

Introduction

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Revision of the European Works Councils Directive 94/45/EC was a long-awaited, hard fought and significantly delayed process compared with trade union expectations and the obligation under Art. 15 of the Directive that set the deadline for 1999 (for more information see (Dorssemont and Blanke 2010; Blanke et al. 2009; Dorssemont 2009; Jagodzinski 2009b; Jagodzinski 2010). Once it was officially announced in the European Commission's Work Programme for 2008 hopes of an improved legal framework increased among labour representatives, only to give way to the hard reality of difficult (pre)negotiations between the social partners. This was followed by disillusionment concerning the possible outcome of the review process, brought about by political compromises and sacrifices on the long list of issues reported as problematic by workers' representatives, trade unions and experts (Jagodzinski 2009a). The official negotiations to which the social partners were invited by the European Commission were, in a dismaying and dramatic move, dictated by the requirements of a narrow window of opportunity, rejected by the ETUC. The process stalled and verged on collapse when the European Commission found itself pursuing an extremely controversial cause, to be saved by a mid-summer deal between the ETUC and BusinessEurope. The revision – which in the meantime, due to political pragmatism, was recast into a 'recast' – was saved. With the official publication of the text of the new Recast Directive 2009/38/EC on 6 May 2009 the job was done and all interested parties could sigh with relief.

All that remained was the 'technical' process of transposing the directive into national law, an exercise theoretically easy enough for both the national authorities and the European Commission. The latter provided guidance in the form of Expert Group meetings, which resulted in a (non-binding) Report (European Commission 2010a) that contained the results of (non-binding) commonly agreed conclusions

concerning a harmonised approach to implementing the transposition.¹ This thus seemed to be a mere formality of lesser importance.

Despite the regular two-year deadline for transposition the national implementation process with the deadline 6 May 2011 was not completed on time by all member states. Delays (sometimes only minor) in transposition of the directive occurred in the Cyprus, the Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, the Netherlands, Poland, Romania and Slovenia (that is, 18 out of the 31 EU and EEA member states – see Table 1). In July 2011, the Commission sent letters of formal notice to the 17 member states that had not complied with their obligations. Of these cases of infringement, eight were closed by 24 November 2011² (Slovakia, Cyprus, Czech Republic, Finland, Hungary, Ireland, Lithuania and Slovenia) and five cases were closed soon afterwards as the member states completed the transposition process. A little more time was taken by the Commission with regard to some remaining countries due to delayed parliamentary procedures (France, Poland, Romania, Belgium, United Kingdom), but eventually these member states transposed the EU directive into national law within several months of receiving the ‘reasoned opinion’ request. In November 2011 the European Commission requested that Greece, Italy, Luxembourg and the Netherlands transpose new legislation on European Works Councils (recast of EU Directive on European Works Councils) into national law. The request was issued in the form of a ‘reasoned opinion’ under EU infringement procedures. The demand was that if Greece, Italy, Luxembourg and the Netherlands did not bring their legislation into line with EU law within two months, the Commission could decide to refer these member states to the Court of Justice of the European Union. With regard to Iceland the EFTA Surveillance Authority delivered a reasoned opinion concerning late implementation of Directive 2009/38/EC and on 26 June 2013 a final warning was issued, with the possible consequence of submitting the case to the EFTA Court.³

Eventually, none of the member states was disciplined by the launch of an official Treaty infringement procedure. Nevertheless, the fact that a significant number of the member states transposed the directive either hastily to meet the final deadline or even beyond the allowed due date might have had an impact on the quality of national transpositions. Hasty legislative work and limited inclusion of social partners in national debates (see Table 2) preceding law-making procedures may partly explain why in various aspects national laws simply reproduced the wording of the directive without attempting to implement it in national systems.

In the context of the method used for completing transposition an interesting and relevant factor potentially bearing on the quality of implementation was the conduct of pre-implementation consultations with the national social partners and/or general stakeholders. Table 2 depicts various consultation methods applied in selected EU member states. As can be clearly seen, in the majority of member states

1 Throughout this publication ‘implementation’ and ‘transposition’ are used interchangeably.

2 See Press Release of the European Commission of 24/11/2011 (European Commission 2011).

3 Source: EFTA Surveillance Authority PR(13)58, <http://www.eftasurv.int/press--publications/press-releases/internal-market/nr/2012>, accessed on 22/02/2015.

Table 1 National implementing measures transposing Directive 2009/38/EC (state: February 2015)

Country	Means of transportation	Remarks
Austria	Federal Law N° 601 OF 17 October 1996 amending the Labour Constitution Act (Arbeitsverfassungsgesetz), the Labour and Social Courts Act (Arbeits- und Sozialgerichtsgesetz) and the Federal Law on Employee Representation in the Post Office (Bundesgesetz über die Post-Betriebsverfassung)	
Belgium	<p>1. Collective agreement no. 101 of 21 December 2010 on workers' information and consultation in Community-scale undertakings and groups of undertakings and review of CCT N° 62 (December 2010), made generally applicable by Royal Decree (March 2011)</p> <p>2. Transnational collective agreement 62 quinquies</p> <p>3. Loi modifiant la loi du 23 avril 1998 portant des mesures d'accompagnement en ce qui concerne l'institution d'un comité d'entreprise européen ou d'une procédure dans les entreprises de dimension communautaire et les groupes d'entreprises de dimension communautaire en vue d'informer et de consulter les travailleurs, MB 17.2.2012 p 11419</p> <p>4. Loi modifiant la loi du 23 avril 1998 portant des dispositions diverses en ce qui concerne l'institution d'un comité d'entreprise européen ou d'une procédure dans les entreprises de dimension communautaire et les groupes d'entreprises de dimension communautaire en vue d'informer et de consulter les travailleurs, MB 17.2.2012 p11421</p>	
Bulgaria	Decree No 55 'Act amending the Act on informing and consulting employees in multinational undertakings, groups of undertakings and European companies', State Gazette No/year: 26/2011	Related binding law: Law on information and consultation with employees of multinational (community-scale) undertakings, groups of undertakings and companies, promulgated in the State Gazette No 57 of 14.07.2006
Cyprus	Law No. 106(I)2011 on the Establishment of a European Works Council, No 4289, of 29.7.2011	
Croatia	Decision promulgating the Law on European Works Councils, which the Croatian Parliament adopted in session on 15 July 2014 (Class: 011-01 / 14-01 / 111; No: 71-05-03 / 1-14-2)	
Czech Republic	Act of 8 June 2011 amending Act No 262/2006, the Labour Code	
Denmark	Act No. 281 of 6 April 2011 amending the European Works Councils Act (Lov om ændring af lov om europæiske samarbejdsudvalg)	
Estonia	Community-scale Involvement of Employees Act (with amendments of, among other things, the act adopted on 16.06.2011, published in RT I, 04.07.2011, entered into force on 14.07.2011)	
Finland	Act 620/2011 amending the Act on cooperation in Finnish groups of undertakings and Community-scale groups of undertakings	

Table 1 National implementing measures transposing Directive 2009/38/EC (state: February 2015) (cont.)

Country	Means of transportation	Remarks
France	1. Decree No 2011-1414 of 31 October 2011 concerning the composition of the special negotiating body and of the European Works Council 2. Ordinance No 2011-1328 of 20 October 2011 transposing Directive 2009/38/EC	
Germany	Second Act amending the Act on European Works Councils transposing Directive 2009/38/EC on a European Works Council (2. EBRC-ÄndG) of 14 June 2011	
Greece	Law No. 4052 (promulgated in: Government Gazette 41 of 01-03-2012), Art. 49 ff.	Infringement procedure launched by the European Commission ⁴
Hungary	Act CV of 2011 amending Act XXI of 2003 on EWCs (July 2011)	Denmark
Ireland	Statutory Instrument No. 380 of 2011 (transnational information and consultation of employees Act) (amendment) Regulations 2011	Denmark
Italy [2]	Legislative Decree No. 113 of 2012. Published in OJ on 27 July 2012 and entered into force on 11 August 2012	1. Preceded by and based on Joint Declaration in favour of the implementation of Directive 2009/38/EC Of 6 May 2009 of 12 April 2011 of: CONFINDUSTRIA, ABI, ANIA and CONFCOMMERCIO – Imprese per l'Italia and CGIL, CISL, UIL; 2. Infringement procedure launched by the European Commission ⁵
Latvia	Law on informing and consulting employees of Community-scale undertakings and Community-scale groups of undertakings ⁶ of 19.05.2011 ("LV", 82 (4480), 27.05.2011.) [entered into force on 06.06.2011]	
Lithuania	Law amending the Law of the Republic of Lithuania on European Works Councils of 22 June 2011, No XI-1507	
Luxembourg	Act of 26/12/2012 modifying the Labour Code (Loi du 26 décembre 2012 portant modification du Titre III du Livre IV du Code du travail, Publication: Au Mémorial A n° 294 du 31.12.2012)	Infringement procedure launched by the European Commission ⁶
Malta	L.N. 217 of 2011 Employment and Industrial Relations Act (CAP. 452) European Works Council (Further Provisions) Regulations	
Netherlands	521 Act of 7 November 2011 amending the European Works Councils Act	Infringement procedure launched by the European Commission ⁷
Poland	1265 Act of 31 August 2011 amending the Law on European Works Councils	
Portugal	Law No. 96/2009 of 3 September 2009 on European Works Councils	
Romania	Law No. 186 of 24 October 2011	

4 Source: http://europa.eu/rapid/press-release_IP-11-1421_en.htm (accessed on 22/02/2015).

5 Source: http://europa.eu/rapid/press-release_IP-11-1421_en.htm (accessed on 22/02/2015).

6 Source: http://europa.eu/rapid/press-release_IP-11-1421_en.htm (accessed on 22/02/2015).

7 Source: http://europa.eu/rapid/press-release_IP-11-1421_en.htm (accessed on 22/02/2015).

Table 1 National implementing measures transposing Directive 2009/38/EC (state: February 2015) (cont.)

Country	Means of transportation	Remarks
Slovenia	European Works Councils Act - 2011 (ZESD-1) (Official Gazette of the Republic of Slovenia No. 49 of 24 June 2011)	
Spain	Law 10/2011 of 19 May amending Law 10/1997 of 24 April on the right of employees in Community-scale undertakings and groups of undertakings to information and consultation	
Sweden	Act (2011:427) on European Works Councils	
United Kingdom	Statutory Instrument No. 1088 of 2010 'Terms and Conditions of Employment. The Transnational Information and Consultation of Employees (Amendment) Regulations 2010'	Infringement procedure launched by the European Commission (concerning inclusion of Gibraltar in the scope of transposition) ⁸
EEA ⁹		
Iceland	n/a	The EFTA Surveillance Authority delivered a reasoned opinion to Iceland on the late implementation of Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting workers. On 26.6.2013 a final warning was sent to Iceland (EFTA Surveillance Authority PR(13)58).
Liechtenstein	Abänderung des Gesetzes vom 16. Juni 2000 über Europäische Betriebsräte (LGBl. 2000 Nr. 162, LR 822.12)	
Norway	Supplementary Agreement VIII 'Agreement regarding European Works Councils or equivalent forms of cooperation'	

Note: Countries in grey: delayed transposition after 06/06/2011.

Source: Compiled by Romuald Jagodzinski, 2015.

the legislative technique chosen was negotiations, official tripartite/bipartite consultations or consultation at the level of relevant ministries. In a significant number of countries, however, only some substandard forms of public consultation took place: informal consultation with the social partners or a broad public consultation (which has the inherent weakness of treating all comments equally and underweighting opinions from collective partners such as trade unions or professional organisations). In the worst scenario no consultation about the implementation of the EWC Recast Directive took place at all. Based on the above evidence we propose the hypothesis that the quality of pre-implementation consultations with the social partners and other stakeholders had an important impact on the quality of transposition laws in those countries. In cases of substandard pre-implementation

⁸ Source: <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1207&furtherNews=yes>

⁹ For the EEA countries the directives should have been implemented by 1 November 2012 (source: <http://www.eftasurv.int/press--publications/press-releases/internal-market/nr/2012>, accessed on 22/02/2015).

consultations the risk has always been that either important interests, experiences and comments from the most relevant stakeholders (in the case of EWCs the trade unions and employer organisations) are not taken into consideration, or, equally bad, that one of the primary stakeholders has more influence and impact on the shape of concrete provisions in its favour and at the expense of its counterparts. Consequently, power imbalances in industrial relations can be preserved or even further amplified, thereby compromising the overall quality of national social dialogue at company level.

Official negotiations between the social partners or dialogue within the framework of bipartite or tripartite negotiations are by no means the only guarantee of quality laws, but if the former are lacking or of poor quality the laws are prone to be implemented only formally, without paying sufficient heed to the practicalities and effectiveness of statutory provisions. Cases in points might be Portugal (implementation approach based on a copy/paste from the Directive) or the United Kingdom (significant problems with the implementation of definitions of information and consultation¹⁰ or confusion with regard to the right to training without loss of pay – see the relevant chapters).

Once the lagging member states provided explanations (mainly delays in the legislative agendas of national parliaments resulting from late introduction by the respective ministries) and finally transposed the Directive implementation as a whole seemed done and dusted. The last minor hurdle of a purely technical nature would still be the formal requirement imposed on the European Commission to provide an implementation report/study to be drawn up by 2016 (Recast Directive Art. 15), but it would represent only a formality that could be dealt with easily.

The process in question could look like the above description if the process of transposition of the original EWC Directive 94/45/EC was taken as the model and benchmark. Because the draft EWC Directive was contested by some member states (mainly the United Kingdom) and long-fought for (since the late 1970s) the European Commission showed significant political courage in advocating the introduction of a European directive in 1994. As a result of this political climate and the lack of agreement about the future EWC framework among the European social partners the original EWC directive was a compromise. As such it needed to be general enough on some issues for the member states to stomach and accept into national industrial relations (legal) frameworks. With limited experience of the functioning of EWCs prior to 1994, numerous loopholes and highly abstract provisions of the EWC directive 94/45/EC were subsequently implemented at national level, often without much reflection on their practical capacity to provide for stable, transparent and clear rules on workers' transnational information and consultation. In 2000 the European Commission prepared the Implementation Report (European Commission 2000) that reflected this laxness or a conviction that social dialogue is not a hard-core issue that requires stringent observation of hard legal norms. The Implementation Report therefore recorded significant diversity in solutions and provisions implemented by the member states in various areas. Generally, the Eu-

¹⁰ Initially the definitions of information and consultation were transposed (in draft implementation act) as 'obligations', but after heavy criticism by experts changed into 'definitions'.

Table 2 Approaches to pre-implementation consultations in selected member states

	Negotiations	Tripartite-bipartite organisations	Government/Ministry-level consultation	Informal consultation	Public consultation	Questionnaire	No consultation	N/A
Austria	X							
Belgium	X							
Finland	X	X						
Bulgaria		X						
Denmark	X		X		X			
Cyprus			X					
Czech Republic							X	
France			X			X		
Germany			X	X				
Greece				X				
Hungary				X				
Ireland			X					
Italy	X							
Luxembourg			X					
Netherlands		X						
Poland		X						
Portugal					X			
Romania							X	
Slovakia								X
Slovenia		X						
Spain		X	X					
Sweden			X					
UK					X	X		

Source: Romuald Jagodzinski based on ETUC/SDA Survey amongst affiliated trade unions 'The role of social partners in transposing the recast directive 2009/38/EC on European Works Councils (EWCs)'.

European Commission assessed the quality of implementing measures as 'clearly very positive' (point 2.1, *ibid.*) stipulating that 'In a significant number of cases those issues have been solved or will be solved by the parties concerned'; some potential for conflict and the necessity for courts to intervene was foreseen ('In other cases (...) they can best resolved by the courts'; *ibid.*), but no further consideration as to how or by what means, for example, this should have happened was offered.

Living in a perfect world

As a direct result of overall approval of the quality of transpositions and the fact that no specific problems or failures to transpose the directive were identified on part of

member states no corrective actions were required or pursued. The natural conclusion from this Implementation Report was that the national legal frameworks were precise and transparent enough to provide for the efficient and unhindered operation of EWCs.

Sadly, the above conclusions based on analysis of the Implementation Report 2000 were not observed with regard to the operational practice of EWCs. As demonstrated by research evidence by leading researchers collected in the ETUI publication Memorandum European Works Councils (Jagodzinski, Kluge and Waddington 2009) there have been numerous problems with the operation of EWCs since the introduction of the legal framework in 1994. Arguably, the most pivotal and consequential one is the low quality and inadequate timing of information provided to and consultation with EWCs, as documented by Waddington (Jagodzinski, Kluge and Waddington 2009: 23–24).

Some of the identified shortcomings have been addressed (for example, definitions of information and consultation have been improved, along with the right to training without loss of pay) or at least partially dealt with (for example, sanctions, transnational competence of EWCs, recognition of trade union role and stake in the operation of EWCs) by the recast of the EWC directive.

Importantly, several of crucial provisions and clarifications are laid out in the preamble to the recast EWC directive, rather than in the actual body of the Recast Directive. In the preamble, the rationale for the directive, the legislator's intentions, objectives, and limitations of the Recast EWC Directive are laid out in 49 paragraphs. While it is true that the member states are not (explicitly) required to transpose the content of directives' preambles into their legislation—and indeed, in the case of the EWC Recast Directive most did not this does not mean that the principles laid down in the preamble do not apply; on the contrary, any court asked to rule upon a dispute in EWC and SNB matters must explicitly take into account not only the wording of the Directive, but also the spirit of the Directive and the European lawmaker's intentions. This spirit and intent of the law is described in the preamble making the latter a crucial and indispensable part of any directive

One of the clearest examples of this concerns one of the major innovations of the EWC Recast Directive: the clarification of EWCs' transnational competence. Chapter 3 covers this issue in more detail; here, we seek merely to emphasise that in order to properly apply and fully appreciate the significance of new provisions on EWCs' transnational competence it is necessary to understand relationship between provisions found in the preamble and those found in the body of the directive and apply them jointly. In the body of the directive, Article 1.3 defines the competence of the EWC as being limited to transnational issues, and Article 1.4 presents a brief and primarily geographically defined conception of 'transnational'. Several recitals, however, shed valuable light on the intentions of the legislator by introducing elements of decision-making hierarchy rather than geography as part of the definition of 'transnationality'. Recital 12 mentions as a criteria the impact on workers of a decision taken in a different member state other than the one in which they are employed. Recital 14 states that 'only dialogue at the level at which directions are prepared and effective involvement of employee representatives make it possible to an-

participate and manage change'. Recital 15 posits an essential division of competence between the national and transnational institutions of employee interest representation, and, crucially, identifies the notion of the 'relevant' level of management and representation, respectively. Finally, the rather laborious wording of Recital 16 somewhat obscures its main thrust: that the essential criteria defining whether or not an issue is transnational depends not so much on a geographical conception of levels, but of a hierarchical one instead. Put differently, it is not so much in which country the responsible level of management is physically located which matters. It is instead the fundamental recognition that national-level employee representatives who may be affected by a decision taken by central management may not otherwise have access to relevant decision-making actors, processes and relevant information on these, since these are acting at the transnational level, whose more appropriate counterpart is the EWC. Crucially, the EWC is expected to fill this gap, whether or not any other country is affected by the measure. Furthermore, it is only in the preamble's Recitals 16 and 42 where the crucial rule for determining transnational character of a matter is defined. Recital 16 stipulates that in addition to the level of management involved in decision-making it is the matter's *potential* effects that render it transnational. Recital 42 reiterates the principle that it is the *possible* impact of managerial decisions. The crucial question *who* determines the 'potential effects' of a matter can only be replied by looking at the body of the Recast Directive where in Art. 10 it is the EWC that is defined as the body that '*represents collectively the interests of the employees*'. The intention of the original 1994 EWC Directive had already been to meet the challenge of company internationalisation by bridging the gap between national and transnational information and consultation; however, the reliance on an awkward geographical conception not (fully) reflecting reality as a shorthand formula in practice led to substantial legal uncertainty and disagreements in practice about the very role and competence of the EWC. The provisions of the recast EWC directive, in particular the explanations provided in the preamble, go some way towards clarifying this dynamic question. It is thus clear that the Recast Directive's meaning and impact in the case of EWCs' transnational competence (but also in other aspects) can be fully appreciated only by reading the provisions in body in conjunction with the relevant recitals of the preamble. This is why it is a significant shortcoming of national authorities not to have implemented also these important rules from the Directive's preamble, which may have important implications for the EWC practice and the Directive's *effet utile*.

Helpfully, the 2010 Report by the group of experts on the implementation of recast EWC directive (European Commission 2010a) also unequivocally makes this point, citing next to the various provisions of the recast directive also at some length the ideas developed in the Impact Assessment Study of 2008 (European Commission 2008). Reference is also made to the discussion in the informal Trialogue in December 2008, in which the then recent case of a closure of a plant in Germany which had been decided by central management beyond the reach of the national-level institutions of information and consultation was explicitly brought forward to illustrate just what the recast of the EWC Directive was aiming to clarify with its definition of transnational competence. The report also refers to the standard rules of the SE, in which the criteria of transnationality is explicitly defined as 'questions (...) which exceed the powers of the decision-making organ in a single member state.' The expert report also usefully highlights that the potential impact which

would warrant involvement is not limited to negative impacts, but is instead much broader than that. In this way, it is clarified that even workforces which stand to benefit from a decision or measure are also concerned and have the right to information and consultation on those matters.

The abovementioned problems with applying the original directive in practice were not just theoretical claims on the part of researchers or criticisms from trade unions and workers' representatives: they have been confirmed by hard-core evidence involving over 60 court cases before both national courts and the Court of Justice of the European Union (see Jagodzinski, Kluge and Waddington 2008: 16 ff; Part II of Dorssemont and Blanke 2010).

The combined weight and gravity of the above-listed evidence of various kinds leaves no doubt concerning the shortcomings of national legal frameworks concerning European Works Councils. The stark contrast between the enthusiastic findings of the Implementation Report 2000 (European Commission 2000) and the (sometimes) grim reality is too significant to ignore or shove under the rug. There are at least two underlying reasons for this state of affairs:

- (i) lack of a comprehensive analysis of national legislation, combined with an absence of thorough reflection on the implications of particular legal solutions (including what they fail to generate);
- (ii) the lax, 'anything-goes' approach of the European Commission, which means that all legal solutions applied in the process of implementing the Directive, no matter how diverse, can be accepted under the universal, extremely flexible and capacious label of 'diversity of national industrial relations'.

If the intentions of at least some of the new provisions are laid out so clearly, and if they are furthermore so obviously informed by an understanding of the shortcomings of the implementation of the 1994 EWC directive, then clearly the notion of useful effect is of key relevance in assessing the quality and consistency of the transposition of the recast EWC directive. There is an undeniable tension between the need to lend useful effect to the new provisions, while at the same time respecting the principles of subsidiarity. These tensions are explored more fully throughout this study.

Learning from past experiences

The post-recast reality in which EWCs are currently living is, however, radically different from the pre-2009 world under the regime of the 'old' 1994 Directive. The provisions of the new EWC Recast Directive became more specific and precise. We have new definitions of information and consultation, as well as new rights. Added to that there is the heritage of combined national and European jurisprudence that is well documented and familiar to stakeholders. Another important difference is the currently available vast knowledge on EWCs resulting from extensive research by experts, academics and institutions over almost two decades. Thanks to the above-described changed context there is simply no excuse for another Implementation Report that is as cursory and undemanding as that of 2000.

Origin, relevance and goals of the study

The report presented here is the outcome of several expert meetings of the authors under the aegis of continuous research on EWCs conducted at the ETUI. The idea of conducting the study was born soon after the hype over the adoption of the Recast EWC Directive subsided and gave way to reflections about the practical application of the newly modified rights for workers. Because it is well known that, generally, directives do not apply directly to individuals it was clear that the decisive impact on the functioning of EWCs, their members and the contents of newly (re)negotiated agreements on information and consultation would be exerted by national laws. This fact seemed to be overlooked or disregarded by some stakeholders who, while celebrating the victory of adopting the new EWC Recast Directive 2009/38/EC, considered the battle for improved legal frameworks for EWCs won once the Directive was adopted.

The present study represents an attempt to contribute to the research on EWCs by emphasising the importance of the legal frameworks within which they function. While these legal frameworks are not the sole determinant of the quality of EWC operations or their effectiveness – other important factors include, for example, the agreements between EWC and management, national industrial relations traditions, corporate governance model and social dialogue culture within the company – they do represent an important backbone, a basis for more precise arrangements in EWC agreements. As the authors have previously demonstrated (ETUC and ETUI 2014), the quality of these frameworks (both of the EU Directive and national transpositions) has significant standard-setting influence on the content of EWC agreements: the legal provisions are often directly copied into EWC agreements and over time we observed a ‘gravitation’ of negotiated arrangements towards standards solutions laid down by the law.

These findings feed into the rationale for analysing national frameworks. It is thus not only a technically interesting legalistic exercise, but concerns many practical aspects and asks important questions. First, analysing the quality of the national transpositions of any directive (and the EWC Directive in particular due to grave differences of opinion among the social partners and the consequently complicated and time-restricted political process¹¹) poses the question of the ratio between input and output, as well as costs and benefits: how many of the valuable improvements laboriously achieved at the EU level trickle down to the intended beneficiaries – workers – at national or even plant level? Second, the question of the coherence of EU-wide law arises: how are *transnationally* driven, exercised and relevant workers’ rights to *transnational* information and consultation to be effectively realised and enjoyed when *national* laws are so different and incoherent? While relevant generally, these questions are particularly pertinent for EWCs as a form of transnational interest representation introduced – or, arguably, imposed – by the European Union into national industrial relations systems as a new (or, arguably, foreign) element. In this case, understandably, the responsibility of the European authorities – in particular, the European Commission as the Guardian of

11 For details, see, for example, Jagodzinski 2008.

the Treaties¹² – is significantly greater than in case of, for example, a simpler technical harmonisation of national provisions.

By analysing national implementation laws transposing the EWC Recast Directive this publication strives to raise the above questions by pointing to concrete issues and cases in which the discrepancies between the Directive and the final output – national provisions applicable to workers – are problematic and stark. In this way the research presented in this volume aims to contribute not only to a better understanding of the legal frameworks for EWCs, but – via the link shown by the ETUC and the ETUI (2014: 98) – also to a large body of knowledge on conditions that affect the practical functioning and effectiveness of EWCs.

To achieve that, the study aims to provide an initial comparative insight into national laws transposing the EWC Recast Directive and evaluate the quality of their provisions. Two questions constitute the red thread running through the analysis: first, the question of whether the national transposition laws are genuinely implementing measures or merely ‘prosthetic’, imitating real transpositions and in fact just a copy/paste from the Directive.¹³ If national implementation measures simply repeat a Directive’s goals without specifying the method of achieving them and procedures to guarantee the rights enshrined therein they cannot and should not be recognised as proper transposition. In this context, the second overarching question asked in the present analysis was whether the available national provisions are adequate to ensure the goals of the Directive?

The present report does not claim to be fully comprehensive. It merely flags up issues that require attention and thorough analysis by the European Commission (or, in fact, by any external body given the task of conducting such an analysis) when preparing the next implementation report. Due to limited resources our study used only selected research methods and is subject to limitations with regard to the profundity of its analysis. Thus it can make only a modest contribution to an official implementation study that should ideally comprise, among other things, the following methods and elements:

- A formal review and analysis of national provisions transposing the Directive in terms of both satisfying the formal technical requirements and ensuring effective achievement of the Directive’s goals. The latter should take place with regard to the overarching objective(s) of the Directive, but should also cover whether realisation of the objectives of individual provisions is effectively ensured. In this regard reference should be made to common arrangements agreed between representatives of national authorities in the form of the Expert Report on the Implementation of the EWC Recast Directive (European Commission 2010).
- Analysis of the ways of effectively enforcing the rights provided to workers and their representatives (see Chapter 4 in this report). Analysis of this aspect should not be limited to a formal analysis, but should take into account the

¹² Art. 258 TFEU.

¹³ EU directives lay down certain goals or end results that must be achieved in every member state. They (usually) do not prescribe specific measures to achieve these goals. National authorities have to adapt their laws to meet these goals, but are free to choose the method.

specific characteristics of EWCs as worker representation structures in transnational settings, but embedded in national legal orders. This specific set-up requires proper transposition by the member states, but also supervision of harmonisation and, if needed, corrective adjustments by the European Commission which, in contrast to individual member states, has a European perspective (especially with regard to levels of sanctions). Where relevant, the implementation study should identify key problems with enforcement of the new rules of the Directive and explore the causes of such problems.

- Articulation (linking) of the EWC legislation with other laws on workers' representation already in place in national law. In this context analysis of the consistency of the new rules introduced by the EWC Recast Directive with existing instruments and policies should be undertaken.
- Based on a thorough analysis of the above aspects and with the ultimate principle of *effet utile* in mind the implementation study should formulate conclusions and recommendations for corrective actions and adjustments, at both national and European levels (with possible further changes to the Directive).
- It might be expected that the implementation study explore national specificities with regard to questions such as the reasons for the existence or the absence of EWCs as one of the main goals of the Directive (Recital 7).

Consistence with general frameworks

Despite its obvious focus on EWCs the implementation audit should be conducted while keeping in mind congruency and reference to more general frameworks and strategies in the area of worker information and consultation.

The first framework of this kind is the general framework laid down by the EU's 2020 Strategy, which advocates smart, sustainable and inclusive growth. According to the framework the EU has an important role to play in supporting and complementing member states' activities in this connection, including working conditions, such as information and consultation in the workplace. Although the 2020 Strategy does not sufficiently emphasise and integrate worker representation the national legislation implementing the EWC Directive should still be in line with its guidelines (ETUC and ETUI 2011).

Second, the European Commission's fitness check of the three directives on information and consultation of employees at national level (as part of the Smart Regulation Agenda and the Regulatory Fitness and Performance Programme, REFIT) also touches on the essence of the EWC Directive. Because, according to various declarations on the subject, the fitness check programme is the 'expression of the Commission's ongoing commitment to a simple, clear, stable and predictable regulatory framework for businesses, workers and citizens' (European Commission 2013) these standards should be observed when analysing the implementation of the EWC Recast Directive. Also, the attainment of goals pursued by the fitness check programme should be ensured by the European Commission when conducting the study on transposition of the EWC Directive.

Last but not least, the recently adopted ETUC resolutions ‘Towards a new framework for democracy at work’ (October 2014) and ‘Towards a legal framework for TCAs’ represent important points of reference and guidelines for evaluating the quality of national transpositions of the EWC Directive. The ‘Democracy at work’ resolution calls to mind that the right to information and consultation is a fundamental right recognised in particular by the Charter of Fundamental Rights and the revised European Social Charter. It also argues that more worker involvement is an element of social justice and good corporate governance. Furthermore, it emphasises the importance of proper articulation between the levels and institutions of worker information and consultation, stating that they are likely to work better in companies in which there is workers’ board-level representation, which normally allows privileged access to early information. The resolution also points out that, currently, EU company law is characterised by a minimalist approach based on restrictive regulation and a strong mutual recognition principle. These principles are manifested in EU action that are limited solely to removing barriers to cross-border business rather than promoting a European model for corporate governance that would include strong workers’ rights. The ETUC resolution also points out that the earlier mentioned Refit Agenda of the European Commission demonstrates this extreme deregulation approach characterised by treating workers’ involvement solely as a potential ‘burden’ to businesses rather than as an asset. Such an approach fosters the understanding among company managements that they have *carte blanche* to misuse European law to minimise their obligations under national law.

A remedy against such abuses, according to the ETUC resolution, would be a single directive encompassing various workers’ involvement rights. The resolution makes an important point concerning articulation between various levels and instances of information and consultation. It argues that horizontal standards on information, consultation and workers’ board-level participation would address the gaps, loopholes and inconsistencies in the EU *acquis*, reducing incentives for abuse and circumvention. In the context of ensuring coherence between national legislations the ETUC points out that the EU legislator must not be complacent and assume merely a coordinative role between different national company statutes, based on the country of origin approach. Quite the opposite: because transnational companies have emerged as key players at the European level, benefitting from and in turn shaping European market integration, the European Union needs to send strong signals that it seeks to promote a business model based on social justice and sustainability. This concerns EWC and SE legislation as a possible inspiration for such a general framework, with a strong requirement of transparent and efficient mechanisms for linking various levels of information and consultation (including the emerging instrument of transnational company agreements¹⁴). The ETUC resolution emphasises, among other things, the importance of early information and stronger consultation prerogatives as elements of workers’ capacity to manage change. A particularly important demand with regard to implementation of the EWC Recast Directive (see Chapter 4) is that effective and dissuasive sanctions should be put in place.

14 In this context the resolution also makes the point that the member states should be responsible for collecting and transmitting to the European Commission information about transnational company agreements (TCAs). As the ETUI argued on the eve of the launch of revision of the EWC Directive (Jagodzinski, Kluge and Waddington 2009: 5, 21, 51) the same demand applies to agreements on workers’ transnational information and consultation.

Articulation between various levels and forms of information and consultation

A specific instance of reference to and embeddedness in broader frameworks is the articulation of the right to transnational information and consultation in EWCs with other levels (vertical articulation) and forms of employee participation (horizontal articulation). Both aspects of articulation are included in the EWC Recast Directive itself (for example, Recitals 21, 37 and 46 of the Preamble; Art. 1.3, Art. 10.2) which stipulates, among other things, that '[f]or reasons of effectiveness, consistency and legal certainty, there is a need for linkage between the Directives and the levels of informing and consulting employees established by Community and national law and/or practice' (Recital 37).

In its vertical dimension, as already pointed out, the EWC Recast Directive 2009/38/EC provides only a half-way improvement on the previous situation: it is welcome and useful that it deals with the question of articulation, but, in doing so, it does not decisively – in the body of the Directive – define the standard solution and impose an obligation to define the arrangements to parties to EWC agreement. Although it might be in line with the principle of subsidiarity to leave this question to be resolved by the parties this shifts responsibility for providing a systemic solution to a common systemic challenge from the national law-making authorities to individual bargaining parties. Consequently, it creates a potential myriad of solutions in which one EWC might choose to go about articulation very differently from other EWCs. No less importantly such a legislative strategy also potentially impinges on the competences of another statutory body, the works council, which, arguably, should not be a competence of EWCs.

Unfortunately, the report of the Expert Group (European Commission 2010a) is rather tellingly helpless in this regard. Across the document, the exact wording of the EWC Recast Directive on the issue of articulation and sequence of information and consultation processes is stoically repeated verbatim without any attempt to provide more far-reaching explanations or to explore alternatives. Clearly, this iron was too hot to touch.

Last but not least, confidence that parties to EWC agreements will be willing to negotiate on such matters is based on hopes or assumptions that find no corroboration in practice: few EWC agreements contain arrangements on the timely priority of access to information and consultation between EWCs and national/local level works councils. Admittedly, in the ongoing analysis of EWC agreements the question about arrangements concerning the priority of information and consultation between the levels was not asked explicitly. Nevertheless, within the framework of the analysis the author did examine agreements with regard to some aspects of articulation. First, only 103 agreements were listed as containing some sort of arrangements on priority of information and consultation.¹⁵ Second, on a more posi-

¹⁵ The ETUI database of EWCs contains two pillars of analysis: regular analysis and a subset of data containing examples from EWC agreements (examples remarkable in either a positive or a negative way). The latter does not pretend to provide complete statistical evidence on the occurrence of specific provisions, but provides a sample of them. Therefore we can say that in the case of articulation there are 'at least' 103 agreements that contain provisions in this respect.

tive note, 65.2 per cent of agreements analysed to date contain some form of arrangements on the dissemination of information about the outcome of EWC work to the workforce (however, the level of precision differs significantly). Furthermore, at least 57.2 per cent of the agreements analysed provide for a ‘subsidiarity clause’ stating that the EWC agreement and rights do not limit or modify the rights to information and consultation stipulated by other pieces of legislation. A far smaller number of EWC agreements contain more substantial provisions on linking the levels: only around 27.6 per cent of currently active agreements analysed provide for a seat (most frequently as observers) for representatives of national works councils and/or a member of the national trade union organisation from one or more countries (usually the country of a company’s headquarters). An even smaller proportion of agreements (15.4 per cent of analysed agreements) provide for access to company premises, for individual members of the EWC, the Select Committee or the entire EWC. All in all, even if these aspects of articulation are covered by some agreements their overall share is fairly low and contractual arrangements on articulation relatively rarely are comprehensive enough to cover these various aspects of inter-linkage between the levels. One can thus conclude that the new obligations of the Directive are not being observed in EWC agreements to a satisfactory degree and that it was probably too optimistic on the part of European law-makers to assume a common, comprehensive and qualitatively satisfactory uptake of articulation into negotiated agreements.¹⁶

At the same time, Recital 37 read in conjunction with Recital 38, which excludes any prejudice to other pieces of legislation on worker representation, frames the articulation of the EWC Recast Directive with other instruments and thus introduces the horizontal dimension of articulation. These provisions impose the need to provide for, on the one hand, interaction with and, on the other hand, respect for other directives in the domain of worker involvement.

In this context it should not be forgotten that, on top of the Charter of Fundamental Rights of the European Union, in the EU there are currently 27 directives on information, consultation and participation of workers, covering general information and consultation for workers and information and consultation in specific circumstances, such as in case of transfer of undertakings, mergers and takeovers, as well as health and safety (ETUC and ETUI 2008). Out of this large body of legislation some items are more directly linked to worker rights in the EWC Recast Directive. First, at company level, Directive 2002/14/EC establishes a general framework for informing and consulting employees in the European Union,¹⁷ Council Directive 98/59/EC concerns collective redundancies and the right of workers’ representatives to be informed and consulted¹⁸ and Art. 7 of Council Directive 2001/23/EC concerns the safeguarding of employees’ rights in the event of the transfer of undertakings, providing for information and consultation of employees by the transferor and/or the transferee.¹⁹

¹⁶ For more on this issue see Chapter 1 of the present report. See also ETUC and ETUI 2015.

¹⁷ OJ L 80 of 23.3.2002, p. 29.

¹⁸ OJ L 225 of 12.8.1998, p. 16.

¹⁹ OJ L 82 of 22.3.2001, p. 16.

There are three other directives that, besides information and consultation rights, provide for the involvement of employees – participation – in the supervisory board or board of directors in enterprises adopting the European Company Statute²⁰ or the European Cooperative Society Statute²¹ or deriving from a cross-border merger.²²

All of this legislation lays down specific obligations on management to inform and consult their workforces, sometimes generally, sometimes very specifically. The legislation at European and national/local levels confers rights on employee representatives to be involved, informed and consulted or even engage in bargaining, whether it be in the monitoring of health and safety measure at the workplace, negotiating a social plan, or giving an opinion on an proposed takeover bid, to name just a few examples.

Indeed, it is in an intelligent and case-by-case linking of these actors and processes that the ultimate goal of the EWC Recast Directive can be achieved: an integrated, articulated system of information and consultation which can keep pace with decision-making in today's highly integrated multinational companies. If articulation is achieved, it has the potential to strengthen the capacity of all parties at both the local/national and transnational levels to fulfil their respective roles. It is the lower levels in particular that stand to be strengthened; with access to full information about the rationales and potential impacts of cross-border measures, information asymmetries are reduced, and they are better equipped to address any local repercussions.

The intended operationalisation of this need for articulation between both actors and processes has the potential to make the impact of this particular provision one of the most far-reaching of all the new provisions. At its basis lies also an understanding that articulation of information and consultation is essentially an iterative process: it is not a one-off information and consultation event for one body at one level and then another body at another level, but rather an ongoing, issue-driven process between actors and across levels that continues to move back and forth until all information and consultation processes have run their respective courses. That the actual provisions in the directive and its transposition are unfortunately rather inadequate does not mean that the horizontal (between various actors) and vertical (between various levels) articulation will not happen, but we must expect it to be fuelled to a great extent by the pressures of practice, power asymmetries, and general trial and error. In the absence of clear rules, conflicts will arise, and shared interpretations may well need to be threshed out.

Because the EWC Recast Directive recognises the need for horizontal and vertical articulation of information and consultation, any analysis of implementing laws should take this requirement imposed on the member states into account. Specifically, it should examine whether and how articulation between various forms of

20 Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.

21 Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.

22 Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

worker representation is ensured by national legislation transposing the new EWC Directive in terms of access to information (including timely priority and scope) and means of ensuring effective and genuine exchange and linkage between these levels that results in tangible improvement of previous practices.

Meaningful implementation study: high or normal expectations?

We emphasise the importance of meaningful implementation of employees' information and consultation rights not just for the sake of proper respect for the law and against diluting European directives by sub-standard national implementation. Far more important is the practical significance of the ultimate standard of the EU *acquis*, namely the principle of effectiveness. In other words, the most important reason for demanding a thorough review of national implementation laws is the need to ensure that workers have the requisite legal instruments and means to exercise their rights as part and parcel of their work activities. As obvious as it might seem, it is worth ensuring that this important value does not get lost in the legal(istic) pursuit of correct transposition. This test of the practical effectiveness of individual national provisions should thus be the 'lens' through which expectations of the implementation study are evaluated. From this point of view whatever provision or demand to modify national legislation ensures the real effectiveness of workers' rights to transnational information and consultation should be seen as normal, even if critics argue that these expectations are too high or far-reaching.

From the point of view of workers, reportedly, the pivotal and most critical moments are as follows (Jagodzinski, Kluge and Waddington 2009):

- (i) Establishment of a Special Negotiating Body (SNB) and an EWC. This initial phase comprises multiple actions, resources and efforts needed to set up a EWC.
- (ii) The very process of receiving information and preparing for consultation. This is particularly difficult in relation to the most common circumstances in which it usually occurs: company restructuring. Anticipating company restructuring and minimising its impact on workers and social conditions were outlined in December 2013 by the European Commission in the form of an EU Quality Framework for Anticipation of Change and Restructuring.²³ The Quality Framework underlines the role of EWCs whose main function is to respond to increased transnational restructuring by establishing a direct line of communication between representatives of workers from all European countries in large multi-nationals and top management. It has been widely accepted since the introduction of EWCs that they play an important role in facilitating industrial change.²⁴ The reality of company restructuring (and the nature of EWCs' involvement in managing these processes via Transnational Company Agreements) has grown in complexity and thus modified national frameworks need to ensure that EWCs can continue to provide this contribution with appropriate, modified means and tools.

²³ COM(2013) 882 final.

²⁴ See Communication 'For a European Industrial Renaissance' (COM/2014/014 final).

- (iii) Conflicts between EWCs and management in which all amicable solutions have been exhausted and the only way of ensuring respect for legally guaranteed rights is recourse to the courts.

With regard to points (i) and (ii) the Directive admittedly introduced changes, not least due to rulings of the Court of Justice of the European Union and some national courts. The obligation imposed on all local managements to obtain and provide information on company structure and workforce distribution to make it possible to set up an SNB/EWC was an acclaimed improvement of the Recast Directive. Similar acclaim greeted the introduction of the definition of information and modification of the definition of consultation. The welcome clarification of the transnational competence, as well as more robust criteria to determine it, is another crucial innovation and improvement. Where the Recast Directive failed to deliver was enforcement of these rights, namely instruments that would clearly provide workers' representatives with effective, easily applicable and immediate leverage against obstruction or abuses of law. The silence of the Directive over these issues was officially justified by the general principle of subsidiarity (see (Jagodzinski 2015 (forthcoming))) and caused in practice by the limitations of the political context and process in which the Recast Directive was adopted (Jagodzinski 2008).

The lack of specific requirements in the EWC Recast Directive with regard to enforcement (Art. 11.2 of the EWC Recast Directive) has been very consequential with regard to the quality of national frameworks, especially in the dimension of their practical effectiveness. Because, as we demonstrate in Chapter 4, the quality (accessibility of recourse to justice, levels and types of sanction) of national enforcement frameworks (see point (iii) above) that provide hard-law leverage and often represent the last resort for workers is not satisfactory, it is more difficult for workers' representatives to exercise their right to set up an EWC and to qualitative and timely information. It is an interrelated system of dependent elements and, obviously, shortcomings in one area will have detrimental effects on others. Because the Recast Directive remained conservatively general on the issue of enforcement because the European Commission argued in favour of the principle of subsidiarity, in this respect one can expect that the latter will be consistent in its approach and will examine the national implementation laws from the point of view of the real-life effectiveness of national judicial and administrative measures and their practical availability to workers' representatives.

Concerning enforcement issues some important legal lacunas should not be forgotten. These lacunas originate, in part, from the general character of the obligation to ensure appropriate judicial and administrative provisions, combined with the laxness of the previous implementation report on Directive 94/45/EC from 2000 (European Commission 2000). For these two reasons some situations in which SNBs/EWCs (or workers' representatives before establishing an SNB) can find themselves remain outside the scope of legal frameworks and beyond the national court systems that could help to enforce workers' rights. First and foremost is a scenario in which either no action has been taken within the statutory six months after the initial application to the management to launch negotiations, or no agreement has been concluded within three years of negotiations. In both situations the process reaches a stalemate and no national law provides for a procedure to apply

the provision smoothly and transparently, stipulating an automatic setting up of an EWC de jure, based on subsidiary requirements. In such circumstances workers' representatives, deprived of financial and legal means (financial resources are supposed to be provided by management; see also Chapter 4) do not find any remedy in national law because the latter does not contain clear instructions concerning the authority (court, ministry of labour) tasked with declaring that an EWC should be set up and issuing injunctions obliging the management to recognise this body and finance its operations.

Second, the problem of the availability of clear procedures allowing verification of SNB and EWC mandates has not been (transparently) regulated at national level (as required by Art. 5.2 in conjunction of Art. 10.1 of the EWC Recast Directive). As reported by practitioners (ETUFs, EWC and SNB members) it is not uncommon that legitimate questions are raised with regard to the legality of the mandates of some members. In situations in which such doubts are justified – for example, with regard to the participation of members of management nominated by the company rather than elected by the workforce – the SNB or EWC is often confronted with lacunas in national laws that prevent them from excluding such members.

Third, another problematic area of implementation is the obligation to inform recognised competent European trade union and employers' organisations about the commencement of negotiations to establish an EWC (Recital 26 and Art. 5.2 (c) of the EWC Recast Directive). The silence of the vast majority of national implementation laws on the obligation to inform about the launch of negotiations (see Table 7 in Chapter 3.2) reflects the general wording of the body of the EWC Recast Directive itself, which does not mention any concrete organisation (there is reference to organisations specified in Art. 138 of the Treaty only in the Preamble). Nevertheless, these organisations (and procedures) were specified to all the parties (representatives of the member states) in the official guidelines (Expert Report) to implementation of the directive (European Commission 2010a) and thus should be known to them and implemented. Of course, the guidelines on implementation are not binding for either party, but it should not be possible for the European Commission to ignore any member state breach of obligation to implement this provision.

The latter conclusion can be extended to the whole implementation study: we expect that the European Commission, by means of the research partner conducting the implementation study, will use the guidelines and recommendations of the Expert Report (European Commission 2010a) as point of reference for evaluating the quality of national transposition acts. The Expert Report contains the results of a deepened analysis and conclusions aimed at ensuring coherent application of the Directive's provisions. The resources and collective expertise invested in the workings of the Expert Group are simply too precious to be 'dismissed' such as a series of interesting meetings with minutes as a petty by-product (as was the case with similar proceedings concerning the original Directive 94/45/EC in 1995). Quite the opposite is the case: national authorities who affirmed the recommendations of the Working Party should be held accountable for deviations between the agreement recorded in the Expert Report and the contents of national laws. If the implementation report finds discrepancies between the two enquiries possible corrective actions should follow. Such decisiveness by the European Commission would help

prove that the goals laid down in the Better Regulation agenda really serve to improve the quality of legal frameworks and not only their simplification and reduction at the expense of workers.

While this ETUI report, due to limited resources, might not be sufficiently comprehensive and detailed with regard to the exploration of national laws beyond the transposition acts implementing Directive 2009/38/EC, at least it may point out problematic areas or individual examples of improper transposition in certain member states in the hope that the actual Implementation Report to be published in future by the European Commission will scrutinise those instances and deal with the matters more systematically and comprehensively.