

## Chapter 11

### Conclusions and prospects

European legislation in the form of the Directive and the Recast created and subsequently developed the initial opportunity for lay representatives to meet, network and present their concerns to management, as well as to engage in information and consultation activities with senior managers from MNCs. In addition to the intended and formal processes involved in the establishment of EWCs, information and consultation procedures and the selection of representatives, the legislation prompted institution building within trade union organisations intended to support the formal processes. In this context, standing committees were established by the ETUFs to monitor and ratify developments, training and advice arrangements were set in place, and procedures were implemented to articulate EWCs with other institutions of labour representation. The voluntary components of the legislation and the inclusion of a wide range of minimum, rather than actual, standards have ensured that the development of EWCs is uneven and qualified, and subject to negotiation within MNCs.

Exacerbating the unevenness in the development of the institution are the contested positions of the parties involved. European policy-makers view the legislation as creating circumstances for transnational information and consultation procedures that will add value to the MNCs within which they take place. The legislation, however, is characterised as soft law (Dorsemont 2010) with ambiguities in the definitions of key terms and scope for negotiation on the actual standards set in practice within each MNC. BusinessEurope opposed legislation of any form, but, when it recognised that legislation or a recast version thereof was politically inevitable, lobbied for soft rather than hard law elements with low minimum standards. BusinessEurope now acknowledges that the legislation has enabled managers to develop transnational HR strategies that benefit MNCs (2008). Managers responsible for EWCs within MNCs identify a wide range of added value elements as accruing from the legislation, while acknowledging that delivering on the information and consultation agenda is problematic and, hence, downplayed (Pulignano and Turk 2016). Evidence presented in this volume, for example, shows that the quality and timeliness of information and consultation procedures are generally poor and, in cases of corporate restructuring, do not allow EWC representatives to bring influence to bear. BusinessEurope argues that opting for non-binding solutions with rudimentary enforcement regulations ensures flexibility and does not generate burdens on MNCs. In practice, this approach allows managers to control information and consultation processes. A third competing position is that of trade union organisations. While welcoming the legislation in principle, trade unionists were disappointed with the content, particularly the voluntary elements, and the weakness of the minimum standards. It was accepted by trade unionists that the

Directive was a compromise solution. An understanding that the Directive would be reviewed in 1999 mitigated initial concerns, as it was thought that a revision would address the weaknesses of the Directive. The preference for hard law among trade union organisations contrasts markedly with the preference of European policy-makers for soft law and that of BusinessEurope for voluntary solutions. Trade union organisations view the poor practices of EWCs, particularly those associated with the inadequate quality of information and consultation procedures, as justifying the case for more wide-ranging hard law elements in the legislation, together with the reform of some substantive elements. Differences between the parties to EWCs on these and other issues ensure that the institution is contested, with the result that, to a considerable extent, each EWC is the result of circumstances specific to the MNC within which it is embedded.

In addition to being contested institutions, EWCs are institutions in process insofar as their condition recorded by the survey in 2018 will not remain constant. As social partners with different priorities contest the institution, there is no certainty as to the direction of any subsequent change. Such change may lead to more robust information and consultation arrangements or may accentuate the pursuit of managerial transnational HR strategies. In the light of contestation, it is reasonable to assume that both of these lines of development will be pursued in different EWCs. Some EWCs may remain stationary in their development, while others may regress from relatively advanced stages of development to a more rudimentary stage when confronted by adverse circumstances (Mählmeyer et al. 2017) Similarly, the institution is relatively immature with the initial legislation adopted in 1994 and subsequently amended in 2009.<sup>1</sup> While the Recast of 2009 does not appear to have had a marked impact on information and consultation practices, the commitment placed on the Commission to report on the implementation of the Recast (Article 15) and the subsequent debate may promote further legislative change, which, in turn, may lead to even further institutional change. In this context, the development of the institution will be influenced by decisions taken by policy-makers at European level and within Member States.

The uneven development of the institution raises the question of how many EWCs are compliant with the legislation. Case study evidence reported in Chapter 1 suggested that only a minority of EWCs experience consultation (Lecher et al. 2001: 134) or are involved in corporate decision-making processes (Kotthoff and Whittall 2014: 257–262), with the consequence that it is estimated that no more than 20 per cent of EWCs have developed to a stage where consultation with management has taken place (Kotthoff and Whittall 2014: 7). While based on the proportion of EWC representatives rather than of EWCs, the evidence presented in this volume is similar. EWCs are certainly institutions engaged in information exchange rather than both information exchange *and* consultation. On average, for example, 29.0 per cent of representatives report ‘useful information and consultation’ on items drawn from the subsidiary requirements agenda compared to 44.2 per cent reporting ‘useful information, but no consultation’ (Table 4.2). While the 29.0 per cent reporting ‘useful information and consultation’ in 2018 is an increase

---

1. In addition to the adoption of the Recast Directive, the coverage of the legislation changed with successive enlargements of the EU and the reversal of the UK opt-out.

on the 18.8 per cent reporting similar circumstances in 2007 (Table 4.2), these data indicate the progress that remains to be made if the intentions of European policy-makers are to be realised in practice. Similarly, only 20.8 per cent of representatives report information and consultation procedures as taking place before the managerial decision on the issue is finalised (Table 4.5), and 22.1 per cent report that EWCs are either ‘very effective’ (4.2 per cent) or ‘effective’ (17.9 per cent) as a means of influencing management decisions (Table 4.7). Regarding corporate restructuring, 46.9 per cent of representatives were involved in an extraordinary meeting called to discuss such events, only 26.1 per cent of which reported that the extraordinary meeting took place before management had finalised their decision on the matter at hand. In summary, the evidence suggests that between 20.0 per cent and 25.0 per cent of representatives view EWCs as realising the intentions of European policy-makers, a range broadly consistent with the estimation emerging from case study evidence.

The context of uneven development, contestation between the parties to EWCs, the realisation that EWCs are an institution in process and an acknowledgement that around three-quarters of representatives think that managers fail to comply with the regulations form the backdrop to these concluding remarks. It should also be noted that the situation of EWCs in 2018 has changed in detail but not in principle since 2007 when the initial survey was conducted, evidenced most clearly by the somewhat smaller majority of representatives dissatisfied with information and consultation arrangements in 2018 (71.0 per cent) compared to 2007 (81.2 per cent). The scale of reform required to meet the intentions of European policy-makers regarding the provision of information and consultation to the representatives of workers within MNCs thus remains vast. The 2018 survey data demonstrate that the reforms included in the Recast are insufficient to realise the intentions of European policy-makers in practice. Subsequent reform intended to realise these objectives, therefore, must be wide-ranging. To elaborate these issues, this conclusion will proceed in four sections. The first three sections will elaborate the position of the Commission and European institutions, BusinessEurope and managers, and trade union organisations on EWCs in the light of the survey evidence. The section on trade unions will also present the views of EWC representatives on the ETUC reform agenda. Unless otherwise stated, the evidence to be presented in these sections is drawn from the 2018 survey. The brief fourth section will speculate on the future development of the EWCs in the light of the evidence presented in this volume, the history of the development of the institution and the contrasting positions of the parties to the institution.

## **European Commission and other European institutions**

During a long and hard-fought campaign, the Commission overcame resistance from some Member States, particularly the UK, BusinessEurope and national employers’ associations to introduce the Directive, a process facilitated by the shift to qualified majority voting on the issue of information and consultation rights. At the time of its adoption, the Directive was viewed as an element of a nascent European industrial relations system in which employee participation promoted by the legislation would act as a counterweight to the impact of the European single market and allow worker

representatives to influence developments within such a market. Directives 2001/86/EC on the involvement of employees within European companies and 2002/14/EC on informing and consulting employees at national level exemplify further attempts to consolidate a European system of industrial relations (Jagodziński 2013).<sup>2</sup> The shift in the political direction pursued by the Commission and other European institutions, marked by the ascendancy of neoliberal policy prescriptions, led to the downplaying of the initial purpose of the Directive and of the Commission's commitment to develop a social dimension to the internal market (Chapter 2). The requirement to review the Directive by September 1999 enshrined in Article 15, for example, was implemented, and shortcomings in the measure were identified, but it was only in 2009 that minor reforms were adopted in the Recast. Similarly, the Commission report on the implementation of the Recast required by Article 15 of the Recast acknowledges a range of shortcomings (European Commission 2018a, 2018b) which have yet to be addressed by substantive reform. On the occasion of the adoption of the Directive, the Commission initially followed the line advocated by BusinessEurope, which argued that reform was not necessary (2008). In taking this position, the Commission ignored recommendations for more wide-ranging reforms from both the EESC and the European Parliament, even though the latter was heavily influenced by the right-of-centre and neoliberal EPP. Only the political intervention from the French Presidency of the Council compelled the Commission to abandon the same stance as BusinessEurope and adopt the Recast (Jagodziński 2009: 119). It remains to be seen how the Commission will eventually respond to the compelling evidence supporting reform of the Recast. There is reason to suggest, however, that only a similar political intervention to that of 2008 will induce the Commission to alter its current stance.

The situation of the Commission and European policy-makers is addressed in detail by reference to the information and consultation objectives expected from EWCs, institution building, negotiation and the current policy position. In the first three of these fields, the expectations of European policy-makers have yet to be realised. It is also clear that the Commission needs to make a substantial shift in policy if it is to address the shortfalls inherent in EWCs.

## Information and consultation rights

The primary purpose of the legislation concerns two interlinked features associated with information and consultation rights. The first of these features is intended to realise one of the fundamental rights of the EU to enable workers via their representatives to be informed of and to influence managerial decision-making; the second is to provide added value to MNCs in the form of improved decision-making, which contributes to improved economic performance (Mizrahi 2002; Krieger 1992). Issues associated with added value will be discussed below in the section on management. In the short-term, assigning influence to worker representatives over managerial decision-making

---

2. Other measures directed towards the same objective in the field of transnational worker participation include those on collective redundancies, transfers of undertakings, the European cooperative society, takeover bids and cross-border mergers.

---

was expected to mitigate the adverse effects of corporate restructuring, which the Commission correctly anticipated would be intense during the initial development of the European single market. In the longer term, enabling worker representatives to influence managerial decision-making was viewed as an element of a European social dimension to accompany the process of European integration.

Regarding the provision of information and consultation services to worker representatives, the evidence presented in this volume is clear-cut. The vast majority of representatives are unable to influence the content of managerial decision-making. In addition, EWCs tend to be, at best, institutions engaged in information exchange rather than both information exchange *and* consultation. The primary objective of the legislation is thus not being achieved for between 75.0 per cent and 80.0 per cent of the representatives. Management action or inaction is at the heart of this situation on four inter-related counts: most managers release information too late to enable worker representatives to influence the content of managerial decision-making; they do not engage in consultation; they do not seek agreed solutions with the EWC; and many of them cite confidentiality as a means of restricting the exchange of information and consultation on a wider range of issues. It is also questionable whether the majority of managers wish to engage in information exchange and consultation with EWCs. Given that these features characterised EWC practice before the Recast (Waddington 2011: 219–228), the current situation is a measure of the failure of the Recast. Even if all the improvements in the proportion of representatives reporting ‘useful information and consultation’ between 2007 and 2018, increasing from 18.8 per cent to 29.0 per cent, are assigned to the Recast, it is apparent that the measure has proved insufficient to address the challenge at hand. It is likely, of course, that some of the representatives reporting an improved performance between 2007 and 2018 do so on the basis of a learning curve rather than legislative change (De Spiegelaere and Waddington 2017). Indeed, managers responsible for EWCs within MNCs regard the Recast as merely bringing the legislation into line with practice: that is, ensuring that the legislation catches up with the learning curve (Pulignano and Turk 2016: 79–83). In short, the Recast has failed to allow EWCs to meet the expectations of European policy-makers regarding their primary information and consultation function. This situation is recognised by the Commission, particularly with regard to shortcomings in the consultation process which mean that EWC representatives have ‘very little influence in the decision-making process in their companies, notably in cases of restructuring’ (2018b: 6).

A purpose of the legislation on EWCs was to mitigate the imbalance between social and economic aspects of European integration. The inadequacy of the information and consultation services available to worker representatives fails to reinforce the social aspects of European integration and brings into question the commitment of the Commission to social sustainability, as outlined in the Europe 2020 strategy. Furthermore, the Commission recognises the imbalance in the information and consultation function of EWCs in that the social aspects enabling EWC representatives to influence corporate decision-making are being downplayed, whereas the economic aspects in the form of corporate added value are being accentuated (European Commission 2018a, 2018b), but has yet to suggest a means whereby this imbalance can be corrected.

## Institution building

A second aspect of the situation of the Commission and other European institutions with regard to EWCs concerns institution building. The focus here is on the direct impact of the legislation on institution building, particularly on the growth in the number of EWCs. In addition, the involvement of trade unions in the operation of EWCs is assessed together with the impact on articulation of reporting back requirements, as these features indicate a change in the character of institution building promoted by European policy-makers. Institution building implemented by BusinessEurope and trade union organisations to accommodate the arrival of EWCs are discussed in subsequent sections of this chapter.

The most straightforward form of institution building promoted by the legislation is the creation of EWCs and SEWCs. By December 2018, there were 998 EWCs in operation. As fewer than 50 EWCs were established before the adoption of the Directive and almost 500 were formed between September 1994 and September 1996, it is clear that the legislation promoted significant institution building that would have been unlikely in the absence of the Directive.

Figure 1.1 shows that the rapid growth in the number of EWCs between 1994 and 1996 was followed by a period of much slower growth to 2018. The Commission acknowledged that the rate of formation of new EWCs was too slow and regarded the establishment of new EWCs as a specific objective of the Recast. To this end, the Recast placed a duty on managers to release information on the size of the workforce (Article 4(4)) and to set in place the conditions necessary for the establishment of EWCs in the form of communications, translation and interpretation services (Article 4(1)), while providing for management and the appropriate employers' associations and trade union organisations to be informed about the initiation of negotiations to establish an EWC (Article 5(2)(c)). These measures failed to increase the rate of formation of EWCs after 2009 (Figure 1.1), confirming that the amendments included in the Recast are insufficient to meet the objectives they were intended to achieve. Again, this failure of the Recast and the reasons for it are acknowledged by the Commission (2018a: 39), albeit without any accompanying commitment or recommendation for reform.

In the absence of a registration procedure, there is no certainty regarding the number of MNCs that meet the workforce thresholds specified in the legislation. The most recent estimate advanced by the Commission is that 2,400 MNCs fell within the scope of the legislation in 2018, with an accompanying rate of coverage of 44.2 per cent.<sup>3</sup> Almost a quarter of a century after the adoption of the Directive, established institutions do not cover more than half of the MNCs that fall within the scope of the legislation. The limits to the institution building directly generated by the legislation are thus clear-cut.

Another feature of institution-building directly influenced by the legislation concerns the involvement of trade union organisations. For reasons never explained and to the chagrin of trade unionists, the term 'trade union' did not appear in the Directive. The

---

3. The Commission reports that 1,060 EWCs and SEWCs were in operation at the time of its estimate of 2,400 MNCs falling within the scope of the legislation, hence the rate of coverage is 44.2 per cent (2018a: 19).

trade union response to this exclusion was to promote their involvement in the form of trade unionists serving as EWC representatives and the appointment of unionised EWC coordinators to advise on practice and policy, to support the (re)negotiation of agreements and to organise training for EWC representatives. Inevitably, without any legal underpinning, the extent to which these aspects of the trade union response were applied varied between EWCs, in no small part due to variations in the level of unionisation within MNCs. Over time, however, it would appear that trade union organisations developed practices that consolidated their involvement despite their exclusion from the Directive (Waddington 2011: 28–55).

The Recast marked a shift in policy within the Commission regarding the role of trade unions in institution building. In particular, the Recast ensured that trade union organisations may be called upon by SNBs to provide experts (Article 5(4)), have the right to participate in negotiation meetings at the request of the SNB (Article 5(4)), and are informed when negotiations directed towards the establishment of EWCs commence (Article 5(2)(c)). In addition, indirect endorsement of the trade union role was provided by recital 33 and Article 10(1), which acknowledged that representatives require training to undertake their transnational duties. As trade union organisations provide much of the training available to EWC representatives, these measures in practice consolidate trade union involvement. The inclusion of trade union organisations in the institution building process recommended by the Recast was opposed by BusinessEurope, which, in response to a late draft of the legislation, commented that ‘the text is biased in favour of trade unions, giving them undue legal recognition and a major role that corresponds neither to their influence in Europe nor to the interests of workers themselves’ (2008). The Commission thus rejected the position taken by BusinessEurope in this regard.

A further feature of institution building developed by European policy-makers concerns the introduction of a requirement in the Recast (Article 10(2)) for EWC representatives to report back to those they represent. This measure was introduced on the understanding that vertical articulation between EWCs and those they represent is poor, with the consequence that there is a political ‘distance’ between EWCs and those they represent. The objective of the reporting back requirements was thus to shorten this distance and anchor workers in information and consultation processes beyond the act of voting for EWC representatives every four years. The survey data demonstrate that, although the inclusion of a right to report back is a necessary condition for vertical articulation, it is insufficient to ensure the outcomes intended by European policy-makers (Chapter 5). Managements are influential in ensuring the distance between EWCs and other institutions of labour representation within the MNC remains wide. How managers ensure that this is the case is discussed below.

## Negotiation

Prior to 1990, industrial relations negotiations at European level were restricted to relatively sparse interchanges between BusinessEurope and the ETUC, often within tripartite arrangements involving the Commission (Falkner 1998: 55–77). A wide range of initiatives were launched to promote negotiation between the social partners at

various levels to promote European integration, included among which were initiatives involving EWCs. Four aspects concerning negotiation involving EWCs have been raised in this volume: negotiations between BusinessEurope and the ETUC to develop EWCs, negotiations within MNCs, the inclusion of a negotiations function in EWC founding agreements, and the negotiation of TCAs and joint texts. In each of these aspects of negotiation involving EWCs, the situation is qualified in no small part due to the contestation between the social partners inherent in the institution.

At the European level, negotiations between BusinessEurope and the ETUC were built into social policy formation by the Social Policy Protocol to the Maastricht Treaty. Fundamental differences between the social partners effectively rendered the negotiations that took place on EWCs as ineffective in reaching agreed positions that were subsequently adopted as legislation. In 1993/1994, for example, BusinessEurope and the ETUC were unable to reach agreement on a draft directive proposed by the Commission. This failure to agree enabled the Commission to table further drafts, out of which emerged the Directive. The impact of the negotiations was indirect insofar as some of the positions taken by the social partners in the failed negotiations were incorporated into the later drafts proposed by the Commission. Similarly, the view that no revision of the Directive was necessary advanced by BusinessEurope after 1999 was contested by the ETUC. These divergent positions precluded a negotiated revision of the Directive. Only when the French Presidency of the EU made it apparent that a revision would take place was BusinessEurope prepared to enter into negotiations on a revision, effectively on the premise of 'damage limitation'. The ETUC regarded the change of position on negotiations by BusinessEurope as a ploy to take the process beyond the time limit of the French Presidency, thereby eliminating any opportunity for a revision. As BusinessEurope was not prepared to negotiate within an agreed time limit, the ETUC rejected the negotiations option (Jagodziński 2009: 124).

Negotiations within MNCs have been widespread, illustrated by the negotiations that underpin growth in the number of EWCs. The imprecision of the terms included in the Directive and Recast, the absence of definitions for key terms and the reliance on minimum rather than actual standards in the legislation necessitated negotiations initially between management and the SNB and, during any renegotiation of EWC agreements, between management and the EWC. In these respects, the legislation achieved its objective in promoting transnational negotiations within MNCs. Limits to the promotion of such negotiations are also apparent. Estimates suggest, for example, that EWCs have been established in fewer than half of the MNCs falling within the scope of the legislation. To hinder the setting up of EWCs, some managers initially withheld information on workforce size (Case C 440/00, *Kühne and Nagel*; Case C 349/01, *ADS Anker*; Case C 62/99, *Bofrost*), hence the amendment in the Recast (Article 4(4)) to prohibit such tactics. Similarly, some managers refuse to commence negotiations on the establishment of an EWC, leading to the 'automatic' establishment of an EWC under the subsidiary requirements (EWC News 2016; ArbG Berlin, Beschluss vom 15.07.2016, 26 BV 4223/16). On the workers' side, some home country representatives resisted the establishment of EWCs on the grounds that such a development would dilute and/or impair their influence with management (Whittall et al. 2008).



A further limit on the negotiations function rests on managerial reluctance to concede a negotiations function or the failure of EWC representatives to pursue such a function to add to the information and consultations rights included in the legislation. In 2000, only 2.4 per cent of EWC founding agreements made provision for EWCs to engage in negotiations (Carley 2001), a proportion that remained almost constant until 2015 when 3.0 per cent of agreements included such a provision (De Spiegelaere and Jagodziński 2015: 26). It remains a moot point whether the terms of agreements have been superseded by practice, as, in 2007, 21.3 per cent of EWC representatives stated that their EWC had engaged in negotiations, a proportion that had risen to 34.0 per cent by 2018. While the accuracy of these data is debatable,<sup>4</sup> the point remains that only a minority of EWC representatives engage in negotiations beyond those around the founding agreement. This is not to downplay the institution building elements of the legislation in that these negotiations take place without any legal framework, suggesting that there is a spillover, which could lead to an appropriate form of regulation at some point in the future (Jagodziński 2007).

Consolidating the point that a negotiations function beyond that around the founding agreement involves a minority of EWC representatives are data on the negotiation of TCAs and joint texts, which appear to be increasing in number. It should also be acknowledged that the subject matter of some of these TCAs and joint texts is designed to address the shortfalls inherent in the practices of EWCs linked to the legislation (Chapter 10). The failure of the legislation to ensure the involvement of EWC representatives in decision-making on corporate restructuring, for example, prompted several EWCs to negotiate agreements on procedures to handle corporate restructuring. In this context, the inadequacy of the legislation has promoted negotiations intended to remedy the legislative shortcomings.

### Where do European institutions go from here?

At this juncture, it is apparent that there are marked qualifications in the fields of information and consultation, institution building and negotiations with regard to the intentions of European policy-makers. Although EWC representatives reported marginal improvements in the quality of information and consultation procedures following the adoption of the Recast it is far from clear that it was the Recast rather than learning curve effects that was responsible. Irrespective of the source of this marginal improvement, only about 20.0 per cent to 25.0 per cent of EWC representatives are content with the current quality of information and consultation procedures. Furthermore, the rate of formation of EWCs did not accelerate after 2009. The Recast thus failed to remedy the shortcomings of the Directive and to realise the intentions of European policy-makers. This failure places the Commission in a quandary on three counts.

4. As argued in Chapter 10, the question on negotiations was clear in that it asked 'Was your EWC involved in the negotiation of a formal signed agreement with management in the previous five years? By this, we do not mean an agreement on how to run the EWC (EWC agreement), but an agreement on a policy issue (such as a framework agreement or a transnational company agreement).' The authors suspect that respondents interpreted this question by reference to negotiations *per se* rather than those directed towards framework agreements or transnational company agreements. The resultant data are thus likely to overstate the involvement of EWC representatives in negotiations beyond the founding agreement.

First, current EWC practice meets neither the requirements of the Community Charter of the Fundamental Social Rights of Workers (1989), those of the Charter of Fundamental Rights of the European Union (2000), nor those of the European Pillar of Social Rights (2017). The Charter of the Fundamental Social Rights of Workers states that information and consultation should take place in due time, particularly in cases of technological change, collective redundancies and corporate restructuring (point 18). The Charter of Fundamental Rights of the European Union insists that '[w]orkers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided by Community law and national laws and practices' (Article 27). The European Pillar of Social Rights, adopted in November 2017, states that '[w]orkers or their representatives have the right to be informed and consulted in good time on matters relevant to them, in particular on the transfer, restructuring and merger of undertakings and on collective redundancies' (Principle 8). The failure of EWC practice to meet these standards that underpin European social policy constitute an imperative for change. Furthermore, the Commission has acknowledged these limitations of EWC practice in these fields (2018a, 2018b) and is thus formally obliged to act in its capacity as 'guardian of the Treaties' (Article 17(1), TEU) to align EWC practice with the content of the Treaties.

Second, the Recast was formally excluded from the 'fitness check' exercise launched by the Commission to assess the viability of EU legislation (SWD(2013)). In reporting on the Recast in a similar style to the 'fitness check', however, the Commission identified a series of 'inconsistencies' with other directives on information and consultation adopted as EU legislation (2018a: 42). These inconsistencies mark points where the Recast is weaker than other extant legislation with regard to the range of information that should be made available, the time frame for information and consultation procedures, and the obligation on management to respond to opinions expressed by worker representatives or to consult with a view to reaching an agreement.<sup>5</sup> The Commission thus acknowledges that the Recast is weaker than other legislation adopted in the field of information and consultation. To strengthen the Recast in these areas is thus necessary, but merely brings it into line with other legislation in the field. Of course, it should be noted that weak legislation is only one aspect of the challenge faced by EWCs. Enforcing existing legislation is just as problematic (Chapter 9).

Third, the Commission lacks a strategy and the political resolve to address the shortfalls in the current situation that it recognises. Until the ETUC withdrew from the initiative, the centrepiece of the Commission's strategy to improve the performance of EWCs was the preparation of a 'practical handbook for EWC practitioners' (2018b: 8) in which best practice would be shared on the assumption that it would subsequently be adopted throughout the institution. This proposal constitutes the culmination of a process that

---

5. The informal fitness check of the Recast Directive conducted by the Commission identified the Recast Directive to be weak compared to Directive 98/59/EC on collective redundancies with regard to the range of information that should be made available; compared to Directive 2001/23/EC on transfers of undertakings with regard to the time frame for information and consultation procedures; and compared to Directive 2002/14/EC on the information and consultation of workers with regard to the obligation on management to respond to opinions expressed by worker representatives or to consult with a view to reaching an agreement (European Commission 2018b: 42).

has passed through various stages, for the most part reproducing the events following the adoption of the Directive.<sup>6</sup> Given that the Recast only emerged following the intervention of the French Presidency, it is clear that, in the absence of a substantial revision agenda proposed by the Council or the European Parliament, the Commission can be expected only to maintain the *status quo*. Marked changes in the social policy direction of the EU prompted by the Presidency of Ursula von der Leyen may also lead to an altered stance within the Commission towards EWCs, but, at the time of writing, there is little evidence to suggest that this may be case.

Putting aside the ETUC withdrawal from the case study handbook initiative, which resulted in its demise (see Chapter 2), it is difficult to imagine how such an initiative could have addressed the scale of the challenges faced by EWCs. By definition, best practice is a contested term. Employers' associations and trade union organisations, for example, already distribute best practice examples to affiliated organisations in the form of handbooks, guidelines and training. These best practice examples emphasise different points depending on whether they originate in employers' associations or trade union organisations. Extant practice is currently influenced by the distribution of such material. Furthermore, it is likely that the Commission would have been reliant on those organisations that already distribute case studies to source the material for its handbook. It is also questionable whether further material on the minority of EWCs that are functioning adequately can inform decision-makers within the majority of underperforming EWCs of how to move forward. If management withhold information and do not consult with an EWC as a matter of choice, what useful information is gleaned by the EWC representatives confronted by such a management approach from a best practice handbook produced by the Commission that is not available in best practice manuals published by trade union organisations?

## Employers' associations and management

Employers' associations and managers responsible for EWCs within MNCs have pursued a bifurcated strategy in which BusinessEurope has attempted to politically subvert the institution at European level, whereas managers have exploited the lack of precision in the legislation to promote corporate objectives within MNCs while downgrading information and consultation requirements. The two elements of this strategy mirror that of German employers in their attempts to promote deregulation and liberalisation (Kinderman 2005). No claim is made here that these two strategic elements are coordinated. On the contrary, it is clear that a majority of managers responsible for EWCs have not heard of, or do not communicate directly with, BusinessEurope (Waddington et al. 2016: 68–71). Although the two elements of the

6. These stages in the reporting on the Recast Directive are very similar to those following the review of the Directive: Article 15 deadline for review of Directive (September 1999); identification of shortcomings of the Directive (post-1999), arising from a conference convened by the Commission, expert group meetings and reviews of academic evidence; presentation of reasons for not amending the Directive (post-1999); need to adopt other legislation on information and consultation; transpositions not completed; insufficient time to assess performance; conduct of case studies to illustrate best practice (2004); intervention by the French Presidency and adoption of the Recast Directive (September 2009).

strategy are relatively independent, they serve the same purpose: that is, ensuring that the legislation can be manipulated to serve corporate interests. In this section, the two elements of the employers' strategy will be examined separately.

## BusinessEurope and employers' associations

BusinessEurope and European employers' associations argue for deregulation and liberalisation of the European economy. Since the financial and sovereign debt crisis of 2008, this argument has focused on policies favouring austerity, weakening trade unions and collective bargaining, enhancing wage flexibility and limiting job security (BusinessEurope Reform Barometer, various dates). Within the context of these policy preferences, it is no surprise that BusinessEurope has steadfastly opposed legislation on information and consultation rights at European level and advocated voluntary solutions on a company-by-company basis. The presence of directives on information and consultation of workers is thus contrary to the preferred position of BusinessEurope. Two points are inextricably linked to this observation. First, differences in the preferred positions of BusinessEurope and trade union organisations have rendered the negotiation of agreed solutions between the social partners almost unworkable. Second, to minimise formal engagement with the processes of negotiation of information and consultation legislation, BusinessEurope has not implemented any wide-ranging institution building. The constitution of BusinessEurope, for example, still requires unanimity among member organisations in order to proceed, effectively offering a 'way out' of negotiations if one member organisation dissents from the majority view and allows a veto to any single member organisation. The absence of institution building by BusinessEurope is problematic for its relations with MNCs. Managers responsible for EWCs, for example, think that some institution building should be implemented by BusinessEurope in the form of the provision of legal support, more benchmarking of best practice and the delivery of managerial training (Waddington et al. 2016: 71). It is also evident that, by acting within such rigid arrangements, BusinessEurope has distanced itself from managers responsible for handling EWCs and the practices implemented by managers (Waddington et al. 2016: 63–72).

BusinessEurope opposed the adoption of both the Directive and the Recast. In both instances, it lobbied to resist or delay the measures and offered negotiations with the ETUC as a tactical ploy to the same ends. Eventually, political developments generated circumstances in which BusinessEurope was no longer in a position to resist legislation. In the case of the Directive, these circumstances centred on a perceived need to adopt social policy measures to complement those directed towards the European single market, whereas the intervention of the French Presidency undermined the resistance to change in the case of the Recast. When political opposition to these measures was deemed to be no longer sustainable, BusinessEurope adopted a number of positions in principle, including a preference for subsidiarity and proportionality, a call for the legislation to be minimalist in its coverage, requirements and enforceability, and a proposal for voluntary elements to be included in the Directive and retained in the Recast. These positions in principle also underpin the opposition of BusinessEurope to an EU policy on TCAs (2012).

The opposition of BusinessEurope to the Directive and Recast was layered insofar as both measures were also opposed on operational grounds. BusinessEurope argued that the Directive would, *inter alia*, slow corporate decision-making, entail significant costs, be conflictual and negatively affect investment, while also claiming that it disregarded established practice and national law (UNICE 1991a). Similarly, operational opposition to the Recast was expressed in terms of its impact in raising ‘high obstacles’ to effective corporate decision-making, its bias in favour of trade unions, and its perceived function as a straitjacket in forcing MNCs to adapt to a one-size-fits-all regulation (BusinessEurope 2008). While these operational concerns are second level compared to its objections in principle, they raise two points. First, BusinessEurope provides no evidence to support the operational concerns it raises, which remain assertions. Second, evidence from managers responsible for EWCs contradicts BusinessEurope’s assertions on EWCs as a significant cost, and on the Recast as raising high obstacles to effective decision-making and acting as a straitjacket (Weber et al. 2000; Pulignano and Turk 2016: 53–89). In addition, the research endorsed and funded by the Commission corroborates the managerial research and confirms the positive role played by trade union organisations in EWCs, finds no evidence of a slowing of managerial decision-making, and shows an integration between national law and practice and EWCs (European Commission 2016a; EPEC 2008; Vitols 2006). In short, each of the operational concerns raised by BusinessEurope is open to question and lacks supporting evidence.

The absence of supporting evidence on these operational concerns has not prevented BusinessEurope from achieving the objectives *vis-à-vis* the in principle objections to the institution. The reliance on low minimum standards, the limited coverage and the imprecision of the definitions within the legislation are testament to the efficacy of BusinessEurope lobbying and advocacy of its positions in principle. These features of the legislation ensure the ‘flexibility’, subsidiarity and proportionality required by BusinessEurope. Furthermore, the inclusion of Article 13 in the Directive guaranteed a voluntary element to the legislation, which BusinessEurope managed to extend in the Recast through the exclusion of agreements signed under Article 13 from legislative coverage. Adherence to these positions in principle and the enlisting of political support from European policy-makers has thus enabled BusinessEurope to shape much of the content of the legislation. As a consequence, political debate is now long removed from the hard law-based harmonisation proposals that included codetermination and characterised much of the period before 1990. Political debate is also far removed from the mass of research evidence on the shortcomings of EWCs. Although BusinessEurope was unable to prevent the adoption of the legislation, it has, ever since, successfully campaigned to subvert the legislation and to create circumstances within which managers can manipulate the legislation to secure corporate advantage without necessarily complying with the information and consultation requirements or facing legal consequences for breaches of the legislation.

### Managerial pursuit of corporate objectives

The legislation explicitly obliges management to engage in information exchange and consultation with workers’ representatives. Within the context of the different national

variants of the European social model, European policy-makers assumed that such information and consultation arrangements would contribute to corporate added value and introduce a social element to the European single market (Savoini 1995; Recast, recital 23). Seeking improvements in corporate added value and engagement in information and consultation processes were thus not viewed as antithetical by the policy-makers who drafted the legislation. Subsequently, worker representation and social dialogue at corporate level were recognised as essential for sustainability in general and corporate sustainability in particular (European Commission 2019). Many managers do not share these views. The survey evidence demonstrates that managers downplay the provision of information and consultation to worker representatives while accentuating the pursuit of corporate added value. Only 1.5 per cent of EWC representatives, for example, report that managers engage in information and consultation procedures before decisions are finalised and are willing to engage with the EWC (Chapter 8). Managers have thus exploited the imprecision and ambiguities in the legislation that result from the activities of BusinessEurope to advance a separate agenda at the crux of which is corporate value added. BusinessEurope (2017) and the Commission (2018a, 2018b) acknowledge the extent to which this HR agenda directed towards corporate value added has become embedded. Furthermore, the Recast has raised levels of satisfaction with the legislation among managers while concurrently failing to increase significantly satisfaction among EWC representatives (Commission 2018b: 38–39).

With regard to information and consultation rights, between 75.0 per cent and 80.0 per cent of EWC representatives report that managers fail to comply with the information and consultation requirements of the legislation. Among the areas where non-compliance is marked are the absence of consultation; the release of information only after management have finalised their decision-making processes, thereby eliminating any prospect of EWC representatives influencing the content of managerial decision-making; and the use of definitions of ‘confidentiality’ and ‘transnationality’ to limit information and consultation activities. In consequence, the vast majority of representatives view EWCs as an ineffective means of influencing management decisions. Furthermore, although European HR managers are the most likely to attend EWC meetings, they are also among the least likely to have available the information required by EWC representatives and to have the appropriate decision-making authority.

Managers cite an obligation to comply with stock market regulations as a reason for their failure to comply with EWC legislation (Commission 2016a; Pulignano and Turk 2016: 28–31). In practice, managers assign precedence to one group of stakeholders, shareholders, over another, employees. In addition, many managers question the underlying assumption of European policy-makers that employee participation and cooperation is a key element of European company performance. Only 37 per cent of managers, for example, report that a cooperative model of labour management decision-making improves company competitiveness in Europe (Vitols 2006: 146). A substantial proportion of managers thus ideologically question a key assumption of the legislation, which is also likely to contribute to their failure to comply with EWC legislation.

Two further observations are linked to these findings. First, the Recast has not markedly improved the rate of compliance with the legislation among managers. The Recast thus failed to meet one of its key objectives. Second, the inadequacy of managerial information and consultation arrangements impairs the capacity of trade union organisations to articulate EWCs with other institutions of labour representation within the company. In particular, the withholding of information and the absence of consultation limit the interest in EWC activities among those represented by the EWC, as the information is often available through other sources. Similarly, when information is released only after management have finalised their decision-making processes, the benefits of acquiring information from the workforce by EWC representatives are significantly reduced, as such information cannot be used to influence management (Chapter 5). As a result, the policy objectives of ‘permitting suitable linkage between the national and transnational levels of dialogue’ and creating ‘linkage between the Directives and the levels of informing and consulting employees established by Community and national law and/or practice’ promoted by the Recast (recitals 21 and 37) are effectively obstructed.

The managerial downplaying of information and consultation requirements has been accompanied by ever more sophisticated HRM policies intended to secure corporate value added. Immediately following the adoption of the legislation in 1994 and the establishment of the initial EWCs, managers reported value added accruing to MNCs from the institution (Lamers 1998; Hume-Rothery 2004; Vitols 2003). By 2016, no fewer than 70.0 per cent of managers reported that EWCs added value to the MNC, and 55.0 per cent thought that the benefits of EWCs outweighed the costs, whereas only 19.0 per cent thought that the costs outweighed the benefits (Pulignano and Turk 2016: 73–79). This situation was confirmed by BusinessEurope, which argued that the majority of managers see ‘that the EWC can add value to the company’, particularly by ‘building on an environment of trust, mutual respect, cooperation, a positive attitude and engagement’ (2017). In addition, managers report value added as arising from enhanced employee commitment to the goals of the enterprise, the promotion of corporate identity and the reduction or elimination of conflict (Pulignano and Turk 2016: 63–73). These findings were confirmed by a study endorsed by the Commission which showed that, over time, employers have been increasingly content with the legislation, as it has led to more effective decision-making, enhanced productivity, improved internal company communications and increased trust (Commission 2016a). The Commission acknowledges the benefits accruing to MNCs from EWCs (2018a, 2018b). In so doing, the Commission identifies a contrast between increasing satisfaction with the legislation among managers responsible for EWCs because of the value-added benefits and no increase in satisfaction among EWC representatives, the vast majority of whom are unable to influence company decisions (2018b: 38–39). In practice, the evidence demonstrates a shift in the utility of EWCs away from the initial target group of workers with a deficit of information and consultation towards a managerial HR agenda.

The presence of legislation on information and consultation arrangements constitutes a defeat for BusinessEurope, which prefers voluntary rather than legislative solutions in these areas. BusinessEurope, however, was able to ensure that its positions in principle resonated throughout the legislation with the consequence that a majority of managers

have been able to manipulate EWC practice to secure corporate value added while downplaying the information and consultation provision to worker representatives. The Commission acknowledges this imbalance. Furthermore, managers responsible for EWCs disagree with many of the operational objections to the legislation raised by BusinessEurope and instead view the legislation as sufficiently flexible for them to achieve their objectives.

## **Trade union organisations and worker representatives**

Chapter 2 showed that trade union organisations had campaigned for 25 years for the inclusion of transnational information and consultation provisions to accompany economic aspects of European integration before the adoption of the Directive in 1994. Disappointment with the content of the Directive was mitigated by Article 15, which committed the Commission to review the measure by 1999. Trade unionists thought that this review would lead to much improved legislation. Disappointment with the Recast, however, prompted the ETUC to formulate a reform agenda (Appendix B) in the hope of spurring further change. While this reform agenda is directed towards ensuring that EWC practice is more akin to the initial intentions of the European policy-makers who drafted the legislation, it is much curtailed when compared to the content of the pre-1990 legislative proposals.

To review the position of trade union organisations and worker representatives towards the legislation and its reform, this section comprises two stages. The first stage assesses the impact of trade union attempts to ameliorate the limitations of the legislation. The second stage presents the views of EWC representatives on the reform agenda of the ETUC. The argument running through these two stages is that measures taken by trade union organisations to improve EWC practice to date have proved insufficient to overcome the shortfalls of the legislation. As a consequence, the gap between the intentions of European policy-makers and EWC practice remains wide. To narrow this gap is the objective of the proposed reforms tabled by trade union organisations.

### Trade union responses to the limitations of the legislation

In response to the inadequacies of the legislation revealed by EWC practice, trade union organisations instigated a range of reforms and practices intended to mitigate the shortcomings of the legislation, its implementation and its enforcement. Institution building, articulation, trade union involvement and training were the foci of these reforms and practices. The impact of these four reforms and practices will be assessed below.

In contrast to BusinessEurope, trade union organisations favoured the establishment of a European system of industrial relations to complement the economic aspects of European integration enshrined in the single market and were thus prepared to build institutions to participate in the elements of such a system as they were established. To this end, the Stekelenburg Report, *For a More Efficient ETUC* (1990), recommended a



---

broad division of labour between the ETUC and the ETUFs, with the former taking prime responsibility for political relations with the Commission, and the ETUFs focusing on industrial matters, which include day-to-day responsibility for the oversight of EWCs. Of course, the distinction between political and industrial responsibilities is not rigid: the generation of ETUC policy on EWCs, for example, was the responsibility of a committee chaired by the ETUC with a membership drawn from the ETUFs and affiliates.

Within the ETUFs, committees were established initially with a brief to monitor and support EWCs and latterly to monitor and support EWCs, SEWCs and developments within MNCs. In all ETUFs, these committees are now standing committees, usually supported by permanent employees of the ETUFs, with members drawn from affiliated trade unions. These committees assist special negotiating bodies, provide guidance on EWC best practice regarding agreements and EWC activities, oversee EWC founding agreements and their renegotiation, and ratify any TCAs that may be concluded. In most ETUFs, a TCA is not considered valid unless ratified by the appropriate committee, thereby ensuring a degree of trade union control over such developments. In short, the ETUFs built an infrastructure within which EWC and SEWC practices could be monitored with the objective of improving practice. It should be noted, however, that the resources available to these committees is limited, with the consequence that the support available to EWC representatives is also restricted.

A second area in which trade union organisations have sought to mitigate the shortcomings of the legislation concerns articulation. In practice, trade union organisations have promoted horizontal communication among representatives between meetings and vertical communication between representatives and other institutions of labour representation within the MNC and with those represented by the EWC. Where horizontal and vertical communication are intense, representatives try to establish agreed positions and are more likely to develop a European identity and engage in cross-border solidarity. The challenge for trade union organisations is that fewer than half of the representatives are in frequent contact with their fellow representatives between meetings; most employees represented by EWCs are not well informed about, or arguably interested in, EWC activities; and representatives do not tend to ask for input from the local level to inform their decision-making at the EWC (Chapter 5). In short, when horizontal and vertical communication are in place, positive effects are reported, but such communication is only in place for a minority of representatives, with the consequence that national and plant identities, rather than a European identity, tend to inform the activities of EWC representatives. Two factors with origins in managerial practices inhibit communication. First, management limit communication between representatives and the local level and visits to the different sites of the MNC. Managers do this by applying confidentiality provisions (Tables 8.10 and 8.11) and preventing EWC representatives from visiting the different sites operated by the MNC (Table 5.13). Second, the majority of managers do not engage in consultation and/or fail to provide employees with timely information and consultation (Table 4.2). In consequence, representatives are less likely to prioritise vertical communication, as events at the EWC are likely to have been superseded elsewhere within the MNC (Chapter 5). Although the Recast endorses the right to report back and confirms the intentions of European policy-makers to reduce the isolation of EWCs from events

within the MNC, the terms of the Recast and the national transpositions are insufficient to address the challenge. Furthermore, trade union organisations have been thwarted in their attempts to intensify horizontal and vertical communication as a means of mitigating the shortcomings of the legislation on a widespread basis.

A third aspect of the trade union strategy to improve EWC performance concerns trade union involvement in EWCs. While the exclusion of any reference to trade unions in the Directive frustrated trade unionists, the specification of a limited role for trade unions in the Recast represented an acknowledgement by European policy-makers of some of the roles undertaken by trade unions in the operation of EWCs. In this sense, the Recast constituted a political step forward, as it provided some legal underpinning to selected forms of trade union involvement in the institution. This legal underpinning, however, is restricted to trade union roles in the establishment of EWCs rather than in their day-to-day operation. Independently of this legal underpinning, trade union organisations have sought to ensure that a coordinator is appointed to liaise between each EWC and the relevant ETUF, and that trade unionists are selected to serve as representatives. Both of these practices are associated with a higher quality of information and consultation procedures (Table 4.4), but not to the extent that the quality of those procedures meets the expectations of European policy-makers. The challenge for trade union organisations is that a substantial minority of representatives are not unionised and that almost 20.0 per cent of representatives report that their EWC operates without a coordinator, while a further 21.3 per cent do not know if there is a coordinator (Chapter 3). On these issues, trade union policies are beneficial, but improvements are required to achieve a more complete coverage. The addition of legal underpinning to a trade union role in the operation of EWCs would no doubt enable trade union organisations to extend the coverage of coordinators and thus improve practice.

A fourth element of the trade union strategy to mitigate the limitations of the legislation comprises the provision of training. Although the Recast introduced a right to training for EWC representatives, it has not led to an increase in the proportion of representatives actually attending training events (Table 7.1). Trade union organisations are integral to the training provision available to representatives and have recently focused on the delivery of single EWC training (Table 7.3). The benefits of training in terms of skill enhancement, awareness of the duties of transnational representatives and knowledge of the regulations are wide-ranging (Tables 7.5 and 7.7). Attendance at training events, however, is not enough to promote a higher quality of information and consultation procedures at the EWC (Table 7.6). Training is thus a necessary but insufficient element of any attempt to overcome the shortcomings of the legislation. From a trade union perspective, the volume of demand from representatives for more training and the provision of training on specific topics, notably analysis of corporate financial data and the strategies of MNCs, are outstanding demands that have yet to be met (Table 7.8). Similarly, it is open to question whether the resources, many of which are available through the budget lines of the Commission, and the time devoted to the training of EWC representatives constitute 'value for money' for trade union organisations given the marginal effects of training on EWC practice.

## Searching for a viable regulatory framework

The principal concern within trade union organisations and among EWC representatives is to create circumstances in which the legislation functions in practice as intended by the European policy-makers who drafted the measures. As noted above, the reforms and practices introduced by trade union organisations have, at best, mitigated the shortcomings of the legislation rather than ensured consistently satisfactory EWC practices. In this context, the ETUC drew up its reform agenda (Appendix B). Chapter 2 showed that the content of this reform agenda is significantly curtailed in comparison with the content of earlier proposals on transnational information and consultation arrangements, reflecting lowered expectations and current political realities. At the heart of the ETUC reform agenda are measures designed to improve EWC practice and raise it to a standard compatible with the initial expectations of European policy-makers. Gone are proposals to extend the coverage of the legislation by lowering the workforce size thresholds, to include a codetermination right to supplement information and consultation rights, or to increase the frequency of plenary meetings. Central to the current ETUC position is the introduction of more rigorous enforcement mechanisms. The objective here is thus to determine the extent of support among EWC representatives for this reform agenda. To this end, Table 11.1 reports the views of EWC representatives on aspects of the ETUC reform agenda.

While by no means a 'hard and fast' distinction, the items listed in Table 11.1 are concerned with strengthening the legal framework, promoting articulation with trade unions and improving operational matters. EWC representatives prioritise measures to strengthen the legal framework and to limit managerial discretion, highlighting the stark inadequacy of the current regulations. Furthermore, several of these measures were emphasised by EWC representatives in 2007 (Waddington 2011: 198–199), indicating a long-standing dissatisfaction with the legal framework and the limited impact of the Recast.<sup>7</sup> Although there are differences in degree, it is also apparent that support among EWC representatives is marked for all items of the ETUC reform agenda listed in Table 11.1.

Table 11.1 shows that the four items most heavily supported by EWC representatives are concerned with strengthening the legal framework and addressing shortcomings in the current legislation. Prohibiting the implementation of a managerial decision before consultation and higher quality information are fundamental matters that were implicit in the Directive but, due to the tentative wording of the legislation and the absence of monitoring of the transpositions by the Commission, failed to materialise in practice. Similarly, a demand for information on a wider range of topics illustrates the limitations on the scope of EWC agendas constrained by the inclusion of a narrow subsidiary requirements agenda that has acted as a standard-setting catalogue of competences (ETUI and ETUC 2013: 89–104). A more rigorous sanctions regime is explicitly requested in the form of stronger sanctions and is implicit in the demand

7. In 2007, the options for the reform agenda question were different, but 'consultation to take place before operational management decisions are implemented', 'time limits on the provision of information by management', and 'information to be provided by management on a wider range of issues' all received index scores of 4.22 or above, where 5 was the maximum score (Waddington 2011: 198–199).

for prohibition of the implementation of managerial decisions before consultation has taken place. While this position is understandable in the context of managerial failures to comply with the terms of the legislation, the implication is either that the threat of stronger sanctions will compel more managers to comply with the legislation or that EWC representatives will become more likely to pursue legal remedies. To be effective, the pursuit of legal redress is likely to require accompanying facilities to ensure easier access to justice for EWCs, such as a formal recognition of their legal standing towards courts of law, financial assistance to pursue cases and access to legal expertise. Chapter 9 shows that EWC representatives do not generally pursue legal remedies, even though they recognise that the quality of information and consultation procedures does not meet the standard set in the legislation. It remains to be seen whether EWC representatives are inhibited from going to court because of vague and inefficient legal frameworks, or whether they decide against taking legal action because they perceive the current sanctions as inadequate, thus diminishing the benefits of pursuing a legal resolution.

The Recast provided a legal underpinning to the involvement of trade unions in the establishment of EWCs, and research funded and endorsed by the Commission acknowledged the beneficial role undertaken by trade union organisations in supporting the day-to-day operation of EWCs (Commission 2016a). EWC representatives require the Commission to convert this acknowledgement into a legal measure by extending the legal underpinning of trade union involvement to strengthen articulation between trade union organisations and the operation of EWCs. Around half of the EWC representatives, for example, think that ‘trade unions should have more rights to assist my EWC’ and that ‘trade union organisations should provide more support to my EWC’, while 75.0 per cent think that ‘my EWC should have access to more resources’ including expertise, which is likely to emanate from trade union organisations. It should also be noted that office holders, representatives with a coordinator and trade unionists support these three measures more strongly than EWC representatives as a whole. Similarly, in 2007, ‘guaranteeing a formal trade union role’ and ‘guaranteeing a trade union seat on the EWC’ were points of agreement among the majority of EWC representatives (Waddington 2011: 198–199), confirming an enduring demand among representatives for trade union articulation with EWC operations.

Finally, Table 11.1 demonstrates wide-ranging support among representatives for measures to facilitate the day-to-day operation of EWCs. In particular, and consistent with both the ETUC reform agenda and the data presented in this volume, EWC representatives strongly support the introduction of more facilities for employee-only side meetings and improved access to the different sites of the MNC. Contrary to the ETUC reform agenda, however, 58.2 per cent of EWC representatives argue that ‘there should be more meetings per year’. The relatively low level of support for this issue contrasts with the marked effects of large numbers of plenary meetings on perceptions of the quality of information and consultation procedures (Tables 4.4 and 4.6). In their efforts to strengthen the legal framework, promote articulation between EWCs and trade union organisations and improve operational matters, EWC representatives do seem to be on a never-ending treadmill. Although they recommended very similar changes to improve the institution in both 2007 and 2018, and the Commission acknowledges

Table 1.1.1 How should the functioning of the EWC be improved?

	All			Office holders			Representatives with a coordinator present			Trade unionists		
	Support %	Neutral %	Disagree %	Support %	Neutral %	Disagree %	Support %	Neutral %	Disagree %	Support %	Neutral %	Disagree %
Management should be prohibited from implementing a decision before consultation has taken place	83.1	10.1	4.4	87.7	6.9	3.9	83.0	10.6	4.4	84.4	9.4	3.8
My EWC should be informed about more topics and issues	82.7	12.5	2.4	78.8	17.1	2.5	82.0	13.0	2.8	83.4	12.0	2.5
There should be stronger sanctions if management do not comply with the agreement or the law	79.3	14.1	2.1	82.2	13.7	1.9	80.7	14.1	2.4	82.1	12.8	1.4
My EWC should receive higher quality information	75.9	16.7	5.5	78.7	15.2	4.6	77.0	16.3	5.7	76.8	16.4	5.2
My EWC should have access to more resources (time, money, expertise)	75.0	17.3	5.0	76.9	17.0	4.5	75.9	16.5	5.1	77.7	15.4	4.4
EWC representatives should be able to meet among themselves more frequently	71.4	21.2	5.0	72.1	18.0	7.5	72.4	20.1	5.5	73.5	20.0	4.5
The EWC should receive more help to understand the information provided	70.9	21.1	5.4	70.4	22.0	5.7	70.7	20.4	6.2	72.7	19.9	5.0
EWC representatives should have better access to the different sites of the MNC	64.1	23.9	7.4	62.7	27.5	6.5	63.2	25.4	7.3	66.9	22.4	6.5
There should be more meetings per year	58.2	25.8	14.4	56.9	27.6	14.8	59.5	24.2	14.6	59.7	26.2	12.6
Trade unions should have more rights to assist my EWC	54.9	27.3	10.9	58.2	28.3	9.6	56.7	27.9	10.6	60.5	25.7	8.9
Trade union organisations should provide more support to my EWC	50.3	33.9	9.3	55.9	29.5	10.7	51.1	34.3	8.9	54.6	33.9	6.8
Select committee meetings should be more frequent	42.9	33.5	14.9	51.5	29.3	16.6	45.1	32.2	15.5	44.0	33.2	14.4
N	1301–1312			456–470			796–804			1116–1125		

Note: The percentage data in the column headed 'support' refer to respondents who answered 'strongly agree' or 'agree' in response to each statement; in the column headed 'neutral', respondents answered 'neither agree nor disagree', while the column headed 'disagree' contains the responses from representatives who replied 'disagree' or 'strongly disagree'. Respondents who answered 'don't know' are excluded from the table, hence the percentage data do not add up to 100 per cent. The values of N are those of all respondents who answered the question irrespective of the response. Only representatives who had attended at least one plenary meeting are included.

and, on occasion, has produced evidence in support of these proposed changes, it has consistently failed to initiate the necessary procedures to implement them.

To summarise, workers' organisations have always been disappointed with the content of the legislation, and so minimising the adverse effects of the legislation has emerged as a major concern for them. To that end, trade union organisations established an infrastructure within which policies and practices associated with EWCs and MNCs could be established and monitored. In addition, initiatives to articulate EWCs with other institutions of labour representation, to involve trade unionists in their operation and to provide training were implemented. Despite the breadth of these initiatives, the quality of information and consultation procedures remains sub-standard. In consequence, the ETUC has tabled a reform agenda intended to address the shortcomings of the legislation. Since 2007, the majority of representatives have supported elements of this reform agenda.

## The way forward<sup>8</sup>

The European social dimension is an ambiguous concept comprising various national social models and social policies adopted by the EU. Although EU social policies have different relations with the various national social models, they can help to integrate national social policies within a unified European framework (Menz 2015; Streeck 2019). By the mid-1990s, the integrative elements of the European social dimension led to suggestions that a 'corporatist policy community' based on social partnership and centred on the Commission was in the making (Falkner 2016: 277). This policy community, whose character was certainly open to question (Streeck 2019), was not at all robust and, as a result, it was short-lived. Interrelated structural and political factors contributed to its demise.

In structural terms, EU social policy is formulated and implemented within a polity comprising two tiers: transnational institutions and nation states. Successive enlargements of the EU added to the complexity of the relations between these two tiers (Bonfeld 2002; Habermas 2012: 12–52). Furthermore, the two-tier structure is suited to neoliberal regulation rather than the establishment of robust social policy, corresponding institutions and redistributive interventions: the former is less likely to challenge national sovereignty, while the latter requires greater democratic legitimisation and is more likely to challenge national sovereignty (Majone 1993; Scharpf 2009). The structure of EU policy-making thus does not favour social policy interventions, leading some to suggest that European social policy has been 'subsumed' within neoliberal market-building and suffers from a democratic deficit (Beck 2013: 66–86; Streeck 2019).

---

8. The focus here is on the possible political development of EWCs within the framework of the policies of the Commission, other European institutions and the social partners. Future research possibilities are thus excluded. There is a range of research options, however, that arise directly from this study. For example, further analysis of the survey data could examine differences between EWC and SEWC representatives, contrast the views of representatives from different countries and assess the variation between EWC representatives within the same EWC. Similarly, case study research could be directed towards unearthing the detail that underpins the survey findings reported here: that is, to consolidate the survey results.

Political factors linked to the demise of the corporatist policy community centred on neoliberal market-building at European level, initially exemplified by Commission proposals on market reform (1993) and drives for national competitiveness within larger Member States.<sup>9</sup> In combination, these developments relegated the different aspects of the social dimension to secondary concerns (Offe 2003). Discussions around the integration of European welfare states, hard law interventions and the upward harmonisation of social measures fell away. As illustrated by both the Directive and the Recast, the social policy legislation that was enacted relied on low minimum standards, subsidiarity, imprecision regarding key terms and voluntary elements rather than the hard law approach that characterised earlier proposals. The transformation of European social policy into a productive factor was also accentuated by the terms of monetary union where competitive wage devaluation and deregulation of labour rights compensate for the absence of competitive monetary devaluation (Degryse 2012). Furthermore, there were significant implementation failures at national level of the rudimentary social policy measures that had been adopted (Falkner 2005). Subservience of the social dimension to markets was consolidated by the Viking and Laval judgments (Deakin 2012; Ghailani 2008), while the contraction of national variants of the social model was prompted by the demands of the Troika following the financial and sovereign debt crisis (ETUI and ETUC 2014) in Cyprus (Ioannou and Sonan 2019), Greece (Katsaroumpas and Koukiadaki 2019), Ireland (Maccarrone et al. 2019) and Spain (Fernández Rodríguez et al. 2019). As a consequence, even by the reckoning of the Commission, these countries are now treated as poor performers on measures of social convergence and the promise of progress (2018c: 17).

This is a far from auspicious backdrop to the case for the revision of the Recast. Recent debates around the European Pillar of Social Rights implemented through the European Semester initially generated some qualified enthusiasm about a revival of the social dimension (Rasnača 2017). This qualified enthusiasm has tended to dissipate as the primary indicators of the social scoreboard were directed towards Member States rather than transnational developments, and low and worsening levels of the implementation of country specific social recommendations were recorded (Al-Kadi and Clauwaert 2019), leading some to suggest that the European Pillar of Social Rights is a mere addendum to economic and financial policy (Hacker 2019: 55; Dorsemont and Jagodziński 2018). In addition, there are, at the time of writing, unknown effects of Brexit and the Covid-19 crisis to consider. While the scale of the effects of these developments are also unknown, they will have a ‘disturbance’ impact on policy-making that is likely to take precedence over social policy implementation. Brexit and the Covid 19 crisis will, no doubt, be cited by some policy-makers at European level as reasons to delay social policy development and, yet, in terms of their likely effects on corporate restructuring, they are precisely the type of events that European policy-makers initially thought best addressed through institutions of transnational employee participation (Savoini 1995).

9. The Third Way of British Prime Minister Tony Blair, the *Neue Mitte* of German Chancellor Gerhard Schröder and the privatisation and fiscal restraint of French Prime Minister Lionel Jospin, for example, centred on increasing national competitiveness through domestic reform and placed the European social dimension as subservient to national reform objectives.

As for the social partners, it is highly unlikely that negotiations between BusinessEurope and the ETUC will result in a revision of the Recast. The positions of the two social partners are so wide apart, both in principle and in detail, that meaningful negotiations without third-party intervention are difficult to envisage. The prospects for third-party intervention are also not hopeful. As argued above, a change in political stance is required within the Council for attention to be directed towards social policy in general and EWCs in particular. Given the reluctance of DG Employment to advance social issues and the problem of social inertia elsewhere within the Commission, such a change is most likely to come from within Member States. Since 1999, however, an intervention on EWCs has taken place only once, when France held the Presidency in 2008. In the medium term, it is more likely that the attention of the Council will be directed towards the ramifications of Brexit and the Covid 19 crisis. The European Parliament and the EESC have regularly recommended more far-reaching changes to the legislation that have subsequently been adopted. Lobbying of the European Parliament and the Member States by the ETUC thus represents a potential way forward. While there is no certainty that history will repeat itself, it should also be noted that the Commission has consistently rejected the promptings of the European Parliament regarding a revision of the legislation. At the time of writing, the European Parliament has yet formally to respond to the submission by the Commission of its report on the Recast but it is preparing an enquiry into the operation of EWCs.<sup>10</sup> ETUC lobbying may influence the content of any formal response and thus inject some dynamism into the revision process.

The Commission could also intervene as a third party. Such an intervention could arise from two points already acknowledged by the Commission. First, the Recast has had a limited impact on EWC practice and has not produced the intended effects. The Commission cites evidence to this effect (2018b) and has funded research with a similar red thread (European Commission 2016a). Second, EWC practice does not meet the requirements of the Community Charter of the Fundamental Social Rights of Workers (Article 18), the Charter of Fundamental Rights of the European Union (Article 27) or the European Pillar of Social Rights (Principle 8). In short, the Commission acknowledges evidence that the current legislation does not function as intended and that current arrangements fall short of the regulatory requirements that underpin the social dimension of the European project. In these circumstances, an intervention by the Commission is not beyond the realms of possibility, but it would constitute a *volte-face*. The Commission could also intervene to ensure that the national transpositions of the legislation regarding sanctions are consistent with the Recast. For now, however, the Commission appears to remain wedded to the delay of any revision of the legislation. The now-defunct handbook initiative was the most recent exemplar of delaying tactics. The scale of corporate restructuring likely to result from Brexit and the Covid-19 crisis may act as a stimulus to the Commission, but it is equally as feasible to argue that such restructuring will be cited as a reason for further delay.

---

10. The European Parliamentary Research Service, which assisted in gathering the research for this book, published a European value-added assessment of the Recast Directive that reviewed the operation of the measure and highlighted the competing positions of the social partners on the issue (Müller 2021).



---

Greater certainty can be assigned to BusinessEurope, which will not initiate negotiations on the revision of the legislation and will not voluntarily concede an extension of the legal framework on worker participation. While the ETUC reform agenda is explicit, is supported by the overwhelming majority of representatives and is underpinned by a vast array of evidence, trade union organisations do not have the independent means to implement the revisions deemed to be required. The mobilisation of workers represented by EWCs and/or representatives who sit on EWCs to bring pressure to bear is an unlikely option, although, in the past, specific events at Renault and Hoover have succeeded in pushing for legislative change (Lapeyre 2018: 132–134, 175). Trade union organisations are thus likely to be restricted to lobbying European institutions while citing the voluminous evidence in support of the reform agenda. Within EWCs, trade unions may develop articulation, trade union involvement and training provision to minimise the shortcomings of the legislation, while perhaps also pursuing campaigns within MNCs based around specific themes, such as increasing the frequency of plenary meetings. The results of the 2018 survey are thus, in principle, the same as those of the 2007 survey. Minor details may differ, but the undeniable argument remains: most EWCs are not yet fit for purpose and are still ‘in the making’.