 100 to 150 employees in each of two Member States; the period over which SNB negotiations could take place was increased to three years, thereby facilitating the slowing of the introduction of EWCs; and the range of voluntary provisions was extended. Adopting the measure within the period of the German Presidency, however, was viewed within trade union circles as a priority. Subsequent Presidencies were viewed as unlikely to pursue the measure (Lapeyre 2018). The Labour and Social Affairs Council finally adopted the measure on 22 September 1994 within a regime of qualified majority voting, with 10 Member States in favour, a Portuguese abstention and the UK, which had decided to exercise its opt-out, removing its objections.

The Directive was innovative in its spirit and objectives, but at the price of many aspects of the measure being imprecise, and uniform standards were not stipulated, in contrast to many of the 'hard law' labour standards arising under earlier legislation (Barnard 2006; De Vos 2009). Although information exchange and consultation were acknowledged as the core activities of EWCs, information was not defined and issues such as timeliness and quality were omitted from the definition of consultation. A wide range of voluntary provisions and low minimum standards accentuated the limitations of the Directive and, as Chapter 1 demonstrated, led critics of the Directive to question whether it was fit for purpose. Two other features of the Directive underpinned the position of the critics. First, at the behest of BusinessEurope, the principle of subsidiarity was incorporated into the Directive in several ways, including latitude in the manner in which the Directive could be transposed into national legislation (Hall et al. 1995).⁸ Second, the Directive promoted negotiation within MNCs between management and employee representatives on several counts: negotiations took place notably under Article 13 without recourse to the subsidiary requirements outlined in the Annex to the Directive, and within SNBs under Article 6 when the subsidiary requirements constituted a fallback position of last resort.

The terms of the Directive were thus far removed from the hard law measures on employee participation proposed by the Commission in the 1970s and 1980s. As is

8. Nomination procedures, the distribution of seats, regulations concerning confidentiality and enforcement mechanisms, for example, were settled within each Member State rather than by means of the terms of the Directive.

argued below in relation to the positions of the social partners, the Directive represented a compromise solution. It was viewed as furthering the development of European industrial relations, however, and likely to promote institution building in the form of EWCs and other institutions intended to support or enhance the operation of EWCs (Goetschy 1994; Ross 1994).

The revision process 1999–2009

Article 15 of the Directive specified that the Commission should ‘review’ the operation of the Directive ‘not later than 22 September 1999’. Consistent with this obligation, the Commission confirmed in the Social Action Programme 1998–2000 a commitment to review the Directive and made funding available for an EU-level conference where practitioners identified matters of concern with emphasis placed on: the slowing of the rate of establishment of EWCs after September 1996 and a range of operational concerns, including the infrequency of meetings, the centrality of select committees, and limitations to the effectiveness of information and consultation procedures (Waddington 2011: 183). At this conference, held on 28–30 April 1999, the Irish conservative Commissioner for Employment and Social Affairs, Pádraig Flynn, brought the review process to an abrupt halt in signalling that it was premature to revise the Directive, as the Article 6 provisions had only been in operation for three years, and the ongoing discussions on the Draft Directive on Information and Consultation at national level, which had been tabled in November 1998, and on the information and consultation provision of the ECS would be best finalised before the Directive was revised (Flynn 1999). The Commissioner thus accepted BusinessEurope’s arguments against the revision of the Directive. This position was subsequently reiterated and developed by Commissioner Flynn’s successor, who argued that any revision of the Directive should be informed by practices associated with these other measures following their adoption (Diamantopoulou 2000). The Greek socialist Commissioner, Anna Diamantopoulou, thus argued for a lengthy delay before the revision of the Directive beyond the legal deadline outlined in Article 15 of the Directive, as the other measures had yet to be adopted, and further time was then required to assess their functioning. Article 15 of the Directive required a statement from the Commission on the operation of the measure. The formal Implementation Report identified problems with the operationalisation of the measure but disassociated these from the shortcomings of the legal framework and argued that there was insufficient evidence to justify legal reform (European Commission 2000).

At this juncture, the Commission and the Committee on Employment and Social Affairs (CESA) of the European Parliament differed in their approach. The CESA argued in favour of a revision of the Directive to incorporate reduced workforce size thresholds, a reduction in the duration over which SNB negotiations could endure, the inclusion of a definition of information, and changes to the definition of consultation to ensure timeliness and improved quality. In response to the content of the EU-level conference and the position of the CESA, the Commission reported to the Council and the European Parliament in April 2000 (European Commission 2000). In addition to detailing at length the situation with regard to the transposition of the Directive, the

report highlighted the ‘very low level of transnational information and consultation’ at some EWCs, the absence of an adaption clause to cover company restructuring, the absence of timeliness as a defining criterion of information and consultation, no right to training for SNB negotiators and EWC representatives, and the limitations to the flow of information between EWCs and national-level institutions (pp. 6–7). In this document, the Commission also confirmed that the revision of the Directive was ‘closely linked’ with the operation of the Draft Directive on employee involvement in the ECS and the Draft Directive on Information and Consultation at national level. Although not ruling out a future review, in practice the Commission acknowledged many limitations of the Directive identified by its critics, while preparing the social partners for a long delay in its revision, as other proposed legislation was not yet adopted, and an assessment of its implementation would be some considerable time in the future.

Consistent with the emphasis on delay, the Commission omitted reference to the revision of the Directive in the Social Policy Agenda 2000–2005 published in June 2000. The adoption of the ECS and its accompanying Directive on the involvement of employees (2001/86/EC) in 2001 and of Directive 2002/14/EC in 2002 on informing and consulting employees in the European Community, however, removed a key political obstacle to the revision of the Directive from the perspective of the Commission. In addition, several tripartite Social Dialogue Summits were convened between 2001 and 2005 at which various operational aspects of EWCs were discussed (Waddington 2011: 188). Although ‘delay’ was the watchword of the Commission, the performance of EWCs did not entirely disappear from the political agenda. The European Parliament, for example, continued to advocate a revision and, in a resolution of September 2001, listed no fewer than 12 substantive revision points and called on the Commission to amend the Directive (A5 0282/2001). Included among these revision points were a reduction in the SNB negotiation period to 18 months; the definitions of information and consultation to ensure that employee representatives can influence corporate decision-making; and company restructuring to be accompanied by an enhanced consultation procedure that necessitates an agreement before restructuring takes place.⁹ The EESC also offered an opinion, at the request of the Commission, on the operation of EWCs, which concluded that EWC arrangements for when companies restructure were inadequate, the timeliness of information and consultation procedures was problematic, the gender distribution among EWC representatives was inadequate, and variations in the national transpositions of the Directive accentuated variation in EWC practices (European Economic and Social Committee 2004). Both the European Parliament and the EESC thus identified a reform agenda while the Commission advocated delay.

In response to the views put forward by the European Parliament, the EESC and the ETUC, the Commission issued a communication intended to link EWCs and corporate

9. In addition to the three points mentioned in the text, the 12 revision points advocated by the European Parliament included: a reduction in workforce size thresholds to 500 and 100 employees; the introduction of a right to training for EWC representatives; a wider range of facilities to be available to EWC representatives; the obligation to inform and consult employees on a wider range of issues; adjustment provisions to be available where corporate restructuring disturbs existing EWC arrangements; more frequent preparatory and plenary meetings; improvement of the gender balance among EWC representatives; a strengthening of sanctions for non-compliance; and an extension of the negotiation period when a management decision has significant adverse effects on employees (A5 0282/2001).

restructuring in revising the Directive (European Commission 2005b). Instead of recommending specific revisions to the Directive, however, the Commission encouraged the social partners to negotiate a revised Directive. Wide differences between the positions of the social partners precluded a settlement. The European Parliament called on the Commission to submit a proposal for the revision of the Directive, which should include improved information and consultation provisions and better facilities for EWC representatives (European Parliament 2005). The EESC also confirmed its support for the revision with preferences for a standardisation of the definitions of information and consultation across all EU directives, the number of possible SNB representatives to be adjusted to reflect EU enlargement, and greater involvement of trade unions in the operation of EWCs (European Economic and Social Committee 2006; Jagodziński 2007a).

In response to the positions taken by the European Parliament and the EESC, the Commission announced to the European Parliament its intention to strengthen European legislation on information and consultation (European Parliament 2007a, 2007b). This announcement was followed by the inclusion of a commitment in the Work Programme of 2007 to introduce greater consistency in legislation on information and consultation (European Commission 2007). Politically, the Commission's request to the social partners to negotiate a solution had come to nothing, thus shifting responsibility back to the Commission.¹⁰ Furthermore, representatives of the upcoming French Presidency, due to commence on 1 July 2008, signalled an intention to renew the social agenda, including a revision of the Directive. Compounding these developments, an empirical impact assessment authorised by the Commission confirmed the reservations expressed by the European Parliament and the EESC regarding the operation of the Directive (EPEC 2008).

The Commission presented a consultation document on 20 February 2008, requesting opinions from the social partners and enquiring again as to whether they were prepared to negotiate a revision of the Directive. Although BusinessEurope responded positively to this enquiry, it was felt within the ETUC that the positive response from BusinessEurope was a tactic to prolong negotiations beyond the French Presidency, thereby precluding a revision (Jagodziński 2008: 124; Waddington 2011: 194). BusinessEurope and the ETUC failed to agree on a schedule with a time limit for the negotiations, with the result that the ETUC called on the Commission to present a revised Directive.

In the absence of a negotiated settlement, the Commission tabled an amended Directive in July (2008b, 2008d) and indicated that it would take the form of a recast directive rather than a revision (Jagodziński 2010a).¹¹ Amendments included the definitions of information, consultation and transnational matters covered by EWCs; the introduction of a link between transnational and national information and consultation procedures;

10. It should be noted that the social partners were also unable/unwilling to negotiate on the Information and Consultation Directive (2002/14/EC) at national level (Pochet 2019).

11. The recast procedure had two technical advantages for the Commission. First, the number of amendments that can be proposed by the European Council and the European Parliament is restricted. The European Parliament was thus prevented from submitting the large number of amendments proposed in 2001 (A5 0282/2001). Second, the European Council is unable to dilute a recast proposal. In opting for the recast procedure, the Commission thus retained some control over the development of the proposal.

enhanced training opportunities for EWC representatives; a role for trade unions in the establishment of EWCs; clarification of the role of management in the provision of information on workforce size; and the insertion of an ‘adaptation clause’ to protect EWCs during corporate restructuring (European Commission 2008c). Subsequent tripartite discussions chaired by the French Minister of Labour, Xavier Bertrand, resulted in joint advice that changed the definitions of information and consultation, clarified the term ‘expert’ to include representatives of the ETUFs, strengthened the links between EWCs and national institutions of labour representation, and exempted from the terms of the Recast EWC agreements signed within two years of the adoption of the measure (ETUC et al. 2008). A definition of ‘transnational’ was not agreed during these discussions. The Commissioner welcomed the joint advice and called on the European Parliament and Council to adopt the draft Recast as amended (Špidla 2008).

The response from the CESA of the European Parliament was a proposal comprising 17 amendments to the draft Recast, as amended by the joint advice (2008a, 2008b). The EESC also reiterated the concerns it had expressed in 2006 and proposed a number of amendments in addition to those of the draft amended by the joint advice (European Economic and Social Committee 2008). In effect, the European Parliament and the EESC supported a more extensive overhaul of the legislation than the Commission, the social partners and the French Presidency. This apparent impasse was resolved at a meeting of representatives of the Commission, European Parliament and Council at which the draft Recast, as amended by the joint advice, formed the core document, supplemented by three of the 17 points raised by the CESA: a definition of ‘transnational’, sanctions if management fail to comply with the terms of the Recast, and the need to ensure that no workforce size threshold disqualifies a country from representation on an SNB (Jagodziński 2009). The European Parliament subsequently endorsed this document, which was then adopted by the Council on 23 April 2009, although the UK’s ‘New Labour’ Government abstained.

The principal operational objectives of the Recast are:

- ensuring the effectiveness of employees’ transnational information and consultation rights;
- remedying the lack of legal certainty resulting from defects in some provisions (such as definitions of information and consultation) and the absence of others (definition of the transnational character of a matter);
- ensuring better links with other EU ‘legislative instruments on information and consultation of employees’ (recital 7).¹²

A purpose of this book is to assess whether these objectives have been achieved through the adoption of the Recast.

¹². As noted in Chapter 1, the Recast was also intended to accelerate the rate at which EWCs were established. To date, this increased rate of establishment has yet to materialise. The Recast was also intended to facilitate the resolution of problems encountered in the application of the legislation.

Reporting on the Recast

Similarly to the Directive, Article 15 of the Recast required the Commission to ‘report’ on its implementation and to make ‘appropriate proposals where necessary’ for amendments by 5 June 2016. To this end, the Commission authorised an evaluation study of the Recast, which reported that, in 12 of the countries covered by the Recast, at least one element of the national transposition did not meet the requirements of the Recast;¹³ that there was no increase in the rate at which new EWCs were established (see Chapter 1); that about 120 agreements were renegotiated to incorporate the terms of the Recast, particularly regarding the definitions, the right to training, the adaption clause and the protection of EWC representatives; that there was no significant improvement in the operation of EWCs; that information was not provided early enough to allow for meaningful consultation; and that EWCs had little impact on actual processes of corporate restructuring (European Commission 2016a, 2016b). The evaluation study of the Recast thus identified many of the shortcomings associated with the Directive as also applying when the Recast was in operation. In addition, no fewer than 18 countries failed to meet the deadline for the transposition of the Recast by 6 May 2011 (Jagodziński 2015).¹⁴

Drawing on data from the evaluation study and other research sources, a Commission staff working document published two years later confirmed the limitations to EWC practice identified in the study (European Commission 2018a). The document also emphasised that almost three-quarters of EWC representatives were not consulted about corporate restructuring, and EWC representatives were unable to influence restructuring decisions (European Commission 2018a: 28–29); that ‘the consultation process shows deficiencies in practice’ (European Commission 2018a: 27); that transnationality remains difficult to interpret in practice (European Commission 2018a: 45); and that enforcement poses significant challenges (European Commission 2018a: 33–36). In contrast, the staff working document indicated that employers see EWCs as useful ‘in many ways, such as improving the common understanding of issues’, ‘explaining decisions’ and prompting ‘valuable proposals for action (European Commission 2018a: 45), while, ‘for most employers, the benefits outweigh the costs’ (European Commission 2018a: 46). The Commission thus appears to acknowledge that many of the Directive’s limitations that the Recast was intended to address remain unresolved. Employers, however, appear more content with the post-Recast situation than EWC representatives.

13. The ICF report, published at the behest of the Commission, states that ‘in 12 EEA countries provisions were assessed as not meeting the requirements of the Directive (either because of an absence of transposition or national legislation differing from the requirements of the Recast or lacking specificity). Only in 4 Member States at least one of the key substantive provisions of the Directive was not transposed correctly. In 9 Member States, a relatively minor non-substantive provision (or part of such provision) was not transposed. Among such shortcomings in transposition were the failure to provide the right to training for the EWC representatives without loss of wages, the requirement to inform European social partners about the start of negotiations and provisions on the composition of the EWC’ (European Commission 2016a: 151). It is not clear from the report what constitutes a ‘key substantive provision’ or a ‘minor non-substantive provision’.

14. It was anticipated that the Recast would be transposed by 6 May 2011. Delays in the transposition of the Recast beyond the deadline occurred in Cyprus, the Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, the Netherlands, Poland, Romania and Slovenia. In addition, deviations from the Recast in the transpositions occurred in Bulgaria, Czech Republic, Denmark, Germany, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal, Slovakia and the UK.

Political debate continued apace. In the context of the Refit Programme (2012) and the Better Regulation Programme (2015) launched by the Commission, information and consultation rights within Europe were assessed, although EWCs were not specifically examined (European Commission 2012b). Subsequently, the European Pillar of Social Rights was politically endorsed in November 2017 with *inter alia* the intention of repoliticising EU social policy and mitigating some of the adverse effects of neoliberal economic policies and the accompanying financial crises (Vanhercke et al. 2018: 153–172). Among the objectives of the European Pillar of Social Rights is ‘better enforcing of EU law’ (European Commission 2017). In this context, the failure of the Recast to improve EWC practice in so many areas that had been identified as inadequate under the terms of the Directive suggests that the Commission should revise the legislation in order to ensure that the intentions of that legislation are met in practice: in other words, that the law is better enforced. Surprise was expressed within the ETUC that the Social Pillar had failed ‘to introduce any changes related to workers’ participation rights’ (Kowalsky 2019: 40). The response from the Commission, however, centred on the intention to publish a ‘practical handbook’ comprising examples of ‘good practice and specific examples of agreements made in multinational companies that could be shared across the EU’ (European Commission 2018b: 9). Rather than implementing legislation, the Commission thus decided to adopt a voluntary approach reliant on the adoption of good practices within MNCs where somewhat less than good practice is currently in operation; therefore, the response of the Commission represents a stark mismatch between the identified problems of the legislation and the solutions proposed (Dorsemont and Jagodziński 2018). This approach repeats the cycle of the revision process associated with the Directive insofar as, in 2004, nine EWCs were examined as a means of identifying lessons that might be learned and disseminated as part of the Social Dialogue Summit.¹⁵ A purpose of subsequent chapters is to assess the viability of this voluntary approach based on case studies of good practice.

Summary

This review of the development of EU policy on information and consultation highlights four points. First, the replacement of hard law solutions to information and consultation practices by voluntary mechanisms linked to minimal fallback standards characterises the trajectory of change in legislative proposals and illustrates the reluctance within the Commission to introduce realistic enforcement mechanisms either by imposing stricter sanctions or by ensuring the implementation of the Directive and Recast within Member States. Second, codetermination is now absent from the employee participation agenda at EU level, whereas it was previously an integral element. Third, the same debates have accompanied each legislative proposal on information and consultation. At EU level, the European Parliament and the EESC have tended to advocate legislation with higher standards than the Commission from the mid 1990s. Fourth, the legislation that has been adopted constitutes compromise settlements. The next two sections elaborate the competing positions of the social partners, thereby positioning them in relation to the Commission’s compromise proposals.

15. The nine case studies examined Carrefour, EDF, EDS, Ericsson, Fortis, GKN, Henkel, Lafarge and Unilever.

BusinessEurope and the managerial pursuit of corporate objectives¹⁶

BusinessEurope and managers of MNCs with operations in Europe have pursued policies similar to their German counterparts: that is, attempts have been made to subvert EWCs politically from without, while from within managers have exploited the malleability of the institution to ensure that it serves strategic corporate objectives (Kinderman 2005). This is not to argue that these two aspects of policy are necessarily part of a concerted campaign. Indeed, this section argues, to the contrary, that these two aspects of policy are often pursued independently. The pursuit of particular policy preferences by BusinessEurope, however, has enabled managers with responsibilities for EWCs within MNCs to pursue corporate objectives that originate in HRM at the expense of making core information and consultation provisions based on industrial relations practices available to EWC representatives. To address these issues, this section initially examines the principled and tactical positions adopted by BusinessEurope. A second stage of the analysis assesses the pursuit of corporate objectives by managers within MNCs by means of the information and consultation arrangements available at EWCs.

BusinessEurope, employers' associations and legal regulation

The crux of the BusinessEurope position on employee participation is a steadfast preference for voluntary arrangements rather than legislative solutions. BusinessEurope argues that 'one size fits all' legislation fails to recognise variation between MNCs and the different uses to which information and consultation arrangements may be put within an enterprise (UNICE 1991c). Accompanying this position is advocacy of the principle of subsidiarity, whereby decisions are made as close as possible to their point of effect in order to promote 'flexibility' in the application of any regulation on employee participation; and of the autonomy of the parties in negotiating and conducting arrangements for employee participation (UNICE 1993). These preferences have remained constant since about 1970 and have acted to restrict the political room for manoeuvre available to European policy-makers within the Commission, in no small part due to the effective lobbying conducted by, and on behalf of, BusinessEurope. To illustrate the unchanging stance adopted by BusinessEurope, the processes leading to the emergence of the Directive, the adoption of the Recast and the situation after the adoption of the Recast are examined separately.

Emergence of the Directive

In alliance with different Member States throughout the 1970s and 1980s, BusinessEurope was able to lobby to resist the ECS (1970), the draft Fifth Directive (1972) and the proposed Vredeling Directive (1980). In rejecting the Vredeling proposal, for example, BusinessEurope argued that the measure had a questionable

16. For the most part, UEAPME and CEEP have agreed with BusinessEurope throughout regarding the Directive, Recast and the revision processes. The focus here is on BusinessEurope, as it has tended to lead the discussions on behalf of employers' organisations.

legal basis and that it would damage managerial decision-making, as well as heighten hostility between management and labour (UNICE 1981). Similarly, the British Engineering Employers' Federation (EEF) regarded Vredeling as representing 'a creeping and insidious form of paralysis leading to expropriation' (EEF 1983, quoted by Cressey 1993: 92). Regarding the Fifth Directive, the UK's Confederation of British Industry (CBI), a member organisation of BusinessEurope, argued that it 'threatens confusion to a company's strategic decision-making because it would admit for the first time in Britain the representation of sectional interests on board structures (CBI 1984, quoted by Cressey 1993: 92). BusinessEurope's opposition to these legislative proposals was not simply a matter of British preferences. The American Chamber of Commerce, for example, lobbied hard against these proposals. In addition, the BDA, while acknowledging that board-level employee representation and information and consultation were the norm in the then Federal Republic, argued that harmonisation was unnecessary and not legally justifiable, that the imposition of extensive worker participation rules on companies in other Member States would cause friction and decline in economic performance, and that information and consultation is an area that has no cross-border dimension whatsoever (Callaghan 2007).

Secure in the knowledge that any information and consultation proposal would require unanimity among Member States before the Maastricht Treaty took effect, BusinessEurope was thus able to retain and enforce a principled objection to legislation. Political circumstances changed, however, during the Commission Presidency of Jacques Delors (1985–1994), when a range of social policy initiatives was launched in the wake of the development of the European single market. While these altered circumstances did not result in a change in the principled stance of BusinessEurope towards information and consultation, they required pragmatic adjustments. Among these pragmatic adjustments was participation in the Val Duchesse discussions involving the social partners and the Commission. Although these discussions were intended to promote social dialogue, the issue of employee participation was discussed. On these occasions, BusinessEurope reiterated its preference for voluntary rather than legislative arrangements (Venturini 1988). Furthermore, a joint opinion reached by the social partners acknowledged the benefits of employee participation by means of information and consultation, but was silent on how such arrangements might be introduced (UNICE et al. 1987).

When the Commission tabled the legislative proposal on EWCs in 1990, the response from employers' associations was as before. The CBI opposed the measure and was supported by the UK's neoliberal Conservative Government. BusinessEurope argued that the proposal did not meet the objectives of information and consultation, undermined social partner autonomy, disregarded established practice and national law, and was likely to have an adverse effect on investment (UNICE 1991a). Once again reiterating a preference for a voluntary solution to transnational information and consultation, BusinessEurope suggested that the joint opinion concluded in 1987 (UNICE et al. 1987) form the basis for social dialogue with the purpose of agreeing suitable voluntary arrangements (UNICE 1991b) and that dialogue between the social partners at European level provide 'an opportunity to move away from the false start of the draft Directive, which is over-institutionalised, over-rigid and bureaucratic in character' (UNICE 1991c).

As noted above, support for the amended proposal of the Commission from the European Parliament and the EESC led to the submission of the proposal to the Council in April 1993 based on the Social Policy Protocol and Agreement annexed to the Maastricht Treaty, which provided for qualified majority voting on information and consultation. The opt-out from the Social Policy Protocol by the UK's Conservative Government effectively removed the Member State that was certain to vote against such legislation from the voting lobbies (Grant 1994: 153–210; Ross 1995: 16–50). Invoking the Social Policy Protocol in October 1993, the Commission requested that the social partners negotiate an alternative to the proposed legislation on the understanding that a failure to agree would result in the introduction of legislation. The change in the legislative framework for social policy thus required BusinessEurope to negotiate if legislation was to be avoided. Negotiations took place between November 1993 and March 1994. The CBI then withdrew from the negotiations, arguing that too much had been conceded to the ETUC (CBI 1994). The constitution of BusinessEurope requires all member organisations to agree to a negotiated outcome of social dialogue. The withdrawal of the CBI thus brought negotiations to an end and enabled the Commission to move towards a legislative solution.

At this juncture, BusinessEurope shifted from principled opposition to lobbying to reduce the coverage and requirements of the legislation. Subsequent amendments of the April 1993 draft increased the workforce size threshold, thus reducing the coverage of the legislation; broadened the scope of the voluntary provisions; and extended the period over which negotiations to establish an EWC could take place from one to three years. In short, BusinessEurope's lobbying was successful, as each of these measures was opposed by the ETUC. The adoption of the Directive on 22 September 1994 was thus contrary to the principled position of BusinessEurope, as legislation was adopted to regulate information and consultation procedures in the workplace. The impact of this policy reversal was mitigated, however, as BusinessEurope was successful in ensuring that the content of the legislation excluded a range of policy options supported by the ETUC, was more limited in coverage than earlier proposals, included a substantial voluntary element and promoted negotiated outcomes rather than hard law solutions.

Emergence of the Recast

A central feature of the review process initiated by the Commission as a consequence of Article 15 of the Directive was an EU-level conference held on 28–30 April 1999, convened by the social partners and funded by the Commission. As noted above, the Commission precluded a revision of the Directive on political grounds, while acknowledging limitations to extant EWC practice. At the conference, BusinessEurope representatives highlighted the range of initiatives that had taken place within EWCs as a means of expressing support for the 'flexibility' that was built into the Directive. In addition, the Secretary General of BusinessEurope raised three points in speaking against a need to revise the Directive. First, several Member States had not completed the transposition of the Directive.¹⁷ Second, the three-year negotiation period for setting

17. Luxembourg, Portugal and the United Kingdom had not completed the transposition process (Kerckhofs 1999b).

up EWCs was defended, as it allowed negotiators time to reach considered positions on the terms of operation of EWCs. Third, lowering the workforce size thresholds was rejected explicitly, as such an action would adversely affect small MNCs in terms of cost and staff time (Waddington 2011: 184). The position of BusinessEurope was thus to reject any potential revision and to emphasise the positive aspects it perceived as arising from the flexibility of the legislation.

The legislative and work programme for 2003 published by the Commission included a commitment to revise, rather than review, the Directive. The subsequent consultation document (European Commission 2004) called for the opinion of the social partners on how to improve the operation of EWCs. This document also referred to limitations of EWC practice identified by the European Parliament and the EESC. The Commission thus raised the political pressure on BusinessEurope compared to 1999. In principle, the position of BusinessEurope remained the same as in 1999, however: no revision was necessary, thus further consultation was inappropriate. Formally, BusinessEurope responded to the consultation document unequivocally: it ‘strongly opposed’ a revision of the Directive, since it ‘would send the wrong signal at a time when new Member States’ efforts should focus on effective implementation of the existing legal *acquis*’ and instead recommended a focus on ‘monitoring the transposition and implementation of the Directive in the new Member States, and exchanging and learning from experiences of EWCs and other procedures of workers’ information and consultation in Community-scale undertakings, notably against the background of enlargement of the EU’ (UNICE 2004a). BusinessEurope thus disagreed with the Commission in viewing EU enlargement and the integration of representatives from the New Member States as the principal challenge rather than ensuring a role for EWCs in corporate restructuring. Additionally, BusinessEurope reiterated a preference for amendments to EWC practices to be implemented voluntarily on a company-by-company basis (UNICE 2004a, 2004b), a point reaffirmed by senior officers of BusinessEurope at subsequent Tripartite Social Summits (UNICE 2004c).¹⁸

Tactically, BusinessEurope sought to delay any decision on a revision of the Directive beyond the then Commission’s term of office, which was due to end in November 2004. To that end, BusinessEurope’s spokesperson on EWCs, Jørgen Rønne, argued that there was still inadequate research data available on EWC practices, that the impact of EU enlargement on EWCs should be assessed, and that the outcome of concurrent social dialogue discussions on corporate restructuring should be available before consultations on EWCs between the social partners should commence. Consolidating this position, BusinessEurope reiterated that the ‘best way’ to develop worker information and consultation was through European- and company-level social dialogue: that is, voluntary solutions (UNICE 2004a). Concurrently, BusinessEurope also rejected the Commission’s proposal to explore the links between EWCs and sectoral social dialogue on the grounds that ‘EWCs deal exclusively with intra-company issues whereas the sectoral social dialogue discusses cross-company issues’ (UNICE 2004, 2004b: 4–5).

18. The UNICE statement was unequivocal: ‘The EU institutions [...] should [...] avoid proposing unnecessary revisions of existing legislation such as the European Works Council Directive or new legislation such as the directive on data protection’ (2004c).

With the new Commission came a fresh initiative on EWCs integral to which was a commitment to revise the Directive (European Commission 2005a) and to explore the links between EWCs and corporate restructuring (European Commission 2005b). In launching these initiatives, the Commission also encouraged the social partners ‘to start negotiations with a view to reaching an agreement [...] on the requisite ways and means for [...] promoting best practice in the way that European works councils operate, with a view to making them more effective, more especially as regards their role as agents for change’ (European Commission 2005a: point 2.4). Once again, BusinessEurope asserted its commitment to voluntary solutions in arguing that the initiatives from the Commission undermined the work of the social partners on restructuring that was then under way within the framework of social dialogue (UNICE 2005a, 2005b). More specifically, BusinessEurope argued that the results of recent joint seminars held by the social partners on EWCs had not been widely disseminated and time was required for dissemination; and that, in launching these initiatives, the Commission acted unconstitutionally, as these initiatives failed to meet the condition of balanced support for the social partners in rejecting the voluntarist position advocated by BusinessEurope (UNICE 2005a: point 12).

The announcement in April 2007 by the Social Affairs and Employment Commissioner, Vladimír Špidla, of an intention to overhaul EU-level legislation on information and consultation rights was influenced by the extent of support for a revision of the Directive within the European Parliament and EESC. Throughout 2007, BusinessEurope and member organisations lobbied intensively against the publication of the anticipated consultation document (de Buck 2007; BusinessEurope 2007; BDA 2007) but, once the document had been published, announced a preparedness to negotiate on a revision with the ETUC, thereby reversing previous opposition to such an approach. While welcoming BusinessEurope’s preparedness to negotiate, the ETUC suspected that it was a tactic to extend deliberations beyond the end of the French Presidency when a revision would no longer be possible (Jagodziński 2009).¹⁹ Following a ballot held among affiliates, the ETUC announced that, in the absence of an agreed timetable for negotiations, it was not prepared to negotiate (ETUC 2008a, 2008b; Lapeyre 2018). Pressure from the French Presidency prompted the Commission subsequently to publish an amended draft Recast.²⁰ BusinessEurope responded characteristically in arguing that the Commission was ‘taking a biased view of the issues in question’; introducing rules that ‘constitute a straitjacket to negotiations at company level’, thereby ignoring the autonomy of the parties’ decision-making; and creating ‘high obstacles to taking decisions quickly’ (BusinessEurope 2008). Furthermore, BusinessEurope objected to the broader role envisaged for trade unions and to the timing requirements attached to consultation, and it was concerned to maintain the exemptions attached to the voluntary EWC agreements concluded under Article 13 of the Directive. In short, BusinessEurope maintained its ‘in principle’ objection to legislation and sought to sustain the voluntary elements secured in the Directive. While any amendment to

19. A Czech Presidency was to follow the French Presidency. Representatives of the Czech Presidency had already signalled that they had no intention of taking forward any social legislation.

20. This draft was largely based on Joint Advice submitted to the European Council on 29 August 2008, which was itself based on a common position reached by BusinessEurope and the ETUC (for details, see Jagodziński 2008).

the Directive was unwelcome to BusinessEurope, the absence from the Recast of any lowering of the workforce size thresholds and the shortening of the SNB negotiation period coupled with the continued exemption of voluntary agreements signed under Article 13 of the Directive from the minimum conditions were viewed as successful outcomes of BusinessEurope lobbying and the openness of the Commission to such lobbying (Hoffmann and Hoffmann 2009).

Post-Recast stance

As noted above, the consultation cycle associated with reporting on the Recast comprised an evaluation study of the Recast (European Commission 2016a) and a commitment to publish a 'practical handbook' on EWC practice (European Commission 2018b). BusinessEurope pre-empted the Commission's publication in commenting on the functioning of the Recast (BusinessEurope 2017). The commentary repeated the position taken by BusinessEurope in 1999 when the review of the Directive commenced. In general, BusinessEurope argued that 'there is no need for a revision [of the Recast]' and 'more time is needed to assess [the Recast's] full impact on the functioning of EWCs' (BusinessEurope 2017). BusinessEurope also argued that it was too early to assess the impact of the Recast due to the time taken for transposition of the legislation, that a revision of the Recast would create uncertainty, that the quality of information and consultation processes was a function of corporate culture and mutual trust rather than legislative intervention, and that companies with EWCs concluded under UK legislation should be given time to adapt to another legislation after Brexit. Additionally, BusinessEurope took issue with several of the findings of the evaluation study. In this context, BusinessEurope reiterated its support for the 'principle of autonomy of the parties' (recital 19 of the Recast) and argued that this principle would be contravened if the content of information and consultation procedures were to be legally specified, if time frames for information and consultation procedures were to be legally determined, and if the number of annual meetings were to be increased, as facilities for extraordinary meetings are already in place (BusinessEurope 2017). In short, BusinessEurope rejected the criticisms of the operation of the Recast and suggested that any shortcomings would be best addressed through voluntary rather than legislative solutions. The data available to this study allow assessment of this proposition.

Within the company: the pursuit of corporate objectives

Analysis of the views of managers with responsibility for EWCs within MNCs shifts the emphasis away from the political sphere occupied by BusinessEurope towards that where operational concerns are central. This is not to argue that contestation is absent in operational matters. The argument advanced here to the contrary is that, operationally, managers responsible for EWCs have used them as a means of furthering a corporate agenda within MNCs based on HRM objectives, while concurrently managers have tended to downplay aspects of the formal information and consultation agenda that originate in industrial relations. Competition in the context of operational matters thus centres on the tension between corporate strategy and formal information and consultation requirements.

Two further observations are apposite. First, more than 40 EWCs were established in, primarily French, MNCs before the Directive was adopted in 1994 (Figure 1.1; Kerckhofs 2006: 8). These initiatives reflected operational concerns among some managers following the adoption of the Single European Act and influenced the strategic thinking within some employers' associations (AGREF 1991). Second, as noted at the outset of this section, BusinessEurope and managers responsible for EWCs advance complementary, but not directly linked, policies towards EWCs. The 'distance' between these two policy strands is illustrated by research showing that 93 per cent of managers responsible for EWCs did not liaise at all with BusinessEurope, while 7 per cent did so indirectly through an independent adviser or consultant. In addition, several managers had neither heard of BusinessEurope nor knew of its purpose (Waddington et al. 2016: 68–69). In short, although managers and BusinessEurope are concerned to influence the development of EWCs, their efforts to this end are largely uncoordinated.

In light of the managerial focus on operational matters, it is no surprise that managerial comments on EWCs are concentrated in the period after 1994 and particularly during periods when the legislation was under review. Early signs that managers viewed EWCs as a means of securing corporate objectives were visible when consultation, if it took place at all, added value in the form of improved managerial decision-making, the generation of employee commitment to corporate goals, and greater transparency of corporate processes (Lamers 1998). The same study also identified managerial criticisms of the operational application of the Directive in that it was 'essential to prevent the European consultation process from becoming no more than a once-a-year event' (Lamers 1998: 90), that EWCs had yet to develop a European perspective (Lamers 1998: 147–150), and that relations between the EWC and local levels of operation were problematic (Lamers 1998: 115–120).

Although these findings were solely based on Dutch research, managerial delegates at the conference convened to review the operation of the Directive in April 1999 confirmed these findings on an international basis (Waddington 2011: 184). Managerial delegates added to the Dutch data in highlighting the perceived high costs of convening EWC meetings and delays in corporate decision-making as a result of annual, rather than more regular, plenary meetings. Managers at Japanese MNCs complemented these findings in that they evaluated EWCs favourably, particularly their role in the dissemination of management information, the exchange of information between management and EWC representatives, and in promoting a spirit of cooperation (Nakano 1999). This positive assessment owed much to the observation that managers at Japanese MNCs thought that EWCs 'would not seriously affect corporate decision-making', as they were unlikely to alter the strategic direction of the MNC (Nakano 1999: 323–325).

A different managerial approach to the definition of a 'successful' EWC outlined before the adoption of the Recast embraced the 'deliberate' use of EWCs by managers 'as an agent of change' (Hume-Rothery 2004: 85), thereby ensuring that management can 'take the workforce with them in the change process' (Hume-Rothery 2004: 86). The focus here was on the involvement of EWCs in corporate restructuring and the uses to which management could put EWCs during such events. Within this perspective, several barriers had yet to be overcome before EWCs became 'successful', including:

conflicts between transnational and national legal obligations; the limitations of the EWC agenda, as specified in the subsidiary requirements; and shortcomings in the expertise of EWC representatives, which was insufficient to allow their meaningful involvement in strategic corporate decision-making (Hume-Rothery 2004: 86–90).

Prior to the adoption of the Recast, managerial observations were broadly consistent with those of BusinessEurope insofar as both parties identified similar limitations to the Directive and acknowledged that involvement of the EWC in restructuring could facilitate the process. In contrast to BusinessEurope, however, managers emphasised a range of value-added corporate benefits that arose from the establishment of EWCs. Following the adoption of the Recast, managers responsible for EWCs reported two principal developments. First, the range of value-added benefits arising from EWC involvement was extended with no commensurate increase in the quality of information and consultation processes. Second, differences emerged between the political stance of BusinessEurope and the position of managers within MNCs.

A study endorsed by BusinessEurope, for example, showed an increased sophistication in managerial strategies to extract added value compared to earlier studies. In particular, managers reported that EWCs facilitated the promotion of corporate identity; the development of social dialogue or social partnership within the MNC; the operation of communication systems, particularly ‘bottom-up’ communication systems; the generation of managerial leverage between European and local levels of employee representation; and employee commitment to strategic corporate objectives (Pulignano and Turk 2016). Concurrent with the accrual of these value-added benefits, no fewer than 61 per cent of managers interviewed reported that the EWC had no meaningful impact on proposals for corporate restructuring (Pulignano and Turk 2016: 45). The value added of EWCs reported by managers is also confirmed by an impact assessment of the Directive funded by the Commission (EPEC 2008) and a report to European institutions by the Commission (2018b). In contrast, only four of 56 interviewees indicated that information and consultation procedures were completed before management decisions concerning corporate restructuring were finalised (Pulignano and Turk 2016: 40–42), thus limiting the capacity of EWC representatives to influence strategic corporate decision-making.

In short, managers responsible for EWCs in MNCs report an increasing range of value-added corporate benefits based on the HRM aspects of information and consultation, while most acknowledge that they are not meeting their industrial relations information and consultation obligations as required by the legislation. Furthermore, the reason cited for not meeting these obligations is the commitment of managers to releasing information first to the stock exchange (Pulignano and Turk 2016: 39–44). In practice, therefore, most managers see no alternative to failing to meet information and consultation obligations required by EU-level legislation, as they view stock market rules as the determinant of their actions. This observation raises questions concerning the application of confidentiality provisions, which will be addressed in Chapter 8.

A second post-Recast development is the emergence of differences between the political stance of BusinessEurope and managerial perceptions of EWC practices.

BusinessEurope, for example, argued that the Recast would erect ‘high obstacles’ (2008) to the operation of EWCs. In contrast, managers responsible for EWCs tended to report that the Recast formalised arrangements that were already in place rather than necessitating a significant change to either agreements or practice (Waddington et al. 2016: 52–62). Similarly, the concern raised by BusinessEurope (2008) that the Recast constituted a ‘straitjacket’ also has not materialised, according to managers responsible for EWCs. Managers cite to the contrary the wide range of practices and forms as characteristics of EWCs rather than restrictions as implied by a ‘straitjacket’ (Pulignano and Turk 2016). BusinessEurope (2008) objected to the greater involvement of trade unions and experts in EWCs, to the definitions of information and consultation, and to the slowing down of corporate decision-making that would result from the Recast. Although a minority of managers acknowledge the objections raised by BusinessEurope, the majority do not view these issues as problematic in the operation of EWCs (Pulignano and Turk 2016: 79–90). Furthermore, BusinessEurope argues that the costs of EWCs are prohibitive, while only 19 per cent of managers agree and 54 per cent of managers think that the benefits of EWCs outweigh the costs (Pulignano and Turk 2016: 53–58). It is possible that differences between BusinessEurope and managers are a result of the limited liaison that takes place between the two parties: that is, between the institutional political representative of managers and its constituents. Research into this matter is beyond the scope of this study, but these aspects of the operation of EWCs are examined in Chapters 4 and 8.

Summary

BusinessEurope’s policy on EWCs has focused on avoiding legislation and a preference for voluntary solutions. When BusinessEurope deemed legislation to be politically unavoidable, it strove to limit its coverage and content. BusinessEurope has been successful in this regard, insofar as the Directive and the Recast comprise significant voluntary elements, which managers responsible for EWCs within MNCs have been able to exploit to ensure that EWCs serve corporate objectives, while only a small minority of managers comply with the information and consultation terms of the legislation as intended by European-level policy-makers. The links between the two elements of policy conducted outside and within MNCs are tenuous, as BusinessEurope is ‘distant’ from managers. This ‘distance’ is clearly reflected in the different views of BusinessEurope and managers towards the impact of the Recast on the operation of EWCs.

Trade union organisations

In discussing the impact of trade union organisations on EWCs, it is important to recall that the development of trade union organisations at European level before 1973 was rudimentary (Dølvik 1999). The Commission tabled the ECS and the Fifth Directive, for example, before the establishment of the ETUC, with the consequence that trade union responses to the proposals largely emerged from within the Member States. Within the Commission, the lack of development of trade union organisations at European level was viewed as problematic. Institution building within the social sphere was thus an

intended side effect of proposals on employee participation tabled by the Commission. In addition, academic optimists and critics of the Directive agreed that the measure had many shortcomings. The debate between the two groups centred on the capacity of trade union organisations to overcome these shortcomings: optimists argued that, through networking, identity building activities and training, trade unions would release the potential in the legislation (Martinez Lucio and Weston 2000; Stirling 2004), whereas the critics were more sanguine and questioned the capacity of trade unions to deliver in terms of material and human resources (Keller 1995; Streeck 1997). In part, this review of the interventions made by trade union organisations assesses these competing positions.

Prior to the inaugural Congress of the ETUC in February 1973, there was no uniform position towards employee participation among trade unions in Europe. In no small part, the priority assigned by trade unions to such systems reflected arrangements within Member States. Dutch and German trade unions, for example, tended to favour legislative approaches, with a German preference for codetermination, while Belgian trade unions emphasised the harmonisation of labour policies rather than European-level participation systems (Dølvik 1999: 49–54).

Following the inaugural Congress, the ETUC welcomed the Vredeling Directive of 1980, arguing for an increase in its coverage by means of a reduction in the workforce size threshold, while expressing disappointment that no codetermination right was incorporated into the proposal (Danis and Hoffmann 1995). In particular, the ETUC saw the inclusion in the proposal of companies that have one or more subsidiaries and are based within a single Member State as a step towards harmonisation. Although the EESC and the European Parliament (Spencer 1982a, 1982b) broadly supported the ETUC position, opposition from employers, including the American Chamber of Commerce, and some Member States led to the demise of the proposal.

The ETUC participated in the Val Duchesse social dialogue discussions convened by the Commission, where its preference for legislative approaches to information and consultation arrangements contrasted with the preference for voluntary solutions advocated by BusinessEurope. In consequence, the joint opinion arising from these discussions expressed a general support for information and consultation arrangements at European level without specifying how these arrangements might be introduced (UNICE et al. 1987; Didry and Mias 2005). When the draft Directive was tabled by the Commission in 1990, BusinessEurope recommended that this joint opinion form the basis of negotiations between the social partners on appropriate information and consultation arrangements as a tactic to avoid legislation (UNICE 1991b).

In expressing support for the draft Directive, the ETUC advocated a lowering of the workforce size threshold from 1 000 to 500 employees, the inclusion of timeliness in the definitions of information and consultation, the holding of more meetings than the proposed minimum of one annual meeting, the capacity of EWC representatives to bring the implementation of a managerial decision to a halt if consultation had not taken place beforehand, and specification of a role for trade unions (ETUC 1990). As becomes apparent below, this statement of position has been reiterated on several

subsequent occasions during the development of the legislation to little effect. Rather than adopt these recommendations from the ETUC, which were supported by the European Parliament (1991), the Commission took a different tack and amended the draft Directive by increasing the workforce size threshold within a Member State from 100 to 150 employees, broadening the scope of voluntary provisions, and increasing the period over which SNB negotiations could take place from one to three years. These amendments thus went directly against the direction of change recommended by the ETUC. For the ETUC, therefore, the Directive was a success ‘in principle’: legislation on information and consultation arrangements was welcomed. This success, however, was not unalloyed. The absence of a codetermination right, the absence of a definition for information, the rudimentary definition of consultation, the voluntary arrangements allowed under Article 13, the limited minimum standards, no formal role for trade unions, and the restricted coverage of the Directive were all seen as shortcomings that would impair the operation of EWCs and limit the capacity of trade union organisations to realise the potential of the Directive.

Concurrent with the presentation of the 1990 draft Directive were reforms to the ETUC. In particular, the Stekelenburg Report, *For a More Efficient ETUC*, was adopted in 1990 and *inter alia* recommended a more pronounced role for the ETUFs. As a consequence, the ETUFs became full affiliates of the ETUC at the Seventh ETUC Congress in 1991, and, at the Ninth ETUC Congress held in 1999, responsibility for the coordination of activities associated with EWCs and their long-term development was allocated to the ETUFs. While these developments were instances of institution building at European level desired by the Commission, their implication was that EWC activities are organised on a sectoral or industrial basis, as these are the organisational bases of the ETUFs. Allocation of the operational responsibility for EWCs to the ETUFs enabled the development of different policy emphases within the ETUFs to accommodate variations in the circumstances of EWCs, such as the extent of unionisation among EWC representatives or the form of support made available to EWCs. The allocation of operational responsibility for EWCs coupled with the pursuit of different policy options also raised issues of policy formulation. While the ETUC retained responsibility for engagement in the political sphere, representatives from the ETUFs were also concerned to promote a range of policy alternatives leading, on occasions, to debates over policy choices.

Trade union policy after the Directive

The inclusion of Article 15 of the Directive, requiring a review of its operation by 1999, influenced the ETUC and ETUFs in their acceptance of what was considered in union circles to be an inadequate measure (ETUC 1990). Acceptance of a Directive, viewed as inadequate by trade unionists, was agreed, as the German Presidency of the Council was to be followed by Presidencies that would not promote the measure. In practice, trade unionists saw the review promised by Article 15 as a means of addressing the Directive’s shortcomings. Although the social partners were excluded from a Working Party of the Member States convened by the Commission (Buschak 1999), they participated in the EU-level conference of April 1999 at which the Irish conservative Commissioner,

Pádraig Flynn, announced that a revision of the Directive would be premature on political grounds. Prior to this conference, the ETUC favoured a revision in light of the managerial failure to consult EWCs prior to restructuring at Renault (Vilvoorde) in 1997, Levi Strauss in 1998 and Philips in 1998. In addition, an ETUC Working Party argued that the definitions of information and consultation should incorporate some notion of timeliness, a trade union role should be specified, SNB negotiations should be limited to one year, and sanctions should be introduced where MNCs fail to comply with the legislation, while calling for improved rights to time off and training, and a reduction in the workforce size thresholds (ETUC 1998). At the conference, EWC representatives endorsed this agenda, while adding that the infrequency of plenary meetings inhibited the establishment of continuity and trust among representatives and between representatives and management. In short, the position of EWC representatives mirrored the stance adopted by the ETUC towards the Directive when it was adopted. Commissioner Flynn's decision to abandon any revision in 1999 was thus a source of frustration within trade union organisations and among EWC representatives.

Following the ratification of the Working Party report by the Executive Committee of the ETUC in December 1999 (ETUC 1999), the ETUC formally presented its contents to the first joint consultation meeting convened by the Commission later in December 1999. In addition to reports on the 'very positive' progress on the national transpositions and the political justification for delaying a revision, the report of the Commission, following from the joint consultation, endorsed most of the shortcomings of the Directive identified by the ETUC (European Commission 2000). At this juncture, the positions of the ETUC and the Commission were thus similar, but the political desire to develop other information and consultation measures, particularly developments that led to Directives 2001/86/EC and 2002/14/EC, prohibited the Commission from revising the identified and agreed shortcomings of the Directive and from enforcing an appropriate transposition of the legislation by Member States (European Commission 2000).

While the revision of the Directive was not mentioned in the Social Policy Agenda 2000 2005 (European Commission 2000), the ETUC and the ETUFs continued to campaign for a revision by means of lobbying and organising demonstrations to influence national governments and the Council. Many of the papers presented at a conference convened by the ETUC held on 20–21 November 2000 confirmed the basic ETUC position (ETUC 2000b). These papers also prompted refinements to the ETUC position. In particular, from this point forward, the ETUC position on the revision of the Directive included a preference for 'an appropriate representation' of men and women on SNBs and EWCs, and for the inclusion of equal opportunities, health and safety, and environmental issues to be added to the list of agenda items specified in the subsidiary requirements (ETUC 2000a). The ETUC, however, did not argue for the inclusion of a codetermination right or the lowering of employee thresholds as it had done before the adoption of the Directive. The exclusion of the former was not an indication of a change of position in principle but rather was a tactical recognition that codetermination required unanimity at the Council and was thus unlikely to be a realistic proposition.²¹

21. It was also debatable whether the ETUC could have generated a consensus among affiliates regarding the inclusion of codetermination within the legislation.

The ETUC further refined its position on four counts during the consultation process initiated by the Commission in 2003 at the Executive Committee meeting of 4–5 December 2003 (ETUC 2003). First, the definitions of information and consultation included in the recently adopted Directives 2001/86/EC on the involvement of employees and 2002/14/EC on informing and consulting employees at national level were regarded as superior to the definition of consultation in the Directive. The ETUC argued that the Directive should meet the ‘new community standards’ set elsewhere. Second, the ETUC agreed with the approach of the European Parliament towards sanctions in that they should be effective, proportionate and dissuasive, and that, where managers fail to consult an EWC, any subsequent management decision ‘shall not have legal effects on the contract and the terms of employment of the concerned employees’. Third, the ETUC required managers to demonstrate that an issue was not transnational, rather than placing the burden of proof on employee representatives to demonstrate that an issue was transnational. Fourth, the ETUC required managers to inform ETUFs whether an MNC meets the workforce size threshold criteria. The refined ETUC position thus did not change the substance of the preferred revision agenda, but introduced greater specificity on a range of practical issues.

During April 2004, the Commission opened the first stage of consultation with the European social partners on the possible revision of the Directive (European Commission 2004). In tabling details on the consultation process in 2005, the Commission explicitly linked the revision of the Directive to the regulation of corporate restructuring, thus rejecting the argument of BusinessEurope that restructuring was not the central issue (European Commission 2005a). The ETUC and the ETUFs agreed that this linkage may be present, but it was not necessarily universal, and viewed the two issues as best handled separately (ETUC 2005). In addition, the ETUC reiterated the shortcomings of the Directive outlined above. The concurrent social dialogue processes limited work on EWCs to assessments of the joint lessons learned from EWCs from a series of seminars (ETUC et al. 2006). Although these lessons were interpreted by some in the Commission as sufficient reason for taking no further action on the revision (EWCB 2006), support from the European Parliament (2005, 2007a; Cottigny 2006) and the EESC (2006) effectively kept the revision process alive.

Support for the revision agenda proposed by the ETUC and ETUFs also emerged from the Impact Assessment of the Directive drawn up at the behest of the Commission (EPEC 2008). The breadth of evidence in support of the position adopted by the ETUC and ETUFs and the range of the political origins of this evidence, coupled with the advocacy of a revision by the French Presidency, led the Commission to table a draft Recast on 2 July 2008 (European Commission 2008c). As discussed above, this draft included several of the revisions supported by the ETUC, but excluded extensions to the subsidiary requirements agenda, uniform definitions of information, consultation and transnationality with other EU-level legislation, a reduction in the workforce size thresholds, a reduction in the duration of SNB negotiations, a minimum of two plenary meetings per year, and an entitlement for ETUF representatives to attend all meetings associated with the EWC. Despite these omissions, evidence produced in the Commission’s Impact Assessment (EPEC 2008) and support for a more wide-ranging revision from the EESC (2008) and the European Parliament (A6 0454/2008), the

Commission diluted still further the content of the Recast prior to its adoption by the Council on 23 April 2009. Furthermore, the Commission changed the procedure from the expected ‘revision’ to a ‘recast’, thus limiting the possibility of amending drafts of the document (Jagodziński 2008)

From the perspective of the ETUC, the Recast constituted a limited improvement compared to the Directive, but fell well short of the position advocated by the ETUC. Thus, for the ETUC and the ETUFs, further amendment to the Recast was required if EWCs were to perform in the manner envisaged by European policy-makers.

Policy developments associated with reporting on the Recast predictably followed a similar course to the review process attached to the Directive. A survey of EWC coordinators endorsed by the ETUC, for example, reported an increase in the quality and ease of access to training for EWC representatives, on the added value of EWCs to MNCs, on partial progress in defining information, consultation and transnationality, and on the improved linkage between European and national levels of information and consultation arising from the legislative amendments included in the Recast (Voss 2016). From the perspective of EWC coordinators, the benefits of the Recast are similar to those identified in the evaluation study of the impact of the measure authorised by the Commission (European Commission 2016a, 2016b). The shortcomings in the operation of the Recast identified by the evaluation study are also confirmed by EWC coordinators who report that EWCs operate primarily as information rather than information and consultation bodies, are unable to influence strategic corporate decisions, including those on restructuring, have insufficient resources and competences, operate without adequate expert support due to the management’s interpretation of the legislation, and are limited in their operation because of the management’s confidentiality policies (Voss 2016). Furthermore, underpinning several of these limitations according to EWC coordinators is the inadequacy of the sanctions regime included in the Recast.

Incorporating the findings of both the evaluation study and the survey of EWC coordinators, and following extensive discussions with the ETUFs, in 2017 the ETUC identified 10 priorities directed towards more effective EWCs (see Appendix B). The incoming ETUC Secretariat confirmed support for this agenda in 2019 (ETUC 2019). It is immediately apparent from this agenda that several of the matters raised therein have been long-standing issues of proposed reform from the perspective of the ETUC and the ETUFs. An enlarged list of topics for EWC agendas (point 10), for example, has been the subject of debate since before the adoption of the Directive. Similarly, the role of trade unions (point 3) and coordination between levels of information and consultation (point 4) were raised during the late-1990s in conjunction with the review of the Directive. The removal of exemptions available to voluntary agreements signed under Article 13 of the Directive (point 6) reflects the basic policy preference of trade union organisations for legislative solutions.

The reform agenda is notable for an added emphasis on enforcement and sanctions, reflecting concerns with extant practice. Chapter 9 examines measures taken by EWC representatives to enforce the terms of the Recast. The reform agenda is also notable for the absence of proposals on issues that have figured large in previous iterations. Among

these ‘missing’ items are a codetermination right, an increase in the number of annual plenary meetings, an obligation on management to inform trade union organisations if the workforce size thresholds are met within the MNC, a shortening of the period over which SNB negotiations can take place, and a lowering of the workforce size thresholds. While the 2017 reform agenda includes many long-standing demands for improvement, it is also notable for the demands that have been dropped. In practice, the ETUC reduced the number of demands in order to focus on immediate operational issues. Chapter 11 assesses the views of EWC representatives on this agenda, while Chapters 4 and 5 evaluate the performance of EWCs in relation to this agenda and identify how EWC practices might be reformed in order to ensure that the intentions of European policy-makers regarding information and consultation arrangements are achieved within the institution as a whole rather than within specific EWCs. The study also examines the potential impact of some items excluded from the reform agenda.

ETUFs: operationalising policy options

The ETUFs formally assumed operational responsibility for EWCs after the Helsinki Congress of the ETUC in 1999. As becomes apparent below, however, this Congress decision merely confirmed a division of responsibility that was already in place in practice. The emphasis of this section is thus on operational matters. The position of the ETUC and the ETUFs outlined above reflects many of the operational concerns of the ETUFs. These are excluded from this discussion, which focuses primarily on those issues not included in the proposed programme of legislative reform. From the outset, it should also be noted that the resources available to the ETUFs are limited. Although membership fees were increased from the mid-1990s, by comparison with national union confederations the ETUFs are materially under-resourced and employ far fewer staff (Waddington 2011: 31).²² In 2018, for example, two staff members were responsible for the coordination of EWC activities and policy development within *industriAll*, within the ambit of which fall more than 55 per cent of currently active EWCs. Most other ETUFs rely on a single person to undertake these responsibilities. In consequence, the ETUFs are reliant on support from affiliated trade unions, particularly in the form of staff time, and budget lines made available by the Commission to fund EWC-related projects and activities.²³

An operational issue that underpins many of the policy choices adopted by ETUFs concerns the status of EWCs. In law, EWCs are not trade union bodies. Furthermore, the fact that the Directive made no reference whatsoever to the term ‘trade union’ has

22. Mergers among ETUFs have been influenced by the shortage of resources. In particular, the European Mine, Chemical and Energy Workers’ Federation (EMCEF) was formed in 1996 as a result of the merger of the Miners’ European Federation (MEF) and the European Federation of Chemical and General Workers’ Unions (EFCGU). EMCEF was relatively short-lived, however, as it was involved in the merger with the European Metalworkers’ Federation (EMF) and the European Trade Union Federation for Textiles, Clothing and Leather (ETUF-TCL) to form *industriAll* in 2012. Similarly, UNI Europa was formed in January 2000 from the merger of the European regional organisations of the International Federation of Commercial, Clerical, Professional and Technical Employees (Euro-FIET), Communications International, the European Graphical Association and the Media and Entertainment International. As with *industriAll*, the merger of these European regional organisations to form UNI Europa was part of a wider merger involving the global unification of these union federations.

23. A budget line comprising €17 million per year was made available to support the development of EWCs.

heightened operational concerns. From the perspective of trade union organisations, EWCs posed a challenge insofar as decisions taken or influenced by non-unionists could have a marked impact on the policies adopted by EWCs. The scale of this challenge varies by company, industry and nationality with the relatively low levels of unionisation in private-sector services and in many CEE countries viewed as particularly problematic. In addition, the involvement of EWCs in strategic corporate decision-making is anathema to many trade unions, particularly those based in single channel systems of employee representation. From the perspective of trade union organisations, a central operational objective is thus to exert control over the activities of EWCs and to ensure high rates of unionisation among EWC representatives.

The rudimentary state of institution building within the ETUFs before 1996, coupled with the absence of any requirement in the Directive that the ETUFs be informed when an SNB was established, resulted in many voluntary agreements concluded under Article 13 being signed without vetting by the ETUFs. In practice, this meant that a significant number of the 495 agreements concluded between September 1994 and September 1996 were agreed without reference to legal standards or recommendations from the ETUFs, although the terms included in the subsidiary requirements had probably influenced the negotiation of these agreements. The initial response of most of the ETUFs to the establishment of EWCs was to set up committees with the brief to formulate policies on EWC practice and implementing procedures by means of which founding agreements of newly established EWCs could be monitored and approved; to allocate EWC coordinators to act on behalf of the ETUF responsible for the EWC; and to draw up guidelines and recommendations on EWC best practice.

Initially, the committees set up by the ETUFs to monitor EWCs were informal, reflecting an immediate response to the establishment of large numbers of EWCs under Article 13 of the Directive. The Task Force of the European Metalworkers' Federation (EMF), for example, was formed in February 1996. While there was some variation between ETUFs, over time these committees became more formal, usually by means of a Congress resolution that established them as standing committees operating with a brief covering EWCs, information and consultation procedures, corporate restructuring and company policy. Support for these committees was usually provided by full-time staff of the ETUFs in facilitating the coordination of EWC activities and developing policy options. The majority of the committee members, however, were drawn from unions affiliated to the ETUF. Procedurally, the principal role adopted by these committees was the ratification of negotiated and renegotiated founding agreements and, latterly, the awarding of mandates to negotiate, and ensure the monitoring of, transnational company agreements. By these means, the committees established by the ETUFs exerted some control over the content of EWC agreements.

A key policy option adopted by all ETUFs is the appointment of EWC coordinators and the production of best practice guidelines. The policy intention is to allocate an EWC coordinator to each EWC or SNB, if the process to set up an EWC had just been set in train. The brief of EWC coordinators is to liaise between the EWC/SNB and the ETUF, to ensure that the founding agreement of the EWC complies with the guidelines of the ETUF, to inform EWC/SNB members of their rights and obligations, and to

participate in all meetings convened in association with the EWC/SNB (for example, see UNI Europa 2011; industriAll 2012). The EWC coordinator may also co-opt experts in specific fields, law or accountancy for example, to advise EWC representatives if circumstances so demand. Most ETUFs recommend that EWC coordinators are full-time trade union officers drawn from the home country of the MNC within which the EWC is based. The expectation within ETUFs is that the affiliated trade union that employs the EWC coordinator would ensure that s/he had the appropriate training and support. It should be noted, however, that, while this approach is recommended by ETUFs, ETUF staff members coordinate many EWCs in addition to undertaking their committee support role. Furthermore, 19.9 per cent of EWC representatives who responded to the survey in 2018 indicated that their EWC operated without an EWC coordinator, indicating limitations to the policy in practice.²⁴ Chapter 4 addresses the efficacy of the policy of appointing EWC coordinators by reference to the quality of information and consultation processes, and Chapter 6 examines the impact of trade union interventions of EWC practice.

As could be anticipated, the guidelines and recommendations on EWC best practice drawn up by the ETUFs generally follow the preferences for legislative reform expressed by the ETUC and the ETUFs. To this end, the ETUFs have emphasised the importance of a number of recommendations, including that common positions should be developed among employee representatives on the SNB or the EWC; a greater number of plenary meetings should be held rather than a single annual meeting, and the right to request extraordinary, preparatory and de-briefing meetings should be ensured; the select committee should meet frequently, without management if appropriate, and agree on the agenda, location and minutes of all meetings with management; the composition of the EWC should reflect that of the workforce it represents by reference to gender and employment types; there should be a preference for union members to serve as EWC representatives; internal rules of procedure should be developed that *inter alia* define the role of the chairperson, the role of the select committee and the actions to be taken in cases of dispute; measures should be introduced to prevent management appointees attending as EWC representatives; and a European rather than a national perspective should be instilled in EWC representatives (EFFAT 2009; UNI Europa 2011; EMF 2011). The extent to which the ETUFs have been able to improve on the minimum standards outlined in the Directive and Recast is examined in Chapter 3. Chapter 4 establishes whether the policies on the composition of EWC representatives influence the quality of information and consultation processes, whereas Chapter 5 assesses the development of a European identity among EWC representatives.²⁵

24. It should also be noted that a further 19.3 per cent of respondents did not know if a coordinator was present at their EWC.

25. UNI Europa has also implemented a policy to establish trade union alliances to work in conjunction with EWCs and to influence their policy development. The intention is to establish a permanent trade union alliance to work with each EWC (UNI Europa 2016). IndustriAll is also prepared to set up trade union alliances, but as temporary institutions to deal with specific issues affecting the MNC, not as permanent institutions as in the case of UNI Europa (EMF 2011). The survey questionnaire does not examine the impact of trade union alliances, hence detailed assessment of their influence is not undertaken here.

Summary

Trade union organisations viewed the inclusion of voluntary measures and restricted minimum standards within the Directive and the Recast as limiting the capacity of EWCs to realise the objectives of the legislation expressed by European policy-makers. Although the Recast was viewed as partial progress towards an appropriate legislative framework, it was also a justification of the approach of trade union organisations insofar as it represented the ‘hardening’ of the legislation that underpins EWCs. The range of reforms proposed by the ETUC in 2017 demonstrates the extent to which trade union organisations viewed the Recast as only a partial improvement on the Directive. Furthermore, many of these reforms are long-standing proposals, several of which were initially voiced in some form prior to the adoption of the Directive. To compensate for the limitations of the legislation that underpins EWCs, trade union organisations have implemented a range of policies directed towards strengthening a union influence over the operation of EWCs. Crucial to this policy was the formation of committees with a brief to monitor and vet EWC activities and agreements, and the appointment of EWC coordinators to represent the ETUF within each EWC.

Conclusion

EWCs are contested institutions at two levels. First, BusinessEurope and other employers’ organisations advocate a voluntary approach to transnational information provision and consultation, while trade union organisations advocate solutions based on law. Second, managers responsible for EWCs within MNCs pursue information and consultation practices based on HRM, whereas trade union organisations emphasise those aspects of information and consultation that originate in industrial relations or industrial democracy.

The Commission initially advocated hard law solutions to transnational arrangements for information and consultation, but failed to secure the adoption of legislation, as unanimity at the Council was beyond reach. Successive proposals from the Commission on information and consultation provisions diluted the hard law elements and replaced them with a raft of voluntary arrangements relying on far from demanding minimum standards. Although qualified majority voting was available after the entry into force of the Maastricht Treaty, the perceived need to steer prospective legislation through a neoliberal-influenced Council promoted the dilution of the legislation in the form of more voluntary elements. As key members of the Commission were also political appointees, the influence of neoliberal policy choices within the Commission, particularly after 2000, should also not be downplayed. It should be noted, however, that both the European Parliament and the EESC consistently advocated policies on transnational information and consultation that comprised a wider range of hard law measures and more exacting minimum standards than those proposed by the Commission.

Both the Directive and the Recast required the Commission to report on the practices associated with the legislation and to recommend amendments if appropriate. In both instances, the Commission’s implementation reports accepted and shared evidence on

legislative and operational shortcomings (European Commission 2000, 2018a, 2018b) but failed to propose legal reform and delayed any amendment to the legislation as far as possible. This cycle of delay follows a pattern comprising stages in which the transposition process is viewed as incomplete, followed by claims that data are insufficient to make a judgement, and then the promotion of case study research to identify best practice, followed by arguments that best practice should be exchanged and promoted. Only when further impact assessment studies were completed and the political impact of the French Presidency was irresistible did the Commission propose the Recast (Dorssemont and Jagodziński 2018).

The shift towards favouring voluntary arrangements within the Commission brought it more into line with the position of BusinessEurope and some Member States. The political inclusion of a raft of voluntary arrangements and the acceptance of the principle of subsidiarity effectively weakened EWCs from without. When politically there was no other choice, BusinessEurope indicated a preparedness to negotiate with the ETUC to avoid, delay or dilute the Commission proposals. A preparedness to negotiate was a tactical ploy rather than a strategic choice. In the case of both the Directive and the Recast, BusinessEurope lobbied successfully to reduce the scope and to increase the voluntary elements of successive proposals.

Differences in emphasis between BusinessEurope and managers responsible for EWCs emerged in the context of the Recast. In particular, and unlike BusinessEurope, managers did not think that the Recast introduced 'high obstacles', was too heavy a burden on MNCs or constituted a 'straitjacket' to the operation of EWCs, and most thought that the benefits of EWCs outweighed the costs. Furthermore, managers have been able to implement and develop over time an agenda based on the HRM aspects of information and consultation, while concurrently limiting those aspects of information and consultation that originate in industrial relations or industrial democracy. In short, managers have exploited the malleability of the institution to avoid compliance with aspects of the legislation, while ensuring that the institution serves corporate objectives, as Kinderman noted among German managers (2005).

The drift away from hard law solutions to transnational information and consultation towards negotiated voluntary solutions by the Commission was contrary to the preferences of the trade union organisations. Although trade unionists welcomed the Directive, they expressed wide-ranging concerns about its voluntary elements and weak minimum standards. Their concerns were mitigated by the expectation that the 1999 review of the Directive would address any shortcomings identified. By the time that the Recast was adopted in 2009, the European Parliament, the EESC and the trade union organisations had advocated more profound revisions to the Directive than were adopted. In consequence, while welcoming the revisions adopted in 2009, the reform agenda tabled by the ETUC in 2017 comprised several items that had been raised in some form prior to the adoption of the Directive. In short, the trade union organisations take the view that the Directive and the Recast are inadequate, that the inadequacies were identified at the time of the initial proposals for the Directive, and that legislative amendment is required if these inadequacies are to be addressed.

While liaising with the ETUC in the formulation of a revision agenda, the ETUFs assumed operational responsibility for EWCs. The objective of ETUFs in this regard was to bring a trade union influence to bear on the formation and practice of EWCs. Central to achieving this objective was the establishment of committees to monitor EWCs, the appointment of EWC coordinators to represent the ETUFs within EWCs and the publication of best practice guidelines.