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ANALYTICAL DOCUMENT

Accompanying the document

CONSULTATION DOCUMENT

Second-phase consultation of Social Partners under Article 154 TFEU on a possible revision of the European Works Council Directive (Directive 2009/38/EC)

{C(2023) 5054 final}

1. INTRODUCTION AND POLICY CONTEXT

1.1 Policy context

1.1.1 Why EWCs matter

In the ongoing transformation of the world of work driven by environmental, economic and social sustainability, a meaningful involvement of workers at all levels and their representatives as regards the anticipation and management of change can help diminish job losses, maintain employability, enhance competitiveness and ease effects on social welfare systems and related adjustment costs. European Works Councils (EWCs), information and consultation bodies representing EU-based employees within multinational companies, whose rules are laid down in European Works Councils Directive 2009/38/EC[1] ('recast Directive'), are an important piece of an extensive policy framework on social dialogue.

The right to information and consultation is laid down in the EU Charter of Fundamental Rights of 2000 (Article 27). The Treaty on the Functioning of the European Union (TFEU) also promotes social dialogue between management and labour (Article 151) and recognises the role of social partners (Article 152).

In accordance with Article 153 TFEU, the EU shall support and complement the activities of Member States in the field of information and consultation of workers. A comprehensive set of directives on the information and consultation of workers establishes rules to protect their rights notably in restructuring processes (see section 1.3 below).

Principle 8 of the European Pillar of Social Rights states that "workers or their representatives have the right to be informed and consulted in good time on matters relevant to them".[2]

During the 2009-2010 economic crisis, relatively few workers lost their jobs in EU Member States with well-developed industrial relations systems where workers and their representatives have relatively strong consultation and information rights on the basis of laws and collective agreements.[3] Similarly, according to the European Added Value Assessment conducted by the European Parliament, during the COVID-19 pandemic "*EU Member States with well-developed industrial relation systems, working arrangements and short-working schemes (already in place at the beginning of the pandemic) performed even better than the EU average and far fewer workers (0 - 2 %) lost their job*." [4] A 2016 Eurofound study confirmed that difficult reconstructing measures were better implemented - with employees or trade unions'

[1] Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), OJ L 122, 16.5.2009, p. 28–44.
[2] The European Pillar of Social Rights in 20 principles. Available here: https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles_en
[3] Welz C. et al. (Eurofund) (2014) Impact of the crisis on industrial relations and working conditions in Europe. Available here: Impact of the crisis on industrial relations and working conditions in Europe (europa.eu)
[4] European Parliament (2021) European Works Councils. Briefing – European Added Value Assessment, p. 9.

support - in companies with 'trusting' forms of social dialogue, where consultation was carried out at an early stage.[5]

EWCs are bodies representing EU-based employees within multinational companies. Through them, the employees of undertakings or groups of undertakings operating in two or more Member States are to be informed and consulted on transnational matters affecting them. EWCs play an important role in reconciling economic and social objectives within the single market, especially in a changing world of work. EWCs create a link between employees of the same company or group in different Member States and provide a structure enabling effective dialogue between central management and worker representatives within these entities.

EU law on EWCs aims to bridge the gap between increasingly transnational corporate decision-making and workers' nationally defined and nationally confined information and consultation rights'[6]. When company decisions are taken at a transnational level, the national system of information and consultation does not enable employees in the different Member States to organise inputs and voice their views or concerns on these transnational issues together.[7]

EWCs promote a shared understanding of the transnational challenges facing large multinational companies and the involvement of employees in the decision-making process, with the objective of exchanging on possible solutions, facilitating their implementation and increasing the impact of strategic choices made by the employer. Their potential should be fully exploited in the current context of the twin digital and green transitions and profound industrial transformations, bearing in mind the need to preserve competitiveness, the ability of undertakings to react to rapidly changing market circumstances and the need to ensure adequate working conditions. The information and consultation process of EWCs has to contribute to an efficient decision-making process enabling the companies to take decisions effectively (a general principle of the Directive expressed in Article 1(2)).

1.1.2 Recent policy developments

On 4 March 2021, the Commission put forward the **European Pillar of Social Rights Action Plan**[8] to turn the principles into concrete actions. It was endorsed during the Porto Social Summit of 7 May 2021 as the guidance for the implementation of the Pillar[9]. The Action Plan underlines, amongst others, that information, consultation and participation of workers and their representatives at different levels play an important role in shaping economic transitions and fostering workplace innovation, in particular with a view to the ongoing twin transitions and the changes in the world of work. It stresses furthermore that national authorities and social

[5] Demetriades, S. et al. (Eurofound) (2016) Win-win arrangements: innovative measures through social dialogue at company level. Available here: Win–win arrangements: Innovative measures through social dialogue at company level (europa.eu)

[6] Barnard C. (2012), EU Employment Law, 4th Edition, Oxford, p. 664.

[7] A 2016 KU Leuven study showed that, during company restructuring, EWCs further facilitate employment transfers between sites in different EU Member States, and substitute for the absence of local expertise or institutions. Moreover, 70% of the interviewees consulted during study reported that the EWC was useful as a means to promote corporate identity.
See in Pulignano V., Turk J. (KU Leuven)(2016). European Works Councils on the move: management perspectives on the development of a transnational institution for social dialogue, p. 83-85.

[8] COM(2021). Available online.

[9] Action Plan available online here and Porto Declaration here.

partners must adhere to the framework of EU Directives on the information and consultation of workers, at both national and transnational levels.

The Council has in its 2022 recommendation on ensuring a fair transition towards climate neutrality[10] encouraged Member States, in close cooperation with social partners, to consider a number of measures in support of people most affected by the green transition, and, where adequate, help them to transit, through employment or self-employment, towards economic activities contributing to climate and environmental objectives. Among the measures recommended by the Council is "*the full and meaningful involvement, including information and consultation, of workers at all levels and their representatives as regards the anticipation of change and the management of restructuring processes including those linked to the green transition, in line with the communication from the Commission of 13 December 2013 on 'EU Quality Framework for anticipation of change and restructuring'*." The Commission's Quality Framework referred to in the Council Recommendation[11] stresses that timely information and consultation of workers can help diminish job losses, whilst also maintaining employability levels and lowering adjustment costs through the use of internal flexibility.

The European Parliament adopted, in 2021 and 2023, two resolutions on workers' involvement at company level as a way to support democracy at work, and particularly to reinforce the operation of EWCs.

The 2021 resolution on Democracy at Work[12] covers areas of worker information, consultation and participation, trade unions, works councils as well as some aspects of company law and corporate governance. It calls for a revision of the recast Directive.

The 2023 resolution on revision of European Works Councils Directive[13] aims at *'strengthening EWCs and their ability to exercise their information and consultation rights, as well as to increase the number of EWCs, while taking into account the different industrial relations systems in the Member States'*. It contains an annex setting out proposals for legislative amendments to the recast Directive, including:

- a wider concept of 'transnational matters' on which information and consultation of the EWC should take place;
- an amended definition of 'consultation', i.e. requiring that EWCs receive a reasoned response to their opinion prior to management adopting the decision, and providing that that opinion must be taken into account by management;
- an obligation on Member States to provide for injunctive relief whereby a company's decision may be suspended if information and consultation requirements were infringed, and for financial sanctions of up to EUR 20 million or 4% of annual turnover, and exclusion from public procurement and subsidies;

[10] Council Recommendation of 16 June 2022 on ensuring a fair transition towards climate neutrality 2022/C 243/04 .

[11] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU Quality Framework for anticipation of change and restructuring, COM/2013/0882 final.

[12] European Parliament resolution of 16 December 2021 on 'democracy at work: European framework for employees' participation rights and the revision of the European Works Council Directive' (2021/2005 (INI)). Available here: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0508_EN.html

[13] European Parliament resolution of 2 February 2023 with recommendations to the Commission on Revision of European Works Councils Directive (2019/2183(INL)). Available here: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0028_EN.html

- an obligation on companies to provide EWCs with objective criteria for determining if a matter is confidential and for which duration, and requiring companies to secure prior judicial authorisation before restricting access to information which they consider could seriously hamper the company's activities;
- stricter deadlines for setting up an EWC;
- an end to the exemption of undertakings with pre-Directive agreements from the scope of the Directive and subjecting undertakings with all types of existing information and consultation agreements to the revised rules.

On 1 March 2023, in its response to the European Parliament, the Commission welcomed the Article 225 resolution of the Parliament. In accordance with the political commitment made by President von der Leyen in her Political Guidelines as regards resolutions adopted by the Parliament under Article 225 TFEU, the Commission is committed to follow up with a legislative proposal, in full respect of proportionality, subsidiarity and better law-making principles. The Parliament requests, including the concrete proposals made in the annex to the resolution, will be assessed in the light of ensuring legal certainty for workers and employers and safeguarding and promoting employment and industrial activities in the EU. This assessment will include data and evidence collection and a comprehensive evaluation of problems and drivers in relation to existing EWCs, and on the issues highlighted in the Parliament's resolution. In its response, the Commission further stated that, in line with Article 154 TFEU, it would launch a two-stage consultation of EU social partners and that social partners may also decide to act by means of agreements under Article 155 TFEU.

The European Economic and Social Committee (EESC) has issued a number of opinions, in which it stresses the need for an enhanced role of European Works Councils in the event of large company transformations[14] and in transnational restructuring processes in the context of the twin transitions.[15] In April 2023, the EESC has adopted an exploratory opinion on Democracy at Work,[16] which points to the need to substantially improve effectiveness and resources of EWCs: "e.*g. any circumvention or infringement of EWC participation rights should be sanctioned effectively and access to justice should be facilitated. In this context, the EESC welcomes the European Parliament's recent resolution on the revision of the EWC Directive and calls on the Commission to take legal measures in a timely manner*."

1.2 Consultation of European social partners

In line with Article 154 TFEU, **the Commission is now carrying out a two-stage consultation of social partners.**

During the first stage of the consultation, which ran from 11 April to 25 May 2023, social partners were consulted on the need for, and possible direction of, EU action.[17] 11 recognised social partners sent replies during the first-phase consultation, including **three trade union organisations** (European Trade Union Confederation – **ETUC**, European Confederation of Independent Trade Unions – **CESI**, European Managers – **CEC**) and **eight employer organisations** (**BusinessEurope**, **SGI Europe**, **SMEunited**, European Chemical Employers Group – **ECEG**, Council of European Employers of the Metal, Engineering and Technology-

[14] Opinion of the European Economic and Social Committee of 17 October 2018 on the package on European company law (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018AE1917&rid=3)
[15] Exploratory opinion of 2 December 2020 'Industrial transition towards a green and digital European economy: regulatory requirements and the role of social partners and civil society', INT/913-EESC-2020-03642
Opinion of 9 June 2021 'No Green Deal without a Social Deal', INT/903-EESC-2020
[16] SOC/746-EESC-2022.
[17] C/2023/2330 final. https://eur-lex.europa.eu/legal-content/ES/ALL/?uri=PI_COM:C(2023)2330

Based Industries – **CEEMET**, European Cleaning and Facility Services Industry – **EFCI**, Hotels, Restaurants and Cafés in Europe – **HOTREC**, European Confederation of Woodworking Industries – **CEI–Bois**).

All three responding **trade union organisations** see a **need for a legally binding revision of Directive 2009/38/EC** to address the shortcomings of that Directive. **ETUC** expressly endorses the Parliament's resolution calling for such a revision and stresses that the information and consultation process at transnational level can be regulated only by an EU legal act guaranteeing a level playing field by means of minimum requirements. **CESI** believes that EU action to address issues identified in the first stage consultation document action should target a revision of Directive 2009/38/EC. Likewise, **CEC** submits that addressing the shortcomings in the Directive will prove important to ensure EWCs are not devoid of substance.

While **ETUC** welcomes the Commission's intention to take legal action to improve the Directive, it queries that the first stage consultation document does not take up all relevant issues. For instance, according to **ETUC**, the consultation document did not reflect on the need to ensure more efficient coordination between local, national and European levels.

ETUC also regrets that the Commission's consultation paper referred to the position of trade union representatives only under other issues, and recalls its view that the role of the trade union representative in Article 5(4) of Directive 2009/38/EC should be reflected in the subsidiary requirements. **ETUC** also submits that a right for trade union experts to participate in all SNB, EWC and select committee meetings and to have access to all sites is a necessary condition for supporting and coordinating EWCs' work more effectively. It therefore calls to lay down such rights in Directive 2009/38/EC.

Furthermore, **ETUC** queries that the Commission's consultation paper does not address the issue of concretising the definition of 'controlling undertaking' to clarify the inclusion in the scope of the Directive of companies operating through management, franchise systems and 50:50 joint ventures. In addition, **ETUC** states that the consultation paper could have drawn certain links between EWCs and due diligence.The majority of **employer organisations** argue against a revision of the Directive, as they consider that it is fit for purpose.

BusinessEurope stresses in particular the need to give the social partners at enterprise level the space to negotiate agreements that suit their circumstances. According to **ECEG**, the heterogeneous landscape of EWCs is an accurate reflection of the original intention of the European co-legislators and should be preserved as a key element of the European system of information and consultation of workers in multinational companies. **CEI-Bois** considers that EWCs' practices need to remain flexible to be applied affectively to different sectors and companies across the Member States and that the Commission should refrain from adding additional regulatory burden on companies that have already opted for the creation of EWCs. **CEEMET** cautions that during a time when companies are facing unforeseen economic consequences and are suffering from a huge loss in terms of trade and international competitiveness, a revision of the EWC Directive would be another setback in the competitiveness of European businesses. If the Directive was nevertheless to be revised, **CEEMET** urges to propose specific measures alleviating companies from administrative and financial burden and adapting to the new reality of online meetings. **EFCI** thinks that a legislative intervention increasing companies' responsibilities would weaken EWC's prospects to serve as a shared and constructive solution for all parties involved. **HOTREC** and **CEI-Bois** call on the Commission to present a Commission Recommendation and a code of practice / handbook on the matter instead of revising the Directive. **CEI-Bois** argues that a revision

would create uncertainty for companies and employees to change already well-functioning EWCs and emphasises that the Commission should refrain from adding additional regulatory burden on those companies who have already opted for the creation of an EWC. Rather, it should aim at simplifying the implementation of the existing rules. **BusinessEurope** also maintains that a code of practice could be a good basis to help social partners at company level to identify ways of improving their own practice. **BusinessEurope** queries that the consultation document did not address important issues for the business community, such as increasing discretion for social partners at the company level and reconsidering the Directive's provisions on EWC meetings to provide more flexibility and save costs by making use of improved digital communications.

Amongst the responding employer organisations, **SGI Europe**'s members recognise that the Commission identified well the discrepancies in the implementation of the Directive and that it may be justified to revise the Directive in order to provide greater clarity of the rules and to organise regular genuine *ex ante* consultations of workers representatives in EWCs on transnational matters. **SMEunited** recognises the existence of a certain justification to amend the Directive without ignoring the current general good functioning of it.

The views of social partners on the identified challenges and possible policy options expressed during the first stage consultation are presented further in detail throughout the relevant sections below.

1.3 European Works Councils Directive

European Works Councils Directive 2009/38/EC ('recast Directive'), currently in force, provides for the creation of a European Works Council (EWC) at the request of at least 100 employees of at least two undertakings or establishments in at least two Member States, or at the initiative of the employer. The Directive applies only to multinational companies or groups of companies of a certain size.[18] They can issue non-binding opinions on management decisions on transnational matters affecting workers' employment conditions within the multinational undertaking. They are not a negotiating body, and so have a different objective than information and consultation processes at national or local level which aim to reach an agreement between employees' representatives and management. The information and consultation process in existing EWC agreements mainly covers economic and social topics, such as health and safety, environment and equal opportunities and is of particular importance in cases of cross-border restructuring.

The origins of today's legislation on European Works Councils date back to the 1980s with the very first proposal known as the 'Vredeling directive'. While this proposal was ultimately not adopted due to a lack of agreement between European social partners, several multinational companies voluntarily started creating transnational bodies to facilitate exchanges between management and worker representatives. Such experiences were subsequently taken into consideration by the Commission when preparing the proposal for the first Directive on European Works Councils, put forward following the lack of agreement between social

[18] For an individual undertaking any undertaking with at least 1 000 employees within the Member States and at least 150 employees in each of at least two Member States. For a group of undertakings at least 1 000 employees within the Member States, at least two group undertakings in different Member States, and at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State.

partners in this area. The first EWC Directive[19] was finally adopted in 1994 as a Council directive under the Agreement on social policy[20].

Several shortcomings became evident following the entry into effect of the 1994 EWC Directive, such as the low number of new EWCs created[21] and legal uncertainty hampering the proper implementation of some provisions. Following the consultation of social partners, the Commission adopted a legislative proposal for a recast of the 1994 Directive in July 2008.[22] The European Parliament and the Council adopted the new Directive 2009/38/EC ('recast Directive') on 6 May 2009. Some amendments introduced by the co-legislators reflected a joint position of the social partners put forward during the adoption process in a joint letter to the Council Presidency in August 2008[23].

The recast Directive aimed at addressing the implementation shortcomings of the original instrument:

- ensuring the effectiveness of employees' transnational information and consultation rights,
- increasing the number of EWCs established while enabling the continuous functioning of existing agreements,
- resolving the problems encountered in the practical application of Directive 94/45/EC and remedying the lack of legal certainty resulting from the formulation of some of its provisions or the absence of certain provisions,
- and ensuring that Union legislative instruments on information and consultation of employees are better linked.

In October 2015, the recast Directive was amended[24] to include seafarers in its scope of application.

1.3.1 Content of Directive 2009/38/EC ('Recast Directive')

The recast Directive includes the following main substantive provisions:

- *General principles and concepts of information and consultation*: Article 1 of Directive 94/45/EC stipulated that the arrangements for informing and consulting employees must follow the general principle of effectiveness. Article 2 of the recast Directive adds definitions of information and consultation, including the concepts of timing and content appropriate to the information and consultation.

[19] Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 254, 30.9.1994, p. 64–72.

[20] Agreement on social policy annexed to Protocol 14 on social policy annexed to the Treaty establishing the European Community.

[21] SWD (2018) 187, pages 21-22

[22] Commission proposal COM(2008) 419 final and Impact Assessment SEC(2008) 2166.

[23] ETUC and BusinessEurope (2008), Joint advice by the social partners on the European Work Council 'recast' Directive. See key documents (http://www.worker-participation.eu/European-Works-Councils/Recast-Directive/Chronology-of-the-EWC-Recast-review-Key-docs), 29 August 2008.

[24] Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers.

- *Opening and process of negotiations:* Article 4 clarifies the responsibility of local management to provide information enabling the launch of negotiations to set up new EWCs. Article 5 detailed the role and composition of the special negotiating body (i.e. the body representing employees in the negotiation).
- *Role of trade union and employers' organisations:* Article 5 introduces the obligation to inform the trade unions and employers' organisations of the start of negotiations establishing an EWC.

- *Procedure to set up an EWC:* Article 6 introduces general requirements necessary to set up an EWC, including on its competence and composition, but the specific modalities of functioning of each EWC is to be defined by agreement between the 'special negotiating body' (SNB)[25] and the central management. In accordance with the principle of subsidiarity, Member States are free to determine the method to be used for the election or appointment of the members of the employees' representatives. The Directive does not prescribe what should be the content of the agreement, but rather lists topics on which the SNB and the central management should agree.[26] Where parties are not able to reach such an agreement within a time limit specified in the Directive[27], subsidiary requirements apply. A large majority of EWCs are governed by an agreement signed between the parties. According to the latest data, only around 20 EWCs are governed by subsidiary requirements at present.[28] Article 6(3) allows the negotiating parties (i.e., workers' representatives and management) to conclude an information and consultation procedure ('ICP') instead of an EWC[29]. This possibility is however rarely used.

- *Transnational competence of the EWC*: The EWC's competence is limited to transnational issues, with the recast Directive having criteria to determine the transnational nature of an issue.
- *Minimum rights and obligations:* Articles 8 (Confidential information), 9 (Operation of the European Works Council and the information and consultation procedure for workers) and 10 (Role and protection of employees' representatives) include rights and obligations that apply both in relation to the EWCs based on agreements or subsidiary requirements, regardless of whether they are included in the EWC agreement.
- *Role and capacity of employees' representatives:* Article 10 specifies that the members of an EWC must have the means required to apply the rights arising from the Directive to represent collectively the interests of the employees. It also placed an obligation on

[25] An SNB is a temporary body of employees representatives established in accordance with Article 5(2) of the Directive following the request of employees or the management to set up an EWC. The SNB has the task to determine, together with the central management, the scope, composition, functions and term of office of the EWC or the arrangements for a procedure of information and consultation of employees (Article 5(3)). The SNB may also decide not to open negotiations for an EWC agreement or to close ongoing negotiations without setting up of an EWC (Article 5(5)).

[26] Article 6(2).

[27] Article 7.

[28] Source: ETUI statistics (April 2023).

[29] For more details, see Article 6(3) of the 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 employees (Recast) (op.cit.).

the employees' representatives to report to the employees they represent and gives employees' representatives the right to be provided with training without loss of salary.

- *Links between the levels of information and consultation of employees:* Article 12 of the recast Directive introduces the principle of a link between the national and transnational levels of information and consultation of employees, with due regard for the representative bodies' competences and areas of action. [30] This link may be specified in EWC agreements themselves, with due respect of the provisions of national law and/or practice on information and consultation of workers. If the agreement does not cover this interaction, the process must be conducted both at national and European level in such a way that it respects the competences and area of action of the employee representation bodies. In any case, the EWC process shall be without prejudice to national information and consultation procedures set out in EU law[31]. The European information and consultation process through the EWC is to take place either before or at the same time as the national information and consultation process[32].
- *Adaptation clause:* Article 13 provides for the agreements in force to be adapted in accordance with the applicable agreement or in accordance with the negotiation procedure for a new agreement, where the structure of the undertaking or group of undertakings changes significantly.
- *Continuity:* Under Article 14, the agreements in place under the 1996 Directive are not subject to the obligations arising from the recast Directive. This means that the recast Directive did not require systematic renegotiations of already existing information and consultation agreements in the companies eligible under the Directives. The recast Directive also exempts from its scope undertakings with EWCs negotiated or revised during the transition period between June 2009 and 2011. As a consequence, the obligations arising from the recast Directive do not apply to these undertakings. Indeed, the objective of the Directive was to increase the number of eligible undertakings establishing an EWC while 'enabling the continuity of existing agreements' (Recital 7).
- *Content of the subsidiary requirements:* the Annex to the Directive lays down the rules applicable in the absence of agreement between the management and employees representatives concerning an EWC's establishment, composition and competences.

1.3.2. Evaluation of the recast Directive

In 2018, the Commission published an evaluation of the implementation of the recast Directive[33] that confirmed its EU added value and the improvements it had brought to the quality and scope of information to workers. The Directive was considered relevant by all stakeholders, and the need to develop further transnational dialogue was acknowledged by social partners.

In terms of subsidiarity, EWCs have a genuine EU transnational dimension. The evaluation points out that '*only an EU legal act, transposed into national legislation, can regulate the*

[30] Article 12.
[31] Directive 2002/14/EC Directive 98/59/EC and Directive 2001/23/EC (op.cit).
[32] Recital 37 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 employees (Recast) (op.cit.).
[33] COM(2018) 292 final and SWD(2018) 187 final.

issue of information and consultation procedures and foster transnational social dialogue for workers in transnational companies'[34].

With regard to proportionality, the recast Directive allows Member States to adapt some of its provisions to suit their national industrial relations and legal systems, particularly in determining the arrangements for designating or electing employees' representatives, their legal protection and determining the most suitable sanction and remedy system at national level in case of breaches in the application of the legislation. The evaluation concluded that the recast Directive does not impose administrative, financial and legal obligations in a way, which would constitute an unreasonable burden for companies.

The Commission's 2018 evaluation found that the large majority of Member States have properly transposed the recast Directive. While most provisions have been implemented verbatim in national legislation, some countries have legislated more detailed provisions, going beyond the minimum requirements of the recast Directive.[35]

Overall, the evaluation highlighted persisting issues, mainly related to the low creation rate of new EWCs[36], limits to the effectiveness of the consultation process, weaknesses in the means in place allowing EWCs to enforce their rights (e.g. as regards their capacity to bring legal action), and significant differences across Member States in the type and level of sanctions. Some Member State representatives (namely Austrian, Bulgarian, French, German and Swedish) pointed out that enforcement had become easier due to improved legal certainty. On other hand, employees' organisations considered that the rules still leave substantial room for interpretation of certain concepts.[37]

The evaluation also found that the volume of litigation at national level had been low, and showed no change compared with the trend under the original 1994 Directive. Over the years, the Commission has received few formal complaints against Member States alleging incorrect transposition and implementation.

No cases were brought before the Court of Justice of the EU for a preliminary ruling under this Directive and the Commission has so far initiated infringement proceedings against Ireland on national enforcement procedures.[38] At national level, court cases concerning EWC are not frequent and are concentrated to jurisdictions with higher number of multinationals with EWCs.[39] Some of these national cases point to existence of legal uncertainties, which may compromise the correct implementation of the Directive and can entail costs and delays in decision-making processes in the companies.

To address these issues, the Commission focused its efforts on supporting a more effective application of existing rules, notably by:

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[34] COM(2018) 292 final, p. 7.
[35] SWD(2018)187, p. 14.
[36] SWD(2018)187 pages 21-22.
[37] SWD(2018)187, p. 15.
[38] See a press release here: https://ec.europa.eu/commission/presscorner/detail/en/inf_22_2548
[39] Altogether 160 EWC-related national court cases have been identified by ETUI since 1997 until the beginning of 2023. The low occurrence of legal disputes may be result of various factors, including the seriousness of issues, lack of agreement within the EWC to pursue a legal case against the management, as well as potential lack of legal standing of SNBs or EWCs in some Member States or lack of effective remedies available in Member States (cf. further section 2.3).

- Continuing to provide grants to social partners to support the implementation and functioning of EWCs. The Commission provides financial support to social partners for social dialogue on an annual basis and continues to fund various projects on information and consultation in enterprises, including in relation to EWCs[40].
- Proposing the creation of a handbook for EWC practitioners to help in establishing new EWCs and contributing to a more effective operation of existing ones. The work on the handbook was put on hold in April 2019, following a refusal of the EU level trade union organisations to participate in a group of experts, which would contribute to it.
- Ensuring the full and correct transposition of the recast Directive by engaging in a structured dialogue with Member States. The Commission services held a meeting with Member States' experts with a focus on enforcement and sanctions in 2019, while an infringement procedure concerning the Irish enforcement system was launched in 2022[41].

1.4 Coherence with other EU instruments

The EU's legal framework governing information and consultation at national level has developed over several decades. Directive 98/59/EC[42] on collective redundancies regulates the situation of workers affected by decisions of employers to lay off a group of employees. It sets out rules on the information and consultation of workers' representatives before collective redundancies are made. Directive 2002/14/EC[43] establishes a general framework for information and consultation of workers at national level. Directive 2001/23/EC[44] on transfer of undertakings protects employees' rights in the event that an undertaking, business, or part of an undertaking or business is transferred from one employer to another, stipulating *inter alia* that such a transfer does not in itself constitute valid grounds for dismissal. It contains provisions ensuring workers employed in businesses that are transferred to a new owner are informed and consulted. Article 12 of the recast Directive requires information and consultation of the EWC to be linked to that of national employee representation bodies, with regard to the competences of each.

Directive 2001/86/EC supplementing the Statute for a European company ('SE') and Directive 2003/72/EC supplementing the Statute for a European Cooperative Society ('SCE') [45] provide for the establishment of representative bodies for information and consultation on transnational issues in SE and SCE companies. The recast Directive does not apply to those companies that are, at the same time, Union-scale undertakings or groups of undertakings, unless the

[40] The Commission habitually supports the European Trade Union Confederation's work on EWCs notably its annual EWC conference. Other projects, such as those carried out by sectoral European Trade Unions Federations, are also regularly co-financed to help them to support better functioning of EWCs (e.g. to consolidate good practices of EWCs in a particular sector).
[41] A letter of formal notice was issued to Ireland in May 2022.
[42] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998, p. 16–21.
[43] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 80, 23.3.2002, p. 29–34.
[44] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16–20.
[45] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22–32
Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, OJ L 207, 18.8.2003, p. 25–36

negotiations on workers' involvement in the SE or SCE have not been opened or have been terminated by the special negotiation body.[46]Other EU instruments relevant in case of restructuring require also information and consultation of worker representatives at the national level which complements the information at the transnational level, including Directive 2004/25/EC of on takeover bids (amended in 2014 and 2021); Directive (EU) 2017/1132 relating to certain aspects of company law, i.e. in particular provisions on information and consultation of employees in case of cross-border conversions, mergers and divisions (introduced by Directive (EU) 2019/2121, which amended Directive (EU) 2017/1132; Directive (EU) 2019/1023 on preventive restructuring frameworks – specifically also including access of worker representatives at national level to early warning systems.

Additional safeguards are provided also protect the rights to participation in the company boards in companies adopting the SE or SCE statute described above, as well as in companies resulting from cross-border operations[47].

Another non-regulatory measure concerning the conduct of multinational companies in cases of restructuring is the EU Quality Framework for Anticipation of Change and Restructuring (QFR) adopted in 2013 with the aim of contributing to more sustainable employment opportunities and to maintaining employment levels in the EU. The QFR complements the above mentioned comprehensive legal framework for regulating the way in which social dialogue within companies and groups of companies should address, amongst other issues, anticipation of change and restructuring events[48].

For reasons of effectiveness, consistency and legal certainty, the EU acquis collectively requires that workers and their representatives must be guaranteed information and consultation at the relevant level of management and representation, according to the subject under discussion. To achieve this, the competence and scope of action of a European Works Council must be distinct from that of national representative bodies – contrary to them, EWCs are not bodies for negotiating with the management[49] - and must be limited to transnational matters[50]

A 2015 Eurofound study[51] has identified a variety of situations in the Member States how the process of information and consultation of the EWC is linked to local-level information and consultation, this also be influenced by the differences in national industrial relations . For example, the existence of co-determination rights, the possibility to apply for injunctions or sanctions to enforce local-level information and consultation rights may also influence the way Member States and social partners at each level perceive the issue of linking.[52]

[46] Article 13(1) of Directive 2001/86.

[47] Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, OJ L 321, 12.12.2019, p. 1–44.

[48] EU Quality Framework for anticipation of change and restructuring, COM/2013/0882 final

[49] The information and consultation procedures established in Directives 98/59/EC, 2001/23/EC and 2002/14/EC oblige management to inform and consult workers on the topics specified in the directives '*with a view to reaching agreement*'. The same is not provided in the recast EWC Directive, under which non-binding opinions on the measures proposed by the management may be provided.

[50] Article 1(3) in connection with recital 15.

[51] Dorsemont F., Kerckhofs P. (2015) Linking information and consultation procedures at local and European, page 1.

[52] SWD(2018)187, p. 29.

Overall, the recast Directive is considered to be generally highly consistent with other EU legislation addressing workers information and consultation rights.[53]

As Directive 2009/38/EC sets minimum procedural requirements for the establishment and operation of EWCs in multinational undertakings of a certain size, without limitations as to the content of the transnational matters within its scope, practical synergies can occur between Directive 2009/38/EC and any EU policy field that stands to benefit from the involvement of EWCs, in particular in the context of the twin transitions.

For example, the Commission's proposal for a Directive on Corporate Sustainable Due Diligence (CSDDD)[54], adopted in February 2022, provides that, where relevant, companies should also carry out consultations with potentially affected groups including workers and other relevant stakeholders to gather information on actual or potential adverse impacts. In this context, EWCs could be informed and consulted on the due diligence policy and other due diligence actions of multinational corporations. EWCs' opinions on transnational matters relating to corporate due diligence can potentially help central management to identify and mitigate adverse impacts on workers' rights, other fundamental rights and the environment. Furthermore, EWCs can play an important role in disseminating information about sustainability due diligence matters amongst the employees they represent and can submit complaints using the complaints procedures under the proposed CSDDD.

1.5 EWCs in practice: demographics and practical functioning

According to the available data, in 2021, **3676 multinational companies** operational in the EEA constituted an undertaking or group of undertakings within the scope of the Directive, employing close to **30 million workers** in the EEA.[55] European Works Councils or agreements on transnational information and consultation agreed between employee representatives and the central management are operating in around 1000 companies[56].

The number of companies with EWCs has been relatively stable in the last decades. The take up rate and the overall number of EWCs has not changed significantly since the recast, newly established EWCs taking the place of those dissolved, mainly due to restructuring (mergers).

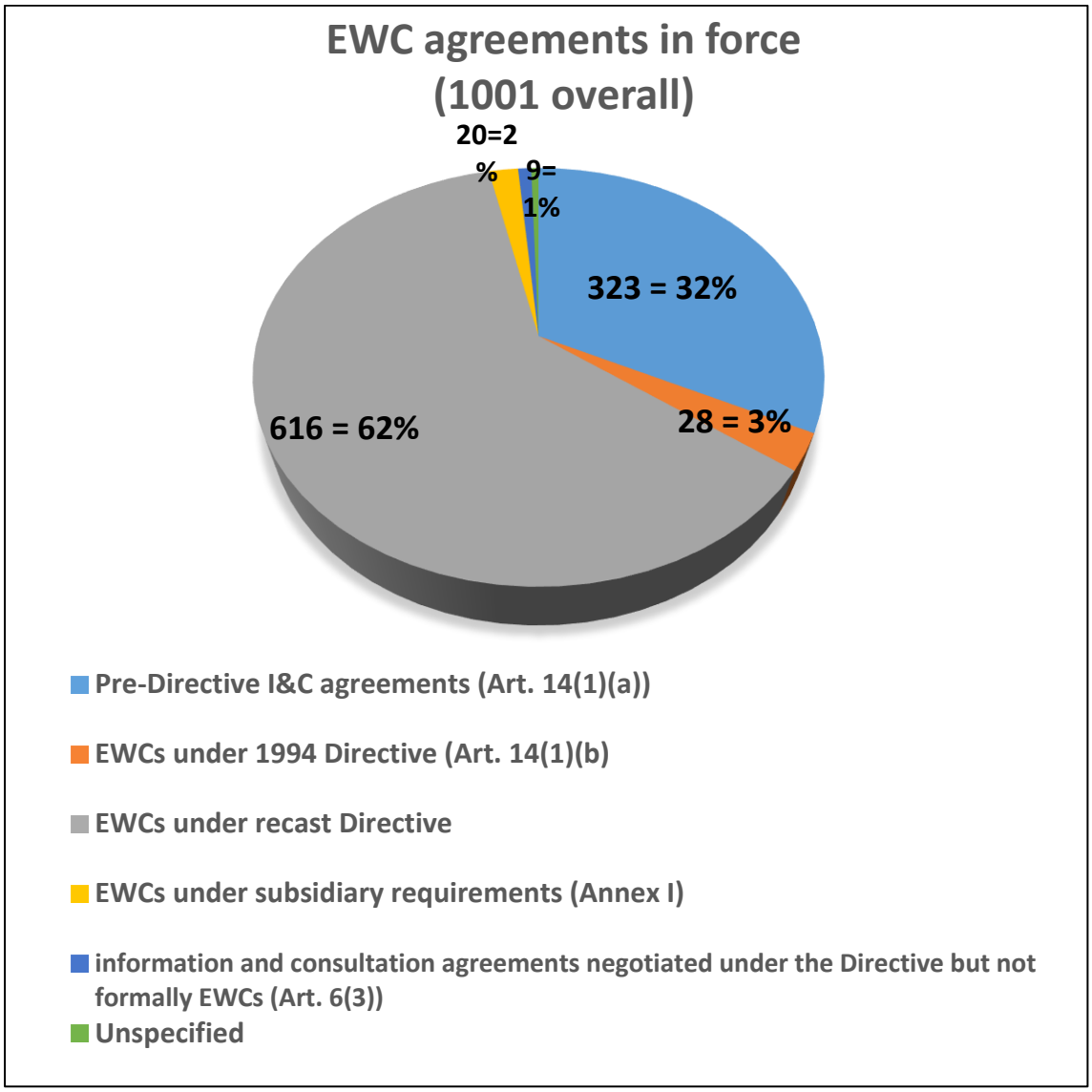
As explained under section 1.2.1 above, several types of information and consultation agreements in large multinational companies co-exist today (see also chart below):

- *Pre-1996 agreements ('voluntary agreements'):* undertakings with these agreements are not subject to the Directive. When jointly renewed or revised by the parties upon their expiry, these agreements continue not to be subject to the 1994 Directive (nor to the recast Directive);
- *agreements signed or revised during the transposition period 2009-2011*: undertakings with these agreements are subject to the rules applicable when the agreements were signed/revised (i.e. those set out in the law transposing the 1994 Directive). When subsequently renewed or revised by the parties, these agreements continue not to be subject to the recast Directive);

[53] SWD(2018)187, p. 43.
[54] COM/2022/71 final.
[55] Source: Eurostat, ad-hoc extraction from the EuroGroups Register. For further information, please see: Employment in large-scale multinational enterprise groups - Statistics Explained (europa.eu)
[56] Source: EWC Database (ETUI, 2023).

- *Agreements concluded under or 2009 Directive the 1994 Directive (and not revised during the transposition period 2009-2011) or under the 2009 Directive:* Undertakings with these agreements are subject to the recast Directive.
- *Information and consultation procedures*: instead of an EWC, parties can set up an information and consultation procedure under Article 6(3) of the recast Directive.

Figure 1.1 EWC bodies by type of agreement



Source: ETUI (2023)

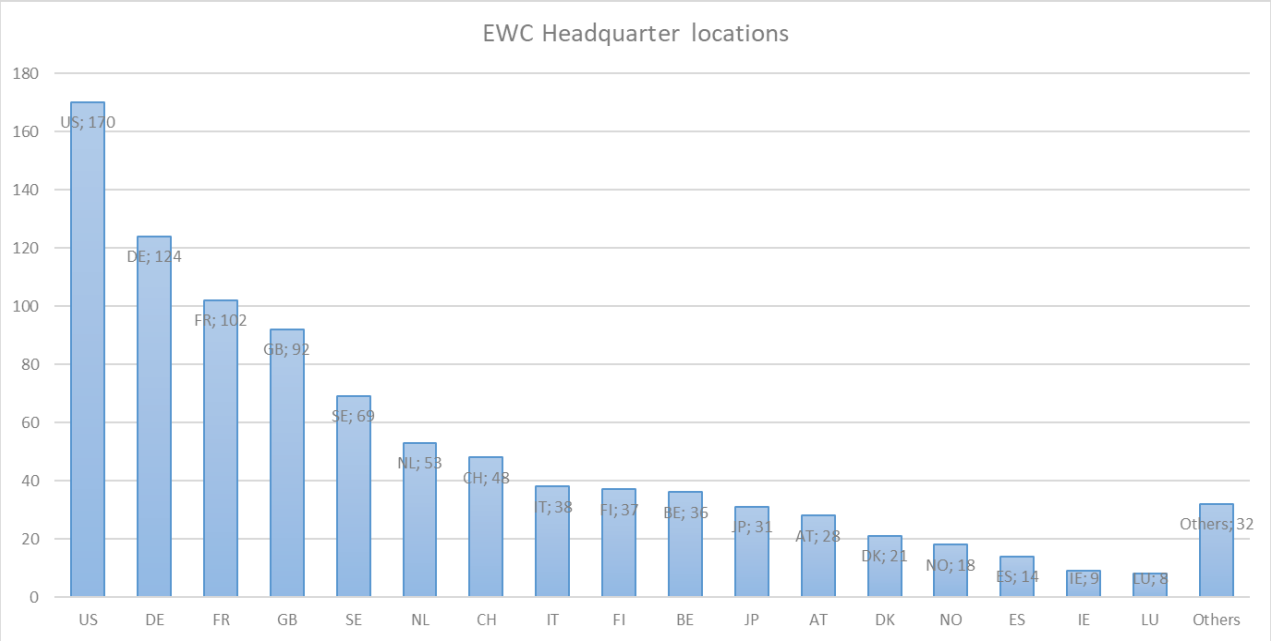
For a multinational to be covered by the EWC Directive, it needs to employ over a thousand employees in total and at least 150 in two EU Member States. Most EWCs are established in multi-national companies ('MNCs') with more than 5,000 employees. In a sample of eligible companies analysed by Eurofound[57], more than two-thirds of eligible companies with more

[57] Kerckhofs P. (Eurofound)(2015). European Works Council developments before, during and after the crisis. Eurofound. Available here: https://www.eurofound.europa.eu/publications/report/2015/industrial-relations/european-works-council-developments-before-during-and-after-the-crisis

than 10,000 employees in the EU have established an EWC, while the proportion falls to one-third for those with fewer than 5,000 employees.

The EWCs can be established in companies under a jurisdiction of an EU/EEA Member State, even if the companies' headquarters are situated outside of the EU.[58] The largest number of EWCs are located in multinational companies **headquartered**[59] in the United States (170), Germany (124), France (102), the United Kingdom (92), Sweden (69), the Netherlands (58), Switzerland (48), Italy (38), Finland (37), Belgium (36), Japan (31).

Figure 1.2 EWC bodies currently active, by country of headquarters



Source: EWC database (ETUI, 2023)

EWCs must be established under the legislation of a Member State. The large majority of EWCs have been established under legislations of Germany, UK[60], France, Belgium, Sweden, Netherlands, Ireland, Italy. At the same time, around 10 EU Member States have either none or only one EWC body established under their rules.[61]

By sector of activity, the majority of EWCs are concentrated in large metal, services or chemical multinational companies.

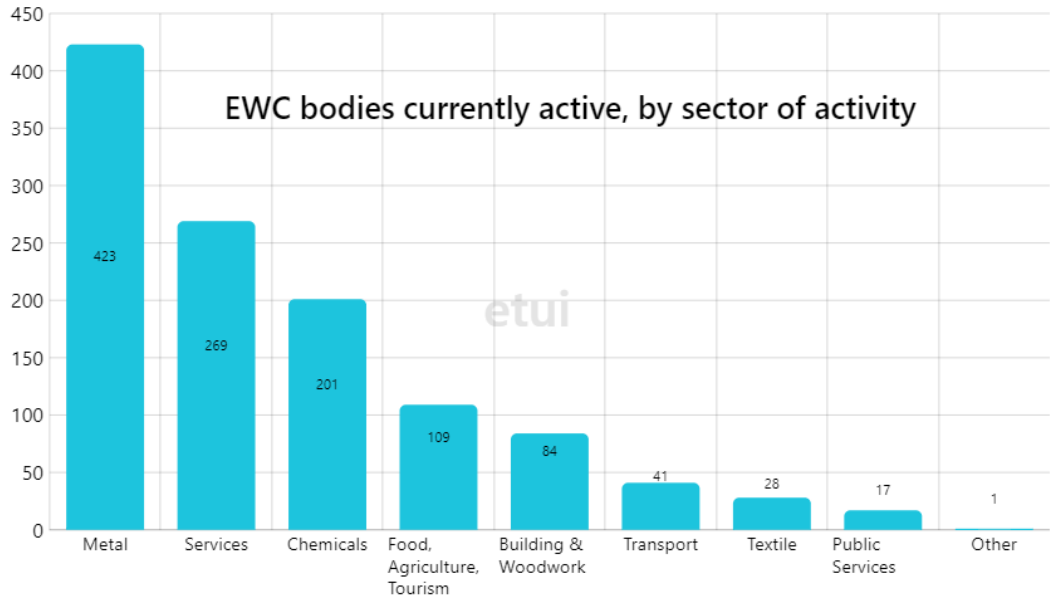
[58] EWCs represent the European employees of a multinational company, whether it is headquartered within or outside the EU.

[59] Headquarters are determined by the seat of the central management of the multinational company indicated in the EWC agreement or, if not stated explicitly, the global ultimate owner (GUO) and the respective country of the central administration/registered seat of the company are determined. (source: ETUI)

[60] Reliable post-Brexit data are not yet available. The UK's withdrawal from the EU had the consequence that the EWCs based in the UK had to be established in another EU Member State. Based on available information, about half of the EWCs (70) formerly based in the UK have moved to Irish law.

[61] Source: ETUI database. (The data relies on information reported to ETUI).

Figure 1.3 EWC bodies per sector of activity (ETUI, 2021)



Source: EWC database (ETUI, 2023)

Overall, EWCs are not equally spread across all sectors. According to the European Trade Union Institute (ETUI) (2015),[62] the main reason for the variation in number of EWCs between sectors is their differing characteristics, namely:

- company size;
- companies that operate on sites with a high concentration of employees (factories or production facilities) facilitate worker organisation;
- companies in sectors where the workforce is spread across different States (e.g. building or transport industries) tend to establish EWCs

Since the entry into force of the recast Directive, the creation of the new EWCs has been rather stable, with slightly more than 20 new EWCs created each year[63].

The overall annual costs of operating an EWC depend on the structure of the EWC and the number of meetings held. These costs often increase when an extensive restructuring is under way, as the intensity of EWC work increases. The 2018 Commission evaluation established the following cost estimates for operation of an EWC under the recast Directive: fixed costs only for the operation of EWCs with average annual running costs EUR 160 900. When taking into account not only fixed costs but also expenditure related to the time spent by employees on EWC-related activities, the average total cost of a recast EWC per year is EUR 240 000, or 0.009 % of the turnover of the average company with an EWC. [64]

A 2016 KU Leuven study showed an overall positive perception of the cost-benefit balance of the EWCs. In their survey, 54 % (=29) of interviewed managers considered that the benefits do justify the costs, 19 % (=10) responded that the costs were not matched by the benefits, and

[62] De Spiegelaere S.; Jadodzinski R. (ETUI) (2015) European Works Councils and SE Works Councils in 2015. Facts & Figures. Available here: https://www.etui.org/sites/default/files/F%26F_Report_EN_WEB.pdf
[63] SWD(2018) 187 final, p. 21-22.
[64] SWD(2018) 187 final, p. 37.

a further 26 % (=14) answered that the key issue was compliance with the legislation rather than whether the benefits justified the costs.[65]

Benefits from EWCs operating under the recast Directive are essentially non-quantifiable. They relate to topics such as: (i) the development of social dialogue in the company; (ii) the reinforcement of mutual trust on both sides of the industrial relationship; (iii) better informed strategic decision-making; and (iv) better targeted measures accompanying structural changes.[66]

2. PROBLEM DEFINITION

2.1 What is the problem?

The following sections describe elements of a preliminary problem definition, which is subject to further evidence gathering, including stakeholders' consultation and analysis of available data.

The elements of the preliminary problem definition described below will therefore require further assessment and input of stakeholders, in order to confirm the existence and scale of the issues and to identify underlying causes and consequences in the context of a perspective EU initiative revising the recast Directive.

On the basis of the 2018 Commission evaluation and on the 2023 Parliament resolution, the information and consultation of employees at transnational level has not always been effective.

Partially, this lack of effectiveness is influenced by drivers which, while having an impact on the problem the EU initiative aims at tackling, are 'external' to its scope and reach. They are described in section 2.2.1., together with other phenomena that are intrinsic to industrial relations and beyond direct reach of policy action (industrial relations systems in the relevant Member States, ownership structure, evolution of workforce and work practices, economic sector, external shocks requiring quick reactions of companies, internationalisation of corporate activities, increasing number and importance of transnational restructuring operations, and trust between the employee representatives of the company and the management).

'Internal drivers' to the problem have been preliminarily identified and are described in section 2.2.2. below. Confirmation of their links to the problem and of their scale is subject to the ongoing evidence gathering.

If confirmed by the ongoing evidence gathering and fine-tuned as appropriate, these internal drivers are the aspects of the problem that the potential EU initiative could aim at addressing to prevent negative consequences.

These drivers and their consequences concern primarily the employees and their representatives and the multinational undertakings.

[65] Pulignano V., Turk J. (KU Leuven) (2016). European Works Councils on the move: management perspectives on the development of a transnational institution for social dialogue, page 56/57.
[66] SWD(2018) 187 final, p. 38.

Indirectly, the effectiveness of the information and consultation of EWCs is also relevant for companies linked to Union-scale undertakings in the value chain, as well as the regional economic systems depending on those undertakings more broadly.

The identified challenges **affect workers and companies not only in Member States where EWCs are based**, but also in all those where undertakings belonging to the same group operate.

Similarly, subcontractors and networks of small and medium-sized businesses, with which the directly affected companies coexist and which they support, are affected along with their workers. The identified shortcomings in the anticipation of change and the capacity to build partnerships for managing it in a sustainable way therefore have an impact on competitiveness and social cohesion in Europe.

While some of the challenges – such as deficits regarding access to justice or a lack of sufficiently deterrent sanctions – are more relevant in certain national legal systems than in others, their effects nevertheless propagate across borders due to the **inherently transnational nature** of EWCs.

More detail on the consequences of the challenges on the different stakeholders is set out in Section 2.3.

2.2 What are the problem drivers?

2.2.1 External drivers

The following external drivers, which are out of scope and reach of potential EU initiative, have been identified.

A. Industrial relations systems in the Member States

In the Social Policy field, the Union may adopt minimum requirements for gradual implementation, having regard to the conditions and technical rules in each Member States.[67] In particular, the Union recognises the diversity of national industrial systems and of national practices, which may be based on trade unions or works councils (or employees' bodies), or combining both. While Union law provides for minimum rights to information and consultation of workers, the Member States determine the practical arrangements for exercising this right at the appropriate level. Depending on national laws, the employee representatives' competences may go beyond consultation and may include a right to co-determination. The available research has shown that in countries where there is a strong tradition of social dialogue and corporate culture, European Works Councils function more effectively than those in countries

[67] Article 153(1) provides the legal basis for the EU "to support and complement the activities of the Member States" in a number of fields for people both inside and outside the labour market: workers, jobseekers and unemployed. The directives based on Article 153 can 'set minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States'. Such directives 'shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings'. The provisions adopted 'shall not prevent any Member State from maintaining or introducing more stringent protective measures'.

with a weak industrial relations culture.[68] A study points out that involvement in restructuring processes is in particular related to the quality of social dialogue[69].

B. Economic and corporate developments and societal changes

Changes in corporate structures were among the main drivers behind the adoption of the 1994 Directive on European Works Councils and of the 2009 recast of the directive.

The frequency of transnational restructuring events and the importance of these, impacts on the work of EWCs. According to the Eurofound 2020 report[70], "*transnational restructurings account for a small share of overall large-scale restructurings (around 6% of cases involving job loss) but by virtue of their much larger size involve a much more significant share of associated job loss. They also take longer to enact*." The report concludes that transnational restructuring incidence is particularly cyclically sensitive. At the same time, where transnational restructuring occurs, it is generally a deliberate and planned process of internal restructuring.[71]

The world of work has been undergoing continuous changes driven by broader economic developments (recessions, inflation, internationalisation of companies), societal changes (demographic change, social inequalities), climate change (resources, modes of production, health crisis) as well as geo-political developments (war against terrorism, Syrian war, migrant flows, lately the Ukraine war and the UK exit from the EU) and the digitalisation of activities and interactions. These external factors and shocks may require quick reactions from companies, which may in turn affect the quality of processes of information and consultation of employee representatives at the various levels, if they are done in a rush or not at all. However, there is no systematic empirical analysis of the extent to which broader economic and social changes have impacted the EWCs' involvement in restructuring decisions. A 2015 Eurofound study concluded that restructuring cases during the Great Recession were challenging for EWCs, but they also presented an opportunity to change and clarify information and consultation procedures.[72]

Consequences of certain events (e.g. the COVID-related restrictions in manufacturing countries like China and the sanctions imposed on Russia) may lead to partial relocation of supply chains, likely generating shifts within the EU industrial sector.[73] In addition, high inflation reduces employees' purchasing power, hence increasing the tensions between companies facing increasing costs and a workforce demanding pay raises. Both dynamics could generate issues and disputes with a 'transnational' scope, hence increasing the need of the involvement of EWCs on financial and restructuring matters.

Evidence on **the effects of digitalisation on the functioning of EWCs** is not conclusive. The limited literature on this topic indicates that online meetings had become more frequent post-

[68] Eurofound (2022) Industrial relations and social dialogue. Challenges and solutions: case studies on European Works Councils. Available here: https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef21050en.pdf

[69] Voss.E, Warneck F., Schulze Marmeling, S. (2022) Coordination and interaction in European works councils, a report for the ETUC, p. 26

[70] Eurofound(2020). ERM report 2020: Restructuring across borders, p. 26.

[71] Ibid.

[72] Kerckhofs P. (Eurofound)(2015) European Works Council developments before, during and after the crisis.

[73] Korn, T., & Stemmler, H. (2022). Russia's war against Ukraine might persistently shift global supply chains. VoxEU. org, 31.

pandemic. Employee organisations recognise the positive aspects of online meetings, however, maintain the importance face-to-face meetings. The Covid-19 pandemic has accelerated the pace of digitalisation. During the pandemic, the number of meetings in selected companies either remained the same or increased[74]. Additionally, there is an increasing quantity of online trainings being made available in the context of EWCs.[75] Digitalisation of companies and industries is increasingly a topic tackled by EWCs.[76] The Parliament has also argued that timely and meaning information and consultation will be essential to ensure that new digital technologies are implemented and monitored in a trustworthy manner that ensures full respect of employees' rights.[77]

Demographic changes may also shift the priorities addressed by EWCs[78]. For example, the increasing participation of women in some industries where the majority of workforce has traditionally been male (e.g., construction) would increase the incentives to adopt company-wide policies on gender equality.

C. Company structure and relationship between the employee representatives and the management

The KU Leuven study (2016) found that there is a wide range of managerial policy towards EWCs that is influenced, *inter alia*, by the country of origin of the company, the manager, the sector of operation, and the company size.[79] For instance, as regards the country of origin, that study concluded, based on interviews with managers responsible for EWCs in multinational companies, that those from "coordinated market economies"[80] are much less likely to report a problem-free good quality debate with their respective EWC than those from "liberal market economies"[81] (15% v. 33%).[82] Good managerial leadership was regarded by interviewees as enhancing the quality of dialogue within transnational companies.[83] Concerning the correlations between company size and operational patterns of EWCs, the study found that smaller companies have better employee engagement in the EWC.[84] These findings suggest that such factors have a relevant impact on the effectiveness of EWCs. However, as they cannot be directly influenced by possible EU policy measures on EWCs, they are considered external drivers for the purposes of this social partner consultation.

[74] Turlan F., Teissier C, Weber T., Kerckhofs P.; Rodriguez Contreras R. (Eurofund) (2022) Challenges and solutions: Case studies on European Works Councils.
[75] Ibid.
[76] The European Economic and Social Committee (2020). An EU legal framework on safeguarding and strengthening workers' information, consultation and participation.
[77] European Parliament (2021) Report on democracy at work: a European framework for employees' participation rights and the revision of the European Works Council Directive. (2021/2005(INI)).
[78] EFBWW (2021). EWC guide on demographic change. Available here: STIC 4 EN Demographic change EN.pdf
[79] Pulignano V. et al. (2016) European Works Councils on the Move: Management perspectives on the development of a transnational institution for social dialogue. KU Leuven, p. 11; Available here: https://soc.kuleuven.be/ceso/wo/erlm/files/permewc-final-report-eng
[80] For the purposes of the KU Leuven Study: Austria, Belgium, Denmark, Finland, Germany, Japan, Luxembourg, the Netherlands, Slovenia and Sweden.
[81] For the purposes of the KU Leuven Study: Australia, Bulgaria, Croatia, China, Cyprus, Czech Republic, Estonia, Hungary, Ireland, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, South Africa, United Kingdom and the United States.
[82] Pulignano V. et al. (2016), op.cit., p. 23.
[83] Ibid., p. 27.
[84] Ibid., p. 25.

2.2.2. Internal drivers related to the scope and coverage of the recast Directive

The 'internal drivers' relate to the scope and reach of the Directive. For analytical purposes, they are clustered into the following four macro-drivers. Confirmation of their links to the problem and of their scale is subject to the ongoing evidence gathering.

A. Workers of certain Union-scale undertakings do not have the same minimum rights regarding establishment and operation of an EWC

The differences in the coverage of the existing EU rules, due to the existing exemptions of undertakings with legacy agreements from the scope of the recast Directive, have as a consequence that information and consultation agreements covering the entire workforce in the exempted Union-scale undertakings are not required to provide for the same minimum elements and rights as EWC agreements concluded under the recast Directive.

In addition, the Parliament has requested in its resolution that the Commission explore the merits of including contracts which enable structurally independent undertakings to influence each other's operation and business decisions (such as franchising or management contracts) within the scope of the Directive to prevent possible gaps.

1) Exemptions of undertakings with legacy agreements from the scope of the recast Directive

As outlined above under point 1.3, depending on the legal basis, the recast Directive excludes from its scope certain Union-scale undertakings with pre-existing agreements on transnational information and consultation. These are undertakings with:

- 'voluntary agreements' (also known as 'Article 13 agreements'): Article 13 of the 1994 Directive established that provisions of that Directive did not apply to Union-scale undertakings or groups of undertakings with pre-existing agreements on information and consultation covering the entire workforce, concluded before September 1996[85]. The recast Directive confirms this exemption in its Article 14(1)(a). According to the latest available data (ETUI, 2023), such 'voluntary agreements' currently exist in ca. one third (=323) of the undertakings with existing agreements; that share of undertakings is consequently exempt from the scope of the recast Directive.

- 'Article 14(1)(b) EWCs': following the joint advice of the EU social partners[86], the recast Directive established a new exemption from its scope for undertakings with agreements concluded or revised during the transition period from June 2009 to June 2011[87]. Undertakings with these agreements are exempted from the scope of the recast Directive. The national law applicable when the agreement is signed or revised shall continue to apply to them. According to the latest available data (ETUI, 2023) a very small number of undertakings remain subject to this exemption. The exemption formally applies to 28 undertakings (i.e. approximately 3%). However, for 16 of them, their EWC agreement stipulates that Directive 2009/38 should be applied to the agreement after the transposition period.[88]

[85] Transposition deadline of Directive 1994/45/EC.
[86] Joint advice by the social partners on the European Works Council 'Recast Directive' of 29 August 2008.
[87] Transposition deadline of Directive 2009/38/EC.
[88] Source: ETUI (unpublished analysis, 2023).

The exemptions continue to apply to the undertakings with pre-existing agreements as long as the agreement remains in force, including when it is renewed or revised by the parties.[89]

An objective of the recast Directive was to increase the proportion of eligible undertakings establishing a EWC while 'enabling the continuity of existing agreements' (Recital 7). The aim was to stimulate take up of new European Works Councils and avoid lengthy renegotiations that would bring no real improvements. A renegotiation of the existing agreement under the recast Directive can be launched by request of the workers where the structure of the undertaking changes significantly and the agreement does not provide for relevant provisions to address this situation.[90]

The 2018 Commission evaluation did not conclude whether and to what extent exemptions under Article 14 create legal uncertainties or prevent effective information and consultation in these undertakings. The evaluation concluded that the recast Directive did not lead to an increase in the rate of creation of EWCs, but it has provided some impetus for the renegotiation of existing agreements, despite the fact that it permits existing agreements to continue unrevised. At the same time, the evaluation recognised that it is not possible to isolate the impact of the recast Directive on the revision of existing agreements from drivers of broader business re-organisations or shortcomings in existing practices.[91]

A 2016 ETUI study[92] examined possible differences between agreements functioning under different legal frameworks. The study noted that the pre-Directive (voluntary) agreements are less likely to include definitions of transnational matters and clauses on reporting to the national employee representatives. On the other hand, they are more likely to provide for the involvement of trade union representatives. The study explains this observation by the need set out in the Directive for such pre-Directive agreements to cover the whole workforce in order for the undertaking to be exempted from its scope. One frequent way of doing so (in the absence of a formally organised SNB) was by negotiating with the trade unions present in the undertaking.[93]

In response to a large-scale ETUI survey of EWC representatives in 2018[94], relatively fewer members of 'voluntary' EWCs ('Article 13 EWCs') than of EWCs subject to the Directive ('Article 6 EWCs') say they have experienced a serious dispute with management over the functioning of their EWC over the previous three years: 10,4% v. 17,8%. According to a recent ETUI publication[95], this may reflect the longer-standing nature of the relationships within the EWC. This aspect is being further assessed in the ongoing evidence gathering.

The Parliament and ETUC consider it important to bring all Union-scale undertakings under the scope of the recast Directive to ensure a level playing field and legal clarity, whereas BusinessEurope considers that existing agreements should be respected. In its resolution, the Parliament stresses that: '*more than 25 years after the adoption of the first EWC Directive,*

[89] Article 14(2).
[90] Article 13 of the recast Directive ('Adaptation')
[91] SWD(2018) 187 final, p. 21.
[92] De Spiegelaare S. (ETUI) (2016) Too little, too late? Evaluating the European Works Councils Recast Directive.
[93] De Spiegelaare S. (ETUI) (2016) 'Too little, too late? Evaluating the European Works Councils Recast Directive', p. 58 and 64.
[94] Overview published on the ETUI website: Can anybody hear us? An overview of the 2018 survey of EWC and SEWC representatives, p. 83.
[95] De Spiegelaere S., Jagodzinski R., Waddington J. (ETUI)(2022) European Works Councils: contested and still in the making, p. 229.

many pre-Directive agreements are still in force and have not been adapted to the requirements of Directive 2009/38/EC; [it] *believes that it is essential that all EWC agreements are governed by the same rights and obligations, in order to ensure equal treatment of workers, access to the application of high Union standards, and legal certainty'.*

This view was reiterated by **trade union organisations** in response to the **first stage social partner consultation**. In that context, **ETUC** submitted that after more than 25 years, there is no longer a justification for exempting old agreements, querying double standards and identifying the exemptions as an obstacle to a level playing field and legal clarity.

In contrast, **employer organisations** responding to the first stage social partner consultation consider the existing exemptions useful and appropriate. For example, EFCI stresses that the grandfathering rules have proven themselves in practice, as the longstanding information and consultation bodies in exempted undertakings are often particularly effective and characterised by a deep level of trust and cooperation between workers' representatives and central management.

The existence and scope of exemptions from the common minimum requirements of undertakings with legacy agreements is being further assessed through the ongoing evidence gathering.

2) Structurally independent undertakings influencing one another's operation and business decisions (such as franchising or management contracts)

Article 3 of Directive 2009/38/EC defines 'controlling undertaking' as 'an undertaking which can exercise a dominant influence over another'. If an undertaking is considered to control another in that sense, they form a group for the purposes of the Directive and hence fall within its scope (provided they meet together the criteria for 'Community scale'). The determination of whether an undertaking is a controlling undertaking is made on the basis of the applicable national law, that is to say the law of the Member State governing the (potentially) controlling undertaking.

The Directive currently neither requires nor excludes that influence exercised by means of contracts between structurally independent undertakings (such as franchising or management contracts) be considered "dominant influence" and hence control. It merely lists the - non-exhaustive - examples of dominant influence exercised by virtue of "ownership, financial participation or the governing rules", and lays down a presumption of dominant influence in certain cases (majority shareholding or voting rights; ability to appoint more than half of the members of an undertaking's management or supervisory body).

Franchising or management contracts are not defined at EU level,[96] nor are EU-level statistics available on the use of these contracts, which can vary significantly in content depending upon the franchise system, the state jurisdiction of the franchisor, franchisee, and arbitrator. EWCs are not designed to deal with or to resolve local issues. Their purpose is to discuss at the central management level decision having transnational impacts across the undertaking or groups of undertakings. On the other hand, companies with management or franchise contracts have

[96] Regulation 2022/720, the recent EU legislative act on protecting intellectual property between the franchisor and the franchisee, does not include a definition of franchise agreements

certain conditions of functioning described as a part of their contract, while otherwise they are independent entities.

In its 2023 resolution, the Parliament requested that the Commission "*explore the merits of including contracts which enable structurally independent undertakings to influence one another's operation and business decisions (such as franchising or management contracts) within the scope of Directive 2009/38/EC in order to prevent possible gaps."* Management contracts are defined by the Parliament's resolution as "*agreements by means of which one undertaking, whilst remaining an independent structure, confers its day-to-day operation to another undertaking. The managing undertaking can thus control the employees of the managed undertaking without owning the business as such*."

The assumptions underlying this request in the European Parliament resolution seem to be, firstly, that the level of legal influence exercised by means of such contracts warrants the application of information and consultation requirements at transnational level, and secondly, that the Directive's definition of "controlling undertaking" (Article 3) does not sufficiently ensure the application of those requirements.

In response to the first stage consultation of social partners, ETUC stressed the need for a comprehensive definition of the concept of 'controlling undertaking' to clarify the inclusion in the scope of companies operating through contract management, franchise systems and 50:50 joint ventures. None of the responding employer organisations elaborated on this issue. SMEunited underlined generally that a possible initiative should not expand the scope of the Directive.

Further research and evidence-gathering is needed to confirm whether this aspect amounts to a problem driver and whether it might need to be addressed through a possible revision of Directive 2009/38/EC.

B. Not sufficiently efficient & effective setting-up of EWCs

The current procedures for setting up EWCs may lead to inefficiencies and ineffectiveness by allowing delaying the establishment of the Special Negotiation Body (SNB) due to unclearly defined legal obligations. Also, the set-up procedure can be lengthy and the SNB may lack necessary support and resources in that process.

3) Delays in the establishment of the Special Negotiation Body (SNB)

The recast Directive provides in Article 7(1) that where the central management refuses to commence negotiations within six months of the request to establish an EWC, an ad-hoc EWC based on subsidiary requirements shall be created. Currently, 20 (= ca. 2%) EWCs are established under such subsidiary requirements.

Article 7(1) has not been amended in the recast. The provision refers to a refusal of the management to commence negotiations and this may create legal uncertainty in situations where such refusal was not explicitly stated by the management, but at the same time the negotiations have not been initiated. Such situations then have to be resolved through national proceedings. In 2016, the Arbeitsgericht Berlin (First instance) ruled that an EWC was established after the management has not convened a constituent meeting within 6 months of the request. According to the national court: "[*t]he refusal to commence negotiations may be explicit. Furthermore, a refusal can also exist if, due to delays on the part of the central management, the constituent meeting of the special negotiating body has not taken place within*

six months of the application being made or if the information required for the formation of a special negotiating body is persistently refused in accordance with § 5 EBRG."[97]

In its response to the first stage social partner consultation, **ETUC** states that it is not uncommon for the central management to delay the establishment of the SNB, and calls for a requirement to constitute and organise a first meeting of the SNB meeting within 6 months of the request, or the subsidiary requirements would automatically apply. This is consistent with previous calls by ETUC for a clarification of the rules, namely "*a clear timeframe for the first SNB meeting, pace of SNB meetings, clear obligation of central management to establish an EWC if subsidiary requirements are to apply*".[98]

Employer organisations responding to the first stage social partner consultation consider that the provisions on the setting-up of EWCs are working satisfactorily. For example, **ECEG** explains that in the European chemical industry, the establishment of EWCs can easily be arranged in most cases, and that the existing rules are sufficient to fulfil the objectives of Directive 2009/38/EC.

4) Lengthy period for concluding an EWC agreement

The recast Directive provides that where the central management and the SNB are unable to conclude a European Works Council agreement within 3 years of the request, an ad hoc European Works Council based on subsidiary requirements shall be created.[99] According to available data, there are currently 20 active EWCs based on subsidiary requirements, representing 2% of the overall population of EWCs.[100]

In its Commission's 2018 evaluation, among the multiple and complex factors which may explain why the recast Directive did not lead to an increase in the rate of creation of EWCs, the Commission mentioned the duration of EWC negotiations, which take on average 2 to 3 years from the establishment of the Special Negotiating Body to the conclusion of the EWC agreement[101]. The deadline of three years established in the Directive nevertheless starts to run even before the establishment of the SNB, as of the request under Article 5(1).

In its resolution, the European Parliament notes that: '*the three-year delay following a request before the subsidiary requirements apply, in the event of a failure to conclude an agreement, is excessive, is often not used effectively and is to the disadvantage of workers'*.

In reply to the first stage consultation, ETUC takes the view that the existing 3-year negotiation period is appropriate, arguing that proper coordination, training and agreement on common demands take time. In contrast, according to **CESI,** practical experience appears to suggest that negotiations can be concluded in a shorter timeframe if indeed both sides are willing and engage constructively.

The employer organisations responding to the first stage consultation consider that negotiations of an EWC agreement can legitimately take up the timespan available in accordance with the existing provisions of Directive 2009/38/EC. For instance, **CEEMET** recalls that according to the Commission's implementation report of 2018, it takes on average 2 to 3 years from the

[97] Germany, 15.07.2016, Groupon, Arbeitsgericht Berlin – 26 BV 4223/16 (First instance).
[98] https://www.etuc.org/en/document/etuc-position-paperfor-modern-ewc-directive-digital-era
[99] Article 7(1).
[100] ETUI database, 2023.
[101] SWD(2018) 187 final, p. 21

establishment of the special negotiating body to conclusion of the EWC agreement. **HOTREC** cautions that some topics require long discussions and subsidiary requirements should apply only when strictly necessary.

The Commission continues to collect evidence and stakeholders' views on whether the existing 3-year deadline is appropriate and effective. The use of digital technologies could ease operational burden and reduce the length of time needed to conclude negotiations.

5) Risk of insufficient resources of SNBs

The recast Directive provides that expenses related to the negotiation of the EWC agreement and the set up of the EWC shall be borne by the central management.[102] The recast introduced new provisions in order to guarantee that SNBs and EWCs have access to the necessary resources. A general principle was introduced in the Directive according to which EWC members shall have the means required to apply the rights arising from this Directive, to represent collectively the interests of the employees of the Community-scale undertaking or group of undertakings (Article 10(1)).

Articles 5(4) and 5(6) assert that any expense related to the negotiation shall be borne by the central management so as to enable the special negotiating body to carry out its task in an appropriate manner and that representatives of recognised trade union organisations may act as experts and advise workers' representatives during the negotiation of the agreement.[103] Member States may lay down budgetary rules regarding the operation of the special negotiating body. They may in particular limit the funding to cover one expert only.

The 2018 Commission evaluation reported that the use of experts in negotiations increased (to nearly 70 %) under the recast rules and was considered helpful in providing advice on the legislation also in sharing expertise encountered by other existing EWCs.[104]

Article 10(4) provides that EWC and SNB members shall have access to training without loss of wages. The transposition of this provision has not been problematic, nor its implementation controversial according to social partners.[105] In the expert group established for transposition of the recast Directive, there was a consensus that under the recast rules costs are not to be borne by the employee representatives themselves.[106] The 2018 Commission evaluation concluded that Member States have properly transposed the provisions on the role, protection and training of EWC and SNB representatives (Article 10). In three Member States (Finland, Hungary and Italy) some provisions go beyond the requirements of Article 10 as they also cover the content of training and the rate of remuneration.[107] As the same provision on right to training applies to SNB and EWC members, see for more information point 8 ('Risk of lack of resources of EWCs') below.

The evaluation noted that the national rules on financial means and the legal costs of proceedings generally reflect the general provision of Article 10(1) of the recast Directive. No

[102] Article 5(6).
[103] A 2016 KU Leuven study estimated costs for setting up of an EWC at EUR 119 207 (referred to in SWD(2018) 187 final, p. 37.)
[104] SWD(2018) 187 final, p. 38.
[105] SWD(2018) 187 final, p. 31.
[106] Report of the Group of Experts (Commission)(2010). Implementation of Recast Directive 2009/38/EC on European Works Councils – Report of the Group of Experts, p. 44.
[107] SWD(2018) 187 final, p. 13.

legislation lays down a dedicated budget for court fees in cases of potential litigation between the SNBs or EWCs and the businesses, although these costs could generally be part of the operating expenses of EWCs.[108]

The European Parliament, in its legislative own-initiative resolution, has requested a number of amendments to the provisions on SNBs' resources (see section 5.2.2.(b) below for details). These requests seem to imply that SNBs do not have sufficient resources under the existing rules – namely as regards access to trade union expertise, training and judicial remedies.

In the first stage consultation of social partners, ETUC underlines the importance of guaranteeing support by recognised trade union organisations' experts to SNBs and EWCs and their select committees

The Commission is in the process of gathering evidence to confirm the existence and scale of problem drivers relating to SNB resources.

6) Gender imbalance in the composition of EWCs

The recast Directive provides in its Article 6(2)(b) that gender balance shall be reflected in the composition of EWCs.

A recent review[109] of national rules transposing the recast Directive has shown that most Member States have transposed the Directive's provision on the composition of EWCs, including the criterion of gender, almost verbatim,[110] while eight Member States[111] have not included a reference to gender balanced representation in the EWCs into their laws.[112] Such measures are also not typically included in laws on nomination of national employee representatives in most Member States.[113]

Available evidence suggests that the Directive's requirement to negotiate, where possible, a balanced composition of EWCs with regard to their gender is not effective in achieving an equal representation of men and women. The majority of EWC members participating to a recent survey of EWC representatives were men, and female EWC members are less likely to be found in more senior functions.[114]

The Parliament underlines the importance of ensuring a gender balanced composition in EWCs as a part of a broader issue of achieving gender equality in the workplace and ensuring equal opportunities and greater participation of women and persons with disabilities in the labour market and stresses that *"EWC members and other employees' representatives bodies can be useful tools in this context."* The first stage consultation of social partners has not yield substantive evidence on the scale of this issue, which is subject to further evidence-gathering.

[108] SWD(2018) 187 final, p. 34.
[109] Mapping of Member States' laws done by European Centre of Expertise in the field of labour law, employment and labour market policies (ECE)(2023), unpublished.
[110] AT, BE, CZ, DK, EE, EL, FR, HR, IT, LT, LU, LV, MT, PT, RO, SE, SI.
[111] CY, DE, ES, FI, IE, NL, PL, SK.
[112] ECE (2023), unpublished analysis.
[113] Provisions on gender balanced composition of national employee representatives have been found in national laws of AT, DE, FR, HR, PT.
[114] https://www.etui.org/publications/guides/can-anybody-hear-us

C. Procedural and material obstacles to effective information and consultation of EWCs

The internal drivers causing procedural and material obstacles to effective information and consultation of EWCs concern namely the unclarity of the concept of transnational matters, which determines the scope of activities of EWCs under the Directive; further, this driver concerns insufficiently effective exchange of views between the EWC and the management (as a follow-up to the EWC opinion); and a risk of insufficient support and resources of EWCs. This driver also concerns a potential issue of excessive use of confidentiality provisions which may hamper effective information and consultation.

7) Legal uncertainty regarding the concept of transnational matters, which does not clearly cover all issues warranting information and consultation at transnational level

The recast Directive aims to ensure that employees of Union-scale undertakings or Union-scale groups of undertakings are properly informed and consulted when decisions which affect them are taken in a Member State other than that in which they are employed.[115] The recast Directive limits the competence of the EWCs to transnational matters (Article 1). EWCs are thus not fora for resolving local-level issues. The concept of 'transnational matters' thus distinguishes the area of competence of an EWC from that of national bodies set out in other directives.[116]

To improve the clarity of the legal framework, the recast Directive defined the concept of 'transnational matters' in Article 1(4), which had been left undefined in the 1994 Directive. It provides that "matters shall be considered transnational where they concern the Community-scale undertaking as a whole, or at least two undertakings or establishments of the company situated in two different Member States."

Recital 16 clarifies that "'[t]he transnational character of a matter should be determined by taking account of both the scope of its potential effects, and the level of management and representation that it involves. For this purpose, matters that concern the entire undertaking or group or at least two Member States are considered to be transnational. These include matters which, regardless of the number of Member States involved, are of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between Member States."[117]

Recital 15 then reiterates that the competence and scope of action of a EWC must be distinct from that of national representative bodies and must be limited to transnational matters. The Commission stressed in the Impact Assessment for the recast Directive that "the potential risk of bringing up local issues at European level (with a subsequent increase in the number of meetings and the associated costs) where decision-making is centralised would nevertheless need to be avoided."[118]

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[115] Recital 12.

[116] In particular: the Framework Information and Consultation Directive 2002/14/EC, Collective Redundancies Directive 98/59/EC, Transfer of Undertakings Directive 2001/23/EC.

[117] Recital 16 was the most important topic for discussion between Council, Parliament and Commission in the search for a first reading agreement on the recast. It was agreed to add "These include matters which, regardless of the number of Member States involved, are of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between Member States." (cf. Group of Experts (Commission)(2010) 'Implementation of Recast Directive 2009/38/EC on European Works Councils', p. 18).

[118] Impact assessment SEC(2008)2166, p. 54.

The transposition analysis carried out during the evaluation of the Directive concluded that this concept has been implemented in all Member States. They did not define this concept in more detail. [119]

The 2018 Commission evaluation of the implementation of the recast Directive concluded that the concept of transnationality is better defined in the recast Directive, but it often remains difficult for European Works Council practitioners to interpret in concrete cases. The feedback from European social partners provided during the evaluation revealed: (i) difficulties in some cases over how to interpret the notion of transnationality; and (ii) some confusion over the notion of transnationality due to the strategic nature of certain decisions, stock exchange rules and the difficulty of determining if certain matters qualify as transnational. Some employee representatives drew attention to the ongoing lack of legal clarity over the scope of a transnational matter and the identification of the transnational nature of topics that are covered by the information and consultation requirement.

A 2016 KU Leuven study also showed a mixed picture as to the perceptions of effectiveness of the concept of transnationality. It found that while the criterion in the Directive according to which a matter is transnational if two or more Member States are concerned is the principal element used, some agreements go beyond this and set quantitative criteria[120]. 39 % of interviewed managers found that the recast Directive led neither to change in the EWC agreement in this respect nor to a reform of EWC practice. 20 % indicated that changes have been implemented because of the recast.

Good practices have been developed by the social partners, such as the inclusion of a transnationality clause in the agreement defining the scope of competence of the EWC, with for instance a set of criteria going beyond Article 1(4).[121] A 2016 ETUI study concludes that this is where the recast Directive has had a tangible effect: it found that the probability of including transnationality definitions in EWC agreements increased from 65 % to around 85 % due to the recast Directive.[122]

Despite the definition being introduced in most EWC agreements, during the Commission's 2018 evaluation, employee representatives reported a lack of clarity about transnational competence of the EWCs as one of the shortcomings of the information and consultation procedure.[123] In the abovementioned large-scale survey of EWC representatives carried out by ETUI in 2018[124], ca. 36% of responding EWC representatives reported frequent discussions with management on whether or not an issue is transnational, compared to ca. 26 % who did not have frequent discussions on this matter in their undertakings (the remaining EWC representatives gave neutral or 'don't know' answers to this question).

On the management's side, during a 2016 study supporting the Commission evaluation, a number of respondents representing management explained that keeping EWCs as a

[119] SWD(2018) 187 final, p. 13.
[120] Pulignano V., Turk J. (KU Leuven)(2016). European Works Councils on the move: management perspectives on the development of a transnational institution for social dialogue, p. 83-85.
[121] Study ASTREE IR Share 2016.
[122] De Spiegelaare S. (ETUI) (2016) 'Too little, too late? Evaluating the European Works Councils Recast Directive', p. 62.
[123] SWD(2018) 187 final, p. 27.
[124] Overview published on the ETUI website: Can anybody hear us? An overview of the 2018 survey of EWC and SEWC representatives, p. 83.

transnational forum can be quite challenging, as employees' representatives tend to bring up local issues at the EWC meetings.[125] A 2016 KU Leuven study found that while the criterion in the recast Directive according to which a matter is transnational if two or more Member States are concerned is the principal element used, some agreements go beyond this and set quantitative criteria.[126] The study stated that several interviewees, particularly in manufacturing, reported that the definition of 'transnational' had proved to be operationally challenging. However, solutions to the issue had been found in most cases in the form of either a specific form of wording in the EWC agreement or the practical application of an agreed understanding of what constitutes 'transnational'.[127]

The remaining scope for divergent interpretations and disputes around the concept of transnational matters is reflected in national case law. For example[128]:

- In a decision of 27 November 2018 in interim proceedings[129], the District Court of Rotterdam ('Rechtbank Rotterdam') considered whether an EWC established in the Netherlands had to be informed and consulted on the possible closure of two establishments in Spain. Based on an interpretation of the concept of transnational matters in conformity with Directive 2009/38/EC, the Dutch court found that it was sufficiently plausible, for the purposes of the decision in the interim proceedings, that the issue was to be considered transnational. The Court took into account that the closures would make around 20% of the relevant undertaking's European workforce redundant, and might have knock-on effects on the activities of its establishments in other Member States.
- In a French case[130], an EWC established in France queried the central management's failure to inform and consult on its decision to claim repayment of a loan that had been granted to keep a loss-making French subsidiary afloat. Although the EWC argued that the decision had to be considered in the wider context of the undertaking's strategy involving the closure of various subsidiaries, the national court held that all the facts of the matter were confined to the French territory and thus did not trigger information and consultation requirements at transnational level.

The Parliament's resolution points to comparable difficulties when underlining that: '*the definition and consequential interpretation of what matters are to be regarded as 'transnational issues' remains vague and subject to interpretation, thus resulting in a fragmented transposition and implementation of Directive 2009/38/EC by the Member States and a resulting fragmented application by undertakings;* [the Parliament] *highlights the fact that the definition needs to be precise and comprehensive and that the scope of possible effects,*

[125] ICF (2016). Evaluation study on the implementation of Directive 2009/38/EC on the establishment of a European Works Council, p. 96. Available here: https://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=211

[126] Pulignano V., Turk J. (KU Leuven)(2016). European Works Councils on the move: management perspectives on the development of a transnational institution for social dialogue.

[127] Ibid.

[128] Other examples of national cases concerning the interpretation of the notion of 'transnational matters': Central Arbitration Committee (UK), Vesuvius, decision of 21 January 2020, Case nr EWC/25/2019; Central Arbitration Committee (UK), Emerson, decision of 19 January 2016, Case nr EWC/13/2015, Central Arbitration Committee (UK), Princes Group, decision of 17 January 2020, Case nr EWC/21/2019.

[129] Rechtbank Rotterdam, judgment in interim proceedings of 27 November 2018, Case no C/10/561635/KG ZA 18-1170.

[130] Tribunal de Grande Instance de Nanterre, judgment of 26 November 2014, N° 14/02861; confirmed on appeal by Cour d'appel de Versailles, judgment of 21 May 2015, N° 14/08628.

as well as the relevant level of management and representation it involves, are missing elements which need to be considered when determining the transnational character of a matter; [it] *reiterates its call to clarify the concept of the 'transnational character of a matter' in Directive 2009/38/EC*".

In response to the first-stage consultation of social partners, most of the employer organisations consider that the Directive's current concept of transnational matters has proven itself in practice and is still fit for purpose, while trade union organisations take a different view. Amongst the trade union organisations, **ETUC** stated that practice shows that there are often disagreements with central management on how to define the transnational character and queried specifically that the relevant recitals concerning the concept of transnational matters are not sufficiently taken into account in practice for the determination of the transnational nature of an issue under national law. CEC Europe submitted that in order to fully understand the functioning of the company as a whole and on an international scale, the concept of "transnational matters" should be broadened.

Amongst the responding **employer organisations**, **ECEG** reported that in its members' experience, that concept does not cause any disputes in practice beyond what can reasonably be expected in any corporate setting. ECEG asserted that this concept is defined with sufficient clarity and has proven itself in practical application. CEEMET also stressed that the current definition of 'transnational matter' is still fit for purpose. Similarly, BusinessEurope submitted that managers and their employees find ways, adapted to their circumstances, to overcome operation difficulties including as regards the definition of a transnational scope. In contrast, EFCI declared openness to a clearer definition of the transnational nature of issues, while cautioning that improving clarity cannot mean defining the precise detail of provisions, as this would be unrespectful of the business specificities of each company. SMEunited also stated that it could work on the wording of that definition.

8) <u>Insufficiently effective consultation</u>

Ensuring the effectiveness of employees' information and consultation rights is the main objectives of the recast Directive.

EWCs must be informed and consulted on management decisions affecting their employment and working conditions. In practice, the EWC can address a wide range of topics such as the introduction of new technologies, development of a new branch of activity, or mergers, acquisitions and restructuring.

The recast Directive aimed to improve effectiveness of the information and consultation of EWCs by introducing a definition of information and amending the definition of consultation in Article 2(f) and (g).

Article 2(f) defines 'information' as:
'(..) transmission of data by the employer to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it; information shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings.'

Article 2(g) defines consultation as follows:

'(..)establishment of dialogue and exchange of views between employees' representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content as enables employees' representatives to express an opinion on the basis of the information provided about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings'.

The recitals clarify that information should be provided at such time, fashion and content without slowing down the decision-making process in undertakings (recital 22), that consultation should be useful in the decision-making process (recital 23) and that opinions expressed by European Works Councils should be without prejudice to the competence of the central management to carry out the necessary consultations in accordance with the schedules provided for in national legislation and practice (recital 37).

Information and consultation of the EWC shall be linked to those of the national employee representation bodies. Arrangements to that purpose are to be defined by agreement, in such a way that they respect the competences and areas of action of the employee representation bodies, in particular with regard to anticipating and managing change (recital 29). Failing that, consultations at both European and national levels have to be ensured in case of restructuring.[131] The recast Directive shall not affect the responsibilities and the information and consultation procedures referred to in Directive 2002/14/EC (framework directive on information and consultation) and to the specific procedures referred to in Article 2 of Directive 98/59/EC (collective redundancies) and Article 7 of Directive 2001/23/EC (transfer of undertakings).[132] The Commission is examining whether the current arrangements sufficiently ensure an efficient coordination between the information and consultation of the EWC and national employee representation bodies.

The Commission's 2018 evaluation concluded that the concept of consultation has been properly transposed by all the Member States. In addition, more extensive provisions were adopted in the Czech Republic, Germany and Estonia — for instance requiring the consultation process to end with a reasoned opinion from the management referring to the opinion expressed by employees' representatives.[133]

The evaluation also reported that the recast Directive brought more clarity on this point and a vast majority of agreements concluded under the recast Directive reflect the new definition of consultation. Some of these agreements contain additional provisions beyond the requirements of the recast Directive such as a list of information to be provided or an extensive list of subjects for consultation.[134] According to the Commission's 2018 evaluation, for most social partners the recast Directive improved the legal framework for the information and consultation process.[135]

[131] Articles 12 and 6(2)(c), recitals 29, 37-38.
[132] Article 12(4).
[133] SWD(2018) 187 final, p. 13.
[134] SWD(2018) 187 final, p. 26.
[135] SWD(2018) 187 final, p. 26.

However, the evaluation recognised that "there is evidence that in some cases the consultation remains only a formal step rather than an opportunity to seek and consider a substantive opinion from the EWC"[136].

The Directive provides that "*the functions and the procedure for information and consultation of the EWC and the arrangements for linking information and consultation of the EWC and national employee representation bodies*" shall be defined in the EWC agreement, in accordance with the principle of autonomy of the parties.[137] It is therefore for the parties to define what follow-up (if any) is to be given to the opinion of the EWC. Annex I of the Directive defines subsidiary requirements that apply to EWCs that have not been established on basis of an agreement. The subsidiary requirements include an obligation of the management to provide a response, and the reasons for that response, to any opinion that the EWC might express. The requirement of reasoned reply also exists in certain EWC agreements (a frequency of this requirement in EWC agreements is subject to the ongoing evidence gathering).

The European Parliament notes in its resolution that: '*the timely manner of consultation remains an issue where the employees' representatives opinion may be requested or delivered at a point in time where no meaningful consideration can be taken or when the management decision on the proposed measure has already been taken;* [it] *regrets that the lack of management obligation to take an opinion into account often results in the input being disregarded or failing to have an actual impact on the proposed measure at hand'.*

In the abovementioned ETUI survey of EWC representatives, 20 % said that they received information and/or consultation took place before the decision on the relevant issue was finalised, for 44% information and/or consultation took place after that decision was finalised but before its implementation, and for 19% during the implementation process. Close to 10% of EWC representatives reported that they were informed and/or consulted only after the implementation of the relevant decision.

For the management, the timing of information and consultation is also closely linked to the issue of confidentiality (see problem driver 10 below). According to the 2016 KU Leuven study, the majority of managers interviewed for that study reported that the modes and timing of the information provided to employee representatives can vary, depending on the company's need to fulfil stock market requirements. In most cases information is provided in both verbal and written forms and when it is official and certain. The need to be certain is used to justify the timing of the release of information, which, in most cases, is 'just a little before' or 'at the same moment' as the formal announcement of restructuring, and it is always in accordance with confidentiality rules.[138]

Responses to the same survey show a correlation between the stage in the decision-making and implementation process at which information and/or consultation takes place and the perceived completeness and detail of information. Amongst the EWC representatives who considered that they were provided with detailed and complete information, only around 6 % said that they received information after the decision on the respective issue had already been implemented, whereas ca. 91 % of those EWC representatives said that they received information either before the decision was finalised (ca. 28 %), between the finalisation of the decision and its

[136] SWD(2018) 187 final, p. 27-28.
[137] Article 6(3)(c).
[138] Pulignano V., Turk J. (KU Leuven) (2016), op. cit., p. 40/41.

implementation (ca. 48 %), or during the implementation process (ca. 14 %). EWC representatives' perception that they did *not* receive detailed and complete information correlated with more than twice as high a likelihood that they received information after the implementation of the decision on the respective issue (14 %).

Another aspect relating to the timing of EWCs' consultation is the coordination with a possible consultation on the same matter at local or national level. The Commission is examining whether the current rules and arrangements sufficiently ensure an efficient coordination between local, national and European levels.

With regard to the EWCs' functioning on the basis of subsidiary requirements (i.e. without an agreement with the management), Annex 1 to the recast Directive sets out default rules that have been transposed in Member States' legislation – they define procedural rules for consultation (including reasoned reply from the management to the EWC opinion), composition of EWC, one annual EWC meeting on progress of the undertaking and its prospects; set requirements for information and consultation if there are exceptional circumstances (e.g. restructuring); set requirements on resources of the EWC.

In its resolution, the Parliament states that the existing right of EWCs based on subsidiary requirements to have an annual plenary meeting with the central management is insufficient. However, the abovementioned ETUI 2018 survey did generally not show a strong correlation between the fact that EWC representatives reported one or two ordinary annual meeting and the perceived effectiveness of those meetings. In contrast, respondents whose EWC holds three or more ordinary meetings per year were significantly more likely to consider those meetings effective as a source of information and as a means of consultation.

Subsidiary requirements serve as benchmark in negotiations of EWC agreements and their impact goes beyond the limited number of EWCs based on subsidiary requirements (20 as of the 1st quarter of 2023). According to the ETUI 2018 survey, about half of the respondents (consisting mainly of those from EWCs with agreements) have replied that their EWC holds one annual plenary meeting, while about 38 % have biannual plenary meetings and ca. 9,5 % have three or more plenary meetings per year. Less than 1 % of respondents stated that their EWC holds plenary meetings less frequently than once per year.

In response to the first stage social partner consultation, **ETUC** identified the definition of "consultation" as an issue to address, considering that the current provisions of the Directive do not ensure enough legal clarity on essential consultation requirements, such as the need for EWCs to have sufficient time to carry out an in-depth assessment and prepare an opinion, and an obligation on management to take into account the EWC's opinion and respond to it before taking the final decision.

In contrast, most employer organisations responding to the first stage consultation do not recognise the shortcomings of the definition of 'consultation'. **BusinessEurope** points out that many EWC agreements either already provide for specific timeframes for information and consultation procedures and a formal response by management to EWC opinions, or the parties to agreements tend to work out the timeframes according to the issue which is being addressed. This view is seconded by **ECEG** which advises that neither the existing legal concept of consultation nor its implementation are liable to create any hindrance for the proper functioning of the EWC Directive, workers' representatives usually having sufficient time to review the facts and produce a written opinion in due time. Likewise, according to **CEEMET**, the notion of consultation is currently perfectly well defined to enable an exchange of views. In contrast,

SGI Europe considers that it may be justified to revise the Directive in order to provide greater clarity of the rules and to organise regular genuine *ex ante* consultations of workers representatives in EWCs on transnational matters.

9) Risk of insufficient resources of EWCs

The recast Directive provides that costs (material, financial, training, expertise, as well as the time devoted by EWC members to performing their duties) of EWCs' operations are to be covered by the company.

Article 10(1) sets a general obligation to provide EWCs with the means to exercise their rights. Article 6(2)(f) provides that EWC agreements must include information on the financial and material resources allocated to the EWC.

Annex 1 setting subsidiary requirements for EWCs operating without agreements states that the operating expenses of the EWCs shall be borne by the central management to enable EWCs to perform their duties in an appropriate manner (e.g. cost of meeting organisation, of interpretation, of accommodation and travelling). Member States may lay down budgetary rules regarding the operation of the EWCs.

The 2018 Commission evaluation noted that the national rules on financial means (including legal costs of proceedings) are generally limited to the general provisions of Article 10(1) of the recast Directive. The vast majority of the Member States has introduced a general regulation concerning the operating costs of EWCs. Additionally, in some Member States there is a legal obligation to provide EWCs with a budget for its operation, whereas in others, although the statutory frameworks for EWCs do not provide for an autonomous budget, other approaches have been introduced, such as cooperation with trade national union organisations.

According to the 2016 KU Leuven study[139], 95 % of EWC agreements include a clause stipulating that the company will cover the basic expenses of EWC activity, such as travel and accommodation costs, administrative assistance and communication facilities linked to the operation of the EWC. Similarly, a 2015 ETUI study revealed that 74% agreements provide a general statement of cost coverage – complemented by some specific mentions of various costs covered – while the remaining 26% have a limited list of expenses covered.[140] Expenses also cover access to training and experts. Provisions guaranteeing independent financial resources have been introduced in some EWC agreements, but this seems to be very rare.

According to information recorded in the ETUI's EWC database, almost 70% of EWC agreements contain provisions on the EWC's right to solicit expert advice, with over 80% of these agreements providing for the choice of an independent external expert, around 18% referring to an in-company and/or independent expert, and less than 2% allowing only for support by an in-company expert.

Since the Directive does not specify how the means are to be provided for EWCs, various practices have been identified among the Member States. No legislation lays down a dedicated budget for court fees in cases of potential litigation between the EWCs and the businesses, although these costs could generally be part of the operating expenses of EWCs.[141] Some Member States have introduced statutory release from court fees for EWCs and others have

[139] Pulignano V., Turk J. (KU Leuven) (2016), op. cit., p. 53.
[140] De Spiegelaere S.; Jadodzinski R. (ETUI) (2015), op. cit., p. 40.
[141] SWD(2018) 187 final, p. 34.

introduced a general regulation concerning the operating costs of EWCs. The latter is the case in the vast majority of the Member States.

During the Commission's 2018 evaluation, employee representatives reported a lack of resources and competences to support information and consultation processes (no possibility to use external expertise, limited timelines for consultation phases) as one of the shortcomings of the information and consultation procedure.[142]

Some cases before the national courts concerned access to expertise and choice of an expert. In a recent judgment concerning an EWC operating under subsidiary requirements in Austria, the Oberlandesgericht (Higher Regional Court) Wien confirmed that such an EWC can choose an independent expert of its choice and it is not obliged to minimise the costs to be borne by central management by having recourse as a priority to experts provided by trade unions or by a statutory representative body, as long as the expert's services and costs are legitimately linked to the functions of the EWC.[143] Moreover, the Higher Regional Court found that fees for expert legal advice to be covered by central management are not limited to the statutory scales of legal fees.

With regard to legal costs, the 2010 report of the Expert Group on implementation of the recast Directive concluded there is a range of different national regimes on costs linked to legal actions involving social partners (e.g. each side to the dispute bears its costs; management bears legal costs; the works council cannot be condemned to any cost in legal procedure; losing party pays both parties' expenses, but without individual responsibility of employee representative). The expert group concluded that, owing to the different legal regimes, flexibility is needed to determine who is to bear the costs related to legal actions, national practice or EWC agreement is to be taken into account.[144]

In 2019, the UK Central Arbitration Committee (CAC) considered that the employer should pay the legal fees incurred in relation to the proceedings.[145] The decision was appealed by the employer to the Employment Appeals Tribunal, which on this point upheld the CAC decision, stating that the management's approach "*inevitably had the effect of leaving either the individual members of the EWC who were taking the reasonable step of bringing CAC proceedings or their chosen experts at an unfair financial risk: that was not a reasonable approach, particularly coming from a very substantial organisation which no doubt had access to and would itself make use of legal assistance in connection with the CAC proceedings*."[146]

In the abovementioned large-scale 2018 ETUI survey, out of the EWC representatives who said that they had not started legal proceedings despite having experienced a serious dispute, around 17% said that this was due to a lack of resources (e.g. finance, expertise). It should however be stressed that most respondents did not specify the reasons for not taking matters to court, so these results cannot be regarded as conclusive.

[142] SWD(2018) 187 final, p. 26.
[143] Higher Regional Court (Oberlandesgericht) Wien, judgment of 23 February 2022, No. 8 Ra 49/22t, subject to appeal.
[144] Implementation of Recast Directive 2009/38/EC on European Works Councils – Report of the Group of Experts – December 2010, p. 39-40
[145] United Kingdom, 9 October 2019, Verizon, Central Arbitration Committee, EWC/22/2019. The CAC has also considered the question of payment of legal representation in cases EWC/21/2019, EWC/13/2015.
[146] Employment Appeals Tribunal, judgement of 1 October 2020, Appeal No. UKEAT/0053/20/DA.

The Commission's 2018 evaluation concluded that Member States have properly transposed the provisions on the role, protection and training of EWC and SNB representatives (Article 10). In three Member States (Finland, Hungary and Italy) some provisions go beyond the requirements of Article 10 as they also cover the content of training and the rate of remuneration.[147]

Article 10(4) provides that EWC members shall have access to training without loss of wages. The transposition of this provision has not been problematic, nor has its implementation been controversial according to social partners.[148] In the expert group established for transposition of the recast Directive, there was a consensus that under the recast Directive rules costs are not to be borne by the employee representatives themselves.[149]

The inclusion of training provisions in the recast Directive was intended to develop the capacity of EWCs by ensuring that representatives have the appropriate skills to actively participate in the work of the EWC. The Commission's 2018 evaluation concluded that the right to training established by the recast Directive is considered to be beneficial. The benefits of training identified by the employee members have been manifold and relate to improved soft skills and better awareness of the EWC's mandate and its possibilities, as well the legal framework and experiences of other EWCs.[150]

According to ETUI data, in 2016 the right to training was included in 58 % of the agreements signed[151]. Two thirds of employee representatives confirmed that they made use of the right to training without loss of wages.

During interviews for the study led by KU Leuven, 82 % of the interviewees (on a basis of 56 interviews) indicated that the training requirements of the recast Directive resulted in no change to the operation of the EWC, as the training already existed in practice. At the same time 10 % stated that changes have been implemented in conjunction with the new legislation (e.g. including a right to training by an expert for all EWC representatives).[152]

The Commission's 2018 evaluation reported that among those who requested training, a large majority (80 %) of EWC members noted that there had been no particular challenges in securing it, but some 20 % stated that local management created obstacles to employee representatives securing training. Those members who took up this right received, on average, 1-3 days of training per year.[153] In the 2016 study supporting the Commission evaluation, both BusinessEurope and ETUC stated that training was not a controversial issue and that the content of training should be decided through agreement between senior management and EWC representatives within each company.[154]

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[147] SWD(2018) 187 final, p. 13.
[148] SWD(2018) 187 final, p. 31.
[149] Implementation of Recast Directive 2009/38/EC on European Works Councils – Report of the Group of Experts – December 2010, p. 44.
[150] SWD(2018) 187 final, p. 38.
[151] De Spiegelaere S. (ETUI)(2016). Too little too late? Evaluating the European Works Councils Recast Directive, ETUI (Stan De Spiegelaere), p. 54.
[152] Pulignano V., Turk J. (KU Leuven)(2016). European Works Councils on the move: management perspectives on the development of a transnational institution for social dialogue, p. 85.
[153] SWD(2018) 187 final, p. 31.
[154] ICF (2016). Evaluation study on the implementation of Directive 2009/38/EC on the establishment of a European Works Council. Available here: https://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=211

In the ETUI's large-scale 2018 survey of EWC representatives , around 36% of responding EWC representatives stated that they had received no training at all in the previous three years. EWC representatives who had received no training on a certain topic were much more likely to express a need for such training: for instance, 69% of those EWC representatives who had no received training about what EWCs can do regarding health and safety or environmental issues identified a need for such training, whereas only 11% of those who had attended such training expressed a need for more training on the same issues. Similarly, 66% of the EWC representatives who had received no training on what the EWC can do regarding equal opportunities considered themselves in need of such training, compared to less than 10% of those who had followed such training.

In terms of the quantifiable costs of training to the companies, the Commission's 2018 evaluation stated that 22 EWCs operating under Article 6 rules had an annual average EWC training expenditure of around EUR 43 800[155] (these costs constitute part of the above-mentioned operational costs).[156]

In its resolution, the European Parliament '*stresses the importance of sufficient [...] resources to assess, evaluate and discuss the information received with the support of available experts*'. Furthermore, it also '*highly regrets that the financial, material and legal resources needed to enable EWCs to perform their duties in an appropriate manner are not always provided by the central management*'.

In response to the first stage social partner consultation, all three responding **trade union organisations** submit that EWCs are not assured sufficient **resources** (covering e.g. expert advice, training or legal costs). For instance, **CESI** considers that insufficient financial and material resources for EWCs to enable them to perform their duties in an appropriate manner appears as a practical and very concrete obstacle that obstructs the effective operation of many EWCs.

The responding employer organisations do not share that view. To the contrary, they stress the importance of reducing the financial strain on companies. For example, **CEEMET** considers that the existing obligations to reimburse the trips, accommodation, paid leave for employee representatives, and translation/interpretation costs already puts a heavy financial burden on companies. **BusinessEurope** stresses the need to reconsider some EWCs meetings arrangements set in the directive with a view to providing more flexibility to companies and EWC members, limiting the related costs, and making good use of the possibilities created by improved digital communications.

10) <u>Confidentiality imposed disproportionately may create obstacles to effective information and consultation</u>

The provisions of the recast Directive regarding confidentiality (including about cases where central management is not obliged to transmit information '*when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them*') originate from the 1994 Directive, and were not modified in the 2009 recast. They are consistent with the provisions relating to confidentiality in other labour law directives, namely Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community (Article 6), as well as

[155] Survey of 22 EWCs for the 2016 ICF study.
[156] SWD(2018) 187 final, p. 37.

Directive 2001/86 supplementing the Statute for a European Company with regard to the involvement of employees (Article 8) and Directive 2003/72 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees (Article 10).

Under the existing rules, protection of confidential information is to be determined by the Member States. [157]

The recast Directive requires the Member States to provide in their laws for appropriate procedures in case conflicts arise in this area. Specifically, Article 11(3) requires administrative and judicial appeal procedures to be available in case of disputes.

In the Commission's 2018 evaluation of the implementation of the recast Directive, workers' representatives cited extensive use of confidentiality clauses as one of the shortcomings in implementation of information and consultation processes in practice.[158] However, the scale of or reasons for the issue were not identified in the evaluation.

A recent mapping[159] of Member States' laws in this area has shown that in about half of Member States, stricter conditions than those existing in the recast Directive are applied for confidentiality and non-disclosure of information.

With regard to the obligation of confidentiality (Article 8(1)), certain Member States limit the possibility of the confidentiality obligation to **business and trade secrets** (AT, DE, FI, HR, HU, LT), to information on the financial position of the group or the undertaking, which is not publicly available (FI), information relating to the security and the corresponding security system (FI).

In PT, the management can only classify information as confidential or refuse to provide under the terms of the agreement, or, in its absence, of the law. Classification of information as confidential, the non-provision of information or the failure to carry out consultation shall be justified in writing, based on objective criteria based. In EE, the central management is obliged to justify the confidentiality of the information at the request of the employees' representatives.

Some Member States apply criterion of a protecting th**e legitimate interest of the undertaking** for applying the confidentiality clause (BG, CZ, SE) or when the "interests of the company so demand" (DK).

[157] "Member States shall provide that members of special negotiating bodies or of EWCs and any experts who assist them are not authorised to reveal any information which has expressly been provided to them in confidence. The same shall apply to employees' representatives in the framework of an information and consultation procedure. That obligation shall continue to apply, wherever the persons referred to in the first and second subparagraphs are, even after the expiry of their terms of office." (Article 8(1)).
"Member States shall provide, in specific cases and under the conditions and limits laid down by national legislation, that the central management situated in its territory is not obliged to transmit information when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them." Member States may make such dispensation subject to prior administrative or judicial authorisation. (Article 8(2)).
[158] SWD(2018) 187 final, p. 27-28.
[159] Mapping of Member States' laws done by European Centre of Expertise in the field of labour law, employment and labour market policies (ECE)(2023), unpublished.

Certain Member States have transposed Article 8(1) without setting additional conditions for a confidentiality obligation (CY, ES, IE, LU, LV, MT, NL, PL, RO, SI, SK).

With regard to the management's **possibility not to disclosure certain information** when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them (Article 8(2)), this provision was **not transposed** by five Member States (AT, FR, HR, SE, SI). Indeed, Member States may choose not to apply this provision[160] and, instead to apply the duty of confidentiality to protect information, disclosure of which would seriously harm the undertaking. The lack of an exemption from the obligation to disclose information is to be considered as a more favourable regulation.

Around half Member States have transposed Article 8(2) referring to the conditions as set in the Directive ("information when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them") (BG, CY, FI, HU, IE, LT, LU, LV, MT, NL, PL, RO, SK).

In EE and PT, the central management is required to give, based on objective criteria, a justification as to why disclosure of the information significantly harms or may significantly harm the undertaking. Similarly, in RO, central management shall provide written reasons for refusing to disclose information.

In six Member States, the employer is not obliged to disclose information classified as confidential or protected under the statutory provisions (BE, CY, CZ, EL, DE, ES)[161].

No Member State requires that the central management obtains a prior authorisation from a court or an administrative body before it withholds information under Article 8(2). A dispute resolution through courts or arbitration is provided by national laws on basis of Article 11(3).According to information recorded in the ETUI's EWC database, around 87% of EWC agreements contain provisions on the question of confidentiality.

In the ETUI's abovementioned 2018 large-scale survey of EWC representatives, over 39% of respondents replied that their management often refuses to give information due to confidentiality (sum of 'agree' + 'absolutely agree'), compared to around 34% who disagreed or 'absolutely disagreed' with that statement. Those who reported a frequent refusal of disclosure of information due to confidentiality were much more likely to consider the ordinary meetings of their EWC ineffective as a means to influence management's decisions.

A 2016 KU Leuven study reported that, for the management, confidentiality is a concern, but that solutions have been found. Confidentiality is an ongoing concern for companies listed on the stock exchange, principally because a trade-off exists between confidentiality and the timing of information and consultation. In these circumstances, solutions between management

[160] See in this respect Article 11(3): "Where Member States apply Article 8, they shall make provision for administrative or judicial appeal procedures which the employees' representatives may initiate when the central management requires confidentiality or does not give information in accordance with that Article." [emphasis added]

[161] The Spanish legislation specifies that the non-disclosure clause can apply to industrial, financial and commercial secrets. It cannot apply to information relating to the level of employment in the undertaking. Similarly, the German legislation specifies that the duty of central management to inform exists insofar as trade or business secrets of the enterprise or group of enterprises are not jeopardised thereby.

and employee representatives need to be arranged. Only few interviewees reported in the context of the study that no solution had been found to the question of confidentiality that was acceptable to management and EWC representatives. The absence of a solution to the confidentiality issue was concentrated in companies where adversarial relations existed between management and EWC representatives and/or there was a marked heterogeneity in expectations within the cohort of EWC representatives.[162]

Individual decisions by national courts illustrate issues linked to confidentiality or non-disclosure of information, although overall very few legal cases concerning alleged abuse of confidentiality clauses have been reported. By way of example[163], in a decision of 12 February 2018[164], the UK's Central Arbitration Committee found that "*the default position of the employer was (a) not to disclose and (b) to classify as confidential anything it feels it has to disclose in order to comply with the minimum legal obligations. This stands in contrast to the thrust and intent of the Directive and the (UK Transnational Information and Consultation of Employees Regulations 1999) which is that relevant information should be given to EWC, with protections available where it is objectively reasonable for management to argue that it its disclosure would prejudice or seriously harm the undertaking*."

In its resolution, the Parliament points to '*the fact that the Member States' implementation of confidentiality provisions is fragmented due to the lack of a clear definition and therefore calls for a clear definition of confidential information;* [the European Parliament] *stresses in this context that further efforts by Member State are needed in order to specify and clarify precisely the conditions under which the central management is not required to pass on information which could be harmful;* [it] *reiterates its call to prevent the abuse of confidentiality rules as a means to limit access to information and effective participation, and calls on the Commission in the context of the revision of Directive 2009/38/EC to require Member States to clearly define in what cases confidentiality is justified in order to restrict the access to information'.*

In response to the first stage social partner consultation, the three responding **trade union organisations** identified the imposition of confidentiality by management and the refusal to disclose information as a problem driver. According to **ETUC**, evidence shows that the confidentiality clause is often misused for objectively non-confidential matters and hinders EWCs in their effective work, especially in the communication with European and national workers' representatives and/or workers. **ECE** also lists confidentiality amongst various obstacles faced by EWCs in their work.

Employer organisations do not share those views, stressing instead that the effective protection of confidential information is a basic prerequisite for successful cooperation between management and workers representatives. According to **ECEG**, the practical experience of its members does not indicate any systematic problems in the protection of confidential information given to EWC members. **CEEMET** welcomes the fact that, under the current Directive, the protection of confidential information is to be determined by the Member States.

D. Shortcomings in enforcing the Directive

This internal driver relates to shortcoming in effective implementation and enforcement of rights under the Directive, including limited access to justice in some Member States. It

[162] Pulignano V., Turk J. (KU Leuven)(2016). European Works Councils on the move: management perspectives on the development of a transnational institution for social dialogue, 28-31.

[163] See also Central Arbitration Committee (UK), Verizon, decision of 9 October 2019, No EWC/22/2019.

[164] Central Arbitration Committee (UK), Oracle, No EWC/17/2017, para 87.

concerns insufficient access to justice for SNBs and EWCs or their members and for employee representatives concerned by the rules under the Directive; it also concerns ineffective penalties and sanctions for non-compliance, or ineffective remedies in some Member States.

11) Insufficient access to justice and lack of effective remedies in some Member States

EU labour and social *acquis* provides general provisions on enforcement of the minimum rights set by Union law, in line with the procedural autonomy of the Member States.

In addition to the general requirements of the 1994 Directive for the Member States to provide for '*appropriate measures in the event of failure to comply with this Directive*', and more specifically, to ensure that '*adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced*', the recast Directive added two elements on enforcement and sanctions:

- Firstly, the addition of Article 10(1): *'Without prejudice to the competence of other bodies or organisations in this respect, the members of the European Works Council shall have the means required to apply the rights arising from this Directive, to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings.'*
- Secondly, two new recitals: *'The Member States must take appropriate measures in the event of failure to comply with the obligations laid down in this Directive.' (recital 35) 'In accordance with the general principles of Community law, administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations arising from this Directive.' (recital 36)*

The 2018 Commission evaluation revealed a variety of situations in Member States regarding the capacity of European Works Councils to access the courts and noted overall weaknesses in the means in place allowing EWCs to enforce their rights.[165] The evaluation reported that there is no consistent practice across Member States as to whether EWCs have the legal status to bring an action before the national courts and the capacity of EWCs to seek legal redress varies across Europe and often depends on trade unions' capacity to act.[166] Access to court also tends to depend on the type of dispute or offence.

The evaluation noted that in four Member States (Austria, France, Romania and Sweden) EWCs have legal personality to initiate judicial proceedings and to represent the EWC in relations with third parties within the limits of their responsibilities. In a further 11 countries (the Czech Republic, Finland, Germany, Ireland, Latvia, Lithuania, the Netherlands, Poland, Slovakia, Spain and Hungary,) EWCs can be a party in legal proceedings. In Belgium, Italy, Ireland, Estonia, Luxembourg, Slovenia, Slovakia, Italy, individual EWC members or trade unions have the capacity to act in justice an action on EWC matters.

[165] COM(2018) 292 final, p. 6-7

[166] SWD (2018) 187 final, p. 34-36. See Annex 5 of the Staff Working document, providing overview of the EWCs' capacity to bring actions before the courts in the Member States.

Given the fact that most EWCs have been established mainly under the jurisdictions of Germany, UK[167], France, Belgium, Sweden, Netherlands, Ireland, Italy, Finland, Austria, Denmark, Spain and Luxembourg, Member States with a low number or no EWCs under their laws generally lack experience in enforcement of the recast Directive under their laws.[168]

In several Member States, disputes for which judicial proceedings are available are limited only to certain EWC-related matters. In Croatia judicial proceedings cover only cases of employees' discrimination, whereas in Malta, Lithuania and Poland only for disputes regarding the confidentiality or disclosure of information.

Problems of access to justice are known to arise in two Member States, namely Ireland, against which the Commission launched infringement proceedings in May 2022[169], and Finland. In Ireland, certain EWCs based on agreements can enforce some of their rights through a private arbitration procedure, for which they bear their own costs. A potential remedy would depend on the outcome of that arbitration. The arbitrator's determination is binding on the parties.[170] Certain breaches of the EWC legislation could lead to a criminal prosecution. Courts however cannot be directly accessed by EWCs or SNBs themselves (nor by trade unions on their behalf) in Ireland. Also in Finland an EWC related dispute cannot be brought by a party to the dispute before a court. The Finnish law designates the Cooperation Ombudsman[171] and criminal courts for ensuring compliance with the rights under the national law transposing the EWC Directive. Access to a criminal court is dependent on whether the prosecution institutes the legal proceedings, based on the violation of rights in question (a complaint against Finland on this matter was submitted to the Commission in November 2022).

Disputes over the establishment or functioning of EWCs can also be resolved in 15 Member States via alternative dispute mechanisms such as conciliation, mediation or arbitration. Those alternative mechanisms are not specially designed for EWCs (they are available for any private dispute), except in the case of Italy, where a dedicated Conciliation Committee was established to provide proposals to solve EWC-related disputes within 20 days.

The Parliament resolution highlights '*the importance of EWCs having access to courts or national competent labour authorities; deplores the fact that EWCs experience obstacles to exercise their rights to information and consultation as defined in Directive 2009/38/EC;* [the European Parliament] *regrets that in some Member States the courts or authorities competent to provide advice or to hear or determine disputes related to EWCs do not have the expertise in the issues provided for in that Directive;* [it] *reiterates its call on the Member States to ensure facilitated administrative and legal proceedings for an effective access to justice for EWCs and*

[167] Source: ETUI database. The data relies on information made available to ETUI. Reliable post-Brexit data are not yet available. Based on available information, about half of EWCs (70) formerly based in the UK have been moved under the Irish legislation.

[168] The current ETUI collection of national case-law (160 national cases have been identified since 1995 until the first quarter of 2023) contains EWC-related cases decided by the courts in France (50), Germany (32), UK (29), Spain (14), Belgium (10), Netherlands (7), Austria (4), Czechia, Romania and Italy (3), Sweden (2), Slovakia, Luxembourg, Norway (1).

[169] Section 10 of the press notice: https://ec.europa.eu/commission/presscorner/detail/en/inf_22_2548.

[170] An appeal could be made against an arbitrator's decision on a point of law. The court's role in such appeal is limited to considering whether the arbiter has reached a lawful decision, not to make its own finding of facts.

[171] The Cooperation Ombudsman has a right to carry out inspections, issue an improvement notice, take a matter to a criminal court on suspicion that an act specified as punishable under the Finnish Act has occurred, and to require that the court obliges the employer or enterprise to meet their obligations within a time limit and that it imposes a conditional fine in order to encourage compliance.

special negotiating bodies, and for the specification of legal status, including granting legal personality, of EWCs and special negotiating bodies, as part of the Commission's impact assessment'.

In response to the first stage social partner consultation, **trade union organisations** consider that there are shortcomings concerning the effective **enforcement of information and consultation rights** under Directive 2009/38/EC: **ETUC** and **CEC** agree that EWCs do not have sufficient access to justice and argue in favour of amending the Directive to address that issue. ETUC attributes the low litigation level to the obstacles of EWCs to access the courts.

The responding employer organisations do not attribute the shortcomings regarding access to justice, sanctions or remedies to Directive 2009/38/EC. . **BusinessEurope** considers that, if national implementation laws do not appropriately transpose the directive, it is the Commission's role to conduct the necessary infringement procedures to ensure a good transposition of the directive in the Member States. BusinessEurope points out that there have been only a limited number of court cases and argues that this is not because EWCs lack the means to go to court but because most EWCs work satisfactorily. Whilst **ECEG** recognises difficulties in the effective enforcement of EWC rights in some jurisdictions, it does not see them as an expression of a weakness of the Directive but of its flawed transposition at the national level.

12) Ineffective penalties / sanctions for non-compliance in some Member States

Recital 36 of the recast Directive provides that sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations arising from the Directive. The recital mirrors the general principle of effective remedy, enshrined in the first paragraph of Article 47 of the Charter of Fundamental Rights, as interpreted by the jurisprudence of the Court of Justice of the European Union.[172] Under this principle, Member States have the obligation to provide for effective remedies whenever rights guaranteed under Union law are not respected, having regard to the procedural autonomy of Member States, the principles of proportionality and subsidiarity and EU competence under Article 153 TFEU (i.e. EU competence for '*minimum requirements for gradual implementation')*.

Currently, none of the EU labour law directives provides for a concrete set of sanctions, the determination of which the Member States regard as their procedural autonomy. This autonomy is subject to the general requirement for penalties to be 'effective, dissuasive and proportionate'.[173] [174]

[172] In the Impact Assessment for the recast Directive, the Commission considered that "*a further reinforcement or more detailed prescription of sanctions would not be in conformity with the subsidiarity principle, as the responsibility for establishing appropriate, dissuasive and proportionate sanctions lies, as a general principle, with the Member States"* (Impact assessment SEC(2008)2166 page 46).

[173] In another field, company law, a recent Commission proposal on due diligence (COM(2022) 71 final) lists examples of types of enforcement measures, while not setting a concrete level of sanctions (in that regard the proposal states that "when pecuniary sanctions are imposed, they shall be based on the company's turnover").

[174] In this context, it is worth mentioning that the Commission's proposal for a Directive on improving working conditions in platform work (COM/2021/762 final) does provide for the possibility to impose fines up to the amount referred to in Article 83(5) GDPR in connection with automated individual decision-making in the context of platform work. However, that proposal does not require such fines in relation to the envisaged information and consultation obligations on the use of automated monitoring and decision-making systems (Article 9 Platform

The 2018 Commission evaluation highlighted significant differences in the type and level of sanctions and remedies available in Member States.[175] In most Member States, sanctions usually consist of a fine imposed on the employer, the amount of which is predetermined by law except in case of Denmark (where courts are given full discretion). A comparison between the concrete upper thresholds in national systems shows a significant difference in terms of levels of fines, also reflecting the diversity of the legal procedures and practice in the Member States more broadly. Violations related to establishing the EWC, where the Directive provides for specific rights and obligations, carry more dissuasive sanctions than sanctions for violations related to its operation (operation of EWC depending on the content of each agreement)..

In most countries national law defines penalties covering most or all of the central EWC-related obligations of the Union-scale undertaking in relation to its EWC. The exceptions are Hungary, the Netherlands and Sweden, where no administrative or criminal law penalties are provided for, but rather exclusively civil law sanctions in case of breach of related obligations.

The Commission's 2018 evaluation concluded that in many cases the nature and level of sanctions are not effective, dissuasive and proportionate.[176]

Depending on a type of breach, a comparison between the concrete upper thresholds shows that these range from EUR 290 in Lithuania or EUR 850 in Romania to EUR 190,000 in Spain. In case of repeated violation, higher sanctions (usually up to twice the basic threshold) are envisaged in Austria, Bulgaria, Lithuania and Luxembourg. Stricter sanctions may be imposed in case of criminal rather than administrative proceedings (Belgium, Germany, Spain) or by the (tripartite) Labour Dispute Commission in Lithuania. In this case, sanctions may be as high as EUR 800,000 (Belgium). The sanctions also vary according to the degree of violation of the law.

However, the national rules may not rely only on sanctions to provide for an effective remedy. For example, though the French law contains generally low penalties, the French courts have granted sometimes cease and desist orders in cases concerning EWCs and obliged companies to comply with the information and consultation rules before implementing a decision.[177]

The exclusive reliance on administrative sanctions (maximum 15.000 EUR) is criticised by some stakeholders as ineffective in the context of the Germany legal system.[178] In the Netherlands, judicial penalties or obligations may not be applied for actions other than the disclosure of information. General weaknesses in access to justice have been identified in Hungary, where the existing legislation implies that courts can only declare the breach of EWC-

Work Proposal). With respect to those obligations, the proposal merely requires Member States to provide for effective, proportionate and dissuasive penalties.

[175] SWD (2018) 187 final, p. 33-36, 57-63 p. 33-36, 57-63.

[176] SWD (2018) 187 final, p. 36.

[177] For example, in a judgment of 19 November 2020 (case no 20/06549), the French Cour de Cassation upheld the suspension of operations of undertakings on the grounds of a violation of EWCs' information and consultation rights.

[178] In accordance with national law, EWCs do not have a right to injunctive relief on the grounds of a violation of their information and consultation rights. This applies also in the case of national works councils as regards non-codetermination rights. (For example, decisions of first and second instance labour courts in Germany: Landesarbeitsgericht Köln of 1 August 2018, case no 6 TaBVGa 3/18; 12.10.2015, Landesarbeitsgericht Baden-Wuerttemberg of 12 October 2015, case no 9 TaBV 2/15; Arbeitsgericht Wiesbaden of 13 June 2018, case no 1 BVGa 5/18).

related obligations, with no possibility to impose a sanction, nor to oblige the undertaking in question to comply.

During the Commission's 2018 evaluation[179], employee representatives stressed that differences in the levels and scope of sanctions set at national level were an obstacle to effective redress and an insufficient incentive for the respect of EWC rights. They argue for a revision of the recast Directive to introduce an obligation to nullify company decisions where information and consultation procedures have been breached, on the condition that the national trade unions directly affected by the decision support suspension and/or nullification[180]. While this solution was not proposed by employer organisations, they also recognise the need to improve measures enforcement measures of the recast Directive[181].

The Parliament underlines in its Resolution concerns about '*the fragmented and insufficient compliance with Directive 2009/38/EC across the Union*' and stresses '*the need to ensure proper, effective and timely compliance, implementation and enforcement of the Directive for the benefit of workers throughout the Union*'. It notably '*regrets that in many Member States penalties for non-compliance are not effective, dissuasive or proportionate as required by Directive 2009/38/EC'.*

In response to the first stage social partner consultation, all three responding **trade union organisations** consider that the remedies and sanctions for the enforcement of the rights guaranteed by the Directive are not sufficiently effective. ETUC, in particular, points out that the maximum level of fines in Germany, the Member State with the most EWCs, being set at 15,000 EUR, is far from being effective and dissuasive for multinational undertakings.

In contrast, **employer organisations**, for example **ECEG**, submit that the existing sanctions for breaches of confidentiality under national law are sufficient and effective.

2.3 Consequences of the identified problem

The identified challenges affect primarily workers and large transnational companies. The most relevant stakeholders can be identified by reference to the type of undertakings directly concerned (i.e. Union-scale undertakings as defined by the recast Directive) and the territories where transnational information and consultation through EWCs is to produce its effects. Indirectly, the effectiveness of the information and consultation of EWCs is also relevant for companies linked to Union-scale undertakings in the value chain, as well as the regional economic systems depending on those undertakings more broadly.

For workers, the above-described challenges are likely to have negative effects on their involvement by means of more limited social dialogue in their company, for instance with respect to the anticipation of company developments and acceptance of change; reduced possibility to provide input on accompanying measures in case of corporate restructuring (e.g. because consultation not launched); reduced effectiveness of social dialogue with the employer on transnational matters (e.g. dialogue not held). Ultimately, these consequences can lead to

[179] SWD (2018) 187 final, p. 35-36.

[180] ETUC (2017). Position paper 'For a modern European Works Council (EWC) Directive in the Digital Era'. https://www.etuc.org/documents/etuc-position-paperfor-modern-ewc-directive-digital-era#.Wh1v-f6ouAg

[181] BusinessEurope (2017). Position paper on the EWC Recast Directive. https://www.businesseurope.eu/sites/buseur/files/media/position_papers/social/2017-02-09_european_works_councils_recast_directive.pdf .

lower employment levels in the companies operating in the EU, less motivated workforce and suboptimal working conditions.

For companies, the challenges could in certain cases lead to higher direct costs relating to the creation or administration of EWCs due to inefficient process, potentially higher indirect costs of implementing measures in case of corporate restructuring (due to lack of common understanding and lack of compromise solutions); loss of business due to a risk of delays on decision-making and decision-implementation (including due to possibly unclear obligations and disputes); fines for non-compliance with information and consultation requirements, linked to legal uncertainty resulting in divergent interpretations of the current rules.

The existence and scope of these consequences are currently subject to ongoing evidence gathering by the Commission.

2.4 How likely is the problem to persist?

Considering its transnational and procedural nature, very few Member States have adopted national legislation going beyond the prescriptive norms of the Directive. Where the Directive leaves autonomy to the Member States to define their rules or procedures (such as enforcement procedures and sanctions), Member States' laws differ according to their industrial relations regimes and existing administrative and judicial structures. This may affect access to certain rights under the Directive. For example, in the Member States where systemic problems of access to justice of EWCs have been identified, the workers' representation is ensured in principle through trade unions rather than works councils and while their national laws provide enforcement procedures for trade unions' rights, they do not provide the same access for EWCs (cf. above internal drivers 10-11).

In absence of future clarifications by the Court of Justice or in the absence of EU action, the above described internal drivers, if confirmed by the ongoing evidence gathering, are likely to persist, although driver 1 could gradually become less relevant, as explained below. The increasing transnational character of economic activities, companies and restructuring processes are intensifying the need for proper information and consultation at transnational level. Certain problem drivers could be partly mitigated through digitalisation. Covid-19 pandemic has sped up the digital working methods, which have also found their place in some EWCs and have allowed for efficient solutions in access to training and ad hoc meetings. Digitalisation will continue to play a key role in the environment of transnational businesses.

Despite these trends, it can be expected that the gap between needs, workers' expectations and the actual operation of EWCs, as well as legal uncertainties will probably continue to grow, as observed over the last 14 years since the adoption of the recast Directive.

With regard to internal driver 1 ('Exemptions of undertakings with legacy agreements from the scope of the recast Directive'), the problem is expected to slowly decrease over time without an EU level action, through a gradual dissolution of legacy works councils (e.g. due to restructuring) and through setting up of new ones under the current rules. This process would however be slow and uncertain, since the legacy agreements may provide for clauses allowing them to stay in force even when the undertaking changes significantly its structure. The risk is then that the agreement does not correspond to the needs of the restructured undertaking, which may nevertheless opt to keep it in place in order to be exempted from EU rules.

If the existing Directive is revised, internal driver 1 ('exemptions of undertakings with legacy agreements from the scope of the recast Directive') would become much more important, since all existing agreements, including those concluded under the 2009 recast Directive, would have been concluded by the parties under rules which had been changed.

3. WHY SHOULD THE EU ACT?

3.1 Legal basis

Directive 2009/38/EC was adopted under Article 137 of the Treaty establishing the European Community. In the current Treaty framework, the appropriate legal basis would be Article 153 of the Treaty on the Functioning of the European Union (TFEU):

- 153(1)(e) which states that " With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (e) the information and consultation of workers;"";
- 153 (2) (b) "to this end, the European Parliament and the Council may adopt (…) by means of directives minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The right of workers to information and consultation within undertakings is also a fundamental right. According to Article 27 of the Charter of Fundamental Rights of the European Union: '*Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.*' Any Union legislation in this field therefore has to be interpreted in the light of these principles and must respect them.

3.2 Subsidiarity: Necessity of EU action

As explained under points 2.1 and 2.3, the Commission is gathering evidence on the existence and scale of issues with respect to the scope of the rules, the effectiveness and efficiency of procedures for the setting-up of EWCs, the effectiveness of the information and consultation process at transnational level, and with respect to enforcement of the recast rules. Insofar as some of the possible underlying causes are closely linked to the coverage and content of the obligations under the Directive, they are the same across the EU. By way of example, the issues of legal uncertainty regarding the concept of 'transnational matters' and of legal complexity created by the exemptions from the scope of Directive 2009/38/EC apply irrespective of the national legal system.

Common minimum requirements at EU level are needed to improve workers' right to information and consultation at transnational level sufficiently (cf. recital 45 of Directive 2009/38/EC). Given the cross-border nature of the undertakings/groups and the matters/issues subject to information and consultation at transnational level, individual Member States cannot enact the basic regulatory requirements to define a coherent framework for such information and consultation. Challenges which reduce the effectiveness of workers' right to information and consultation at transnational level have to be addressed at EU level, in particular where

they relate to the scope and substance of information and consultation requirements laid down in the existing EU provisions. In the challenging context of the twin transitions, it is all the more crucial to harness the full potential of EWCs in anticipating and managing change in a sustainable way through coherent action at EU level.

In the absence of EU action, the internal drivers are likely to persist, and given the context of increased internationalisation, the gaps between needs, workers' expectations and the actual operation of EWCs might continue to grow. Given the transnational nature of EWCs, actions of individual Member States can address the identified issues only to a limited extent (e.g. through revising their laws on enforcement and sanctions). In geographic terms, the effects of the problem materialise not only in the Member State where the EWC is based, but also in all those were undertakings belonging to the same group operate. No Member State can thus be excluded from the outset. Consequently, EU action would be needed to clarify and further develop the minimum standards that apply to all multinational undertakings of a certain size operating in the EU.

3.3 Subsidiarity: Added value of EU action

The objectives of a possible initiative on EWCs (see section 4 below for the list of policy objectives) can be better achieved at Union level by reason of the scale and effects of the relevant measures (see section 5 below for a description of the policy options).

Economies and labour markets of Member States are increasingly interlinked: minimum harmonisation in the social field, in other words upward social convergence, is required, if the ambition for the EU is to go beyond free movement of workers.[182] The specific EU added value lies and results in the establishment of minimum standards, below which Member States cannot compete on the single market, and the fostering of upwards convergence in employment and social outcomes between Member States. This is clearly reflected in the wording of the Treaty itself, which provides that only "minimum requirements" can be enacted at EU level in social policy (Article 153(2)(b) TFEU).

EWCs have a genuine EU transnational dimension. Only an EU legal act, transposed into national legislation, can enact the measures necessary to increase the effectiveness of information and consultation at transnational level. The shortcomings of the existing framework, as tentatively described in section 2 above, could hence not be sufficiently addressed by Member States, and therefore, the necessary measures would need to be taken at EU level.

By reinforcing the effectiveness of the existing minimum requirements for EWCs, while avoiding unnecessary burdens on business and allowing companies to react flexibly to rapidly changing market circumstances, the possible initiative would further increase the added value for companies, linked to the creation of a consistent legal framework regarding the minimum level of protection of workers. A homogenous basic framework for the negotiation, setting-up and operation of EWCs is key for ensuring consistent minimum information and consultation rights at transnational level.

[182] See Reflection paper on the Social Dimension of Europe, COM(2017) 206

These preliminary considerations regarding the added value of EU action are consistent with the European Added Value Assessment (EAVA) prepared by the European Parliament's Research Service in 2021[183], in support of the Parliament's legislative own-initiative resolution with recommendations on a revision of Directive 2009/38/EC. That assessment concluded that in the future, more systematic information and consultation of workers at transnational level could lead to even greater economic benefits – by fostering job quality, reducing the rate at which people leave their jobs ('quit rate'), reducing the number of redundancies, limiting the costs of structural adjustment, helping to eliminate distortions of competition within the single market and inequalities in treatment of workers, and/or easing the burden on social welfare systems.

4. OBJECTIVES: WHAT IS TO BE ACHIEVED?

The possible initiative on the European Works Councils Directive is intended to address challenges, through EU-level action, directly related to several principles set out in the European Pillar of the Social Rights, most importantly:

Principle 8 on **Social dialogue and involvement of workers:** "*[...] Workers 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 2 on **Gender Equality:** *"Equality of treatment and opportunities between women and men must be ensured and fostered in all areas, including regarding participation in the labour market, terms and conditions of employment and career progression."*

Principle 5 on **Secure and adaptable employment:** *"Regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to social protection and training. The transition towards open-ended forms of employment shall be fostered.*

In accordance with legislation and collective agreements, the necessary flexibility for employers to adapt swiftly to changes in the economic context shall be ensured.

Innovative forms of work that ensure quality working conditions shall be fostered. Entrepreneurship and self-employment shall be encouraged. Occupational mobility shall be facilitated. [...]"

The **general objective** of the initiative is to further **improve the effectiveness of the information and consultation of employees at transnational level**, responding to the basic challenges identified in section 2 above. It would confirm the existing principles set out in Directive 2009/38: to improve the right to information and to consultation of employees in Union-scale undertakings and groups (Article 1(1)), and to define and implement the arrangements for informing and consulting employees in such a way as to ensure their effectiveness and to enable the undertaking or group of undertakings to take decisions effectively (Article 1(2)).

In order to reach the general objective stated above, the **specific objectives** of the initiative would be as follows:

[183] Available online at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/654215/EPRS_BRI(2021)654215_EN.pdf

- in relation to problem driver A: to avoid unjustified differences in workers' minimum information and consultation rights at transnational level: a possible EU initiative would aim to apply one set of rules to all Union-scale understakings and their workforce, and to overcome the existing exemptions of certain undertakings from the common minimum requirements;
- in relation to problem driver B: to ensure an efficient and effective setting-up of EWCs: a possible EU initiative would aim to further streamline the process following the employees' request to establish an EWC as contained in the recast Directive and remove any risks of unnecessary delays or of lack of employee representatives' resources during the negotiations process; the initiative would also strive to achieve a more equal gender composition of EWCs;
- in relation to problem driver C: to ensure the appropriate resourcing of EWCs and an effective process for their information and consultation: a possible EU initiative would seek to address the challenges hampering the practical effectiveness of EWCs' information and consultation rights, for instance by promoting more genuine exchanges of views; providing more certainty to the concept of transnational matters; ensuring that the confidentiality or non-disclosure clauses are applied by management only in justified situations; protecting the confidentiality of information shared with EWCs; strengthening the existing rules on providing resources for EWCs' operations;
- in relation to problem driver D: to promote a more effective enforcement of Directive 2009/38/EC, including for instance through effective, dissuasive and proportionate sanctions and access to justice for employee representatives, SNBs and EWCs: well-functioning and accessible enforcement mechanisms being key for the practical effectiveness of information and consultation rights, a possible EU initiative would aim to ensure that sanctions/penalties laid down in the applicable national law provide a genuine deterrence of violations of those rights, and that the rightsholders can effectively assert those rights by means of administrative and/or judicial remedies.

5. WHAT ARE THE AVAILABLE POLICY OPTIONS?

5.1 What is the baseline from which options are assessed?

In accordance with the Better Regulation guidelines[184], the design of possible policy options includes the option of changing nothing. This no-policy-change scenario will be used as a baseline against which the policy options described under heading 5.2. below will be assessed and compared. The baseline scenario projects the status quo, including the tentatively identified problem and problem drivers, into the future. A timeframe of 10 years might be assumed for this purpose.

All relevant EU-level policies and measures described under section 1 above are assumed to remain applicable under the baseline scenario. This includes Directive 2009/38/EC and the other EU instruments forming the EU acquis on workers involvement, some of which have information and consultation requirements as their main subject-matter while others contain ancillary requirements on workers involvement:

– Directive 98/59/EC1 on collective redundancies,

[184] See Better Regulation Tool #60, available at https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation/better-regulation-guidelines-and-toolbox/better-regulation-toolbox_en

- Directive 2002/14/EC on a general framework for information and consultation of workers at national level,
- Directive 2001/23/EC on transfer of undertakings,
- Directive 2001/86/EC supplementing the Statute for a European company with regard the involvement of employees, and Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees,
- Directive 2004/25/EC of on takeover bids (amended in 2014 and 2021);
- Directive (EU) 2017/1132 relating to certain aspects of company law,
- Directive (EU) 2019/1023 on preventive restructuring frameworks
- the EU Quality Framework for Anticipation of Change and Restructuring,
- the recent Commission Communication on strengthening social dialogue in the European Union.

The national legislation adopted to implement existing EU level requirements would also continue to apply during the baseline scenario. While it cannot be excluded that certain Member States might adapt their rules on EWCs, or rules indirectly relevant for EWCs, the Commission is not aware of any significant upcoming reforms at national level. The same is true of possible policy developments at international level.

Certain new Commission initiatives that include elements relevant for the transnational information and consultation of workers are not yet in force but likely to be enacted under the baseline scenario. For instance, the recently proposed Council Recommendation on strengthening social dialogue in the European Union sets out how Member States can further strengthen collective bargaining at national level. Moreover, the proposed Directive on Corporate Sustainable Due Diligence is capable of achieving synergies with Directive 2009/38/EC, as EWCs' opinions can contribute to the development and dissemination of the due diligence policy of multinational corporations.

Given the trend over the last years (see heading 1.7. above for details), the number of EWCs is not expected to increase drastically under the baseline scenario. However, the Commission would aim to continue its longstanding and substantial support of projects raising awareness of transnational information and consultation and promoting best practices. For 2023, a budget of EUR 2,5 million is available for this purpose, with the main priority to "*promote actions aimed at developing employees' involvement in undertakings in particular by raising awareness and contributing to the application of European Union law and policies in this area and the take-up and development of European Works Councils*". The conception and development of training materials and courses for EWC members, as well as measures to strengthen the cooperation between employees' representatives at national and transnational level are eligible for funding. Such projects may foster employees' awareness of their right to request the establishment of an EWC, and of the potential benefits of transnational information and consultation. They may also contribute to alleviating some of the identified problem drivers under the baseline scenario, such as legal uncertainty regarding certain concepts laid down in the Directive and EWC members' perceived lack of expert advice. Future funding is however subject to the European Parliament's and the Council's yearly decision on budgetary appropriations for this purpose.

The Commission will also continue to monitor the correct transposition of Directive 2009/38/EC. Compliance monitoring involves a structured dialogue with Member States, and if necessary, the launching of infringement procedures[185].

Despite the actions set out above, it is unlikely that the identified problem and its drivers will become significantly less relevant in the absence of a new initiative on EWCs. Since the Court of Justice of the EU has not yet had any opportunity to provide clarifications on the interpretation of Directive 2009/38/EC, it cannot be assumed that these drivers will be addressed in whole or even in part through case law. As the Directive sets minimum requirements and thus a benchmark for individual agreements between central management and employees' representatives, the effectiveness of information and consultation activities on transnational matters is likely to remain suboptimal if the relevant drivers are not tackled through EU action.

Due to the existing and growing challenges linked to the twin – digital and green – transitions, effective information and consultation of employees will become increasingly crucial over the coming years. For instance, accelerating technological development is likely to change the parameters for the performance of economic activities, not least as regards working methods and conditions, creating a strong need for effective information and consultation of employees. Obstacles to effective information and consultation could hence gain in significance as well.

Undertakings with a well-functioning EWC could continue to reap the benefits of constructive dialogue at transnational level. In contrast, undertakings experiencing disputes and uncertainty regarding information and consultation requirements would continue to be less well-equipped to implement the radical changes required in the context of climate change and increased automation and digitalisation. Consequently, EWCs could continue give a competitive edge to certain multinational companies operating in the EU, while others may continue to be deprived of such benefits. However, without EU action to address the identified problem drivers, it is unlikely that this potential can be harnessed on a larger scale, to benefit the competitiveness of the EU economy as a whole.

Specifically, the existing framework will remain complex and fragmented due to the exemptions of certain Union-scale undertakings from the personal scope of Directive 2009/38/EC. Likewise, the procedure for negotiating new EWC agreements will likely not be accelerated if the existing deadlines remain unchanged, as will the current mixed situation regarding the resources available to special negotiating boards and EWCs. The procedure of consultation will remain insufficiently effective, in particular in EWCs whose agreement does not provide for a follow-up to their opinion (e.g. response from the management). EWCs risk not to be informed and consulted on all matters that have a transnational dimension under the baseline scenario. Crucially, the effective enforcement of the minimum requirements laid down in the Directive depends to a large extent on the procedures and sanctions in place at national level. Although the Commission might be able to take up certain grievances by means of infringement procedures, Member States that lack effective enforcement mechanisms are much less likely to address that deficit systematically if they are not required to do so by a new EU initiative. With respect to procedural remedies available to the rightsholders under Directive 2009/38, in the absence of Union action, the fragmentation of national approaches regarding

[185] As mentioned above, infringement proceedings concerning the Irish system on remedies and access to justice for the enforcement for EWCs' rights was launched in 2022. The dialogue with the Irish authorities on the relevant grievances is ongoing.

available remedies is likely to be perpetuated[186]. For example, in certain Member States EWCs will remain entitled to injunctive relief by virtue of national procedural and case law to that effect[187], whereas in others, such a right will likely continue to be unavailable to EWCs[188].

5.2 Description of the policy options

5.2.1. General considerations and overview of policy options under consideration.

A range of policy options has been identified with a view to addressing the problem drivers within the scope of this initiative, as described under heading 2.2 above. These policy options were developed on the basis of the evidence available at this stage of the policy-making process, the relevant recommendations by the European Parliament, and the results of the first-stage consultation of social partners.

For the purposes of this analytical document, the policy options under consideration are organised in accordance with the relevant problem drivers and specific objectives, thus forming lists of sub-options for each of those drivers and objectives.

Overview	
Problem driver	**Policy measures under consideration**
A. Workers of certain Community-scale undertakings do not have the same minimum rights regarding establishment and operation of an EWC	- phasing-out exemptions from the temporal/personal scope - requiring transnational information and consultation as regards undertakings linked by contracts (e.g. franchising and management contracts) that allow one undertaking to influence the operation and business decisions of other, structurally independent undertakings.
B. Not sufficiently efficient & effective setting-up of EWCs	- clarifying obligations for setting up the special negotiating body and initiating negotiations - shortening of the negotiation period - clarifying/strengthening SNBs' resources, including coverage of costs of legal assistance and representation - requiring the inclusion of gender quotas in EWC agreements
C. Procedural and material obstacles to effective information and consultation of EWCs	- clarifying the concept of transnational matters; in the case of a dispute over the transnational nature of an issue, requiring management to justify why information and consultation requirements do not apply; - clarifying / strengthening the concept of consultation, e.g. by requiring management to provide a reasoned response on EWCs'

[186] As explained in relation to problem driver 10 under heading 2.2.2.D. above, Directive 2009/38/EC currently contains only a general obligation on Member States to ensure that adequate administrative or judicial procedures are applicable to enable the obligations deriving from that Directive to be enforced (Article 11(2)), but does not specify the required remedies further. It is thus left to Member States to design the procedural mechanisms enabling employee representatives, EWCs and SNBs to assert their rights guaranteed by Directive 2009/38, as long as the 'effet utile' of those minimum requirements and the fundamental right to access to justice are respected.

[187] For example, in a judgment of 19 November 2020 (case no 20/06549), the French Cour de Cassation upheld the suspension of operations of undertakings on the grounds of a violation of EWCs' information and consultation rights.

[188] For example, in a number of decisions of first and second instance labour courts in Germany (e.g. Landesarbeitsgericht Köln of 1 August 2018, case no 6 TaBVGa 3/18; Landesarbeitsgericht Baden-Wuerttemberg of 12 October 2015, case no 9 TaBV 2/15; Arbeitsgericht Wiesbaden of 13 June 2018, case no 1 BVGa 5/18), it was confirmed that a right of EWCs to injunctive relief cannot be applied by way of an analogy to national works councils asserting co-determination rights, given that the national legislator expressly discarded the possibility of granting such a right with respect to EWCs' information and consultation rights. However, despite the absence of a self-standing substantive right to injunctive relief, the judicial remedies before the labour courts, including applications for interim measures, are in principle available to EWCs.

	opinion on the proposed measures, before implementing the proposed measures or, alternatively, at an earlier stage prior to the adoption of the decision; - clarifying EWCs' access to resources, including coverage of costs of legal assistance and legal representation; - amendments clarifying that the Directive leaves social partners full discretion to agree on the practical arrangements of the information and consultation process, e.g. the use of virtual meeting software to improve efficiency and save costs; - strengthening safeguards against abusive non-disclosure / imposition of confidentiality restrictions on information; - strengthening subsidiary requirements on information and consultation process (number of ordinary meetings, resourcing, participation of EWC members in extraordinary meetings)
D. Shortcomings in enforcing the Directive	- Capacity of employee representations / EWCs / SNBs, or their members on their behalf, to bring legal actions - Member States to notify how access to court is ensured - Strengthening of required remedies and sanctions

In the description of these policy options below, the main addressees targeted by the respective measures are outlined, and it is explained in general terms what rights and obligations would arise for the most relevant stakeholders concerned. Should the EU social partners decide not to negotiate an agreement on the issue, a comprehensive analysis would be developed in an impact assessment, covering all relevant types of impacts and all stakeholders directly or indirectly affected in a systematic manner.

The most suitable sub-options will be selected based on their comparative efficiency, effectiveness, coherence and proportionality. The views expressed by social partners would be given due consideration in assessing and selecting the preferred sub-options. In combination, the sub-options thus selected would form the preferred policy option of a possible Commission initiative, subject to an assessment of their combined impacts.[189]

Under a dedicated sub-heading of this section, explanations are subsequently provided as to the choice of policy instruments that could be used to put the measures into practice, and in particular the need for a legislative initiative and the possibility to pursue certain measures by means of non-binding instruments.

In accordance with the legal basis in Article 153(2)(b), possible adjustments to the existing EU rules would be without prejudice to Member States' responsibility and discretion to integrate the minimum requirements into their respective legal and industrial relations systems. An EU initiative would in any case ensure that the nature and basic purpose of EWCs remain in line with the objectives enshrined in Article 153(1)(e) TFEU.

[189] As the degree of interaction between the problem drivers appears to be limited, the structure of the policy options follows the methodological approach set out in figure 1B on page 118 of the Better Regulation Toolbox (available online: https://commission.europa.eu/system/files/2022-06/br_toolbox_-_nov_2021_-_chapter_2.pdf), in line with the guidance on pages 20 and 21 of the Regulatory Scrutiny Board's annual report for 2020 (available online: https://commission.europa.eu/publications/regulatory-scrutiny-board-annual-report-2020_en). Where the Commission has nevertheless identified relevant interactions between the problem drivers and policy-options, such interactions will be discussed transparently in the description below.

The general approach and features of the recast Directive, which are fully aligned with the principle of subsidiarity, would thus be preserved: Member States would remain free to take into account their national industrial relations systems and legal systems when transposing the Directive's minimum requirements, particularly with regard to determining the arrangements for designating or electing employees' representatives, their protection and the appropriate sanctions. Moreover, the social partners play a key role in implementing the legislation via the negotiation of EWC agreements. Their autonomy is referred to specifically in Article 6(2). Only if they do not come to an agreement, do the more detailed subsidiary requirements laid down in the Annex to the recast Directive[190] come into effect. This decentralised implementation approach enables information and consultation mechanisms and structures to be adapted to the specific characteristics of the companies concerned. It aims to avoid rigidity in obligations or slowing down of efficient company decision-making, while also ensuring appropriate and adapted consultation and decision-making procedures. In addition, the principle of subsidiarity is reflected by: (i) the right[191] for the special negotiating body to stop the procedure of establishing an EWC with a two-thirds majority; and (ii) the choice left by Article 1(2) for the negotiations within the SNB to lead to a procedure for information and consultation, without the establishment of an institutionalised EWC.

5.2.2. Sets of policy measures under consideration by problem driver / specific objective

A. Same minimum information and consultation rights for all EWCs

In order to ensure a consistent, clear and comprehensive framework for information and consultation at transnational level, the Commission considers that an option would be to phase out the existing exemptions from the scope of Directive 2009/38/EC. Moreover, the Commission is currently analysing the European Parliament's request to explore the application of transnational information and consultation rights with respect to structurally independent undertakings that can influence one another's operation and business decisions by virtue of contractual arrangements, by means desk research conducted by its external contractor.

- ***Sub-options***:
    - Phasing out the exemptions from the personal and temporal scope of the Directive: In order not to further prolong – and exacerbate through a possible further revision of the Directive – the regulatory complexity linked to the exemptions of undertakings with pre-existing agreements, those exemptions could be a phased out. Such a measure would have to be accompanied by carefully calibrated transitional provisions to preserve the principle of autonomy of the parties and maintain functioning agreements that are already in conformity with the (revised) minimum requirements of the Directive, while at the same time achieving the desired simplification and clarification of the legal framework. It may be appropriate to differentiate , in particular for the necessary transitional provisions, between the exemption of undertakings with 'voluntary' pre-Directive agreements and that of undertakings with agreements concluded during the transposition period of Directive 2009/38.

      Depending on changes introduced to the existing rules by a potential future initiative, the transitional provisions would have to clarify whether the

[190] Article 7.

[191] Article 5.

agreements concluded under Directive 2009/38/EC need to be adapted to meet the new requirements, in order to guarantee that one set of rules applies to all undertakings falling within the scope of the Directive.

- Requiring transnational information and consultation of employees where contractual arrangements enable one undertaking to influence another's operation and business decisions: In resolution 2019/2183(INL), the European Parliament's called on the Commission to "*explore the merits of including contracts which enable structurally independent undertakings to influence one another's operation and business decisions (such as franchising or management contracts)*[192] *within the scope of Directive 2009/38/EC in order to prevent possible gaps*". According to the Commission services' preliminary assessment, this issue is linked to the question whether an undertaking is considered to control another, so that they form a group for the purposes of the Directive and hence fall within its scope (provided they meet together the criteria for 'Community scale'). The determination of whether an undertaking is a controlling undertaking is to be done on the basis of the applicable national law, that is to say the law of the Member State governing the (potentially) controlling undertaking.

  The Directive currently neither requires nor excludes that influence exercised by means of contracts such as those mentioned by the Parliament be considered "dominant influence", and hence control. It merely lists the - non-exhaustive - examples of dominant influence exercised by virtue of "ownership, financial participation or the governing rules", and lays down a presumption of dominant influence in certain cases.

- ***Stakeholders targeted***: Any measures designed to clarify or expand the scope of the Directive would primarily target the stakeholders to which the rights and obligations under the Directive apply directly, that is to say Union-scale undertakings or groups of undertakings as well as their employees and employee representatives (see heading 2.1.1. above for a detailed description).

  - Phasing out the exemptions of undertakings with pre-existing agreements would affect in particular employee representatives and management of Union-scale undertakings and groups which would otherwise fall under those exemptions. Within this stakeholder group, a distinction should be made between undertakings or groups with agreements concluded before 22 September 1996 ('voluntary agreements') and those with agreements concluded or revised during the transposition period of the recast Directive (2009-2011). The former were previously not subject to any EU-level requirements and might therefore have to make more fundamental adaptations to bring their agreements in line with the requirements of Directive 2009/38/EC. The latter had to comply with the 1994 EWC Directive, but if a possible revised version is to apply uniformly to all Union-scale undertakings or groups, they might nevertheless have to make certain adaptations to their agreements in order to take into account changes made through the recast or the possible upcoming revision. According to ETUI

[192] Management contracts are agreements by means of which one undertaking, whilst remaining an independent structure, confers its day-to-day operation to another undertaking. The managing undertaking can thus control the employees of the managed undertaking without owning the business as such.

data, only a small group of undertakings is covered under the second exemption concerning agreements concluded or revised in period of 2009-2011. A large majority of exempted undertakings' agreements concluded their agreements before 1996 as voluntary agreements.

In addition, undertakings currently subject to the recast rules may be affected depending on the changes introduced to the existing rules by a potential future initiative.

- If Member States were required to consider influence exercised by virtue of contracts between structurally independent undertakings as 'control' for the purposes of Directive 2009/38/EC, transnational information and consultation requirements would presumably become applicable to certain undertakings and workers that are currently not covered. However, no data is available as to the penetration of contractual arrangements that might be considered to involve dominant influence over the operation and business decisions between structurally independent undertakings. Narrowing down the group of potentially affected stakeholders is at this stage challenging due to the lack of precise criteria to identify the relevant contracts.

- Indirectly, employees of these Union-scale undertakings or groups are concerned because they are the ultimate beneficiaries of information and consultation rights determined through the negotiations set out in EWC agreements.

Social partners feedback in the first stage consultation:

Phasing out of exemptions:

- The three responding **trade union organisations** supported a widening of the scope of Directive 2009/38/EC: **ETUC** and **CEC** specifically supported ending the exemption of undertakings with pre-existing information and consultation agreements at transnational level. In this respect, ETUC argued that the provisions of the Directive must apply to all undertakings to ensure a level playing field, endorsing the legislative approach recommended by the European Parliament.

- In contrast, the responding **employer organisations** opposed a phasing out of the exemptions of undertakings with pre-existing agreements. All of those who took a position on this issue (5 out of 8) argued in favour of keeping the existing exemptions. In this regard, **BusinessEurope** submitted that a revision of Directive 2009/38/EC should create a safe harbour for pre-existing EWC agreements by ensuring that the undertakings with these agreements can remain out of its scope. Similarly, **EFCI** stressed that the grandfathering rules have proven themselves in practice, as the longstanding information and consultation bodies in exempted undertakings are often particularly effective and characterised by a deep level of trust and cooperation between workers' representatives and central management. While **ECEG** understands and shares the objective of simplifying the existing legislation, it does not support an automatic transformation/adaptation of the different types of EWCs into one single model. Instead, ECEG would favour a reflection on how Article 13

of Directive 2009/38/EC could serve to modernise those agreements[193]. **CEI-Bois** states that no additional regulatory burden should be added on companies who already have opted for the creation of an EWC.

Coverage of undertakings linked by contract:

- **ETUC** stressed the need for a comprehensive definition of the concept of 'controlling undertaking' to clarify the inclusion in the scope of companies operating through contract management, franchise systems and 50:50 joint ventures. While **CESI** did not refer to specific policy options regarding the scope of the Directive, it submitted in general terms that the scope could be widened to cover more workers under EWCs.
- None of the **employer organisations** elaborated specifically on the idea of including undertakings linked through contractual arrangements into the concept of controlling and controlled undertakings, and thus into the scope of Directive 2009/38/EC, but **SMEunited** underlined generally that a possible initiative should not expand the scope of the Directive.

B. Conditions for an efficient and effective negotiation and conclusion of EWC agreements

Policy options designed to improve the process for the setting-up of EWCs could relate to the timeframe for the initiation and completion of negotiations as well as the resources available to the special negotiating board.

- ***Sub-options***:
    - Clarifying obligations for setting up the Special Negotiating Body and shortening the timeframe for concluding negotiations: In order to ensure that the process for establishing a new EWC cannot be stalled, a clear requirement for establishing the special negotiating body and convening the first meeting within a certain timeframe could be laid down. The negotiation period could be also shortened.

    - Clarifying coverage of special negotiating bodies' costs: It could be clarified that central management's existing obligation to bear the expenses relating to the negotiations of a new EWC agreement includes also the reasonable – in other words non-frivolous –costs of legal assistance and representation incurred by special negotiating bodies. In addition, certain other aspects of SNBs' entitlement to assistance by experts and training could be clarified or complemented

    - Requiring the inclusion of gender quotas in EWC agreements: Central management and the special negotiating body, when establishing a new EWC or renegotiating an EWC agreement, could be required to negotiate the necessary arrangements in order to ensure that the underrepresented gender comprise a certain proportion of EWC and select committee members.

[193] Article 13 currently provides for negotiations with a view to adapting existing EWC agreements following restructurings.

- ***Stakeholders targeted***:

    - The conditions for negotiating EWC agreements under Directive 2009/38/EC are most immediately relevant for members of the Special Negotiating Body and central management involved in such negotiations. The Union-scale undertakings or groups in which these negotiations take place have to bear the associated costs.

    - Indirectly, employees of these Union-scale undertakings or groups are concerned because they are the ultimate beneficiaries of information and consultation rights determined through the negotiations set out in EWC agreements.

    - As some of the sub-options described above entail an increased involvement of trade union representatives in the context of negotiations for a new EWC agreement, recognised Union-level trade union organisations are also amongst the targeted stakeholders.

Social partners feedback in the first stage consultation:

- All three **trade union organisations** consider that there is a need for certain improvements and clarifications of the procedure for setting up EWCs. However, while **CESI** and **CEC** support the European Parliament's recommendation to shorten the three-year deadline for negotiations, **ETUC** disagrees in its response to the first stage consultation, arguing that proper coordination, training and agreement on common demands take time. According to ETUC, "an understanding has to be established between workers' representatives from different member states with very different industrial relations systems". In contrast, according to **CESI**, practical experience appears to suggest that negotiations can be concluded in a shorter timeframe if both sides are willing and engage constructively.
- None of the **employer organisations** argue in favour of adapting the framework for setting up EWCs. **ECEG** explains that in the European chemical industry, the establishment of EWCs can easily be arranged in most cases, and that the existing rules are sufficient to fulfil the objectives of Directive 2009/38/EC. **BusinessEurope** takes the view that the challenges identified in the setting up and functioning of EWCs are practical rather than legal and would not be tackled by a revision of the directive. **CEEMET** refers to the evaluation of the Directive, according to which it takes on average 2 to 3 years from the establishment of the special negotiating body to the conclusion of the EWC agreement. **CEEMET** argues that it is best not to rush the negotiations by reducing the timeframe. Amongst the responding employer organisations, only **HOTREC** nuances the rejection of shortening the negotiation deadline, stating that such a measure might be considered, as long as proportionate and relevant. However, **HOTREC** also cautions that some topics require long discussions and that subsidiary requirements should apply only when strictly necessary.
- Responses did not generally engage with the issue of gender representation on EWCs and special committees. However, CEC (European Managers) and ECEG (European Chemical Employers Group) supported the objective of achieving a gender-balanced composition of those bodies. While ECEG's endorsement refers to the general EU policy objective of gender equality, CEC submits that the representation of women

in the EWCs should be governed by the rules set out in Directive (EU) 2022/2381 on improving the gender balance among directors of listed companies.

C. Policy measures to ensure an appropriate resourcing of EWCs and an effective procedural framework for their information and consultation

Reflections as to how the effectiveness of the information and consultation process at transnational level could be further improved pertain to various contributing factors, such as the issue of legal certainty regarding the concept of 'transnational matters', the requirements for consultation set out in the definition of that term, the appropriate resourcing of EWCs to carry out their role effectively, and the matter of confidentiality or non-disclosure of sensitive information. Different sub-options are under consideration with respect to each of these factors, as outlined below.

- ***Sub-options***:

    - Clarification of the concept of 'transnational matters': In order to ensure that the minimum requirements of Directive 2009/38/EC are applied effectively with respect to all matters warranting information and consultation at transnational level, and to reduce the risk of disputes over the applicability of those minimum requirements, the concept of 'transnational matters' could be clarified. Possible avenues of EU action range from a clarification of that concept to a targeted broadening of the concept. It could also be considered to require the central management, in the case of a dispute with the EWC about the applicability of transnational information and consultation requirements, to justify the absence of transnational issues.

    - Clarification / strengthening of management's consultation obligations: Avenues for action considered include an obligation to provide a reasoned response to EWCs' opinions on the proposed measures and at what stage of the decision-making process. Another element being considered is the timing of the EWCs consultation procedure in relation to related national and local consultation processes. Any policy measures would have to give due regard to the respective competences and areas of action of EWCs and national employee representation bodies, as well as to the provisions of national law and/or practice on the information and consultation of employees, and the impact it would have on companies' ability to take decisions effectively.

    - Clarification of EWCs' entitlement to resources: As mentioned above, the Directive currently requires that the special negotiating body and central management determine certain aspects in their agreement, including the financial and material resources to be allocated to the EWCs. Determining the resources available to EWCs for the purposes of fulfilling their role in the information and consultation of employees is thus a prerogative of these parties. It could be required that parties to the EWC agreement define more specific provisions on coverage of costs relating to the expert support, training, legal advice and litigation in the agreement. Moreover, EWCs could be specifically entitled to the necessary resources for the dissemination of information to the workforce.

- Ensuring effective consultation under subsidiary requirements: Certain clarifications regarding the Annex to Directive 2009/38 could be considered with a view to improving the effectiveness of the information and consultation of those EWCs. For instance, it might be appropriate to increase the number of regular annual meetings with central management, or to strengthen the participation rights of concerned EWC members in extraordinary meetings with the central management.

- Clarifying the possibility to use IT technologies to increase efficiency and save costs: Directive 2009/38/EC leaves social partners full discretion to agree on the practical arrangements of the information and consultation process, e.g. the use of virtual meeting software to improve efficiency and save costs. This possibility for social partners could be explicitly confirmed in the directive.

- Introducing safeguards against the abusive imposition of confidentiality or non-disclosure of information: In order to ensure that effective information and consultation cannot be undermined excessive recourse to confidentiality restrictions, the Directive's existing provisions could be amended to clarify that management may impose confidentiality only within the limits set by Union and national law, subject to objective criteria and in the legitimate interest of the undertaking.

  Furthermore, the sharing by EWCs of information with national or local works councils could be facilitated, provided that the latter are themselves subject to appropriate rules protecting confidentiality.

  Consideration could also be given to the systems used for sharing, accessing and retrieving information to ensure that they are able to uphold confidentiality, including with respect to cybersecurity risks.

  In addition, central management could be required to specify the duration of confidentiality restrictions, and to inform the EWC of the objective criteria for determining whether revealing the relevant information would seriously harm the functioning of the undertaking.

  Finally, a more far-reaching approach could consist in turning the existing possibility for Member States to make non-disclosure of certain information (where such possibility is provided by national rules[194]) subject to prior administrative or judicial authorization (currently not a feature of any national legislation) into an obligation.

- ***Stakeholders targeted***:

  - Similarly to the previous policy options, the primary targeted stakeholders would be EWCs and the relevant undertakings in which they are established. This is obviously the case for sub-options involving additional rights and obligations with respect to the timing of consultations, reasoned responses to

[194] Transposition of Article 8 is not obligatory (cf. Article 11(3)). Certain Member States have not transposed in particular Article 8(2), which provides a possibility to the central management not to disclose information when its nature is such that, according to the objective criteria, it would seriously harm the functioning of the undertaking concerned or be prejudicial to them. Non-transposition of this provision is seen as more favourable to workers. See internal driver 9 (section 2.2) above.

EWC opinions, and the requirement to take those opinions into account. Likewise, EWC members depend on adequate resources and support by experts for their tasks, so – provided the existence of significant funding gaps is borne out by evidence – measures to strengthen the necessary financial coverage have the potential to (positively) affect their work, and by extension the employees in their undertaking who depend on the dissemination of information by EWC members. Conversely, the costs of operation of EWCs have to be covered by the undertakings, which would thus be financially affected by possible increased training activities, recourse to experts and legal advice, or even legal actions and a clearer obligation to fund these.

- In the same vein, clarifications of the concept of 'transnational matters' influence the operation of EWCs, because the transnational nature of a matter determines the application of information and consultation requirements under the Directive, hence its material scope. Such measures thus have immediate relevance for the central management bound by these requirements, as well as members of existing EWCs and other employee representatives involved in transnational information and consultation. Indirectly, through dissemination of information by those EWC members and other employee representatives, the wider workforce would be affected.

- Some of the policy options have a specific relevance also for trade union representatives, as they would make the latter the primary source of expertise for EWCs.

- The sub-options concerning confidentiality restrictions and non-disclosure are also liable to have repercussions beyond the EWC and undertaking immediately involved in the consultation, if the information to be disclosed concerns third parties. As with all policy measures under consideration, the possible impact of these sub-options on companies' legitimate confidentiality interests would have to be carefully considered.

- The sub-options on the coverage of legal costs and the sub-option making non-disclosure subject to a mandatory prior administrative or judicial authorisation might impact companies ability to take decisions effectively. These sub-options could also imply an increased recourse to lawyers and national courts. With respect to these sub-options, legal practitioners active in this field and Member States' judiciaries are therefore also to be considered as relevant stakeholders.

Social partners feedback in the first stage consultation:

Concept of transnational matters:

- The **trade union organisations** agree that the **concept of transnational matters** should be clarified and/or broadened, as recommended by the European Parliament. **ETUC** submits that incorporating the relevant recitals in the enacting terms would ensure legal clarity and certainty in the interest of both management and labour.
- In contrast, **BusinessEurope** refers to the abovementioned 2016 study of the University of Leuven, which underlined that managers and their employees found ways to overcome operational difficulties related, amongst others, to the definition of a transnational scope. For the most part, the other **employer organisations** are also opposed to a revision of the concept of **transnational matters** in the Directive.

For instance **SGI Europe**'s members express great concern over the Parliament's recommendation to include potential effects indirectly concerning employees in more than one country, as this could lead to almost every decision or choice of the enterprise to end up on the table of EWCs, which **SGI Europe**'s members would consider extremely intrusive. **CEEMET** echoes these concerns, fearing that purely local issues could artificially be made transnational, and that the broad definition recommended by the Parliament could distort the division of competences between national works councils and their European counterparts. **HOTREC** recalls that transnational issues should not include decision-making bodies in a single state. **ECEG** considers that the existing legal concept of transnational matters has proven itself in practice and does not cause any disputes beyond what can reasonably be expected in any corporate setting. According to **ECEG**, existing ambiguities can be effectively clarified on a case-by-case basis through arbitration mechanisms or - in the very worst (and rare) case - the courts. Amongst the responding employer organisations, only **EFCI** and **SMEunited** declare openness to a clearer definition of the transnational nature of issues, to create more uniform conditions for companies and reduce disparities in national legislation.

Information and consultation requirements:

- **ETUC** generally supports amendments to the definition of 'consultation' laid down in Directive 2009/38/EC, as recommended by the European Parliament. According to **ETUC**, in order for the consultation to be meaningful, EWCs must have sufficient time to carry out an in-depth assessment of the information provided, included when needed with the support of experts, as well as to consult national and regional workers' representatives. The **ETUC** stressed that "*before management takes a final decision, the transnational information and consultation process must be properly conducted and completed*" and that the EWC's opinion "*shall be taken into account by management and the EWC shall receive a reasoned response before the final decision is taken*.". The **ETUC** also demanded a "*information and consultation rights must guarantee that the EWC can deliver its opinion before consultation is finished at the respective levels*". Similarly, **CESI** states that it should be specified that consultations must necessarily be taken into account by management, and this in a meaningful way. **CESI** argues that, in the longer-term, ways could be envisaged to turn EWCs more into negotiating bodies, where their opinions could have even more weight and are not only 'taken into consideration'.
- In contrast, several responding **employer organisations** were sceptical vis-à-vis the changes to the definition of 'consultation' recommended by the Parliament. BusinessEurope considers that given the variety of situations management and EWCs are confronted with, it would be impossible to draft a "one size fits all" template for the timing of the consultation process that would work equally well. According to **CEEMET**, the Parliament's recommendations would put employees' representatives in a position to delay important decisions by central management indefinitely, which would reduce management's agility needed in a fast-changing economic world. **EFCI** admits that a discussion could take place on the issue of timing and the rules applying in case no confirmation is given by the management to requests issued by workers but cautions that the role and function of EWCs should not evolve in the direction of de facto parallel collective bargaining or co-determination powers.

Use of IT technologies such as virtual meeting software:

- **BusinessEurope** requests to reconsider the Directive's provisions on EWC meetings to provide more flexibility and save costs by making use of improved digital communications.
- Similarly, **CEEMET** asks the Commission to propose specific measures alleviating companies' administrative and financial burdens and adapting to the new reality of online meetings.

Confidentiality / non-disclosure of information:

- **ETUC** calls for clear provisions on the grounds and circumstances justifying the withholding of information, and on the grounds based on which EWC members' right to share information with relevant stakeholders (in particular workers' representatives) can be restricted. **CESI** also refers to the risk of companies using 'confidentiality restrictions' in an abusive way as a pretext to circumvent a consultation of EWCs.
- **CEEMET** explains that listed companies have to comply with strict rules on when and to whom price sensitive information can be given before public disclosure, considering that disclosure to the EWC makes it much more likely that the information will be made public. For the most part, the responding **employer organisations** reject potential amendments to the Directive's provisions on confidentiality and non-disclosure. According to **CEEMET**, weakening confidentiality provisions endangers the competitiveness of companies with the consequence of weakening Europe as an innovative and forward-looking industrial and business location. Moreover, **CEEMET** submits that this approach may be counterproductive for social dialogue in multinational companies, as it will create an environment where the management will not be comfortable sharing sensitive information. **EFCI** would also not support a revision of the text that would limit the autonomy of the management when deciding about the confidential nature of the issue being discussed. While **SMEunited** recognises that some work on confidentiality might be necessary, it also emphasises that trade secrets must be protected and adding red tape must be avoided. **HOTREC** argues against reducing the scope of the existing confidentiality provisions, pointing out that consultations take place on sensitive decisions such as mergers or acquisitions.

Resources:

- All three **trade union organisations** support amendments to strengthen EWCs' entitlement to resources. **ETUC** stresses in particular the importance of guaranteeing access to recognised trade union organisation expertise, pointing out that most Member States provide only for a minimum right of consulting one expert of EWCs' choice. **ETUC** suggests that trade union experts should have a right to participate in all SNB, EWC and select committee meetings and have access to all sites. **CEC** refers to the need to fund training of EWC members on language, intercultural understanding, EWC functioning, sustainable leadership, diversity, and unconscious biases), as well as EWCs administrative and logistical costs.
- These views are not shared by the responding **employer organisations**, who stress the importance of reducing the financial strain on companies rather than increasing EWCs' entitlements. **SMEunited** cautions that any more detailed rules on funding would need to be considered in a careful manner.

Subsidiary requirements:

- **ETUC** stresses that the role of representatives in Article 5.4 needs to be reflected in the subsidiary requirements. Moreover, the ETUC sees a need to strengthen the subsidiary requirements, in particular to foresee at least two annual meetings in person of EWCs subject to subsidiary requirements.
- **Employer organisations** generally do not support amendments to the subsidiary requirements. For instance, **ECEG** reports that its member companies have not faced any significant problems in relation to the subsidiary requirements. **CEEMET** rejects the introduction of additional mandatory EWC meetings as it expects such requirements would lead to considerable additional costs for the company (e.g. costs for accommodation and travel expenses, costs for interpreters and the organisation of meetings). **CEEMET** also suggests to take into account that representatives can attend the meetings of the EWC online and pass resolutions by means of video and telephone conferences. This point is mirrored by **HOTREC**, which also considers that some of the existing meetings could be replaced by online events. Similarly, **BusinessEurope** suggests to reconsider some EWCs meetings arrangements set in the directive with a view to providing more flexibility to companies and EWC members, limiting the related costs, and making good use of the possibilities created by improved digital communications.

D. Effective enforcement of the Directive through sanctions and access to justice

The effective enforcement of the minimum rights guaranteed by the Directive depends on several factors: (i) compliance monitoring by the European Commission (and if necessary, infringement proceedings), (ii) appropriate sanctioning by national competent authorities, and (iii) effective judicial and/or administrative remedies available to the rightsholders entitled under the Directive (primarily employee representatives and members of the special negotiating bodies and the EWCs). For the purposes of the first component, a possible revision of Directive 2009/38/EC could be used to ensure that Member States provide the Commission with the information needed to identify enforcement gaps. Regarding the other two components, strengthened requirements in the Directive could be considered, as outlined in more detail below.

- ***Sub-options***:

    - With a view to enhancing the enforceability of transnational information and consultation rights, Member States could be provided with specific recommendations as to how they can comply with their obligation to apply administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in cases of infringement of the obligations arising from the Directive.

    - The obligation for Member States to provide effective and timely access to court to enforce rights under the Directive could be laid down in the enacting terms. Such a measure could potentially synergise with strengthened requirements on the resourcing of EWCs (see under sub-heading (c) above), which would address, amongst others, the coverage of reasonable legal costs. By virtue of such an obligation, Member States would for instance have to enable EWCs, or their members on their behalf, to challenge a refusal by central management to disclose information on transnational matters, or an unjustified prohibition to

share such information with employee representatives. Likewise, employee representatives who requested central management to initiate negotiations of an EWC agreement would be able to bring an action on grounds of a failure to comply with that request within the applicable deadline.

- An obligation on Member States to provide for effective, dissuasive and proportionate sanctions, which already follows from the general principles of Union law, could be laid down in the enacting terms of Directive 2009/38/EC.

- Additional specific references (for example, size of undertaking) could be laid down in the enacting terms of the Directive, to be used to guide the determination of fines.

- Measures strengthening the requirements on access to justice and fines could be accompanied by a provision requiring Member States to inform the Commission about the procedural elements in place by which they ensure that all the rights set out in the Directive can be effectively asserted through administrative or judicial proceedings. Such a requirement would show that no enforcement gaps exist (or make such gaps visible) and would help EWCs and companies to avoid pursuing cases in relation to given rights through the wrong procedure.

- More specific rights could be laid down in the enacting terms of the Directive (for example, preliminary injunctions) for relevant infringements of the Directive's requirements.

- ***Stakeholders targeted***:

  - The primary stakeholders targeted by the policy options on effective enforcement would be those subject to the rights and obligations to be enforced, that is to say employee representatives, Special Negotiating Bodies (and their members), EWCs (and their members), and Union-scale undertakings. These stakeholders are potential parties to disputes and potential applicants for, resp. subject to penalties. As a general rule, measures facilitating access to justice and requiring more effective sanctions have the potential to lead to an increased recourse to the relevant procedures. However, it should be borne in mind that Directive 2009/38/EC, in conjunction with general principles of Union law, already requires Member States to apply administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in cases of infringement of the obligations arising from that Directive. Moreover, the deterrent and general preventive function of penalties has to be considered when making assumptions about possible impacts on the number of legal or administrative proceedings.

  - National administrative authorities and courts are also potentially directly affected by the policy options on effective enforcement, as the practical implementation of the relevant requirements falls to them. This might have certain budgetary implications for Member States, although the limited number of EWCs and the low level of legal disputes up to now suggest that such implications are unlikely to be significant.

Social partners feedback in the first stage consultation:

Access to justice / remedies:

- All three responding **trade union organisations** are in favour of strengthening EWCs' access to justice as well as the remedies and sanctions available under national law, in order to ensure an effective enforcement of the rights guaranteed by the Directive. **ETUC** reiterated its support for introducing a **right to injunctive relief**, enabling EWCs to request the suspension of management decisions taken in violation of their information and consultation rights. In this respect, **ETUC** requests that administrative or judicial systems are put in place to allow for swift decisions on EWCs' requests for the suspension or nullification of management decisions '24/7 in a few hours'. ETUC further calls for recognising the legal personality of EWCs, and requiring central management to provide the necessary financial support for legal proceedings.
- In contrast, **BusinessEurope** submits that a right of EWCs to injunctive relief would create significant risks of imposing on companies to freeze or delay decision making, leading to disproportionate penalties, an undermining of the trust and confidence of companies in EWCs and undermining the role of social partners at company level. **CEEMET** argues that a temporary suspension of the implementation of management decisions would hamper the decision-making process in companies and be a serious intrusion in the corporate governance. **CEEMET** stresses that the legal framework must not hinder appropriately flexible and responsible entrepreneurial action, and not create a hostile culture where employee representatives may use the tool of preliminary injunction as a threat in the consultations forcing the company to undesired decisions.

Sanctions:

- **ETUC** submit that "*the Commission rightly underlines that sanctions must be effective and dissuasive*". Both **ETUC** and **CEC** specifically endorse introducing provisions on **financial penalties**, as recommended by the European Parliament, referring to the dissuasive purpose of such penalties. On the other hand, **CESI** suggests that the Commission should first further assess why Member States have not been ensuring provision of effective sanctions, even though under the existing rules they are supposed to be dissuasive.
- In contrast, several employer organisations are forceful in their rejection of the European Parliament's recommendations concerning financial penalties. BusinessEurope considers that "*GDPR-sized fines, as proposed by the European Parliament, do not have any positive role to play in labour relations and would seriously damage the cooperation and trust between social partners at company level and increase the risk of social dialogue becoming excessively adversarial*". **SGI Europe** and **HOTREC** consider increased financial penalties disproportionate, in particular where an enterprise unintentionally fails to consult EWCs. **CEEMET** states that the Parliament proposes excessive, 'completely unrealistic' and disproportionate penalties for companies, arguing in addition that the determination of the level of penalties is a prerogative of the Member States. **EFCI** rejects the thresholds set out in the European Parliament's resolution as 'completely unacceptable'. **SMEunited** cautions that any more detailed rules on sanctions need to be considered in a careful manner.

5.2.3. Relevant EU policy instruments

On a preliminary note, it should be stressed that all of the subsequent considerations are without prejudice to the option for social partners to negotiate an agreement on transnational information and consultation of employees, which may be implemented by a Council decision on a proposal from the Commission, in accordance with Article 155 TFEU.

By definition, some of the policy options under consideration would need to be pursued by means of binding instruments, as they necessarily imply amendments to existing requirements. The possible initiative on a revision of the recast EWC Directive would take the form of an amending Directive. Article 153(2) in conjunction with Article 153(1)(e) TFEU provides for the possibility of adopting a directive in the area of the information and consultation of workers[195], involving minimum requirements for implementation by Member States. This legal basis would enable the EU to adapt the minimum requirements laid down in Directive 2009/38/EC in a binding manner.

For some of the avenues of EU action under consideration, non-binding measures could also be envisaged to contribute to the objectives set out above, . Non-binding measures could for instance take the form of a Commission Recommendation addressed to Member States and/or interpretative guidance in the form of a Commission Communication.

The guiding principle for the selection of the appropriate policy instruments is proportionality. Action will not go beyond what is necessary to achieve the objectives effectively, including as regards the choice of policy instruments. Coherence with the existing policy framework for information and consultation is another key consideration.

As possible EU legislative action can only set minimum standards in the labour and social affairs field and cannot ensure full harmonisation in the internal market, a possible initiative would be combined with the continued efforts of the Commission in monitoring the compliance with and enforcing the applicable requirements.

6. WHAT ARE THE IMPACTS OF THE POLICY OPTIONS?

This section provides a preliminary overview of the impacts that the Commission would assess, in preparation of a possible initiative, as regards the policy options outlined in Section 6. The preliminary overview is based on the currently available evidence, and would be adapted and developed in a possible impact assessment in light of the results of the ongoing evidence-gathering and consultation of social partners. The possible impacts under consideration relate to the social and economic spheres, public authorities, as well as other domains such as fundamental rights and competitiveness. A table at the end of this section summarises the main possible impacts on the most relevant stakeholder groups in terms of costs and benefits.

6.1. Social impacts

Same minimum information and consultation rights for all EWCs:

Employee representatives in Union-scale undertakings currently exempt from the scope of Directive 2009/38 would potentially benefit from the phasing out of those exemptions. If their respective agreement with management currently falls short of the minimum requirements set out in the Directive, this measure could deliver strengthened information and consultation

[195] Article 153(1)(e) TFEU lays down that the Union shall support and complement the activities of the Member States in the field of information and consultation of workers. Activities related to co-determination laid down in Article 153(1)(f) are not envisaged in this initiative.

rights for those stakeholders, possibly following a re-negotiation of that agreement. Workers in such undertakings could benefit in the form of improved information and more effective representation by their EWC, leading to possible positive impacts on employment and working conditions.

Workers whose undertakings are currently not subject to information and consultation requirements on transnational matters because influence exercised by virtue of contracts between undertakings is not considered 'control' under the applicable national law could theoretically benefit from a broadened definition of that concept covering e.g. franchising and management contract. However, no specific evidence is currently available on the stakeholder population that might be affected in that way, for lack of information about the scale of use of such contracts and the degree of influence on the operation and business decisions of undertakings bound by such contracts

Efficient and effective setting-up of EWCs:

Employee representatives requesting the establishment of a new EWC or the re-negotiation of an existing EWC agreement would benefit from a clarification of management's obligation to initiate negotiations within a certain period, and from a shorter negotiation deadline. Such measures would potentially strengthen the negotiating position of these stakeholders, as central management would face a more immediate prospect of defaulting to the subsidiary requirements if no compromise is achieved. This prospect might plausibly incentivise central management to engage more readily with the suggestions put forward by employee representatives, as some of the subsidiary requirements may not be as conducive to a constructive and efficient information and consultation process as an agreement tailored to the specific structure and situation of the respective undertaking. The same considerations may however also drive employee representatives to seek a compromise within the shortened negotiation period. Whatever the outcome of the negotiations, the policy measures under consideration should guarantee that the employee representatives could avail themselves more quickly of the desired information and consultation rights.

Possible provisions relating to the resourcing of the SNB by central management could help members of that body to represent employees' interests more effectively during negotiations, potentially leading to EWC agreements of better quality. Such outcomes would also benefit the workforce more generally in the form of improved social dialogue on transnational matters.

Target thresholds for special negotiating bodies and central management to agree on the gender composition of EWCs and select committees could directly benefit female employee representatives in the form of increased opportunities to get involved proactively in information and consultation procedures. EWCs as a whole might be able to produce more authoritative opinions due to their increased representativeness of all employees. Consequently, workers could benefit from a more balanced representation of their interests, by means of an improved quality of EWC opinions which could theoretically yield better outcomes for the workforce, e.g. in terms of working conditions or the strategic orientation of undertakings. However, it should be stressed that such assumptions are, at this stage, not supported by specific evidence. On a societal level, target thresholds for gender representation could deliver the general benefit of improved gender mainstreaming.

On the other hand, there might be a risk, in certain sectors, that places in the EWC or its select committee remain vacant because of difficulties filling gender quotas. If such a risk materialises, this could hamper the effectiveness of information and consultation on transnational matters.

Measures ensuring the appropriate resourcing of EWCs and an effective process for their information and consultation:

The policy measures considered with a view to enhancing the information and consultation process could deliver direct benefits to employee representatives, and thus benefit the general workforce of Union-scale undertakings. For instance, a right to a reasoned response by management to EWC opinions could ensure that central management engages in a more effective dialogue with its EWC. Clarifications of the concept of transnational matters could potentially deliver a smoother collaboration between EWC members and central management, and reduce the risk that relevant matters are not subject to information and consultation. In conjunction with the measures relating to the effective enforcement of the minimum obligations guaranteed by the Directive, more restrictive provisions on the imposition of confidentiality and the withholding of information by central management could potentially also improve the position of employee representatives by giving them access to more information and/or more possibilities to consult on information provided and formulate a better substantiated opinion. The latter benefit could notably be reaped by those EWC members who are affected by the abusive use of confidentiality by central management under the baseline scenario; there is no conclusive evidence yet about how widespread an issue such abuse is at the moment and would be in the future in the absence of EU action.

Effective enforcement of the Directive through sanctions and access to justice

Similarly to the impacts outlined for the other measures, employee representatives and workers would potentially benefit from improved administrative and judicial remedies as well as dissuasive penalties. Such measures would provide stronger incentives for central management to comply with information and consultation obligations, potentially contributing to a more effective and diligent application of these requirements in practice. Such outcomes would be most relevant for those stakeholders whose EWC is subject to a national system lacking effective enforcement mechanisms under the baseline scenario.

6.2. Economic impacts

Same minimum information and consultation rights for all EWCs:

The phasing out of the exemptions from the scope of Directive 2009/38 would potentially create some, likely moderate, direct adjustment costs for some of the currently exempted Union-scale undertakings that would need to adapt or re-negotiate existing EWC agreements falling short of the minimum information and consultation requirements laid down in the Directive. In reply to the first stage consultation, employer organisations expressed a clear preference for the continued exemption of undertakings with voluntary 'pre-Directive' EWC agreements. They argued for instance that such agreements provide an effective basis for a trustful dialogue between management and employee representatives, implying that the phasing out of the existing exemptions could upset the proven framework for that cooperation.

Undertakings newly included in the scope of the Directive by virtue of a broadened concept of 'control', covering also influence exercised by means of contracts, would face familiarisation[196] and adjustment costs to ensure compliance with those minimum requirements. Undertakings with existing EWC agreements who would be required to expand their information and consultation mechanisms to a wider workforce of undertakings linked by

[196] Those costs form part of implementation costs incurred in the course of developing an understanding of legislative requirements.

contracts, would also have to bear adjustment costs. However, as explained in relation to workers above, the Commission's evidence-gathering activities have not yet yielded any robust information about the stakeholders affected by such a measure.

At the same time, depending on their structure, undertakings that are not covered by the Directive under the baseline could potentially also reap certain benefits from becoming subject to the minimum information and consultation requirements on transnational matters. They could notably gain a new forum for constructive dialogue with employees on transnational issues, potentially facilitating the development of mutual collaboration and better-quality decisions on strategic matters, in particular in the context of the fundamental challenges linked to the twin transition. At the same time, it must be recalled that local issues would not be within the scope of this dialogue. According to the abovementioned study conducted by KU Leuven in 2016, 54% of interviewed managers considered that the EWC-related benefits justify the costs, while only 19% responded that the costs were not matched by the benefits.

There might be certain marginal indirect positive and negative economic impacts on other stakeholders, such as consumers and companies linked to Union-scale undertakings in the value chain. For instance, insofar as information and consultation of employees on transnational matters contributes to adjustments of business decisions compared to the baseline scenario, this might have an impact on factors such as pricing, the location of production sites, sustainability of business activities, recruitment and redundancies of employees etc. Similar considerations apply in the context of the other policy options under consideration. However, it is not possible to make any more specific assumptions about such impacts, as they depend on various unknown factors.

Efficient and effective setting-up of EWCs:

Union-scale undertakings would face certain direct adjustment costs as they might be required to provide additional resources to SNB members in certain cases. This economic impact would likely be marginal as SNB members are entitled to consult experts and to take necessary training without loss of wages already under the existing text of the Directive. A possible obligation to cover reasonable legal costs of SNBs during the negotiating phase could present an additional cost factor for those undertakings that decline such coverage under the baseline scenario.

A shortened negotiation period might deliver certain cost savings for undertakings, due to a more efficient process for setting up EWCs. Moreover, insofar as the policy options under consideration would help employee representatives to be better prepared and more knowledgeable for negotiations, undertakings could indirectly benefit from a smoother and more targeted process, and higher quality outcomes.

As regards possible requirements on special negotiating bodies and central management to include into the EWC agreements target thresholds for a balanced gender composition of EWCs and select committees, such target thresholds may entail limited direct adjustment costs for Union-scale undertakings with existing agreements, related to the adaptation of those agreements to adjust the gender composition. However, such adjustments might also deliver benefits for undertakings, for instance in the shape of reputational gains and more balanced employee input supporting business decisions.

Measures ensuring the appropriate resourcing of EWCs and an effective process for their information and consultation:

Some of the clarifications of the concept of transnational matters under consideration might lead to the application of information and consultation requirements in cases that would not have been subject to these requirements under the baseline scenario. This could entail certain direct adjustment costs for Union-scale undertakings with EWCs currently operating on the basis of a more narrowly defined concept of transnational matters (i.e. more broadly defined transnational matters would lead to an obligation to consult the EWC in more situations). On the other hand, such clarifications might help undertakings to save certain costs linked to dispute about whether a certain matter gives rise to information and consultation obligations.

Clarified requirements regarding EWCs' expenses to be covered by central management could also lead to some direct adjustment costs for Union-scale undertakings, and so could an obligation to provide a reasoned response to EWC opinions. However, firstly, such impacts would not exist where the existing EWC agreements already provide for such a step, which might often be the case, or where providing a reasoned response to EWC opinions is a common practice. Secondly, undertakings could in return reap the benefits of a more effective consultation process with employee representatives, as outlined above.

Subjecting the non-disclosure of information to a mandatory prior administrative or judicial authorisation could imply direct adjustment costs for companies, e.g. lawyers' and judicial or administrative fees, as well as delays in decision-making. In light of employer organisations' replies to the first stage consultation, impacts possible of policy measures relating to confidentiality on trade secrets and competitiveness will have to be carefully considered.

Effective enforcement of the Directive through sanctions and access to justice:

In Member States with insufficient sanctions and remedies under the baseline scenario, policy measures strengthening the enforcement of information and consultation obligations could involve higher penalties for non-compliant undertakings.

Granting EWCs a right to injunctive relief in the case of an alleged violation of their information and consultation rights could potentially entail opportunity and transactions costs for businesses related to the suspension of their decisions. Taking into account employer organisations' replies to the first stage consultation, such impacts might represent a significant burden for companies. They will have to be thoroughly assessed against the need to preserve companies' ability to take decisions effectively.

On the other hand, a more effective enforcement of EWCs' information and consultation rights would result in a more level playing field and incentivise more diligent compliance efforts by Union-scale undertakings. This in turn could yield indirect benefits for the latter and lead to increased employee/employee representatives' trust due to a better-functioning dialogue with employee representatives on transnational matters.

6.3. Impacts on competitiveness

There are no robust indications, at this stage of the Commission's evidence-gathering activities, that an initiative on EWCs would have a measurable impact on competitiveness of Union-scale undertakings and the EU economy more generally. According to the Commission 2018 evaluation, the average total cost of a Recast EWC represents 0.009% of the company turnover. It is therefore likely that policy measures which are limited to incremental changes or clarifications of the existing provisions will not represent a significant fraction of the company turnover.[197] Furthermore, more effective information and consultation of employees on

[197] SWD/2018/187 final, p. 37.

transnational matters could plausibly be assumed to reinforce the quality of both sides of the industrial relationship, contribute to better informed strategic decision-making, and enable better targeted measures accompanying structural changes, in particular in the context of the twin transitions. Such benefits might potentially amount to strategic advantages of relevance for the competitiveness of Union-scale undertakings. However, concerns voiced by employer organisations in response to the first stage consultation, in particular with respect to potential impacts on companies‘ ability to take and implement decisions efficiently, show that there could also be significant effects on competitiveness of the more far-reaching measures under consideration. These will be carefully considered by the Commission in the framework of its ongoing evidence-gathering and assessment activities, notably in the light of the importance of enabling swift corporate decision making in a rapidly changing environment, safeguarding confidentiality to protect undertakings' legitimate interests, and ensuring legal certainty, in particular when it comes to obligations and possible risks of fines.

6.4. Impacts on public authorities

While no significant costs and benefits for Member States' authorities are expected as a result of the possible measures ensuring an efficient and effective setting-up of EWCs, the other policy options under considerations might have certain impacts on these stakeholders. For instance, if the exemptions from the scope of Directive 2009/38 were phased out, national authorities tasked with compliance monitoring and enforcement would potentially benefit from a simplification of the regulatory framework for information and consultation on transnational matters. Member States would be able to repeal the obsolete legislative regimes that remain applicable to exempted undertakings in the absence of EU action.

Moreover, requiring a mandatory prior administrative or judicial authorisation of the non-disclosure of information would likely entail some direct enforcement costs for national authorities adjudicating on the applications for such authorisations. The need to monitor compliance with new target thresholds for gender representation could entail a marginal increase in enforcement costs.

National administrative authorities and courts would have a key role in implementing the measures aimed to ensure an effective enforcement of the minimum requirements under Directive 2009/38. In certain cases, Member States may face one-off direct costs of adjusting their enforcement mechanisms, in particular where the existing mechanisms are not sufficiently effective, and of transposing the new measures in their own national legislations. Member States would face some minor one-off administrative costs related to their possible obligation to inform the Commission about the procedural elements in place by which they ensure that all the rights set out in the Directive can be effectively asserted through administrative or judicial proceedings. In terms of indirect impacts, improved access to courts may enable more of the rightsholders under the Directive to lodge judicial actions, which could entail higher adjudication costs for Member States. On the other hand, more effective remedies and sanctions would provide stronger incentives for compliance, which in turn could depress the number of disputes and need for legal actions.

6.5. Other impacts / stakeholders

Any possible indirect impacts of policy measures **on the environment** would be considered by the Commission in a possible impact assessment. It does not seem excluded that increasing the minimum number of annual EWCs meetings under subsidiary requirements from one to two could entail additional travel of participants in these meetings. However, given that there

is only a relatively small number of active EWCs subject to subsidiary requirements, the potential related environmental impacts are unlikely to be significant, given also the general trend towards an increased use of virtual meetings triggered, amongst others, by the Covid-19 restrictions.

With respect to potential **fundamental rights impacts**, target thresholds for a more balanced gender composition of EWCs could contribute to giving practical effect to the right to non-discrimination on ground of sex (Articles 21 and 23 Charter of Fundamental Rights of the European Union). Moreover, any measures ensuring effective access to justice would contribute to enabling EWCs, SNBs and employee representatives to avail themselves of their fundamental right to an effective remedy for the enforcement of their rights under the Directive. Moreover, all of the policy options measures aimed to ensure the effectiveness of the minimum requirements of the Directive would be conducive to the respect of workers' right to information and consultation within the undertaking, guaranteed by Article 27 of the Charter of Fundamental Rights of the European Union.

The following table provides a preliminary overview of the impacts to be assessed for these policy options with respect to the most relevant stakeholder groups affected, subject to ongoing evidence-gathering by the Commission.

	Possible impacts		
	Economic impacts • *Impact on businesses (EWCs-related costs and benefits, decision-making)* • *Impact on competitiveness (single market, international competitiveness, research & innovation)*	**Social impacts** • *Social dialogue* • *Employment (transitions, skills)* • *Working conditions*	**Impacts on public authorities** • *Budgetary consequences* • *Public authorities organisation*
Baseline (impacts of taking no EU policy action to address the problem drivers)	For businesses that experience disputes with EWCs or face uncertainty regarding their obligations, the functioning of EWCs will continue to be ineffective and will contribute to higher operation costs of EWCs (which are nevertheless overall very low compared to turnover). According to the 2018 Commission evaluation, the average total cost of a Recast EWC per year is EUR 240,000 (namely 0.009% of the company turnover). For businesses with well-functioning EWCs, implementation of changes and adaptation of business will continue to be facilitated through a constructive dialogue, potentially giving the business a competitive edge. No familiarisation costs due to new rules.	For employee representatives – - the SNBs/EWCs may in some cases lack necessary resources to carry out their tasks or to enforce their rights - the procedure of consultation may sometimes not be effective (e.g. no follow-up to the EWC opinion, uncertainty as to the transnational nature of certain matters). - may experience obstacles and delays when requesting the setting up of an EWC. Likely continued under-representation of women on EWCs and select committees; sub-optimal representation of women's concerns and interests in EWC opinions, in particular in the context of changing working methods linked to the digital transition. EWCs risk not to be informed and consulted on all matters that have a transnational dimension, or not to be able to discuss the subject of consultation with the employee representatives concerned due to wide use of confidentiality clause. In some Member States, SNBs/EWCs or their members may continue experiencing obstacles to	Due to the overall low number of disputes before the national courts so far, no significant costs are identified for public authorities. The continued exemption of undertakings with legacy agreements perpetuates the ensuing complexity for national supervisory authorities and courts (co-existence of different legal regimes). No transposition and familiarisation costs.

			access courts and effective remedies (including proportionate, dissuasive and effective sanctions) to enforce their rights before the decisions are implemented by the company. Good practice EWCs with well-designed agreements will continue to contribute to an effective social dialogue on transnational matters in their undertakings, and help ensuring employment with a good quality working conditions to all employees.		
	Economic		**Social**		**Public authorities**	
	Costs	**Benefits**	**Costs**	**Benefits**	**Costs**	**Benefits**
Same minimum information and consultation rights for all EWCs	<u>*For businesses:*</u> *Direct adjustment costs related to the adaptation of an agreement for those Union-scale undertakings with an agreement governing the right to transnational information and consultation that falls under Article 14, provided that the agreement does not already correspond to or exceed the revised minimum requirements of the Directive. A complete renegotiation (rather than adaptation) may be required in some cases.	*For businesses that would need to adapt their agreement:* *If pre-Directive agreements fell short of minimum requirements, possible positive impacts in terms of ability to communicate with employee/employer representatives and trust. *For businesses that would newly be considered as Union-scale undertakings:* *Positive impacts related to the added-value for employers of having a well-functioning EWC (such as: (i) the development of social dialogue in the company; (ii) the	<u>*For employee representatives and workers:*</u> *No direct/indirect costs	*For employee representatives:* *Direct positive impacts on social dialogue for those employee representatives benefiting from improved EWC functioning following the renegotiation of their agreement. *For workers:* *Indirect benefits for workers (impact of social dialogue on employment, working conditions) *For workers in undertakings linked by contracts:* *Indirect benefits for workers working for	*No direct or indirect costs	*Direct cost savings related to the simplification of the EU regulatory framework following the end of the exemptions under Article 14 (possibility to repeal old rules).

	*Possible direct adjustment costs arising from the inclusion in an existing agreement of the undertakings linked by contract with the Union-scale undertaking (e.g. higher number of employee representatives). *Possible direct adjustment costs arising from the conclusion of a new agreement for Union-scale undertakings reaching the threshold to be covered by the Directive due to the inclusion in the calculation of the undertaking linked by contract.	reinforcement of mutual trust on both sides of the industrial relationship; (iii) better informed strategic decision-making; and (iv) better targeted measures accompanying structural changes). * Possible general benefits in terms of increased legal clarity and a more consistent regulatory framework regarding information and consultation on transnational matters		undertakings linked by contract as they would now also be covered by the scope of the rules.		
	Economic		**Social**		**Public authorities**	
	Costs	**Benefits**	**Costs**	**Benefits**	**Costs**	**Benefits**
Efficient and effective setting-up of EWCs	*For Businesses:* *Direct adjustment costs related to the greater support provided by the Union-scale undertakings to the SNBs for the negotiations of new or	*For businesses:* *Possible cost savings through shorter negotiation period *Possible improved quality of the EWC agreements thanks to the	*For employee representatives and workers:* *No direct/indirect costs * In certain sectors, possible problems	*For employee representatives:* *Improved conditions (i.e. support) for an efficient and effective setting-up of EWCs for SNBs members (faster procedure, clarified obligations, better	* Possible marginal increase in enforcement costs due to the need to monitor compliance with gender target thresholds	*Potentially reduced enforcement costs (e.g. adjudication costs) thanks to fewer disputes relating to failure or delays in initiation of negotiations

	revised agreements (i.e. legal costs in case of disputes, possibly marginally higher costs relating to training and expert support for SNB/EWC members)-. *Direct adjustment costs related to the adaptation of EWC agreements to reflect gender target thresholds * Possibly marginal one-off adjustment costs for the training of new EWC members of the underrepresented sex	support provided to SNB members *Slightly reduced potential for disputes relating to failure or delays in initiation of negotiations, due to clarified obligation of the management * Indirect benefits in the form of potential for more balanced and comprehensive employee input supporting company decision-making; opportunity of better quality strategic decisions and improved relationship with workforce * Potential reputational gains if a more equal representation of women and men is achieved	filling all places of EWC with employee representatives of the underrepresented sex	defined provisions on SNB resources and support). *Possible improved quality of the EWCs agreements following the new support-related measures. *Slightly reduced potential for disputes relating to failure or delays in initiation of negotiations, due to clarified obligation of the management * Direct benefits in the form of increased opportunities for female employees to get involved proactively in information and consultation procedures; more authoritative opinions due to better representativeness <u>*For workers:*</u> *Indirect benefits through improved transnational social dialogue at the company level (better quality EWCs agreements, more effective and efficient procedure for setting up EWCs).		

				For employee representatives: * More balanced representation of employees' interests; improved quality of EWC opinions could yield better outcomes for workforce in terms of working conditions, strategic orientation of undertakings, etc. *Societal benefits:* * Improved gender mainstreaming		
	Economic		**Social**		**Public authorities**	
	Costs	**Benefits**	**Costs**	**Benefits**	**Costs**	**Benefits**
Ensuring the appropriate resourcing of EWCs and an effective process for their information and consultation	*For businesses:* *Direct compliance costs related to the possible adaptation of the existing agreements to comply with the new requirements. *Direct adjustment costs (i.e. in terms of time and resources) for the functioning of EWCs in the case of a potential extension of the concept of	*For businesses:* *Possible improvement of the decision-making process with a more effective consultation process (e.g. reasoned opinions, obligation to take EWC opinion into account) * Potential reinforcement of the quality of dialogue on both sides of the industrial relationship;	*For employee representatives and workers:* *No direct/indirect costs	*For employee representatives:* *Improved social dialogue at EU level thanks to new or reinforced measures for the functioning of the EWC (i.e. # meetings, EWC resourcing, follow-up to the EWC opinions, training and expertise) *Information and consultation procedures on a higher number of	*Possible direct enforcement (adjudication) costs for implementing mechanism under which obligatory prior administrative or judicial authorisations would have to be obtained by undertakings to withhold information the disclosure of which could seriously harm the undertaking.	*Potentially reduced enforcement costs (e.g. adjudication costs) thanks to fewer disputes relating to information and consultation process (clarified process and resourcing, clarification of transnational matters)

	transnational matters (e.g. to any decisions taken in a Member State other than that in which they produce their effects (even if those effects are limited to that latter Member State)) *Direct adjustment costs due to legal costs, training, expertise. * For undertakings with EWCs operating on the basis of subsidiary requirements, and potentially indirectly also undertakings with newly negotiated agreements using the subsidiary requirement as a benchmark: direct adjustment costs due to an increased number of annual meetings and participants * Direct adjustment costs linked to the obligation to provide a reasoned response to EWC opinions (unless the relevant EWC	* Potentially better targeted measures accompanying structural changes *Cost savings (i.e. in terms of time and resources) thanks to better clarity on the concepts of transitional matter and confidentiality (i.e. less disputes)		issues thanks to the possible extension of the transnational concept. *Possible higher level of information for employee representatives thanks to additional measures related to management's possibility to impose confidentiality/withhold of information. *For workers:* *Indirect benefits for workers (impact of social dialogue on employment, working conditions)		

	agreement already required such a response under the baseline scenario). *Potentially substantial opportunity and transaction costs related to delays in the implementation by businesses of the proposed measures *The sub-option making non-disclosure subject to a mandatory prior administrative or judicial authorisation could imply increased direct costs for companies for lawyers and judicial / administrative fees and potentially significant opportunity costs due to process delays					
	Economic		**Social**		**Public authorities**	
	Costs	**Benefits**	**Costs**	**Benefits**	**Costs**	**Benefits**
Effective enforcement of the Directive through sanctions and	*For Businesses:* *Possible direct charges in case of non-compliance related to sanctions and fines	*For Businesses:* *Increased employee/employee representatives' trust thanks to better compliance	*No direct/indirect costs	*For employee representatives:* *Improved social dialogue thanks to dissuasive measures encouraging businesses	*Possible one-off costs related to the obligation to notify Commission how access to courts of EWCs and SNBs is ensured	*Enforcement costs savings with improved compliance of the rules thanks to dissuasive measures (i.e. fines, sanctions)

access to justice	*Possible direct charges related to delays in management's decision-making process following violation of the information and consultation obligations *Possible negative impacts on competitiveness at international level in the event of a suspension of management decisions or a substantial sanction.	*More legal clarity and more consistent regulatory framework regarding requirements for information and consultation on transnational matters		to comply with their obligations. *More effective access to courts of EWCs and SNBs in order to assert their rights, positively impacting the quality of social dialogue.	*Costs of adjusting national enforcement mechanisms *Costs related to a possible higher number of court cases following the obligation for Member States to ensure an effective access to courts of EWCs and SNBs.	