Chapter 9
Enforcing the rights of EWCs

There are three points of departure regarding the enforcement of the rights of EWCs. First, Chapter 4 shows that EWCs are institutions engaged in information exchange rather than both information exchange *and* consultation, that information is often released too late for the EWC to influence corporate decision-making, and that the majority of EWC representatives do not think that EWCs have an effect on managerial decision-making. The intentions of European policy-makers thus need to be implemented in practice. Efforts to articulate EWCs with other institutions of labour representation (Chapter 5), to promote trade union involvement (Chapter 6) and to make training provisions available (Chapter 7), at best, have mitigated limitations to EWC practice. EWC representatives are thus faced with the challenge of enforcing their rights. Second, Chapter 8 shows that managers responsible for EWCs within MNCs downplay the information and consultation aspects of EWCs in preference for policies directed towards corporate added value, thereby protecting what is known as their 'managerial prerogative'. Furthermore, many managers use confidentiality as a means of limiting the flow of information to EWCs (Chapter 8) and are not prepared to comply with the terms of the legislation, quoting, among other sources, stock market regulations as restricting their capacity to fulfil information and consultation provisions towards employees (Pulignano and Turk 2016). To enforce the rights of EWCs, representatives must bring pressure to bear on managers in order to force their compliance with the regulatory framework. Third, a key element of the ETUC reform agenda includes 'effective and dissuasive sanctions, including a right to a temporary suspension of company decisions' (Appendix B, point 1). In addition to this, in point 2 (Appendix B), the ETUC desires specification of the legal status of EWCs and SNBs to remove obstacles to launching litigation against MNCs that deny these institutions their rights or obstruct them. Point 2 recognises that formal obstacles concerning the legal status of EWCs and their capacity to act in court confront EWCs in most Member States, a situation acknowledged by the Commission (2018a; Jagodziński and Lorber 2015). In short, the ETUC envisages that some EWC representatives will enforce the rights of EWCs and SNBs by means of recourse to law and thus realise the intentions of European policy-makers towards EWCs. The proposed legal reforms are intended to facilitate this process and constitute a development from about 2010 when discussions were under way involving the ETUC and ETUFs about mounting a coordinated strategic litigation campaign based on test cases where EWC practice does not meet the requirements of the legislation (Waddington 2011: 230). Although individual EWCs, with support from ETUFs, have subsequently taken cases to court to enforce rights, there has been no such coordinated litigation campaign to improve EWC practices by setting legal precedents.

European legislators clearly took the initial view that the parties to EWC agreements would voluntarily comply with the legislation even though the Directive included no sanctions for non-compliance. This view was largely reproduced in national law.[1] In a step towards remedying this error of judgement, European policy-makers referred to sanctions in the Recast and imposed general requirements on Member States when transposing the measure to introduce sanctions 'that are effective, dissuasive and proportionate in relation to the seriousness of the offence' (recital 36). This clause, however, was included in the Preamble to the Recast, rather than in the operative part of the instrument. In addition, Article 11 of the Recast places an obligation on Member States to ensure that managers and EWC representatives abide by their legal obligations and requires Member States to 'provide for appropriate measures in the event of failure to comply' with the legislation together with 'adequate administrative or judicial procedures […] to enable the obligations […] to be enforced'. This action shifts responsibility to the Member States for the introduction of an effective sanctions regime and also means that national practices are likely to influence if and how sanctions are sought in cases of managerial non-compliance.

Contrary to expectations, the uptake of these requirements by Member States has been limited in national transpositions with many retaining the rudimentary enforcement regulations adopted in connection with the Directive rather than introducing new substantive measures (Jagodziński 2014). The approach taken by these Member States is at odds with the requirements of the Recast and is contrary to interpretations of the European Court of Justice, which confirm that enforcement provisions are a substantive matter guaranteeing a 'genuine rule of law in the European context', which 'implies binding rules which apply uniformly and which protect individual rights' (European Court of Justice 1975: 17) rather than a technical matter. The Commission also acknowledged that enforcement of the Recast is problematic when reviewing the quality of the national transpositions of the Recast (2018b) but declined to take commensurate action to ensure that the legislation that it had proposed could be enforced, although the Commission did start a dialogue with the social partners on this topic (Dorssemont and Jagodziński 2018).

In the context of EWCs, there is a hierarchy of sources regarding their rules of operation and the enforcement of these rules. The legislation, currently the Recast, represents the highest level in the hierarchy and outlines the intentions of European policy-makers regarding objectives and practices. In a manner consistent with legal theory and the legal construct of EU law, European directives may generally not be a direct reference source for representatives or managers responsible for EWCs within MNCs, as directives are addressed by Member States and are not directly applicable to the practice of individual institutions. The national transpositions are the second highest

1. Given the concerns about the enforcement of EU legislation at national level at the time, this approach was hopelessly optimistic. Well before the adoption of the Directive, concerns surfaced about EU law enforcement in the context of the Single European Act and Article 8 of the European Economic Community. These concerns culminated in a Declaration on the Implementation of Community Law, annexed to the Maastricht Treaty, which required Member States to transpose Community directives fully and adequately into national law within specified deadlines, while ensuring that they are applied with the same effectiveness and rigour as national law (Snyder 1993).

level in the hierarchy of operation and enforcement. The national transpositions enable Member States to 'tailor' the strategies of achieving objectives set by European legislation to national industrial relations practices and traditions. It is beyond doubt that Member States are required to transpose EU legislation to ensure uniformity and effectiveness, while respecting the principle of subsidiarity. The extent to which national transpositions meet these criteria, however, is open to debate (Jagodziński 2014). It is also apparent that many of the minimum standards stipulated in European legislation become the standard specified in national transpositions, thus limiting advancement (Jagodziński 2014). A third level in the hierarchy of operation and enforcement is the negotiated agreement of the EWC, the central objective of which is to translate the general framework of the relevant national transpositions into everyday rules suited to the needs of the specific EWC. While these needs are contested (see Chapter 2), agreements underpin the operation of EWCs by regulating, *inter alia*, their objectives, specifying rights and duties, and outlining the resources available. The agreement is the measure in the hierarchy of operation and enforcement that is closest to EWC representatives.

In the absence of an effective legal means to enable EWCs to enforce their rights, it is no surprise that the ETUC and ETUFs emphasise enforcement in their reform agenda and the quality of agreements when EWCs are established. This chapter addresses three key questions regarding practice and enforcement: how knowledgeable are representatives of the regulations that apply to the EWC, what are the practical impediments to pursuing the rights of EWC representatives, and how do EWC representatives advance their rights? To address these questions, the chapter comprises two sections, the first of which examines the familiarity of EWC representatives with the regulations and thus their capacity to enforce the rights of the EWC. This section also examines the efforts of representatives to enforce the rights of the EWC by taking action within the EWC. The second section analyses 'serious disputes', as defined by EWC representatives, that might be expected to be taken to court in the event of a failure to agree with management. It assesses how representatives handle serious disputes and the implications of such disputes for trade union organisations. In the light of the scale of managerial non-compliance with the information and consultation regulations, this chapter argues that most representatives do not define this non-compliance as constituting a serious dispute. In seeking resolution of serious disputes, representatives opt for solutions within the EWC and acknowledge the difficulties of initiating legal action.

Familiarity with the regulations and their enforcement

In order to enforce the rights of EWCs, representatives need to acquire knowledge of their rights irrespective of their source within the hierarchy of operation and enforcement. This section establishes the extent of this knowledge and thus whether EWC representatives are equipped to enforce the rights of EWCs. Chapter 7 demonstrated that attendance at training sessions tends to improve the knowledge of EWC representatives of the regulations that underpin the operation of EWCs. The first stage of this section elaborates arguments on the extent of knowledge among EWC representatives about the European legislation (Directive and Recast), the national transpositions and the

EWC agreement. The second stage focuses on the EWC agreement and establishes how EWC representatives view the content of the agreement in relation to practice, the ease whereby it may be improved through renegotiation and the extent to which EWC representatives cite the terms of the agreement to management in attempts to enforce the rights of the EWC.

Knowledge of EWC regulations

Table 9.1 establishes the extent to which EWC representatives are knowledgeable about the three levels in the hierarchy of sources on EWC operation and enforcement. Reviewing the 'all' results confirms that the EWC agreement is closer to the EWC representatives than the national transposition measures and the European legislation insofar as 64.3 per cent of all EWC representatives agree to some extent that they have a good knowledge of their EWC agreement compared to 42.5 per cent and 37.9 per cent with a good knowledge of European legislation and the national transposition measures. It is also apparent that substantial minorities of EWC representatives are far from knowledgeable about the national transposition measures (29.0 per cent) and the European legislation (26.0 per cent). That more than 15.1 per cent of EWC representatives disagree to some extent that they are knowledgeable about their EWC agreements suggests that a minority of EWC representatives are not be able to enforce their agreement, as they are unaware of the detail of its content.

Table 9.1 also shows that, for each category of EWC representative, knowledge of the content of the EWC agreement is superior to that of either the legislation or the national transposition measures, confirming the relative proximity of the EWC agreement to representatives. Optimistically, office holders are the most knowledgeable about the three hierarchical levels of regulation, with a relatively small minority disagreeing to some extent that they have good knowledge of the EWC agreement (4.2 per cent). There are relatively more office holders reporting that they do not know much about the European legislation (15.2 per cent) and the national transposition measures (17.3 per cent). By comparison, however, EWC members are even less knowledgeable, particularly regarding the national transposition measures and the European legislation. On the basis of these data, it thus appears that any action to enforce the rights of an EWC would be reliant on the actions of office holders, confirming their 'leadership' role within the EWC.

Trade unionists, representatives with a coordinator present, and home country representatives are more knowledgeable than their paired counterparts on each of the three points in the hierarchy of sources on EWC operation and enforcement. Three points emerge from this observation. First, the more wide-ranging training opportunities available to trade unionists appear to be associated with a better knowledge of the regulatory framework (see Chapter 7). Second, differences in knowledge of the levels in the hierarchy of sources are most marked between representatives with an EWC coordinator present and those operating with no coordinator, suggesting that the detailed knowledge of the regulatory framework of coordinators is disseminated to EWC representatives. This finding again confirms the advantages of the ETUC/ETUF policy

Table 9.1 **Knowledge about EWC regulations**

	Strongly agree %	Agree %	Neutral %	Disagree %	Strongly disagree %	Don't know/ not applicable %	N
I have a very good knowledge of the content of the European Works Council Directive							
All	8.5	34.0	28.5	22.3	3.7	3.0	1,299
Office holders	14.3	45.5	24.4	13.8	1.4	0.6	469
EWC members	5.6	28.7	30.9	25.7	4.7	4.4	720
Trade unionists	9.0	35.5	28.2	20.6	3.7	3.1	1,116
Non-members	5.9	25.4	30.2	32.1	3.9	2.6	179
EWC coordinator present	6.2	33.4	32.4	23.1	3.6	1.3	799
No EWC coordinator	10.9	39.4	26.9	18.4	2.3	2.0	269
Home country representatives	7.8	34.6	29.8	22.2	3.8	1.8	286
Foreign representatives	8.7	33.8	28.1	22.3	3.7	3.4	1,013
I have a very good knowledge of the content of the national transposition measures on EWCs							
All	7.4	30.5	29.8	24.8	4.2	3.3	1,296
Office holders	13.7	40.7	27.4	15.4	1.9	1.0	468
EWC members	4.2	25.2	31.3	28.9	5.5	4.8	718
Trade unionists	8.1	31.7	30.2	23.1	3.8	3.2	1,113
Non-members	3.5	23.9	27.1	34.6	7.0	4.0	179
EWC coordinator present	8.8	34.2	31.7	20.6	2.6	2.0	796
No EWC coordinator	7.8	33.2	27.8	24.5	5.3	1.4	269
Home country representatives	9.2	32.3	29.0	23.8	3.6	2.1	286
Foreign representatives	6.8	30.0	30.0	25.1	4.4	3.7	1,010
I have a very good knowledge of the content of our EWC agreement							
All	16.7	47.6	17.6	12.2	2.9	3.0	1,290
Office holders	29.6	55.9	8.5	2.8	1.4	1.9	464
EWC members	10.2	45.1	20.5	16.9	3.6	3.8	716
Trade unionists	17.5	48.9	17.0	10.7	2.8	3.0	1,107
Non-members	11.9	39.7	21.2	20.6	3.7	3.0	179
EWC coordinator present	19.9	52.1	15.8	7.7	2.2	2.2	795
No EWC coordinator	18.9	49.4	18.0	10.2	2.6	0.9	267
Home country representatives	19.5	53.7	14.3	7.9	3.2	1.5	280
Foreign representatives	15.9	45.7	18.6	13.5	2.8	3.5	1,010

Note: These responses are only from those EWC representatives who had attended at least one EWC meeting.

favouring the appointment of EWC coordinators and the centrality of the contribution made by trade union organisations to the application of the EWC regulations. Third, foreign representatives are less knowledgeable than home country representatives on the EWC agreement. For foreign representatives, the national transposition measures that apply to their EWC will not be same as those introduced in their country of origin.

This may explain why home country representatives claim greater knowledge of the national transposition measures than foreign representatives, but the situation remains ambiguous, as the survey did not delineate between the national transposition measures that apply to the EWC and those applying to the EWC representative.

Operation of the EWC agreement

EWC agreements are negotiated and, by definition, are unlikely to meet all the requirements of EWC representatives. The purpose here is to establish whether the terms of EWC agreements, irrespective of their quality from the perspective of the representatives, are being met in practice: that is, do EWC representatives enforce the terms of the negotiated EWC agreement? As a minimum, practice should match the terms of the EWC agreement. Managers responsible for EWCs within MNCs argued that practice, in many cases, was superior to both the agreement and the terms specified in the Directive; hence, from their perspective, the Recast largely brought the legislation into line with extant practice (Pulignano and Turk 2016). A similar point was made in conjunction with a comparison of the rate of establishment of EWCs and their performance following the adoption of the Recast (De Spiegelaere 2016). If practice is below the standard set in the EWC agreement, it is an indicator of dissatisfaction and of the extent to which EWC representatives need to take action to reach agreed standards. How EWC representatives use the agreement to enforce standards is also examined by reference to the renegotiation of agreements and the extent to which EWC representatives cite the terms of agreements to managers as a means of enforcing their content. This analysis thus centres on the enforcement of rights within the EWC. The next section of this chapter examines the enforcement of rights by recourse to law: that is, by leaving the confines of the EWC and seeking support from external agencies.

Reference to the data for 'all' in Table 9.2 shows that almost a half of the EWC representatives view practice as being consistent with the content of the EWC agreement. A further 9.2 per cent of EWC representatives rate practice to be an improvement on the EWC agreement. Approaching 60.0 per cent of EWC representatives thus think that practice is, at least, consistent with the content of the agreement. No fewer than 22.2 per cent of EWC representatives regard practice as being inferior to the standards agreed in the EWC agreement. It is this group of EWC representatives that should be expected to take action to ensure that agreed standards are maintained in practice. Finally, 21.0 per cent of all EWC representatives do not know whether practice is inferior or superior to the terms of the agreement. The absence of a position on the relationship between practice and the agreement among this group of EWC representatives suggests that they are unlikely to instigate action to improve practice relative to the content of the agreement. It is surprising that 21.0 per cent of EWC representatives 'don't know' how EWC practice ranks alongside the content of the agreement, as only 15.1 per cent of all EWC representatives (Table 9.1) report that they disagree to some extent that they have a good knowledge of the EWC agreement. More than half of those unable to assess practice in relation to the content of the agreement, however, are those with a short experience as an EWC representative. It is noteworthy that, given the low levels

Table 9.2 **Practice and the EWC agreement**

	Practice is better than what is written in the EWC agreement %	Practice is consistent with what is written in the EWC agreement %	Practice is below the standards set out in the EWC agreement %	Don't know %	N
All	9.2	47.6	22.2	21.0	1,299
Office holders	12.9	52.9	25.9	8.4	468
EWC members	7.2	45.1	20.7	27.1	720
Trade unionists	10.2	47.2	23.0	19.6	1,115
Non-members	3.5	49.0	18.1	29.5	180
EWC coordinator present	9.9	51.5	22.7	15.9	795
No EWC coordinator	11.4	46.0	23.8	18.9	270
Home country representatives	11.0	55.2	19.3	14.5	287
Foreign representatives	8.6	45.3	23.1	23.0	1,012
Article 13	10.2	42.1	21.5	26.2	415
Article 6	8.6	50.4	22.6	18.4	884

Note: These responses are only from those EWC representatives who had attended at least one EWC meeting.

of satisfaction with the quality of information and consultation procedures (see Chapter 4), almost 60.0 per cent of EWC representatives consider practice to be consistent or better than standards defined in the founding agreement.

The contrast between office holders and EWC members is marked regarding the relationship between practice and the agreement. In particular, office holders are polarised in their evaluation of the situation: they are both more positive and more negative about this relationship than EWC members. Furthermore, markedly fewer office holders (8.4 per cent) than EWC members (27.1 per cent) are unaware of the relationship. This latter point is anticipated insofar as office holders would be expected to work most closely with the agreement. The 12.9 per cent of office holders who think practice is superior to agreement offers some support to the view of managers that practice is on a learning curve and may supersede the content of the underpinning regulations (Pulignano and Turk 2016). In contrast, the 25.9 per cent of office holders who rate practice to be inferior to the content of the agreement suggest that contestation remains a key concern and that many managers are prepared to engage in practices that do not meet the standards of the agreement to which they are signatory.

Polarisation within each category of EWC representative is a characteristic of the assessment of the relationship between the EWC agreement and practice. Throughout, between 42.1 per cent and 55.2 per cent of each category take the view that practice is consistent with the content of the agreement. Similarly, for each category, minorities of EWC representatives view practice to be superior and inferior to the content of the agreement, with those viewing practice to be inferior comprising the larger group in

each category. Apart from home country representatives, the group viewing practice to be inferior to the content of the agreement is at least twice the size of that taking the opposite view. Dissatisfaction with practice is thus more pronounced among EWC representatives than suggested by the managerial view, which regards practice to be superior to the content of EWC agreements in many cases (Pulignano and Turk 2016). The implied learning curve is thus absent in many cases. This observation is particularly important in the context of Article 13 agreements. Article 13 agreements are, by definition, relatively long-standing and *inter alia* are thus most likely to be subject to learning curve effects. This is not the case, however, with similar proportions of EWC representatives operating under Article 13 and Article 6 agreements regarding practice to be both superior and inferior to the context of the agreement. It should also be noted that all EWCs may be subject to a 'regression curve' as management and/or EWC representatives change, thus 'disturbing' established relationships.

Without recourse to external agencies, there are two options that may be implemented to improve compliance with EWC regulations. First, EWC representatives may seek to renegotiate the agreement to bring it up to the standard required by the legislation and/or the national transposition measures as a remedy to limitations in practice.[2] Second, EWC representatives may take the view that the agreement is satisfactory, but its standards are not upheld in practice, and thus may refer to the agreement within the EWC as a means of promoting respect for agreed standards.

The renegotiation of agreements also allows adaptation to changed circumstances and to new regulations. Chapter 1 noted that, by December 2018, no fewer than 369 (37.0 per cent) of the 998 active agreements had been renegotiated at least once. The extent of this renegotiation confirms that it is a strategy that may be employed to bring the agreement to a standard that meets regulations or changed circumstances. Among the survey respondents, 57.4 per cent reported that the agreement had been renegotiated or amended since 2009, 19.2 per cent indicated that no renegotiation had taken place and 23.4 per cent did not know if a renegotiation had taken place.

Table 9.3 shows that almost a half of all EWC representatives agreed that renegotiating the agreement was tough and time-consuming. This situation is broadly replicated among the different categories of EWC representatives listed in Table 9.3. The consistency of this result suggests that representatives may be deterred from renegotiating the EWC agreement as a means of improving practice by the difficulties inherent in the renegotiation process. Although substantial minorities of EWC representatives do not know whether renegotiation of the agreement is a tough and lengthy process, those closest to any renegotiation, office holders, were the most likely to agree that the process is very tough and time-consuming.

Table 9.4 raises three further points. First, those who had renegotiated or amended the EWC agreement since 2009 were more likely to agree that the process is tough and lengthy than those who had not renegotiated the agreement since 2009, suggesting that

2. It should be noted that legal standards are binding and enforceable even if the EWC agreement does not make any reference to them.

Table 9.3 **Industrial relations environment within the EWC***

Amending my EWC agreement is a very tough and lengthy process

	Strongly agree %	Agree %	Neutral %	Disagree %	Strongly disagree %	Don't know/not applicable %	N
All	12.3	35.2	25.5	9.2	0.7	17.2	1,291
Office holders	15.2	44.9	20.3	11.3	1.0	7.3	469
EWC members	10.6	30.9	27.3	8.4	0.5	22.3	712
Trade unionists	13.2	35.9	25.9	9.4	0.7	14.9	1,108
Non-members	7.3	31.5	22.9	7.7	0.6	30.2	179
EWC coordinator present	12.1	38.8	25.7	8.2	0.9	14.4	794
No EWC coordinator	14.6	32.8	27.2	13.3	0.3	11.8	267
Article 13	10.4	30.9	28.5	10.7	1.1	18.5	413
Article 6	13.2	37.4	23.9	8.4	0.5	16.5	878
Those who had renegotiated or amended the agreement since 2009	15.3	41.6	23.4	10.2	0.9	8.7	729
Those who had not renegotiated or amended the agreement since 2009	12.5	36.9	29.5	7.7	1.0	12.5	251

Note: * These responses are only from those EWC representatives who had attended at least one EWC meeting.

experience of renegotiation hardens opinion on the process. Second, trade unionists and representatives with EWC coordinators view renegotiation as a tougher and lengthier process than their paired counterparts. While a range of factors may account for these differences, it is likely that the pursuit of ETUF and trade union objectives by trade unionists and representatives with EWC coordinators may be a contributory factor: that is, management resist elements of the trade union renegotiation agenda, making the process more difficult. Third, and associated with the points mentioned above, representatives whose EWC operates under an Article 6 agreement view renegotiation as a tougher and lengthier process than those with an EWC established by an Article 13 agreement. The difficulties expressed by representatives on an EWC operating under an Article 6 agreement may reflect the impact of renegotiation processes conducted since 2009 to bring their EWC agreements into line with the Recast, as required by the legislation. It is clear, however, that the difficulties encountered in negotiations to bring EWC agreements into line with the Recast did not result in markedly improved information and consultation procedures within the EWC (see Chapter 4).

A second approach to achieving agreed standards of practice without reference to external agencies is for EWC representatives to refer to the EWC agreement as a means of reminding management of their obligations. Based on Table 9.2, it is anticipated that EWC representatives who viewed practice to be inferior to the content of the agreement would refer most frequently to the agreement in any attempts to bring practice to the level stipulated in the agreement. Table 9.4 offers limited support to this proposition.

Table 9.4 **EWC agreement: practice and enforcement**

Employee representatives at my EWC often refer to the EWC agreement to enforce our rights

	Strongly agree %	Agree %	Neutral %	Disagree %	Strongly disagree %	Don't know/not applicable %	N
EWC representatives reporting practice to be better than the agreement	6.1	33.2	29.7	21.7	4.0	4.8	134
EWC representatives reporting practice to be consistent with the content of the agreement	4.0	36.7	33.7	17.0	3.3	4.6	593
EWC representatives reporting practice to be inferior to the agreement	9.3	34.5	33.7	17.5	2.0	2.6	289

Note: These responses are only from those EWC representatives who had attended at least one EWC meeting.

Where practice is viewed as inferior to the content of the EWC agreement, 43.8 per cent of EWC representatives often refer to the agreement as a means of improving practice, where practice and agreement are consistent 40.7 per cent, and where practice is superior to the agreement 39.3 per cent. Where practice is inferior to the content of the agreement, EWC representatives make more frequent references to the agreement in an effort to improve the situation. EWC representatives are thus prepared to take initiatives within the EWC aimed at improving practice and implementing the terms of agreements. That 39.3 per cent of EWC representatives often refer to the agreement when practice is superior to the content of the agreement confirms the contested nature of EWC practice and suggests that maintaining such levels of practice is not a given and that making reference to the agreement is a means whereby superior practice can be maintained.

To summarise, among EWC representatives, knowledge of the EWC agreement is more pronounced than knowledge of the European legislation and the national transpositions. Office holders and EWC representatives with long service are the most knowledgeable on each of the three levels in the hierarchy of sources on EWC operation and enforcement. A substantial minority of EWC representatives are not knowledgeable about the underpinning regulations, suggesting that they are not in a position to enforce the rights of EWCs. While approaching half of the representatives view EWC practice to be consistent with the content of the agreement, more than 22.0 per cent of EWC representatives view practice to be inferior to the terms of the agreement. Although a substantial proportion of EWC representatives consider renegotiation of the agreement to be a tough and lengthy process, more than 36.0 per cent of agreements had been renegotiated by December 2018 as a means of either improving practice or bringing the agreement into line with the Recast. Similarly, and confirming the contestation inherent to EWCs, representatives often have to refer to the agreement to ensure that management comply with its terms, particularly if EWC practice is inferior to the content of the agreement. It should be noted, however, that only a minority of EWC

representatives refer to their agreements to enforce their rights, and the survey data do not allow assessment of the impact on practice of doing so.

Serious disputes and enforcement beyond the EWC

Since EWCs are contested institutions, the need for enforcement of regulations and agreements within EWCs is wide-ranging. Chapter 2, for example, illustrated that the objectives of management and representatives with regard to EWCs may differ substantively. Similarly, Chapter 4 showed that the standards at most EWCs regarding the quality of information and consultation procedures, the utility of the institution as a means of influencing corporate decision-making and the limited influence afforded to EWCs during restructuring certainly raise questions of enforcement and may underpin conflict within the institution. Similarly, the first section of this chapter demonstrated that renegotiation of the EWC founding agreement and frequent references by EWC representatives to the agreement in attempts to maintain agreed standards are regular features of EWC practice. These practices raise questions about the capacity of EWC representatives to enforce the required standards within EWCs. In contrast, Chapter 5 demonstrated that relations between management and EWC representatives are far from hostile, even though the requirements of the legislation are not met in most instances. This apparent contradiction raises a number of questions regarding the handling of conflict in connection with the operation of EWCs: for example, do representatives view management failures to meet their obligations under the legislation as forming the basis of serious disputes, and do representatives seek remedies in law to enforce the standards of the regulations?

These questions are of particular relevance in the light of the preferences within the ETUC and ETUFs for clarification on the legal status of EWCs and SNBs in order that they may launch litigation against MNCs more easily (Appendix B, point 2) and for the inclusion of effective and dissuasive sanctions in the legislation (Appendix B, point 1). In short, the ETUC and the ETUFs wish to create circumstances where recourse to the law is readily available in instances where management fail to comply with regulations, thereby enabling EWC representatives to seek solutions to managerial non-compliance outside the EWC and strengthening the 'dissuasive' character of sanctions, thus stimulating management to comply with the regulations. Implicit in these proposals is the recognition that it is not possible to ensure managerial compliance with legislation and agreements in all circumstances without, at least, the threat of recourse to law. Such a threat of recourse to law might mitigate the imbalance of power within the EWC where management are the principal source of information and have more resources in the form of financial, legal and corporate policy expertise.

This is not to argue that such a threat is absent under current arrangements. Since 1997 there have been at least 129 cases where EWCs have sought remedies in the courts to enforce regulations, an average of five per year (EWCdb).[3] Consistent with the sources

3. While the EWCdb is the most comprehensive source of information on cases taken by EWCs and SEWCs, it is likely to understate the total number of cases due to issues associated with the compilation of the database.

of dissatisfaction with EWC practice expressed by respondents to the survey, the most prominent topics on which cases were taken to court include the establishment and operation of an EWC and the definitions used in the EWC (114 cases); the quality of information and consultation procedures (94 cases); and corporate restructuring (55 cases).[4] It is also noteworthy that there is a marked national concentration within the cases taken to court, with 42.6 per cent appearing in French courts, 26.4 per cent in German courts and 15.5 per cent in UK courts.[5] These are the three countries with the largest number of EWCs operating under national transpositions, suggesting that the number of cases taken to court is associated with the number of EWCs based in the country. Other factors are also influential, as the number of cases pursued in French courts is greater proportionally than the number of EWCs based in France. Such factors are likely to include the extent of adversarialism and of litigation within national industrial relations systems and the advice offered by trade unions to EWC representatives.

This section examines the views of EWC representatives towards 'serious disputes' with management within the institution during the three years prior to the distribution of the survey. The interpretation of 'serious dispute' was left to the representatives who responded to the survey. The objective is to identify the extent to which representatives think serious disputes occur, some of the circumstances associated with these disputes and the means representatives pursue to seek resolution of such disputes. To these ends, the section comprises two stages, the first of which identifies the extent to which representatives define disputes as serious, while the second examines the actions taken by representatives to remedy serious disputes. Assessment of these issues allows examination of the viability of the ETUC strategy to facilitate access to the courts and identification of some of the issues that trade union organisations would need to address if such a policy were implemented.

Presence of serious disputes

Reference to the data for 'all' in Table 9.5 shows that 15.4 per cent of EWC representatives report the presence of a serious dispute during the three years prior to the distribution of the survey, while 67.9 per cent indicate that there had been no serious dispute. Given the shortcomings of the information and consultation arrangements at EWCs from the perspective of representatives (see Chapter 4), it is immediately apparent that very few EWC representatives regard the inadequacy of information and consultation procedures as the source of a serious dispute. That 16.7 per cent of all EWC representatives are unaware as to whether there had been a serious dispute in the preceding three years is a further indicator that a substantial minority of representatives are 'distanced' from the affairs of the EWC.

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4. More than one topic could be cited in any court case, hence the sum of the number of topics covered by court cases is greater than the actual number of cases taken to court.

5. Of the complete range of court cases, the number of cases that were brought before the French courts is 55; for the German courts, this number is 34; UK courts, 20; Belgian, 5; Austrian, 4; Italian, 3; Slovakian, 2; Swedish, 2; Dutch, 2; Luxembourg, 1; and Norway, 1 (EWCdb).

Table 9.5 **Has there been a serious dispute between the EWC representatives and management over the functioning of your EWC during the previous three years?***

	Yes %	No %	Don't know %	N
All	15.4	67.9	16.7	1,299
Office holders	21.2	74.2	4.6	467
EWC members	12.6	65.2	22.3	721
Trade unionists	17.0	68.8	14.2	1,115
Non-members	7.1	62.7	30.3	180
EWC coordinator present	18.5	68.3	13.3	799
No EWC coordinator	14.4	76.3	9.3	268
Article 13	10.6	68.9	20.5	418
Article 6	18.0	67.4	14.7	881
EWC representatives based in MNCs with headquarters in:**				
Nordics	14.2	67.1	18.8	253
LMEs	23.2	63.8	13.1	310
CMEs	14.2	69.9	15.9	433
MMEs	11.1	69.7	19.2	296

Notes: * These responses are only from those respondents who had attended at least one EWC meeting.
** There were very few responses from EWC representatives based in MNCs with headquarters in EMEs, hence this category is excluded from the table.

Office holders, trade unionists and representatives with a coordinator present are more likely to report the presence of a serious dispute than their paired counterparts. In the case of office holders, the greater reported presence of serious disputes may result from a closer proximity to the centre of events. Similarly, the presence of an EWC coordinator and trained unionised EWC representatives may result in a greater knowledge of the rules applying to the EWC, which may also contribute to the occurrence of serious disputes. It is also noteworthy that the 'don't know' responses for each of these categories are among the lowest reported, suggesting that it is a shift from 'don't know' to 'yes' that is the primary influence, whereas the 'no' responses remain fairly constant. Representatives at EWCs operating within the voluntary arrangements of Article 13 agreements are less likely to report the presence of serious disputes than their counterparts at EWCs operating under Article 6, which may reflect longer-standing relationships within the EWC.

Reference to the country clusters shows that representatives based in MNCs headquartered in liberal market economies are the most likely to report the presence of serious disputes. In short, serious disputes are most frequently reported in MNCs based in countries with no long-standing tradition of works council representation. Serious disputes were reported at a high frequency in both US- and UK-based MNCs. Although it was mentioned above that more than 40 per cent of all court cases appear in French courts, the presence of serious disputes in MNCs based in mixed market economies is relatively infrequent, suggesting that peculiarities within national industrial relations systems underpin the pattern of results. It is also apparent that around two-thirds of

Table 9.6 **Occurrence of serious disputes and timing of information and consultation procedures**

	Serious conflict %	No serious conflict %	Don't know %	N
All	15.4	67.9	16.7	1,299
Before the managerial decision is finalised	8.5	79.1	12.5	261
After the managerial decision is finalised, but before implementation	18.0	67.3	14.7	570
During implementation	17.9	67.3	14.8	243
After implementation	20.3	62.1	17.6	126

Note: These responses are from only those respondents who had attended at least one EWC meeting.

representatives from each of the country clusters do not think that a serious dispute occurred in the three years prior to the distribution of the survey.

Given the absence of serious disputes reported by around two-thirds of EWC representatives and the inadequacy of information and consultation procedures at EWCs, Table 9.6 presents data on the extent to which EWC representatives report serious disputes in relation to the timing of information and consultation procedures. Two points are immediately apparent from Table 9.6. First, the later information and consultation procedures take place, the greater the likelihood that EWC representatives report the presence of a serious dispute. Second, even when the timing of information and consultation procedures precludes representatives from influencing the content of managerial decision-making and the implementation of a managerial decision, the majority of representatives report no serious conflict. In short, when managers fail to comply with the regulation, the majority of representatives do not regard the matter as reason for a serious dispute.

Interpretation of these findings is far from straightforward. A variety of factors are likely to contribute to an explanation, including:

- a tacit, but commonly understood, imbalance of power between EWC representatives and management, coupled with an implicit consensus that management are the distributor and source of information that they can release at will;
- an unwillingness on the part of EWC representatives to engage in conflicts with management, resulting in the downplaying of the infractions of information and consultation procedures, including an unwillingness to admit that they were serious;
- a belief that the model type of information and consultation practices, as outlined in the legislation, is a distant theoretical model, and, in practice, deviations are commonplace and acceptable, and may constitute the 'norm';
- an impact of local industrial relations practices, particularly the functioning of works councils and trade unions, regarding sanctions;
- a lack of knowledge or consensus among EWC representatives on how to proceed to address the source of the conflict.

The survey findings do not allow a ranking of the relative importance of these explanations. It is apparent, however, that, although the vast majority of representatives view the quality of information and consultation procedures to be inadequate, very few representatives view this inadequacy to be the source of a serious dispute. On the contrary, around two-thirds of representatives reported the inadequacy of information and consultation procedures as an insufficient reason for a serious dispute. This brings into question the key assumption that underpins the ETUC proposed reform of the legislative position of EWCs and sanctions: namely, will representatives pursue managerial infringements of the regulations in court? That is, if litigation were more readily accessible, would EWC representatives be more willing to address inadequacies within the EWC by turning to litigation? It is this issue that the next stage of the analysis will address.

Handling serious disputes

This stage examines how those representatives who identified a serious dispute (N = 200) handled the situation: that is, was a resolution to the dispute sought within the confines of the EWC or did representatives take the dispute to court? In selecting those representatives who identified the occurrence of a serious dispute, the analysis focuses on those who would be expected to be most likely to take a case to court to resolve their dispute. Table 9.7 presents the initial results and shows that representatives are likely to pursue several avenues in order to seek resolution of serious disputes. The preference of representatives is to seek resolution of serious disputes within the EWC. Around 80.0 per cent of representatives 'always' or 'mostly' refer to the founding agreement and more than 70.0 per cent to the legislation in order to resolve a serious dispute, thereby keeping the dispute within the EWC. Procedures for conflict resolution specified within EWC agreements are thus essential if conflict is to be handled within the EWC.[6] Over half (55.5 per cent) of representatives are 'always' or 'mostly' prepared to seek assistance from a trade union. While, technically, this action may involve going outside the EWC, the presence of a coordinator on the EWC encourages this action, as 60.2 per cent of representatives with a coordinator are prepared to pursue this option. Once again, this confirms the centrality of the coordinator to articulation between EWCs and trade union organisations.

It is relatively rare that an independent mediator is appointed to help resolve serious disputes (19.7 per cent). This is not surprising, as this action not only involves taking the matter outside the EWC, but also requires that an agreement on the independent mediator be reached between management and the representatives. Seeking support from a mediator also brings into question adherence to Article 9 of the Recast, which requires central management and the EWC to work in a spirit of cooperation. It is also apparent that it is relatively rare for the workforce represented by the EWC to be mobilised to provide support (12.0 per cent), further supporting the idea that there

6. The EWCdb includes only 27 EWC agreements that refer to the provision of fees to the EWC should litigation be entered into. Financial resources are thus not readily available to the majority of EWC representatives should they decide to take a case to court.

Table 9.7 **How did the EWC handle the dispute(s)?**

	Always %	Mostly %	Some-times %	Rarely %	Never %	Don't know %	N
We referred to the agreement to support our arguments	45.8	33.8	14.5	2.0	0.5	3.3	185
We referred to the legis-lation (Directive, national legislation) to support our arguments	41.1	30.3	16.6	3.1	7.1	1.9	187
We asked a trade union for help	29.6	25.9	16.1	9.5	14.8	4.7	182
We made use of an inde-pendent mediator to resolve the dispute	8.0	11.7	6.8	10.7	51.8	11.1	180
We mobilised workers to support our arguments	5.5	6.5	14.6	17.7	46.8	9.0	181

is a 'distance' between EWCs and those they represent (see also Chapter 5) and that EWCs are not an effective means through which trade union actions can be organised (see Chapter 6). This finding also suggests that forcing management to comply with regulations through the mobilisation of the workforce is unlikely on a wide-ranging basis. Acknowledgement of this point may underpin the ETUC preference for statutory sanctions to enforce managerial compliance, although it should be acknowledged that there have been instances of mass workforce mobilisation in defence of the rights of specific EWCs (Whittall et al. 2009; Müller and Rüb 2009).

A further survey question asked whether legal proceedings were pursued to resolve the serious dispute identified by the representatives. Only 28 representatives, 14.0 per cent of those who reported the occurrence of a serious dispute, indicated that they had pursued legal proceedings, while 152 (76.0 per cent) indicated that no legal proceedings were initiated.[7] As fewer than a quarter of all respondents are content with the quality of information and consultation procedures (Chapter 4), it is remarkable that only 2.2 per cent of them (28/1,299) initiated legal proceedings to seek redress during the five-year period prior to the survey. In general terms, this suggests a reluctance on the part of representatives to initiate legal proceedings, the difficulty of pursuing such proceedings under the current arrangements and/or the resolution of the issues within the EWC.

When faced with a serious dispute, representatives on Article 13 EWCs are less likely to pursue legal proceedings (7.1 per cent) than their counterparts on Article 6 EWCs (16.7 per cent). It remains to be seen whether representatives of Article 13 EWCs are less litigious, work with regulations that impose restrictions on the taking of legal proceedings, are influenced by the voluntary arrangements that permeate Article 13 agreements or resolve the serious dispute within the EWC.

7. Twelve respondents did not know whether legal proceedings had been initiated.

Marked national variations in the initiation of legal proceedings are also apparent. In particular, only 2.6 per cent of Nordic and 8.4 per cent of representatives from coordinated market economies who reported the occurrence of a serious dispute indicated that they had initiated legal proceedings compared to 33.5 per cent of representatives from liberal market economies and 20.3 per cent of representatives from mixed market economies. These figures are influenced by the 25.9 per cent of representatives operating within US-based MNCs and the 34.0 per cent of representatives operating within French-based MNCs who had initiated legal proceedings in connection with a serious dispute. While it is surprising that Germanic representatives who operate within an industrial relations system that is permeated by law do not seek legal redress when confronted by a serious dispute, the fact that representatives operating in French-based MNCs choose to refer to the legislation may explain the high proportion of all EWC cases that arrive in French courts. In short, the data suggest that the French system promotes the seeking of legal redress by representatives.

The reluctance of many representatives to initiate legal action when confronted by a serious dispute raises the question as to why there were no legal proceedings. Table 9.8 presents the answer to this question. Leaving aside the 'other' response option, the most significant reason for not taking a serious dispute to court was that the issue was not important enough to go to court. Of course, this is a contradiction in terms: if a dispute is serious, then it merits being taken to court. It should be acknowledged, however, that additional factors may impinge on the decision not to initiate legal proceedings. Such an action, for example, may be viewed as damaging to long-term relations with management, which may have a more detrimental outcome than the consequences of the issue that is the subject of the serious dispute. Additionally, the absence of a consensus in the EWC may prevent any legal action from being taken. The 17.5 per cent of respondents who report this factor as influencing decision-making on legal proceedings suggest that cultural differences in the interpretation of events and/or differences in relations between home country and foreign representatives may intervene in decisions to take legal action. It also points to the damaging effects a breakdown in consensus among EWC representatives may have on the operation of the EWC.

Two further factors that may result in no legal action being taken and that centre on the support available to EWCs are 'we did not know enough about how to proceed', cited by 10.7 per cent of representatives, and 'we did not have enough resources for a court case', cited by 11.3 per cent of representatives. The absence of knowledge on how to proceed indicates a shortfall in extant trade union training arrangements, although this topic did not figure large in the training requirements of EWC representatives (see Chapter 7). The assessment of available resources is also related to the presence of a coordinator, with 15.8 per cent of EWC representatives without a coordinator mentioning this issue compared to 11.1 per cent of those with a coordinator, suggesting that coordinators may be in a position to wrest additional resources from trade union organisations to assist EWCs. Knowledge about how to proceed was influenced by the presence of a coordinator, with 20.1 per cent of representatives with no coordinator citing insufficient knowledge on how to proceed, while 9.6 per cent of representatives working with a coordinator were in a similar position. Coordinators thus appear to bring knowledge to the EWC on how to proceed with court cases. It should also be noted

Table 9.8 **Why didn't the EWC take a case to the court/press charges to resolve the dispute?**

	N=167	Yes %
We did not think the issue was important enough to go to court		26.1
There was no consensus in the EWC on this issue		17.5
The possible sanctions were considered too small to invest time and resources in such a process		12.5
We did not have enough resources for a court case (e.g. financial means, expertise)		11.3
We did not know enough about how to proceed		10.7
There are no provisions in national law allowing EWCs (and/or their members) to go to court		9.6
We were afraid of the consequences for the EWC representatives		8.1
The trade union advised us not to go to court		4.2
Other		26.6

Note: Respondents could indicate as many reasons as appropriate, hence the sum of the percentage data is greater than 100.0 per cent.

that every representative who mentioned that 'the trade union advised us not to go to court' worked in conjunction with a coordinator, further suggesting that advice from the trade union via the coordinator may bring experience of previous court cases to the attention of the EWC.

Two further reasons why no legal action was taken are directly related to the ETUC reform agenda. 'The possible sanctions were considered too small to invest time and resources in such a process' was cited by 12.5 per cent of representatives, while 9.6 per cent mentioned 'there are no provisions in national law allowing EWCs to go to court' as a reason for not going to court. The perceived inadequacy of the sanctions among representatives as a reason for not taking legal action lends support to the ETUC reform agenda, which explicitly calls for more demanding sanctions, including those beyond financial penalties, when management fail to comply with the regulations (Appendix B, point 1). The absence of provisions in national law allowing EWCs to go to court reflects the inadequacy of the transposition process and the failure of European policy-makers to exert control mechanisms. It is noteworthy that representatives on EWCs operating under Article 13 were more likely to cite this reason (18.9 per cent) than their counterparts on EWCs operating under Article 6 (6.3 per cent). Representatives thus view the voluntary Article 13 arrangements as having more limited access to legal redress. Two points are raised by these data. First, the Commission has acknowledged limitations in several national transpositions of the legislation (2018a, 2018b), but has declined to intervene to address these limitations. This is contrary to the duty of the Commission (Dorssemont and Jagodziński 2018) and impedes the operation of EWC legislation. Second, any measure to clarify the legal status of EWCs and thus their capacity to take legal action is likely to eliminate some of the reasons why legal proceedings are not initiated and thus facilitate the procedural aspects of EWC operation (Jagodziński and Lorber 2015). That 8.1 per cent of EWC representatives reported that they did not pursue litigation because they were afraid of the consequences of such action is further evidence of the inadequacy of the legal framework, as the finding indicates that these

EWC representatives do not think that the legal framework is robust enough to preclude managerial retaliation. The large proportion of respondents reporting 'other' (26.6 per cent) may be an indication that the issue at hand was resolved within the EWC, but this possibility was not pursued within the survey.

In summary, serious disputes are extremely rare, particularly in the light of the perceived inadequacy of information and consultation procedures. Most representatives attempt to address serious disputes within the EWC, thus emphasising the importance of imparting knowledge of agreements and national transpositions in training programmes, appointing coordinators to provide detailed advice on experiences of other EWCs and setting the terms of EWC agreements to allow for litigation. Very few serious disputes resulted in court cases. A range of factors explain why serious disputes were not taken to court, prominent among which were issues relating to internal EWC politics, such as the need to achieve consensus among representatives, the importance of the issue at the heart of the serious dispute in relation to the ramifications of the court case, and trade union advice. In addition to these issues arising from internal politics, issues relating to the legislation are further reasons why legal action is not pursued, in particular the inadequacy of sanctions and the limitations of some national transpositions of the European legislation.

Conclusions

From the perspective of the representatives, the majority of managers do not comply with the information and consultation requirements of the legislation. The need to enforce the requirements of the legislation is thus paramount. Efforts to articulate EWCs with other institutions of labour representation, to facilitate trade union involvement and to enhance training opportunities for representatives have proved insufficient to ensure managerial compliance with the legislation and thus the intentions of European policy-makers. To address this situation, the ETUC reform agenda is designed to dissuade managers from non-compliance with the information and consultation regulations by creating the circumstances in which the threat of effective and readily available legal action combined with proportionate sanctions to combat managerial non-compliance is enhanced.

Where EWC practice is perceived by representatives to be inferior to the terms of the founding agreement and where representatives have identified serious disputes, representatives primarily attempt to redress the situation within the EWC by reference to the founding agreement and/or the legislation, rather than going outside the institution and pursuing legal action. To enforce rights within EWCs requires knowledge of the regulations. Among representatives, knowledge of these regulations is widespread but uneven, with knowledge of the founding agreement surpassing that of the national transposition measures, which, in turn, is greater than that of the European legislation. For each of these levels in the hierarchy of operation and enforcement, substantial minorities of representatives are unfamiliar with the regulations governing the institution. While some of these representatives are recent appointees, the extent of unfamiliarity with the regulations suggests that substantial minorities of representatives

are unable to enforce the rights of EWCs. A lack of familiarity with the founding agreement may also contribute to an explanation of why 21.0 per cent of representatives do not know whether practice within the institution matches or is better or worse than the terms of operation specified in the founding agreement. In addition to attempting to improve practice by enforcing the rights of the EWC by reference to agreements and legislation, representatives have also sought to renegotiate founding agreements. Representatives, however, view renegotiation as a tough and time-consuming process, a view emphasised by representatives involved in the renegotiation of agreements since 2009.

Given the extent of perceived managerial non-compliance with the regulation, it is surprising that only 200 representatives, 15.4 per cent of all survey respondents, report the occurrence of a serious dispute and, of these, only 28 representatives indicate that they initiated legal proceedings. Two points arise from these findings. First, for a significant number of representatives, managerial non-compliance with the regulations does not constitute the source of a serious dispute. Second, very few of the representatives who report the presence of a serious dispute take the matter to court. Securing a consensus within the EWC among the representatives, involving the trade union(s) and ensuring that representatives have sufficient knowledge of the appropriate procedures are all factors internal to the EWC that can result in no legal action being taken. In addition, the current regulations reduce the prospect of legal action in that 12.5 per cent of representatives view the sanctions as inadequate and, for 9.6 per cent of representatives, the provisions of the national transposition measures preclude the initiation of legal proceedings.

The implications for the parties to EWCs are wide-ranging. From the perspective of representatives, the majority of managers do not comply with the information and consultation regulations but instead actively pursue the HR agenda, assessed in Chapter 8. BusinessEurope opposed the moderate reference to sanctions included in recital 36 of the Recast in wishing to maintain a position where there were no European-level sanctions for managerial non-compliance with the regulations. The Commission supported BusinessEurope in arguing that any sanctions should remain a matter of national rather than European competence, a position subject to debate in view of precedents on sanction-setting mechanisms in other areas of EU law.[8] In practice, the current situation thus confirms the viability of the BusinessEurope strategy. Moreover, the desire of most representatives to resolve disputes or improve practice by taking action within the EWC supports the BusinessEurope strategy, as this desire reduces the likelihood of court action. Further consolidating the BusinessEurope position and, no doubt, underpinning its resistance to any future change to the sanctions regime, the current threat of legal intervention is insufficient to persuade the majority of managers to comply with the regulations. In these circumstances, BusinessEurope is likely to lobby in favour of the *status quo*, thereby allowing continued and wide-ranging managerial non-compliance with the information and consultation regulations.

8. On environmental law, see Faure (2010); and, on criminal sanctions for market abuse, see European Commission (2020).

For European policy-makers, these findings constitute a rude awakening. From an initial position in which no sanctions were included in the Directive in the naïve expectation of compliance with the regulations, European policy-makers expected that the reference to sanctions in recital 36 rather than binding measures in the Recast would be sufficient to stimulate national legislators to adopt effective enforcement provisions and thus ensure managerial compliance with the regulations. Clearly, this expectation has not been realised in practice, with the consequence that information and consultation arrangements, a core purpose of the legislation, remain inadequate from the perspective of the representatives. Not only has the Commission failed to introduce an appropriate sanctions regime, it has also failed to monitor and control the quality of the national transpositions regarding sanctions (Dorssemont and Jagodziński 2018). Having acknowledged the problems related to sanctions, the Commission initiated an exchange between Member States on the topic. The results of this consultation remain to be seen. There are no indications, however, that this process will lead to an upscaling of sanctions or an easing of access to the courts.

Three factors compound the situation for European policy-makers. First, representatives cite the limited sanctions available under the current regulations as discouraging claims from being brought: that is, some representatives recognise that there is an issue to address, but do not do so because the regulations do not offer a satisfactory prospect of effective, proportionate and dissuasive redress. Second, it is the duty of the Commission to ensure that EU-level legislation is fully and accurately transposed to national level. It is clear that the Commission is failing in this task (Jagodziński 2014), a point that it acknowledges (2018a, 2018b), with the consequence that there are further limits to seeking legal redress for managerial non-compliance. Third, limits to seeking legal redress are accentuated by the ambiguity in the legal status of EWCs and SNBs in relation to the MNCs within which they operate (Jagodziński and Lorber 2015). European policy-makers acknowledge that these limits exist (European Commission 2018a, 2018b), but they have yet to address them, for reasons they decline to explain. The failure to address these points in practice endorses the BusinessEurope strategy of minimising sanctions to allow continued managerial non-compliance with the information and consultation regulations.

Efforts made by trade union organisations to articulate EWCs with other institutions of labour representation, to promote trade union involvement and to train representatives have been insufficient in overcoming the shortfalls in the Directive and, latterly, the Recast. Furthermore, within trade union organisations, it is implicitly acknowledged that widespread worker mobilisation is unlikely to take place as a means of reforming the legislation, although it has taken place within specific MNCs at times of crisis. To improve the quality of information and consultation procedures, trade union organisations are thus reliant on the actions of European policy-makers. This reliance is manifested in the emphasis on sanctions and access to justice. Although the ETUC welcomed the reference to sanctions in recital 36 of the Recast, it was disappointed that this reference was not included in the legislation as a binding measure and thus had hardly any impact on national enforcement provisions. The reform agenda promoted by the ETUC attempts to rectify this situation and to raise the threat of legislative action as a means of generating greater managerial compliance with the regulations.

The data presented here suggest that taking legal action would be a last resort, as representatives tend to opt for solutions to disputes within the EWC rather than resort to court action. In addition, the data indicate that, for a significant number of representatives, managerial non-compliance with the regulations does not constitute a serious dispute. This brings into question the assumption that underpins the ETUC strategy that representatives will enforce managerial compliance with the regulations by means of legal proceedings or the threat thereof when more effective sanctions and enforcement mechanisms are in place. If the majority of representatives do not view managerial non-compliance as serious, why should they be expected to initiate legal action to address the issue? The practical implication here is that trade union organisations would have to accompany their preferred legislative change with measures to shift the opinion and strategy of representatives. Among the measures that could be employed are support for representatives in the form of more resources, legal advice and training. In addition, the role of the coordinator could be developed to ensure that existing legal decisions and the experience of other EWCs can be brought to the attention of the representatives with the issue at hand and to raise expectations among representatives about the quality of information and consultation procedures. In these instances, actions are likely to require extensive trade union interventions and resources at local level to shift opinions on information and consultation arrangements at European level and within Member States.