NSZZ Solidarność Komisja Krajowa

Jan Czarzasty

# REPORT

# EWC – processing financial information as a key factor for effective communication and negotiation

Project VS/2019/0025
"EWC – PROCESSING FINANCIAL INFORMATION AS A KEY FACTOR FOR EFFECTIVE COMMUNICATION AND NEGOTIATION"
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# REPORT

# EWC – processing financial information as a key factor for effective communication and negotiation

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"EWC – processing financial information as a key factor for effective communication and negotiation"

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## Introduction

The report summarises the empirical findings of the research conducted thus far within the project "EWC – processing financial information as a key factor for effective communication and negotiation" (VS/2019/0025). This version of the report covers activities conducted between February 2019 and April 2020.

The project is led by the National Commission of NSZZ "Solidarność" (Poland) with four co-applicants: CISL (Italy), UGT (Spain), Podkrepa (Bulgaria) and Syndex Polska (Poland). The project is backed by associated organisations of three types: European Branch Federations (IndustriAll, UNI, EFFAT); social partner organisations at the national level, trade unions: NHS (Croatia), CSDR (Romania) and KSS (Northern Macedonia), and employers' organisations: POLBISCO (Poland) and Browary Polskie (Poland).

The main aim of the project is to help EWCs become better partners for company management. This is to be achieved through a successful transition from the information stage to the consultation stage, and specifically by:

- understanding economic issues;
- learning how to use financial information;
- passing on the information received to the constituents.

In the course of the project the consortium partners worked to create a mechanism for handling information and develop skills on how to retrieve, use, interpret and pass on financial and confidential information and liaise with the national and local levels. The specific objectives were to:

- develop guidelines on handling financial and confidential information in the context of stock and trade confidentiality and other legal regulations.
- specify confidentiality in terms of its content and time of limitation.
- learn the rules regulating internal exchange and sharing financial/confidential information without harm to anyone's interests.
- promote good practices on project issues.

The report is structured as follows (unless otherwise indicated in each chapter, Jan Czarzasty is the author): **Chapter 1** outlines the context: European Works Councils in terms of legal regulations and recent developments. **Chapter 2** focuses on terms and conditions for

requesting and processing financial information in the context of the EWC Directive. **Chapter 3** provides a methodological note explaining the organisation and structure of the empirical research. **Chapter 4** (by Ewa Kędzior) aims to explore the extent to which protection of information and personal data (in terms of the GDPR) affects the implementation of the objectives of I&C Directives. **Chapter 5** carries out an analysis of how confidentiality is defined at the national and EU levels, with extensive input from national-level researchers. **Chapter 6** contains a benchmarking analysis for the EU States in question and uses data collected during field research. **Chapter 7** (by Ewa Kędzior) describes how to handle information with a view of properly conducting social dialogue in the Member States of the Central and Eastern Europe. **Chapter 8** (by Daniel Kiewra) offers a set of priorities on the exchange of financial information. The report ends with **Chapter 9** which discusses the results and conclusions.

As we put the report into circulation, we wish to express our gratitude to a large number of people without whom or their involvement our work would have never been completed. In particular, we would like to thank Maria Żytko and Karol Nosal, who are responsible for managing the entire project. There are more people in NSZZ "Solidarność" who have contributed to the successful completion of the report: Jerzy Jaworski and Ewa Kędzior, the latter being also a co-author. As for the partner organisations, we are very thankful to Luis Pérez Capitán, Ilaria Carlino, Marija Hanževački, Francesco Lauria and Vilma Rinolfi. Romuald Jagodziński's presence at project meetings and insightful comments have also helped to improve the report considerably.

The national-level researchers (or the National Legal Experts, as we refer to them), whose input constitutes the empirical foundation of the report deserve the highest appreciation. In alphabetical order, we wish to acknowledge the excellent work of Klementina Chiabudini, Antonio Famiglietti, Agnieszka Ghinararu, Martín Hermoso, Adrian Iliev and Roberto Pedersini, who have also provided very insightful comments to the entire comparative report. Ewa Kędzior's (one of the report's co-authors) contribution is naturally essential as well. Maja Stefkovska-Paneva, contributing from Macedonia, also brought a very valuable input to the project. Finally, the project included a training module which – although not reflected in the report – should be recognized as well. Daniel Kiewra (one of the report's co-authors) and Robert Szewczyk did an excellent job running the training sessions.

It need to be stressed out that after the closure of the research stage in our project with the report being prepared, the COVID-19 pandemic broke out. The pandemic is not over as we

are releasing the report. The long-term impact of the pandemic on socio-economic realities, including industrial relations and social dialogue, and – in a more narrow perspective – on operations of EWC still remain to be seen, yet there is no doubt that we should not expect a fully return to the pre-pandemic state in all those regards.

## Chapter 1. Background: European Works Councils - regulations and recent developments

In 1994 the Council of the European Union adopted Directive 94/45. That was an unprecedented move to create an opportunity for employees to possibly gain some degree of control over enterprises in the age of accelerating internationalisation of business (often regarded as globalisation *per se*, although such a generalisation is too far reaching). As the draft Directive was being negotiated, it was met with positive reactions from employers. Article 13 of the Directive offered an incentive to anyone wishing to establish an EWC before the end of a two-year *vacatio legis*. If an agreement (usually referred to as a pre-directive agreement or a voluntary agreement) had been drawn before 22 September 1996, it would be considered legitimate and binding, even if it did not comply with the provisions of the Directive. Not only employers, but in certain cases also trade unions used the opportunity. Many thought it was reasonable to negotiate the agreements without having to worry about rigid regulations and procedures (such as appointing a special negotiating body). As a result, nearly 400 EWCs were established using the path offered by Article 13 of the Directive.

Directive 94/45/EC stated that after 5 years the act had to undergo a revision process with a view to amend it. Yet it took much longer before the revision process was completed. It did not help that employer organisations were not interested in amending the original Directive. As a consequence, it was not until 2009 that recast Directive 2009/38/EC was adopted. The recast Directive explicitly formulates an obligation for EWC members to forward the information acquired to employees. There are also important provisions enhancing the role of trade union federations by expressly indicating the obligation to inform the federation of the commencement of the EWC formation process and by offering the possibility to their representatives to participate in the EWC negotiations. The Recast Directive gave an opportunity for voluntary agreements to be concluded by 2011, just as was the case in the period 1994–96. This time, however, no huge wave of such agreements followed, unlike the period after the adoption of the original Directive.

At present (2020), there are 1,180 active EWCs[1]. The first one came into existence already in 1985. In 1995, there was a sudden surge in the number (by 72, following the wave of voluntary agreements). When Directive 94/45/EC entered into force, over 400 such bodies were established in 1996 alone. Over the next five years, the number continued to grow at a

[1] Data retrieved from the European Works Councils and SE works councils database by the European Trade Union Institute: http://www.ewcdb.eu/stats-and-graphs.

relatively quick pace (over 50 new EWCs established each year until 2001). In the following years the process slowed down but still the number of new EWCs created per annum did not fall below 30. From 2017 onwards, the figure has been lower, however. In relative numbers, it means that roughly every second transnational corporation that falls within the scope of the Directive has set up an EWC, although the data may be slightly outdated (de Spiegelaere & Jagodzinski 2016). As a result of mergers or dissolutions, 317 EWCs ceased to exist. Still, there are 290 EWCs (25% of all active) established in line with Article 13 of the Directive.

The sectoral distribution of EWCs is as follows:

- 430 – metal industry
- 261 – services
- 205 – chemical industry
- 108 – food industry, hospitality industry, catering services
- 81 – construction and wood industry
- 39 – transport
- 30 – textile industry
- 15 – public services
- 38 – other/unspecified industries

In terms of company size, over 40% (481 in total) of EWCs can be found in companies with less than 5,000 employees; one third (378 in total) of EWCs operate in companies with more than 10,000 employees and 16% (186 in total) exist in companies with 5,000–10,000 employees. No data is available for the remaining 10% or so.

As regards internationalisation (number of EEA countries in which companies run their operations), about half of EWCs operate in companies active in more than 10 countries, and the share of EWCs in companies active in more than 5 (but less than 10) and below 5 countries are nearly equal.

As for the country where the head office is located, the largest number of EWCs is in Germany (271 active), followed by the USA (188), France (132), and the UK (102). Recently, we have had the first case of an EWC in a company whose headquarters is in Poland. This, however, is the result of a relocation because originally the enterprise was not set up under Polish law.

There were reservations surrounding EWCs from the very beginning. In addition, new challenges have emerged. EWCs are often seen as an institutional hindrance by large

corporate employers. There is also reluctance from trade unions, which frequently tend to treat EWCs (which are a non-union form of employee representation) as competitors, especially if they lack union delegates (and such cases have been growing in recent years).

The opinions on the actual effectiveness and potential of EWCs as a platform for articulating the collective interests of employees of transnational corporations vary (e.g. Jagodzinski 2011; Mählmeyer, Rampeltshammer and Hertwig 2017). In the years preceding the adoption of Directive 94/45 (1983–1994) and directly thereafter, there were high hopes for what the institution may achieve (see Mueller and Platzer 2003). There was also scepticism according to which EWCs were at risk of ritualism and domination by employers and had the potential to undermine the position of trade unions as employee representation (e.g. Schulten 1996, Streeck 1997).

Over time, the facts seemed to confirm the pessimistic position. In summing up three decades of this institution, researchers pointed to its key weaknesses: difficulties in exercising the information and consultation rights, limited resources at the delegates' disposal, EWC scope (programme) formulated mainly by employers and cultural barriers (above all language) impeding the efforts of employee members (Köhler, Gonzalez Begega 2010). The importance of EWCs for industrial relations tends to be seen in their symbolic rather than actual influence (Waddington 2011). More tangible accomplishments, however difficult to measure, include the successful launch by EWCs of the information and education function, i.e. a learning mechanism through which the delegates can (also informally) exchange knowledge (Czarzasty 2014). Establishing and maintaining such a mechanism, however, requires mutual trust (Timming 2006). That process is hindered not only by cultural (language) but also cognitive barriers (delegates from different countries see the same phenomena from different perspectives such as their national systems of industrial relations) (Whittall 2000; Huzzard, Docherty 2005). There are also the economic and political obstacles (hampering trans-border labour solidarity due to conflicting particularistic interests within corporations, sometimes intersecting the divisions in industrial relations such as forming coalitions to oppose the relocation of production or to secure new investments in so-called "beauty contests") (Banuyls et all. 2008; Pernicka, Glassner, Dittmar 2014).

There is a positive correlation between the degree of company internationalisation and EWC establishment: more than half of the existing EWCs work in enterprises operating in more than ten countries and more than one quarter – in companies operating in at least 5 countries (Köhler, Gonzalez Begega, Aranea 2015). The rate of formation of new EWCs remained

stable for nearly thirty years. The authors above link the sudden increases in 1994–96 and (less rapid) in 1997–1999 to legislation opening new areas for council establishment - the adoption of Directive 96/45 and extension, under Directive 97/75, of the rights to information and consultation on a European scale to employees of British companies. By contrast, the adoption of Recast Directive 2009/38 failed to enhance the process of EWC internationalisation.

Despite the abovementioned nuanced views on EWCs, in particular, their legal basis, functional effectiveness and position vis-à-vis trade unions, there is consensus that the institution must be retained, and even more: it needs to be enhanced. One of the ways to enhance it is by strengthening the knowledge and skills of EWC members, which includes requesting and processing financial information.

## Chapter 2. Terms and conditions for requesting and processing financial information in the context of the Directive

The EWC Recast Directive (2009/38/EC) states that information should 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". Subsequently consultation shall take place "at such time, in such fashion and with such content as enables employees' representative to express an opinion […] about the proposed measures".

Financial information is one of the most sensitive subjects from a company's perspective due to the enormous risks posed by leaks and the possibility of passing on such information to market competitors and other entities who may potentially use it against the company's interest. For that reason, the release and dissemination of financial information is subject to restrictive security measures and limitations defined by internal corporate policies and regulations.

On the other hand, financial information is also a very significant type of information from the perspective of worker representation. In substantive terms, worker representatives may and should be interested in financial information as it indicates the overall economic condition of their employers. This has a direct and indirect effect on the position of employees by highlighting the likelihood of layoffs, economic problems and their nature (temporary or threatening the very existence of the employee). This helps to set the limits for 'concession bargaining' or the grounds for advancing pay demands. In formal terms, employees and their representatives are entitled to specific information about the central management (the de facto employer, as an actor in industrial relations processes) as part of worker participation rights (information, consultation and co-determination) under the labour law framework (also under Article 2 of the Directive), while corporate (commercial) law protects the interest of companies through a number of arrangements (trade secrets, competition clauses, confidential information). In other words, labour and corporate laws overlap forming a place where divergent interests of employees and employers meet making it a territory for disputes and conflicts.

As stipulated in Annex I ("Subsidiary requirements" referred to in Article 7) of the Directive explicitly (Point 2) EWCs "shall have the right to meet with the central management once a year, to be informed and consulted, on the basis of a report drawn up by the central management, on the progress of the business of the Community-scale undertaking or

Community-scale group of undertakings and its prospects. The local managements shall be informed accordingly." Annex I (Point 1 a) also specifies that the "information of the European Works Council shall relate in particular to the structure, economic and financial situation, probable development and production and sales of the Community-scale undertaking or group of undertakings. The information and consultation of the European Works Council shall relate in particular to the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies."

There are two key notions addressed by the Directive: confidentiality and secrecy. They are mentioned in Article 8 of the Directive. However, while the former is brought in explicitly (point 1), the latter is not (point 2).

1. Member States shall provide that members of special negotiating bodies or of European Works Councils and any experts who assist them are not authorised to reveal any information which has expressly been provided to them in ***confidence***. […]

2. Each Member State 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.

Article 8.2 leaves a wide margin of discretion to the Member States in defining the boundaries of secrecy for central management bodies operating under their jurisdiction. As far as Article 8.1 is concerned, while the subject of confidential information is not defined, the focus is on how the information is provided, and (implicitly) the intentions of the information-providing party are underlined (the decision on how to 'package' the information and whether to label it 'confidential' or not is actually left in the hands of the giving party, i.e. central management).

As suggested by Meylemans & De Spiegelaere (2019: 1400), it is important to consider confidentiality and how it is practically delivered in terms of **legitimacy**. In other words, is labelling the information to be released confidential justified or unjustified? Legitimate confidential information is that provided in a timely manner but of a sensitive nature. Citing

his own survey data, Waddington (2003)[2] lists examples of sensitive types of information with one of them defined as "economic and financial information". It is one of the most frequently raised issues, occurring in more than 90% of EWCs in question and in more than 60% of the cases where "useful information and consultation" was reported. It was ranked the second most important issue on the EWC agenda, just after "corporate strategy and investment plans". Interestingly, in over 60% of the cases, the "economic and financial information" released was initiated by the management.

The quality of the economic and financial information differs across the EWCs, but, in general, it is often questionable. There are many studies which reinforce that claim (e.g. GHK, 2007; ICF, 2016; Waddington, 2011).

As Meylemans & De Spiegelaere (2019) observe, quality of information correlates heavily with the type of EWC. They use the EWC typology proposed by Lecher et al. (2001), who divide EWCs into **symbolic, service providers, project-oriented and participatory** (on a scale from the most passive to the most active), to present data from their recent exploratory study of confidentiality. In the conclusions they suggest that in the context of adversarial employer-employee relations (where the symbolic type of EWC is most likely) management is more likely to refuse information and/or deem it confidential. This is reinforced by findings of other studies (e.g. Pulignano & Turk, 2016; Timming, 2006).

According to Meylemans & De Spiegelaere (2019), citing De Dreu et al (2001) some strategies may help to boost the effectiveness of information flows:

- **Problem solving** involves taking into account the goals of the other party in order to come to a mutually beneficial solution. The example given is determining a deadline by which confidential information can be made public that satisfies the needs of both parties.
- **Accommodating** involves giving in to the wishes of the other party. Here, this could mean an EWC accepting the confidentiality stipulation imposed (rightfully or not) by the management. This is most common when one party expects the other party to do something for them in return: for example, when employee representatives expect to receive more sensitive information from the management in exchange for their silence.
- **Avoiding** involves moving away from the issue causing conflict and discussing other subjects. This could mean the EWC deciding not to discuss the issue any further.

[2] The survey was done on a sample of EWC union-affiliated delegates (n=558) from six countries: Denmark, Germany, Finland, Ireland, Sweden and the UK.

- **Forcing** involves confronting the other party directly and trying to impose one's own view. Here, the EWC could challenge the confidential nature of the information and demand the freedom to communicate it.
- **Compromising** involves seeking out mutual concessions to find a middle ground. In the EWC, management and employee representatives could decide on some information not being confidential and some retaining its confidential status.

Using Lecher's typology, it can be assumed that legitimate confidential information is likely to be obtained by active (project-oriented and participatory) EWCs using strategies such as forcing and compromising.

## Chapter 3. Research in the project: methodological note

The key component of the project is field research performed in all the countries in focus designed to collect original data that would help with the diagnosis (current state of affairs) within the scope of the project (operations of EWCs, implementation and enforcement of the Recast Directive (2009/38/EC).

The national researchers (National Legal Coordinators, NLEs) were asked to conduct research at country level. The research process relied on standardized and (partially) structured tools (to ensure comparability of data), comprising three questionnaires prepared by the Leader.

1. **Questionnaire 1** to collect general, contextual data regarding the national legal environment. This questionnaire was to be completed by National Legal Expert him/herself based on their own legal expertise and desk research. It required screening the legal environment (general regulations and case law/jurisprudence).

**2. Questionnaire 2a** to obtain a commentary by the National Legal Expert following the National Consultation Meeting (to be held in each country from the sample). The meeting was to be conducted as a Focused Group Interview (FGI) with the National Legal Expert acting as the moderator using the questionnaire as a script for the discussion;

**3. Questionnaire 2b** to collect the opinions of the participants in the National Consultation Meeting uninhibited by the effects of group discussion (FGI is a mixed form, combining techniques of interview and debate), the questionnaire was self-administered (to be filled out by each participant him-/herself prior to the discussion).

## Chapter 4. EC-verification of the extent to which protection of information and personal data (in terms of the GDPR) affects the implementation of the objectives of I&C Directives: GDPR and EWC access to information

**The protection of personal data is one of the fundamental rights of citizens of the European Union, as reflected in Article 8 of the Charter of Fundamental Rights of the European Union. Everyone has the right to the protection of their personal data.** Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by the law. Everyone has the right of access to data which has been collected about them and the right to have it rectified. Compliance with these rules shall be subject to control by an independent authority.

The principles of protection of the right have been laid down in Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), further on: the GDPR. The GDPR contains provisions governing the protection of natural persons with regard to the processing of personal data and provisions on the free movement of personal data. The practical application of the GDPR is ensured by national laws. The GDPR, in force since 25 May 2018, has imposed specific obligations on companies and institutions to protect the personal data of their customers, partners or employees.

The GDPR lays down rules on the processing of personal data and, in Article 83, introduces severe sanctions for infringements of those rules. For this reason, since the GDPR took effect, companies have often refused to provide data on their employees on the grounds of the GDPR. This analysis seeks to answer the question of when the central management's refusal to provide data is justified and when invoking the GDPR is merely a pretext for refusing to provide data.

So what are the personal data falling within the scope of the GDPR? Pursuant to Article 4(1) GDPR, 'personal data' means any information relating to an identified or identifiable natural person ('data subject'). An identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

The scope of protection under the GDPR covers the processing of personal data, as defined in Article 4(2) of the GDPR. 'Processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

As indicated in recital 4 of the GDPR, the processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. The GDPR respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for [...] information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity.

The first sentence of the recital 26 of the GDPR indicates what information is covered by data protection rules. It states that the principles of data protection should apply to any information concerning an identified or identifiable natural person. The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable. The GDPR does not therefore apply to the processing of such anonymous information, including for statistical or research purposes.

In line with the objective of the EWC Directive, the information to be provided by the central management to the EWC concerns transnational matters which significantly affect workers' interests. These include:

- employment situation and trends;
- investments and substantial changes concerning organisation, introduction of new working methods or production processes;
- transfers of production;
- mergers;
- cut-backs or closures of undertakings, establishments or important parts thereof;
- collective redundancies.

Given the transnational Community-wide nature of such information, it is unlikely that the information provided by central management concerning or affecting employment issues is sufficiently precise to make it possible to determine in detail to which workers or other persons it specifically relates. It is, of course, possible to determine a certain group of employees to whom particular decisions or items of information relate.

However, if it were found in practice that any information relating to the central management's plans of a transnational scale, such as the transfer of an undertaking or its specific structure, e.g. R&D, to another country, concerned any persons individually identifiable by the EWC members, the GDPR provisions cannot constitute grounds for refusing to provide the EWC with this type of information. The legal basis for data processing in this case will be Article 6(1)(c) of the GDPR, providing that the processing of personal data is lawful where processing is necessary for compliance with a legal obligation to which the controller is subject. The legal obligation referred to in that provision is the obligation to provide the EWC with information as part of the information or consultation process, which arises indirectly from the EWC Directive and directly from the national EWC laws implementing the EWC Directive.

## Chapter 5. Analysis on how confidentiality is defined at the national and EU level in the context of CJEU jurisprudence

### 5.1. Comparative overview of the state of implementation of the Directive

All countries in focus have transposed the Directive into their national legislation. In each country, there is a specific piece of legislation implementing the Directive. In the 'old' member states (MS), that is, Italy and Spain, the original Directive (94/45/EC) had been adopted first, followed by a transposition of the Recast Directive (2009/38/EC). The same path was followed by some of the new member states (NMS) such as Poland, Romania and Bulgaria. In the case of Poland, the Law on European Works Councils was adopted in 2002, prior to the country's membership in the EU (and put on *vacatio legis* until official accession in 2004). Croatia, a latecomer to the EU, adopted the Recast Directive in 2014. It is noteworthy that Bulgaria opted to introduce the provisions of the original Directive not only through a separate dedicated legislative act but also the Labour Code.

**Table 1. Implementation: general overview**

| ***What national legal regulation implements Directive 2009/38/EC?*** | |
|---|---|
| BG | **Labour Code**, as the main legal act regulating Industrial Relations in Bulgaria, it regulates the EWC as well. There is also a special EWC regulation – Information and Consultation of Workers and Employees in Multi-National Enterprises, Groups of Enterprises and European Companies Act (**hereafter: the Law**). It introduces additional provisions related to European Workers' Councils and the Procedure for Informing and Consulting Workers and Employees.<br>*https://ec.europa.eu/social/BlobServlet?docId=4860&langId=en*<br>*https://ec.europa.eu/social/BlobServlet?docId=4859&langId=en* |
| CRO | Directive 2009/38/EC has been transposed into the legal system of the Republic of Croatia by the European Works Council Act, passed by the Croatian Parliament on 15 July 2014 and published in the Official Gazette 93/14, 127/17<br>http://narodne-novine.nn.hr/clanci/sluzbeni/2014_07_93_1872.html<br>https://narodne-novine.nn.hr/clanci/sluzbeni/2017_12_127_2877.html |
| IT | Legislative Decree (namely an act of the Government enabled by the Parliament) no. 113/2012. The Parliament issued a law in December 2011 delegating the Government to adopt various European Directives including the one on the EWCs.<br>https://www.gazzettaufficiale.it/eli/id/2012/07/27/012G0131/sg<br>In the recitals, the Decree indicates that the social partners have been heard in the process of drafting the Decree.<br>https://ec.europa.eu/social/BlobServlet?docId=7048&langId=en |

| | |
|---|---|
| ES | Act 10/1997, of 24 April On Rights Of Information And Consultation Of Employees In Undertakings And Groups Of Community-Scale Undertakings. https://ec.europa.eu/social/BlobServlet?docId=4888&langId=en<br>Revised in 2011 (in line with the Recast Directive) by Law 10/2011, Of May 19, Amending Act 10/1997 Of 24 April On Rights Of Information And Consultation Of Employees In Undertakings And Groups Of Community-Scale Undertakings. https://ec.europa.eu/social/BlobServlet?docId=7019&langId=en |
| PL | The Law Of 5 April 2002 on European Works Councils, in force since 1 May 2004 https://ec.europa.eu/social/BlobServlet?docId=7227&langId=en<br>Revised by the Law of 31 August 2011 (in line with the Recast Directive). https://ec.europa.eu/social/BlobServlet?docId=7227&langId=en |
| RO | Initial Law on EWC is Law no 217/2005 which was a transposition of the Council Directive 94/45/EC at the time of Romania's integration with the EU. Later modified in 2006, then amended and supplemented in 2011.<br>1. Law no 217/2005 on establishment, organising and functioning of European Work Councils (this Law transposed Council Directive 94/45/EC regarding the consultation of European Work Councils or a procedure of information and consultation of the workers in undertakings and in community-scale groups undertakings<br>https://ec.europa.eu/social/BlobServlet?docId=4869&langId=en<br>2. Modified in 2006 by: Government Ordinance no 48/2006 on the modification of the Law no 217/2005 on the establishment, organising and functioning of European Work Councils<br>https://ec.europa.eu/social/BlobServlet?docId=4870&langId=en<br>3. Law no 186 of 24 October 2011 amending and supplementing law no 217/2005 on establishment, organising and functioning of European Work Councils; issuing authority Parliament of Romania; published in Official Gazette no 763 of 28 October 2011<br>https://ec.europa.eu/social/BlobServlet?docId=7228&langId=en |

Article 6 of the Directive defines the content of the agreement establishing an EWC. These provisions are generally found in numerous clauses of the national legislation transposing the Directive. The notable exception to that pattern is Spain, where one provision of the national legislation literally repeats Article 6. There are, however, striking differences regarding the level of detail. On the one hand, there are vague formulations, as in the case of Bulgaria, or very detailed and specific provisions, as in the case of Croatia.

## Table 2. Implementation – Article 6

| How was Article 6 of *Directive 2009/38/EC implemented into the national law?* | |
|---|---|
| BG: | Art. 3 of the Law states that the exercise of the rights and obligations under this Act shall be carried out in a spirit of cooperation, mutual concessions and respect for the interests of each of the parties.<br>Art. 8 of the LC: Labour rights and obligations are exercised in good faith in accordance with the requirements of the law. |
| CRO | Article 17 and Article 30 of the European Works Council Act states that:<br>(1) The central management and the Negotiating Committee shall negotiate in good faith and in accordance with the principle of freedom of contract.<br>(2) The central management and the negotiating committee may agree on the modalities of participation of workers in decision-making, or may by majority vote decide on the establishment of the European Works Council or one or more information and consultation procedures.<br>(3) If the agreement referred to in paragraph 2 of this Article has been concluded, the provisions of Title IV of this Act do not apply, unless otherwise stipulated by such agreement.<br>(4) The agreement referred to in paragraph 2 of this Article shall apply to all workers employed by undertakings and establishments, or group of undertakings in the Member States, if it does not have a wider scope of implementation in accordance with Article 15 of this Act.<br><br>Article 18 of the European Works Council Act states that:<br>(1) The central management and the Negotiating Committee shall establish the European Works Council by virtue of a written agreement on theestablishment, powers and operation of the European Works Council.<br>(2) In the case of group of undertakings under Article 5, paragraph 2 of this Act, the European Works Council is established at the level of all group of undertakings, unless the agreement referred to in paragraph 1 of this Article stipulates otherwise.<br>The agreement establishing the European Works Council **must contain** information on:<br>1) the implementation of the agreement, or the undertakings, establishments and group of undertakings the Agreement applies to and whether it applies to undertakings and establishments referred to in Article 15 of this Act<br>2) the composition and the number of members of the European Works Council, the term of office and allocation of seats that will, when possible, ensure balanced representation of workers with regard to their organizational unit, category and gender.<br>3) the powers and duties of the European Works Council, information and |

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| | consultation procedures with the European Works Council and workers' representatives at the national level<br>4) the venue, frequency and duration of meetings of the European Works Council<br>5) the composition, the appointment procedures, the functions and the procedural rules of the Committee, if established within the European Works Council<br>6) the financial and material resources to be allocated to the European Works Council<br>7) the date the agreement enters into force, the duration of the Agreement, the procedure for amending or terminating the Agreement, and the conditions and procedure for renegotiating the Agreement, including, where necessary, the case of structural changes in the undertaking or undertakings referred to in Article 5 paragraphs 1 and 3 of this Act<br>8) amendments to the Agreement in the event of exceptional circumstances that significantly affect the interests of workers.<br>(4) The election of the members of the European Works Council from the Republic of Croatia is governed by the provision of Article 12 of this Act. |
| IT | Art. 9 of the Decree:<br>1) Item 2, clause g) is added: specifically mentioning that the agreement founding and/or regulating the EWC must include "the content of information and consultation".<br>2) In Item 3, the Decree argues that a procedure for information and consultation can also be added rather than introduced as an alternative to the EWC procedure as set out in the Directive.<br>3) Item 6 is added specifying the composition of the Italian delegation within the EWC: "One-third of the Italian members of the EWC is appointed by the Unions who have signed the national collective agreement; the remaining two-thirds by the Unitary Workplace Union Structure (RSU)".<br>4) Item 7 is added, to clarify that the national unions and the management will decide who will be part of the procedure when there is no RSU in one plant or company or group. |
| ES | Law 10/1997 directly transposed Article 6. |
| PL | Articles 16.1, 16.2, 17.1, 18.1, 19.1 and 19.2 of the Law of 5 April 2002 transpose the provisions of Article 6. |
| RO | Art. 6 of Directive 2009/38/EC has been fully transposed into Romanian law as art. 20, 22 (1) and (2), 23, 24, 26 and 49 (3) of Law no. 217/2005 (Republished). |

Article 8.1 of the Directive – one of the crucial provisions in the context of the study regarding confidential information – has been transposed in various ways. In the case of Bulgaria, it is explicitly prohibited to distribute confidential information to *other employees*. In the case of Croatia, the entities bound by restrictions of disclosing confidential information (and, in addition, those not bound thereby) are listed in great detail. In Italy, the duration of the ban to distribute confidential information is precisely set at 3 years. In Spain, the provisions of Article 8.1 are repeated. In Poland, the provisions of Article 8.1 were implemented in a way somewhat more favourable from the employees' point of view, as the Polish lawmaker explicitly names 'trade secrets' as the legitimate ground to mark the information as confidential. The list of issues to be deemed confidential is narrow, and the company has no discretionary power to decide what is confidential and what is not. In Romania, the provisions of Article 8.1 are repeated.

**Table 3. Implementation – Article 8.1**

| **How was Article 8.1 of *Directive 2009/38/EC implemented into the national law?*** | |
|---|---|
| BG | Art. 29, para. 2 of the Law: The persons to whom confidential information is passed, may not distribute it to other employees or third parties. The obligation continues even after their term of office expires. |
| CRO | Article 30 of the European Works Council Act states that "the members of the European Works Council shall not after the expiry of the term disclose any confidential business information that they will have learned while performing the duties under this Act". The duty applies to:<br>1) members of the negotiating committee<br>2) workers' representatives within the limits of the information and consultation procedures<br>3) experts and translators<br>4) representatives of workers in the European Works Council employed in undertakings and establishments in the Republic of Croatia. |
| IT | Art. 10, Item 1: It is added to establish that the prohibition to disclose confidential information for employees and experts "lasts for three years after the completion of the mandate (wherever they are)". |
| ES | Article 22 of law 10/1997 transposes Article 8.1. There is a vast body of jurisprudence addressing the specific clause. |
| PL | Articles 36.1 and 36.6 of the EWC Law transpose the provisions of Article 8.1. |
| RO | Art. 8.1 of Directive 2009/38/EC has been fully transposed into Romanian law as art. 50 of Law no. 217/2005 (Republished).<br>The confidential information communicated as such to the members of the special negotiation group, the members of the European Works Council, the experts, as |

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| | well as the employees' representatives cannot be disclosed to third parties even after the expiry of the mandate, regardless of where these persons are located. |

Article 8.2 of the Directive – another crucial provision in the context of the study regarding confidential information – has been transposed in an even greater variety of ways. In the case of Bulgaria, the arbitration procedure is outlined in case of a refusal to disclose the information. In the case of Croatia, the issue is not dealt with at all. The entities bound by restrictions of disclosing confidential information (and, in addition, those not bound thereby) are listed in great detail. Italian legislation copies Article 8.2 adding, however, the particle 'only', which narrows the space to manoeuvre for the enterprise. In Spain, provisions analogous to those of Article 8.2 are to be found in the Labour Code. In Poland, there is a legal possibility to challenge the decision refusing information (albeit its efficiency is doubtful) expressed by the national legislation. Romania is a similar case, where the employer is also explicitly obligated to provide the refusal in writing.

**Table 4. Implementation – Article 8.2**

| **How was Article 8.2 of *Directive 2009/38/EC implemented into the national law?*** | |
|---|---|
| BG | BG: Art. 29, para. 3 of the Law: Where the nature of the information under para. 1 may seriously disrupt the operation of the undertakings or companies or be detrimental to them, managing authorities may also refuse to grant it on the basis of objective judgment.<br>Art. 29, para. 4 of the Law: In case of refusal to provide information under para. 3 and any dispute as to its merits, the parties may seek assistance to settle the dispute through mediation and / or voluntary arbitration from the National Institute for Reconciliation and Arbitration. |
| CRO | CRO: The European Works Council Act does not include such a provision. The Croatian legal system foresees such possibility only for shareholders (The Companies Act, art, 287 and 288) but not for WC or EWC. |
| IT | Art. 10, Item 2, added "only". The reason for refusing to disclose the requested information can ONLY be that "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". |
| ES | In line with article 65.4 of the Labour Code, there are restrictions parallel to the ones of Article 8.2 (exceptions). |
| PL | Articles 36.2 and 36.3 of the Law of 5 April 2002 transpose the provisions of Article 8.2. |

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| RO | Art. 8.2 of Directive 2009/38/EC has been fully transposed into Romanian law as art. 51 of Law no. 217/2005 (Republished). |

Article 8.3 of the Directive makes an interesting case, because apart from Poland there are no such provisions in any other national legislations.

**Table 5. Implementation – Article 8.3**

| **How was Article 8.3 of *Directive 2009/38/EC implemented into the national law?*** | |
|---|---|
| BG | No such norm is provided in Bulgarian Legislation. |
| CRO | There are no such provisions. |
| IT | In art. 10 there is no item concerning "undertakings that […] pursue ideological guidance". |
| ES | There are no such provisions in the national legislation. |
| PL | Article 38 of the EWC Law transposes the provisions of Article 8.3. |
| RO | There are no such provisions in the national legislation. |

Article 10.2 of the Directive deals with the issue of transmission of the content and outcome of the information and consultation procedure carried out in accordance with the Directive. In other words, it facilitates the right to communicate (by EWC members) and receive information (by the employee representatives within the whole corporate structure) about the information and consultation processes carried out within EWCs. This regulation does not collide with the provisions of Article 8 (as explicitly stated therein: "without prejudice to Article 8"). In the case of Bulgaria, the national law leaves it to the parties to the agreement to determine how information and consultation will be handled. Croatian, Italian, Polish and Spanish legislations repeat Article 10.2. Romanian law repeats it too, but makes a direct reference to the provisions (Article 44) transposing Article 8.1 of the Directive (see above).

**Table 6. Implementation – Article 10.2**

| **How was Article 10.2 of *Directive 2009/38/EC implemented into the national law?*** | |
|---|---|
| BG | Art. 29, para. 2, item 3 of the Law: With the agreement under para. 1 [between the the Central Managing Authority or the Management Body and the Special Negotiating Body] shall be determined (...) the functions and manner of informing and consulting the European Works Council and the obligations of its members to inform employees of the results of the information and consultation carried out. |
| CRO | Article 27 of the European Works Council Act states that:<br>(5) The European Works Council shall inform the representatives of the workers in |

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| | the undertaking, establishment or group of undertakings, and if such representatives have not been elected or appointed, all workers in the undertaking, establishment or group undertaking on the content and outcome of the information and consultation procedures. |
| IT | Art. 12, item 3, the formulation is exactly the same as in the Directive: informing the workplace representatives or, if they are not available, the workers themselves. |
| ES | Article 10.2 has been literally transposed by Article 29.2 of Law 10/1997 |
| PL | Article 32 of the EWC Law transposes the provisions of Article 10.2. |
| RO | Art. 10 item 2 of Directive 2009/38/EC has been fully transposed into Romanian law as art. 46 of Law no. 217/2005 (Republished). |

Article 10.4 of the Directive provides for EWC members training at the employer's expense. In general, national legislations follow the line of the Article. In the case of Spain, it is implemented literally, as it is in Croatia and Romania, while in Italy it is supplemented by a condition that the content of the training should be agreed between the company management and the select committee or the EWC. In Poland, it is implemented in such a way that only special negotiating body members may have access to training. In Bulgaria, EWC members have been granted by these provisions after the implementation of the Recast Directive.

**Table 7. Implementation – Article 10.4**

| **How was Article 10.4 of *Directive 2009/38/EC implemented into the national law?*** | |
|---|---|
| BG | Art. 7, para. 6 of the Law states that "The members of the Special Negotiating Body shall be provided with employer-funded training where this is necessary to fulfil their representative functions when participating in international events. The cost of training cannot be at the expense of their remuneration. |
| CRO | Article 31 (3) of the European Works Council Act states that the members of the negotiating committee and of the European Works Council shall have the right to education and salary compensation if it is necessary for the fulfilment of their representative duties at international level. |
| IT | Same formulation. It is, however, added that the content of training needs to be agreed upon by the management and the EWC Select Committee or, if this is missing, the EWC itself. |
| ES | Article 10.4 has been literally transposed by Article 28.4 of Law 10/1997 |
| PL | Articles 15.3 and 34.1 of the EWC Law partially transpose the provisions of Article 10.4 |
| RO | Art. 10 item 4 of Directive 2009/38/EC has been fully transposed into Romanian law as art. 48 of Law no. 217/2005 (Republished). New Article 42/1 added by Law 186/2011. |

Article 11.1 of the Directive deals with the application of and compliance with the law. While all the countries in focus have covered it, they have done in various ways. Bulgarian and Croatian provisions are detailed and meticulous. In Spain and Poland it is a matter of national jurisdiction priority. In Romania, it is limited to the application of the law only. Italy establishes two sets of provisions. On the one hand, the legislation envisages administrative fines for different violations of the obligation to provide information and for the disclosure of confidential information by employee representatives and the unlawful refusal to provide the required information by the company management. On the other hand, in case of disputes over the application of the law, a conciliation committee shall be established to avoid litigation. If the conciliation proposal is not accepted, the case is handed over to the territorial labour office, which is responsible for assessing violations and imposing sanctions.

**Table 8. Implementation – Article 11.1**

| **How was Article 11.1 of *Directive 2009/38/EC implemented into the national law?*** | |
|---|---|
| BG | Art. 4, para. 5 of the Law: Where the central management body of the multinational enterprise or of the controlling undertaking of a group of undertakings is located in a non-Member State, the obligations under para. 2 to 4 (providing conditions for the establishment and functioning of an EWC or Information and Consultation Procedure; negotiation of an agreement; notification of the management of the Trade Union Organizations and the employees' representatives in the company under Art. 7, para. 2 of the LC) shall be implemented by the management body of the enterprise established in the Republic of Bulgaria, which is a branch of the multinational enterprise or is an enterprise of a group of enterprises, if it is designated as a representative of the multinational enterprise or of the controlling undertaking. |
| CRO | Article 4 of the European Works Council Act states that:<br>(1) The provisions of this Act shall apply to workers who are employed by an undertaking operating in the European Union and established in the Republic of Croatia, and by a group of undertakings operating in the European Union, provided the controlling undertaking is established in the Republic of Croatia.<br>(2) If the undertaking or the controlling undertaking referred to in paragraph 1 of this Article is not established in a Member State, the provisions of this Act shall apply under the following conditions:<br>1) if the undertaking or the controlling undertaking has designated as its representative agent its establishment or a controlled undertaking that is established in the Republic of Croatia, or<br>2) if the undertaking or the controlling undertaking has not designated its representative agent, and its establishment or the controlled undertaking employing |

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| | the greatest number of workers, in comparison to the other group of undertakings, is established in the Republic of Croatia.<br>(3) The provisions of Articles 7, 9, 12, 23, 30 and 32 of this Act shall apply even if the central management is situated in another Member State, and also if the conditions set out in paragraph 2 of this Article have not been fulfilled.<br>Article 9 of the European Works Council Act states that:<br>(1) Group of undertakings in the Republic of Croatia which are establishments of an undertaking operating in the European Union or which are controlled undertakings of a controlling undertaking operating in the European Union are required to provide the conditions and resources necessary so as to enable the workers to exercise their right to participation in the decision-making process in accordance with Article 2 and Article 4, paragraph 3 of this Act.<br>(2) The undertakings referred to in paragraph 1 of this Article shall ensure that the information on the number of workers referred to in Article 7 of this Act is made available at the request of the central management. |
| IT | Art. 17 establishes administrative sanctions for violations while Art. 18 provides for the creation of a conciliation committee in case of disputes to avoid litigation. If the conciliation proposal is not accepted by the parties, the assessment of violations and the imposition of sanction is taken over by the territorial labour office. |
| ES | Provisions of the ES: Article 11.1 have been transposed by Articles 35 and 36 of Law 10/1997 |
| PL | Article 1.3 of the EWC Law transposes the provisions of Article 11.1 |
| RO | Art. 11 item 1 of Directive 2009/38/EC has been fully transposed into Romanian law as art. 7 of Law no. 217/2005 (Republished). |

Article 11.2 of the Directive is concerned with the enforcement of the regulation and measures in the event of non-compliance. In Bulgaria, there is a clause which envisages civil liability for disclosing information deemed confidential of persons who have been given the information. In the case of Croatia, there is a very detailed set of measures about the body responsible for enforcing the law (labour inspection) and provides a comprehensive list of breaches of the law and sanctions (fines) for respective types of non-compliance. In Romania, there are similar types of clauses, with forbidden deeds (including disclosure of confidential information) and relevant fines. In the case of Poland, there are general restrictions (penal) for non-compliance with the Directive with regard to obstructing the establishment or functioning of a special negotiating body or EWC and discriminating against employee representatives with the labour inspectorate named as the public body responsible for enforcing of the law. In Spain, the issue is dealt with by an entire chapter of the national legislation, listing the types of breaches of the law

but without specifying any particular sanctions, referring to other national regulations of industrial relations instead. In Italy, specific sanctions are envisaged as well as a conciliation procedure to avoid litigation.

**Table 9. Implementation – Article 11.2**

| **How was Article 11.2 of *Directive 2009/38/EC implemented into the national law?*** | |
|---|---|
| BG | The basic sanction provision (which does not go beyond general Contract Law) is defined by Art. 30 of the Law: Persons to whom confidential information has been provided shall be liable for damages caused to the undertakings and companies concerned by failure to comply with the non-proliferation obligation. |
| CRO | Article 33 of the European Works Council Act states that:<br>Administrative supervision of the implementation of this Act and the regulations made thereunder is performed by the central state office responsible for labour affairs, if not otherwise stipulated by other laws.<br>Article 34 of the European Works Council Act states that:<br>(1) Inspection of the implementation of this Act and the regulations made thereunder shall be conducted by the central state office responsible for labour affairs, if not otherwise stipulated by other laws.<br>(2) The labour inspector conducting the inspection has powers under the law or the regulations made thereunder.<br>Article 35 of the European Works Council Act states that:<br>(1) An undertaking as a legal person shall receive a misdemeanour fine from HRK 7,000.00 to 15,000.00 in the following cases:<br>1) if it, upon the request of the workers' representatives, fails to provide information on the total number of workers, the number of workers in individual Member States and in particular undertakings, or the structure of the undertakings (Article 8, paragraph 2)<br>2) if it fails to convene the inaugural meeting of the negotiating committee, or if the negotiating committee fails to provide timely information relevant to the decision (Article 13, paragraphs 5 and 6)<br>3) if it fails to provide the negotiating committee, European Works Council or the Select Committee with the necessary space, staff, resources and other working conditions, including the payment of wages, travel expenses, accommodation and translation (Article 14, paragraph 2)<br>4) if it fails to convene the inaugural meeting of the European Works Council (Article 25, paragraph 1)<br>(5) if it fails to inform, at least once in a calendar year, the European Works Council of the business results and plans of an undertaking or group undertaking operating in the European Union, or fails to submit to the Council a timely report |

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| | with appropriate documentation, or fails to notify the undertaking, establishment or group of undertakings of the meeting. (Article 27, paragraph 2)<br>(6) if it fails to inform in a timely manner the Select Committee, or the European Works Council if the committee has not been established, of special circumstances that significantly affect the workers' interests, or fails to present proper documentation and consult with it on the matter (Article 28. paragraph 1)<br>(7) if, within two years of the inaugural meeting of the European Works Council, it fails to deliver information on changes in the number of workers in the EU Member States and in the undertakings, establishments or group of undertakings (Article 29, paragraph 3)<br>(2) The employer as a natural person and the responsible person of the legal person shall receive a HRK 2.000,00 fine for the misdemeanour laid down in paragraph 1 of this Article. |
| IT | IT: Art. 17 and 18 establish specific sanctions as well as a conciliation procedure to avoid litigation. |
| ES | Article 11.2 has been transposed by Articles 35 and 36 of Law 10/1997.<br>Chapter I Articles 30 – 34 of law 10/1997. |
| PL | Article 36.3 of the EWC Law transposes the provisions of Article 11.2. |
| RO | Art. 11 item 2 of Directive 2009/38/EC has been fully transposed into Romanian law as art. 53-55 of Law no. 217/2005 (Republished). |

As regards sanctions for untimely release of information, there are different approaches to the problem. In Italy, the issue is omitted from the law. Similarly in Bulgaria which provides a legal path under commercial (contract) law for claiming damages for such noncompliance. In contrast, Croatia gives a detailed list of specific breaches and fines for committing them. In Spain, the issue is dealt with by a separate piece of legislation (LISOS). In Poland, hampering the operations of an EWC is considered a breach of law (misdemeanour). Romania employs a similar approach.

**Table 10. Implementation – sanctions for untimely release of information**

| ***According to the national law, are there any legal sanctions envisaged in case of untimely release of the information?*** | |
|---|---|
| BG | No. This question refers to the general Contract Law. According to it, any party who considers itself harmed must prove the harm and connection of this harm with a specific violation (in the case – untimely released information) in order to hold the responsible party liable. |
| CRO | Article 35 of the European Works Council Act states that:<br>(1) An undertaking as a legal person shall receive a misdemeanour fine from HRK 7,000.00 to 15,000.00 in the following cases: |

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| | 2) if it fails to convene the inaugural meeting of the negotiating committee, or if the negotiating committee fails to provide timely information relevant to the decision (Article 13, paragraphs 5 and 6)<br>5) if it fails to inform, at least once in a calendar year, the European Works Council of the business results and plans of an undertaking or group undertaking operating in the European Union, or fails to submit to the Council a timely report with appropriate documentation, or fails to notify the undertaking, establishment or group of undertakings of the meeting. (Article 27, paragraph 2)<br>(6) if it fails to inform in a timely manner the Select Committee, or the European Works Council if the committee has not been established, of special circumstances that significantly affect the workers' interests, or fails to present proper documentation and consult with it on the matter (Article 28. paragraph 1)<br>(7) if, within two years of the inaugural meeting of the European Works Council, it fails to deliver information on changes in the number of workers in the EU Member States and in the undertakings, establishments or group of undertakings (Article 29, paragraph 3) |
| IT | Art. 17 and 18 cover violations and sanctions. According to Art. 17.3, administrative fines for failing to abide by the provisions on information and consultation range from EUR 5,165 to EU 30,988. |
| ES | Royal Legislative Decree 5/2000 Of 4 August, Which Approves The Revised Text Of The Law On Offences And Sanctions In The Social Order (LISOS) deals with the issues of not providing information as stipulated by Article 3.1 of Law 10/1997. Especially, articles 7.7, 9.1 and 9.2 provide specific regulations. |
| PL | Article 39 of the EWC Law lists the behaviour of central management deemed unlawful. |
| RO | There is no express provision in case of untimely release of information. However, not providing information at such time as to enable the operation of the SNB or EWC or the procedure for informing and consulting the employees can be considered an obstruction and falls under art. 53, paragraph (1). |

National legislation either refrains from enforcing employee representatives' right to information or provides only general directions. While Poland has a regulation which envisages a judicial path for enforcing the right to information in case of refusal, it is not regarded effective. In Bulgaria, an arbitration procedure is defined.

**Table 11. Implementation – legal means of enforcing the right to information**

| ***According to the national law, are there any legal sanctions envisaged in case of untimely release of the information?*** | |
|---|---|
| BG | In case of refusal of the Central Board to provide confidential information, the parties |

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| | may seek assistance to settle the dispute through mediation and/or voluntary arbitration from the National Institute for Reconciliation and Arbitration (above quoted art. 29, para. 4 of the Law). The mediation is voluntary but if the parties enter an arbitration procedure, the final Arbitration Award would bind them. |
| CRO | No, there are only sanctions in Art. 35 |
| IT | Art. 17 and Art. 18 envisage sanctions and a conciliation procedure in case of non-compliance with the obligation to provide information. |
| ES | The law of infractions and sanctions in the social order establishes as a serious infraction (article 9.2 c): Actions or omissions that prevent the effective exercise of the rights to information and consultation of the workers' representatives, including the abuse in the establishment of the obligation of confidentiality in the information provided or in the recourse to the exemption from the obligation to communicate that information of a secret nature. Likewise, it is always possible to go to the courts and tribunals and claim for non-compliance. What does not exist is a regulation that requires the delivery of the information in a timely and appropriate manner. |
| PL | According to Article 36.3 of the EWC Law it is possible to sue central management, yet in such a motion to the court of law the employee side would have to explicitly name the information which has not been disclosed. Providing such evidence is difficult. |
| RO | Art. 52 of Law no. 217/2005 (Republished): central management's decision not to provide information mentioned in art. 51 may be appealed by the European Working Council or by the employees' representatives to the competent court, in a period of 30 days. |

The purpose of Article 11.3 is to obligate the Member States to introduce provisions 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. Such procedures may include procedures designed to protect the confidentiality of the information in question. In all countries in focus except Croatia this requirement is fulfilled. The ways of dealing with the issue vary: from a very general approach (Bulgaria) to a very detailed one (Italy). In general, however, the main problem remains which is how to enforce the provisions and challenge the employer's decision to claim confidentiality to stop the release of information.

**Table 12. Implementation – Article 11.3**

| **How was Article 11.3 of *Directive 2009/38/EC implemented into the national law?*** | |
|---|---|
| BG | The above mentioned provision of art. 29, para. 4 of the Law in line with art. 8 of the LC (the obligation for good faith in accordance with the requirements of the law) exhausts the legislation of refusal to provide information and the possible |

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| | consequences of such refusal. In the same way as the general Contract Law requires, in such case the injured party must prove in a general manner the damage suffered and the relation between the damage and the refusal in order to claim compensation or enforcement of the obligation for the information to be provided. The practice in such cases is rather to confirm the employer's subjective assessment that the information would harm their commercial interests. |
| CRO | Such procedures are not provided |
| IT | The whole issue of the way in which it is ensured that the parties abide by the agreement rests in the regime of the sanctions (articles 17 and 18). |
| ES | It is regulated in quite a precise and explicit manner by Article 38.5 of Law 10/1997. |
| PL | Articles 36. 3 to 36.5 of the EWC Law transpose the provisions of Article 11.3. |
| RO | Art. 11 item 3 of Directive 2009/38/EC has been fully transposed into Romanian law as art. 52 of Law no. 217/2005 (Republished). |

Article 12.2 is concerned with the arrangements for the links between the information and consultation of the EWC and national employee representation bodies. In Bulgaria and Croatia, the national legislations do not address the issue, leaving the process of interaction between EWCs and trade unions subject to autonomous coordination between various types of entities. In Italy, Poland and Spain the law repeats the provisions of the Directive. In Romania, interestingly, the law states explicitly that the competences of EWCs should be limited to transnational issues.

**Table 13. Implementation – Article 12.2**

| **How was Article 12.2 of *Directive 2009/38/EC implemented into the national law?*** | |
|---|---|
| BG | The issue of linking the EWCs and the trade unionshas not been developed in Bulgarian legal framework. The implementation of Directive 2009/38/EC in Bulgarian legislation rather created a parallel opportunity for representation of workers and employees alongside the existing possibilities, without including any measures for coordination and synchronization between them. |
| CRO | The agreement establishing the European Works Council must contain information on:... 3) the powers and duties of the European Works Council, information and consultation procedures with the European Works Council and workers' representatives at the national level. |
| IT | Art. 13, item 2: exactly the same formulation |
| ES | transposed literally |
| PL | Article 19.2 item 3a of the EWC Law transposes the provisions of Article 11.1 |
| RO | Art. 12 item 2 of Directive 2009/38/EC has been fully transposed into Romanian |

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| | law as art. 4 (2) and art. 22 (3) of Law no. 217/2005 (Republished). |

Article 12.3 obligates Member States to make sure that in the absence of relevant provisions defined by EWC agreements, the processes of informing and consulting are conducted both in the EWC and the national employee representation bodies if substantial changes in work organisation or contractual relations are likely (e.g. redundancies, relocations etc.). In Bulgaria, EWCs are not supplied with the rights which national-level employee representatives have. In Croatia, when "special circumstances" occur, the central management is required to inform the Select Committee or EWC in a timely manner and hold a meeting to discuss the circumstances. In Italy and Spain Article 12.3 is transposed almost directly, with Italy's national regulation made more specific because the processes of informing and consulting must be coordinated. In Poland the national legislation repeats the Directive and adds a reference to the national information and consultation law (works councils). In Romania, the same regulations of Article 12.3 apply, and it is explicitly stated that the competences of EWCs are confined to the transnational dimension.

**Table 14. Implementation – Article 12.3**

| **How was Article 12.3 of *Directive 2009/38/EC implemented into the national law?*** | |
|---|---|
| BG | None of the rights secured by the Labour Code to domestic forms of worker representation (trade unions or elected worker representatives in non-unionised workplaces) is related with Multi-National Enterprises, Groups of Enterprises and European Companies. |
| CRO | CRO: Article 28 of the European Works Council Act states that:<br>(1) The central management shall inform in a timely manner the Select Committee referred to in Article 26 of this Act, or the European Works Council if the committee has not been established, of special circumstances that significantly affect the workers' interests, present proper documentation and consult with it on the matter.<br>(2) In the case referred to in paragraph 1 of this Article, the Select Committee or the European Works Council shall be entitled to a meeting with the central management.<br>(3) Special cases, as referred to in paragraph 1 of this Article, shall include:<br>1) a change of the registered seat of the undertaking, establishment or group undertaking, a transfer of undertakings or businesses or parts thereof<br>2) organizational and statutory changes in the undertaking, establishment or group undertaking<br>3) redundancy support |
| IT | Art. 13, item 3: it is added "in a coordinated way" between the EWC and the |

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|---|---|
| | national bodies of workers' representation. |
| ES | Transposed literally. |
| PL | Article 19a of the EWC Law transposes the provisions of Article 12.3. |
| RO | Art. 12 item 3 of Directive 2009/38/EC has been fully transposed into Romanian law as art. 4 (3) and (4) of Law no. 217/2005 (Republished). |

None of the national legislations in question have solved the problem of defining confidential information or its scope. Croatia and Poland are the only countries to make references to other national level regulations. The other countries seem to have similar approaches. There is an indication in Romania's national legislation implementing the Directive that employers are obliged to clarify in writing the reasons for refusing information on the basis of confidentiality. As we know from the Bulgarian report "the lack of a legal definition often allows employers to abuse their right to invoke confidentiality" which presumably sums up the problems encountered in the entire country sample and beyond (as the literature review suggests).

**Table 15. Implementation – definition of confidential information**

| ***While transposing the Directive into national law, did the lawmaker define confidential information?*** | |
|---|---|
| BG | No legal definition of "confidential information" as seen in the Law. The following perceptions of confidential information can be extracted in an interpretative way – such information is, "the dissemination of which may harm the legitimate interests of undertakings"; and its dissemination "could seriously impair or harm the operation of businesses or companies". |
| CRO | Neither the Act on EWC nor the national Labour Act contain the term "confidential information". Instead, both acts contain the term " trade secret" in the sense of secrecy. However, in the English translation of the EWC Act the term trade secret is often incorrectly translated as confidential data or confidential business data.<br>The Croatian legal system uses the term " confidentiality" in The Implementation Act of the General Data Protection Regulation in a way that confidentiality means protection of personal data. According to the GDPR and Croatian Implementation Act of the General Data Protection Regulation personal data are confidential information.<br>In the national legislation trade secret is defined by the Privacy Protection Act which has been in force since 1996 and the Act on the Protection of Undisclosed information with Market Value of 2018. The latter Act provides protection to the legitimate interests of trade secret holders and primarily protects trade secrets with economic value as a special form intellectual property. |
| IT | There is no such definition. |

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|---|---|
| ES | There is no such definition. |
| PL | There is no such definition but there is an explicit reference to business secrets. |
| RO | Law no. 217/2005 (Republished) does not provide for a definition of what confidential information means. However, according to art. 51, the central management located in Romania is not obliged to provide information when, according to objective criteria, by their nature, they could seriously affect the functioning of the respective undertakings or could harm them. |

## 5.2. Cross-analysis of research findings on implementing the Directive and domestic practices with special focus on confidentiality.

It is advisable to begin with the assessment of whether the objectives of the Directive have been achieved at the national level as a result of the implementation. The views expressed by the informants representing social partners and the researchers (NLEs) themselves are rather sceptical.

While in formal terms the legal framework is in place, there is little room for enforceability of the provisions: low financial sanctions which are practically insignificant for large corporate employers and a low level of agency on the part of employee representatives are brought into discussion. Considering the weak institutional environment of industrial relations in the New Member States of Central and Eastern Europe (in our case Bulgaria, Croatia, Poland and Romania), the claim made in the Bulgarian report that the introduction of new forms of employee representation as part of *acquis* (EWC included) creates a risk of undermining the national level institutions even further (trade unions) should not be seen a highly surprising.

**Table 16. Implementation – assessment**

| ***Has the implementation of the Directive helped to accomplish its goals (are the legal grounds in place)?*** | |
|---|---|
| BG | The implementation of the irective 2009/38/EC has had a partial or even negative effect – an attempt has been made to break down the existing Trade Union Organizations' sustainable structures by concurrently creating EWCs orchestrated by some employers, which fortunately did not deliver the expected result. Adequate conceptualization and utilization of the EWCs is still pending. No legal definition of "confidential information". |
| CRO | The Croatian European Works Council Act did not create any possibility for the EWC to force the undertaking to provide EWCs with business or financial information important for workers participation in the decision making process. The Croatian European Works Council Act provides penalties in inappropriate small amounts. Such low penalties cannot achieve the purpose of punishment and will not make the undertaking comply with its legal obligations arising from the EWC Act. It |

| | |
|---|---|
| | is interesting that at the same time penalties for identical offenses at the national level prescribed by the Croatian Labour Act ( Art. 228) are higher. No legal definition of "confidential information". |
| IT | The monetary sanctions are too low to actually convince and/or force the corporations to abide by the law, in case they did not want to. The figures were the outcome of a compromise with the Employers' Confederation. The unionists argue that the issues linked to the working of the EWC never reach such political salience to make a workers' mobilization possible in order to put pressure on the management, in case of misapplication of the law. No legal definition of "confidential information". |
| ES | Implementation of the Directive does not, in principle, go beyond the minimum requirements of the Directive, making the enforcement of European works councils' law on information and consultation in practice not fully effective and does not translate into expanding democracy in enterprises. No legal definition of "confidential information" |
| PL | Lack of certain solutions at the statutory level - information provided by EWC members to employee representatives, lack of mechanisms to prevent abuse (prior control of failure to provide information) – may hamper the achievement of the Directive's goal. |
| RO | The obvious shortcoming of the Romanian transposition of the Directive is lack of a clear definition of what confidential information is. This leads to abuses of using this as an excuse not to provide information. |

What are the major problems stressed out in the national reports?

First and foremost, ambiguity of the term 'confidential information' is commonly cited as a major obstacle for the effective enforcement of the workers' rights defined and conferred by the Directive. This is confirmed by nearly all national reports. While no definition is given in the Romanian report, it says that a sort-of-definition is applied implicitly (Article 45 (1) of Law 217/2005).

The second problematic area concerns enforcement or, in other words, strategies and tactics used by employers for not releasing the information or limiting the scope of what is actually released by using 'confidentiality' and/or 'trade secrets' as excuses.

Information (data) is refused on a variety of grounds as can be seen from the national reports.

In the eyes of Bulgarian respondents, in almost all cases commercial interests of a company (i.e. business secrets) and protection of personal data (by reference to the GDPR) are named as the ground for refusing information. Rarely, specific provisions of national or European legislation are called in, and even more rarely, the EWC agreements are mentioned.

According to Croatian informants, the most common reasons for refusal are: legal regulations (national and international), especially stock market regulations, regulations concerning confidentiality, trade secrets and the GDPR.

From the perspective of respondents in Italy, the basis for not providing information is usually legislation. The national legislation defines a conciliation procedure, should divergences between the management and the EWC representatives arise for which specific pieces of information shall be provided and regarded as confidential.

As the informants from Spain see it, in all cases refusal to disclose information to EWC members is supported by reference to national legal regulations, in particular those regarding the supranational dimension and trade secrets.

In the eyes of respondents in Poland, interestingly, no such situation has ever occurred.

According to informants from Romania, confidentiality (thus the law, presumably) is said to be the main reason for refusing information.

There are two lines of argument: 1) general, with confidentiality or trade (business) secrets *per se*, just as in the case of Romania, apparently regarded as sufficient and specific explanation (to various degrees), and 2) specific with the most detailed and elaborated ones observed in Spain, Italy and Croatia. Interestingly, Italy is the only example to include an institutional measure (conciliation procedure), which may be used to challenge the initial refusal by employers. The specific arguments usually refer to legal grounds, with the regulations cited in the national reports as stock-market regulations, the GDPR and general corporate laws.

Other strategies and tactics employers use when asked to disclose the information include: resistance (described by the Bulgarian NLE) that is passing information which in most cases is "general, non-specific and useless" and using peculiar objections against releasing the information such as fears that it could become known to competitors or public authorities, superficial cooperation (reported by Spain, Poland, Italy, Romania) releasing information which is well-known anyway, so the confidentiality-related concerns are irrelevant (Spain); poor quality and general (Romania); in abundant amounts (Poland) and thrown in at the last-minute (Italy) or even during meetings (Croatia, Romania), so it is difficult for the recipients to make any reasonable use of it. As regards the meaning of 'timely', it should be stressed that realistically "timely" is when the information reaches the worker representation *before* the decisions are taken. Last but not least, translating the information is also a problem. The language barrier is a common and serious hindrance to exercising the right to information by employee representatives.

The tactics around 'timely' releases of information are a crucial feature of 'superficial cooperation'. With no specific or even loose definitions of the term in the national legislations (no specific information about such provisions in the respective EWC agreements but the Italian report remarks that "the agreements tend to reproduce the wording of the Directive or of the implementing law"), it is subject to free interpretation with only one boundary fixed: the information cannot be and is not released after the meeting. As a result, the information is shared "during the meeting or just a few days before" (as explained by the Italian report, in a way that is representative for all the countries in focus).

As regards the content of the information, there is a great deal of employer voluntarism. Certainly, 'voluntarism' is a vague term because it covers not only situations of refusals ('playing deaf', so to say) to EWC members' requests for additional information (as reported by Bulgaria and Spanish delegates) but also releasing information that does not match the requests and/or is provided in a form that is hardly comprehensible (as mentioned by EWC members from Croatia, Poland, Romania). However, in any case it does not mean that the employee side remains passive. In all the countries, it is confirmed that EWC members put pressure on employers for extra information. Although we do not know the details of the content of additional information provided in the case of Italy, the national report suggests that EWC representatives usually ask for information before, during and after the meeting. Clarifications are usually provided during the meeting, which may include a Q&A's session.

Nevertheless, the end result of pressure put by EWC members' seems to be only moderately effective in extracting information. The financial data is said to be "not timely relevant and not useful for EWC" (Croatia), mostly because they are equivalent to the information published earlier in accordance with stock-market and other corporate laws (Croatia, Italy, Romania).

Considering the moderately pessimistic outlook on the possibilities of effectively demanding information – shared by the researchers (NLEs) and social partners – a question arises whether new means (measures) should be introduced to assist EWCs in the process of extracting the information. While there is no doubt that such measures should exist ("whoever is not playing by the rules, must be held accountable", as recorded in Spain), it is not entirely clear what path to pursue. Two options are taken into account: 1) 'hard' – legal sanctions; 2) 'soft' – public pressure (or shaming, in more direct words) by means of 'blacklisting' the companies who tend to (persistently) avoid disclosing the information requested. The views on this are mixed because opinions suggest that a mixture of the two may serve the purpose better than choosing one over the other. So they are seen more as complementary rather than alternative solutions. In all of the

national cases, support is envisaged for legal sanctions when employees are refused information in appropriate form and at appropriate time. Yet, the views vary, ranging from very straightforward (Bulgaria, Croatia, Spain) to more balanced and nuanced (Italy, Poland, to some extent Romania). The former express scepticism about the companies' inclination to give sensitive information willingly. The latter countries point out that rigorous enforcement of the law may contradict the very idea of social dialogue: "persuasion tends to bring more significant and lasting results than litigation" (Italy). There is also a suggestion that indirect forms of pressure can be used in place of direct sanctions. Poland is an example with its idea to ban companies which obstruct the right to information from public tenders. Nevertheless, there is a view (Croatia, Poland) that sanctions – should they be introduced – cannot be imposed from the national level. They must come from the EU or they will not be effective, it is claimed. In that context, an interesting observation was recorded (in Italy) which is that the newly created European Employment Authority could be involved in the process and asked to monitor EWCs.

Still, legal sanctions (even those which could lead to financial penalties) are not considered the most effective, possibly because the company's public image is its priceless asset. Therefore, the idea of "blacklisting" companies failing to deliver what is seen as legitimately requested information is not dismissed. However, a "stick and carrot" approach is preferred over "naming and shaming" with the idea of a 'white list' (companies fulfilling their obligations stemming from the law and EWC agreements) used as a counterbalance.

All in all, in order to put more effective pressure on employers, EWCs need enhanced prerogatives. This is quite a widespread belief. How can this be done? Apart from general comments, there are also some concrete proposals offered, such as the one from Italy. To ensure transmission of "relevant and timely information it is essential to establish a Select Committee which maintains closer and more continuous relations with the company management, with the possibility to meet or have formal exchanges more than once per year, on a bimonthly or quarterly basis". In Poland, there is a proposal to facilitate competences of EWCs in such a way that they move more into the direction of 'consultation' from the current standpoint, which is described as 'information'. A possible solution could be an alert that the decision has not been taken yet and the processes is not finalized because the consultations are not over yet. That would mean a possibility to halt the decision-making process. In Bulgaria, a postulate is made to "specify the scope of the information due", which parallels the observation made in Romania concerning "making the provision of the Directive more explicit and precise. At the moment, it is too general, so there are possibilities of misinterpretation (example: abuse of confidentiality)."

## Chapter 6. Benchmarking analysis for the EU States in focus

### 6.1. Information: what type is requested, what are employers' responses

The benchmarking analysis begins with an account of the type of information usually requested by EWCs. The categories of information requested overlap with the financial situation, as explicitly mentioned in nearly all cases (except Bulgaria). Other data are reported as well, including economic performance or profit margins. A very specific type of information which is worth mentioning is a "complete financial statement".

The requests are sometimes turned down. According to informants from Bulgaria, such situations are described as happening "almost all the time", the explanation being that the information is sensitive and as such "could endanger the commercial interests of the company or the personal data of employees, customers and others". In the eyes of Croatian respondents, the assessments are less definitive in tone. While refusals are "not often, they occur when the employer claims the information is of particular financial interest or implies bank secrecy". The information is likely to be restricted when "it is about financial figures, IPOs, acquisitions and something like that" and it occurs "every time EWCs get the information before it is released to the stock exchange". As respondents from Italy see it, refusals reportedly do not happen too often. When they do, it is usually motivated by the limited scope of the information in territorial terms (not of a transnational character). Another instance is when the release of information may "affect the value of the shares". Finally, the information is restricted when it "concerns the transfer of companies or branches". The latter is illustrated by a concrete event: "in the Group, during the French subsidiary sale […] the decision process lasted for more than a year. In that period many sale options were taken into account, but the company management just released official statements to the stock exchange control bodies". The replies from Spain are rather modest in their content. The most extensive response is that "financial information is usually refused, not all economic data of the company are given either. It happens rather regularly". The majority of respondents (five out of eight) from Poland maintain they have not had any such experiences and the company does not refuse any requested information. In the remaining cases – where refusals are admitted to have happened – either "confidentiality or trade secrets" or limited scope of the information in territorial terms (no effect on the whole group) as the main reasons. In the latter case, it is argued that if the specific issue pertains to a single site, the request for information is passed to that site. The role of a steering (select) committee as the executive force of the EWC is mentioned in the context: "I have been going to meetings for 10 years, and only once or twice I heard of

problems in accessing company data, but it was probably about some detailed data. We have got a steering committee in our EWC which meets with the board to prepare actual EWC meetings and they negotiate such things if any difficulties happen". Romanian respondents do not confirm any serious problems of that type, yet some admit their companies exercise certain tactics of obstruction when it comes to releasing the requested information, as illustrated by the statements: "the information is not denied directly but it is postponed and most of the time it is incomplete" or "We are not denied information, but it is not always clear enough".

Management boards use similar ways to justify their refusals to give information. "Confidentiality" is mentioned in all cases. Other frequently encountered negative responses involve "trade" or "business secrets" (responses from Croatia, Poland). Bulgarian informants often mentioned "protecting of personal data". A very interesting – and meaningful in the context of the report – instance of refusal has been reported from Poland and Spain: information was not released on the grounds of not being EU-wide. "If the issue pertains to a specific country, it should be dealt with at the country-level only", as the Spanish report reveals with no specific mention of any particular EWC. In the case of Poland, the refusal is very concrete. Because it is a "limited scope of information (the information applies to one country), it is irrelevant for the EWC". In the case from Italy, the main reasons for refusals reported can be summed up as the public status of the company (i.e. being listed on stock exchange markets), besides confidentiality ("fear of leaks").

The information requested is not necessarily granted and rarely satisfies the expectations of EWCs. The commonly identified pattern is that the information is general and outdated. From Bulgaria it is reported that the information "rarely includes specific economic indicators". In Italy the types of information named by the respondents include business plan information. Furthermore, "delegates often receive information already presented to shareholders, or published in the press or in sustainability reports. […] I have learned that I do not have to wait for information to be provided by the company, but I must be active to seek public information before EWC meetings so that the meetings become consultation". In the eyes of respondents from Spain, in general it seems that whatever type of information is requested by EWCs, it is delivered. A more specific company-level reply lists "the annual financial report and planned investments in specific sites".

Information should be released in a "timely manner". And according to the national reports, it usually happens (meaning the information is given prior to meetings or during them), with no

significant cross-country variations. Depending on the importance of the information and its effects on employees (immediate or not), the date of the release may differ, which is illustrated by the case of Italy. On the one hand, it is reported that "with regards to decisions that have direct and immediate consequences on employment or on agreements in the different countries, information is normally given taking into account the time and the ways foreseen in the legislations of the countries involved in Article 2", while "information with no immediate consequences for workers is normally given during the plenary meeting" or "information is usually given only a few days before plenary meetings". On the other hand, "employee representatives do not always have the competence to interpret information such as, for example, financial statements that are complex. The training of representatives to read and interpret information is important". According to the data reported from Spain, some companies release information on time but there are companies which deliver information "barely a few days before the meeting". So "many of our representatives express disappointment at no information being delivered in time that is 'appropriate'". It is reinforced by statements made by individual EWC members: "many months"; "too long". In Poland, EWC members seem to be generally content with the way information is provided. There are some very precise replies which reinforce the general opinions: "three months, four to five months in the case of the minutes", "one week before the meeting", "three months", "at the meeting, which takes place twice a year", "on the first day of the meeting we submit our questions, on the second day the board responds". In one case the respondent explicitly speaks about the information being provided "not in line with Art. 2, item 1, bullet f of Directive 2009/38/EC, because there is not enough time to get acquainted with the information or analyse it". In Romania the opinions are moderately positive. There are no significant delays reported (except for one case where information "is offered at EWC meetings), and the companies' behaviour is described as "in line with the rules".

When the information (regardless of its quality) is released, there is an issue of any possible restrictions that EWC union delegates may face, if they pass the information on to the members of the union they represent? On the one hand, it is reported that passing the information to parent unions is somehow restricted. Moreover, in Spain it happens on a regular basis, and the key argument used is the risk of the competition gaining sensitive information (financial and/or investment data). Blurring the boundaries of confidentiality is a practice observed by a Spanish member of another EWC: "everything is said to be confidential, so we do not really know what we can inform about and what we cannot", and

"everything carries a seal of confidentiality". As reported in Croatia, there is a very interesting situation in one company, where the respondents state that: "if the EWC has the information, TU representatives have it too. We stipulated in the EWC agreement that our obligation is to inform workers in companies which will be affected by management decision. Exceptions include information about acquisitions and changes in strategy". So negotiating a clause that seemingly explicitly secures the right to pass information appears to be a viable strategy for trade unions. On the other hand, there are examples such as those given by informants from Italy: the general pattern can be described as no or few restrictions. In the latter case, such limitations are said to "happen at the steering committee". Nevertheless, if it does happen, it does so occasionally. There is also a very meaningful example of a viable solution: "It can't happen in Italian parent companies' EWCs, because TU national secretaries responsible for the sector of the Company can participate in plenary meetings." In Poland it appears that no such restrictions are known in most of the EWCs covered by the national study. In some it is admitted that confidential information cannot be passed on. There is interesting practice of a transparent dissemination of information described by one Polish respondent: "I inform the staff at our site about the outcomes of each EWC meeting via our bi-monthly company bulletin. […] If there is confidential information included in the minutes of the meeting, it is marked red, so I know what I can and cannot pass on at the national level".

### 6.2 Confidentiality as the reason for the board to refuse information

As established earlier in this report, confidentiality is often used as grounds for refusing information requested. Respondents from Bulgaria state that it happens "almost each time when specific economic information is required". No details are given, though. In the eyes of informants from Croatia, confidentiality is also quoted as a key argument for refusals. In Romania, the responses range between "rarely" and "very often". In two cases the respondents explained that the board employs confidentiality as a way of refusing information in specific situations: "at each annual negotiation of the Collective Labour Agreement" and "when we ask for data on individual salaries of employees".

However, if any assumption was to be made about an 'East-West" divide in the EU to demarcate the area where confidentiality is used as a grounds for refusal, it would be proved wrong. In Spain the respondents admitted that confidentiality is occasionally used against the release of information or to stop the dissemination of the information disclosed. On the other hand, in Poland EWC members generally consider it to be a marginal problem. The respondents either report that it does not happen or it does sporadically or do not answer at all.

In one case it is explained that confidentiality is not used to block information but to restrict its further usage. Finally, in Italy in most cases the informants claim that such practices do not take place or happen "never, seldom or not very often". In one case the statement is contrary: "quite often". As regards the latter statement, the backgrounds are completely opposite: on the one hand, "the board rarely provides confidential information" (so logically, it cannot be mentioned as a reason for refusal – J.Cz), on the other – "'Confidential' is often seen on the documents the Companies give to EWCs members during the plenary meetings" (so it creates a dilemma for EWC members on what to do further with the information obtained – J.Cz).

### 6.3. Other reasons for refusing access to information

In the eyes of respondents from Bulgaria, "among the most commonly used (grounds – J. Cz.) are trade secrets and the protection of personal data.

As informants from Croatia observe, not only confidentiality but also other specific reasons (business secrets) are mentioned.

According to respondents in Italy, not only confidentiality but also secrecy is said to be the reason for refusals. Fears of insider trading are quoted as an excuse for non-disclosure. Interestingly, there is a practice of not giving "information when the information involves a third party, outside the Group, for example when they discuss sales or acquisitions".

In Spain, confidentiality is confirmed by respondents as the main ground for refusals.

In Poland, the specific reasons named by the respondents are confidentiality and financial/bank secrets but also "company interest". It is also worth noticing that some respondents report that situations of refusals have not taken place.

In Romania, in the vast majority of cases (seven) confidentiality is said to be the reason for refusals, and in five EWCs it is said to be the sole reason. In addition, financial secrets and impact on business/company are also cited.

### 6.4. Confidentiality and release of information in EWC agreements

In Italy's report it is mentioned that in "Italian parent companies' the definition of confidentiality is normally transposed to the Agreement directly from the text of the directive without further clarification". There is one specific definition quoted: "[Company] is not obliged to transmit information when its nature is such that, according to objective criteria, it would seriously harm the functioning of the group companies concerned or would be

prejudicial to them or market sensitive. EWC members and any expert assisting them are not authorized to reveal any information which has expressly been provided to them in confidence. In the event of disputes or violations, art.11 and 17 of legislative decree n.74 of 2 April 2002 will apply". There is an interesting practice pertaining to the duration of confidentiality rather than to its definition *per se*: "we have established that confidential information must have a duration established by the steering committee jointly with the managers. At the same time, the company undertakes not to disclose information relating to the EWC without first informing the steering committee".

In Spain, from the respondents' perspective, there is a general tendency to incorporate broad definitions of confidentiality into EWC agreements (in line with the Directive) but also to brand every piece of information as confidential. It is confirmed at the company level: "it simply redirects to the binding regulations" or "there is discretion and professional secrecy required in the context of confidential information", even though no definition is provided.

The agreements sometimes regulate the issue of releasing information to the members of the union by delegates from that particular union. It is not known to Bulgarian informants. In Croatia, there are no references to such provisions in agreements reported by the informants because there are none. It is explained that "members of the EWC should take care of confidentiality, but there are no details". It is also observed that "there is no difference in the agreement. EWCs don't have restrictions for releasing information to the workers or TU representatives. Just provisions about confidential information". In Italy, there is institutional arrangement that allows trade unions immediate access to information: "in Italian parent companies' EWCs, TU national secretaries responsible for the sector of the Company can participate in plenary meetings". Another interesting pattern is mentioned: "in very general terms, in case the information may possibly affect the employment, it is immediately communicated to the unions involved". Nevertheless, accessing the information does not translate into opportunities to release all information to the union constituency because "confidential information cannot be released. Respondents from Poland, do not reveals much. In some cases the question is not answered, so presumably such clauses are absent, which – along with leaving that item of the questionnaires blank – is likely because "there is no difference between union members and non-members" or "there is only a general regulation restricting the release of confidential information shared at meetings". One company provides a very interesting case, where reportedly "confidential information can be disseminated

outside with a view to conducting information and consultation processes" but no details are provided.

For the sake of the report it is important to clarify whether – while negotiating the EWC agreement – the parties discussed the conditions of releasing confidential information. As for the countries where EWCs have been established, only Italy it is reported that the issue was/has been part of the negotiations, but in one case it is further explained that "no big discussion about confidentiality during the negotiation of the EWC agreements" took place. In the report from Spain the issue is not present. The informants in Poland in all but two cases either claim not to have knowledge of such facts or not having participated in the negotiations. However, there are two EWCs, whose members admit the issue was on the agenda. In the former the reason for inclusion of the issue is explained in very rational terms: "yes, it was, because information has to travel down somehow, from the national to the local level. Without that the whole process would be impossible". In the latter, the issue was at stake as well, "the ban on disclosing such (confidential – J. Cz.) information was agreed as well as the responsibility for doing so. It was also agreed that branding information confidential could be challenged by employee representatives".

The information released to the EWCs is said to generally fulfil the conditions set by the EWC agreements. In Croatian cases, the information released to EWCs is considered satisfactory, though "not always". In Italy, the recipients of the information are in general quite pleased with it, yet with some reservations. A very interesting observation points to two sides of the same coin that the process of transmitting information is: "yes (it fulfils the conditions of the agreement – J.Cz.) in most cases, but the timing is usually not appropriate and this makes the information nearly useless and the consultation impossible". So, it is not just the content but the timing that matters too, and if any of the two conditions is not met, then the whole process is flawed. Another interesting observation is made from a different angle: "normally the information meets the provisions of the agreement but it does not always meet delegates' expectations". Here, the discrepancy between what is available and what is expected is highlighted. In Poland, all eight respondents simply state that the information received meets the conditions set by their respective agreements. From Romania there are three replies, and all admit the information is proper in terms of what the agreements set out but with some reservations, exemplified by the statement "We only receive public data" (according to the Romanian NLE, frequently repeated response). As for Spain the replies are limited in scope. One of the respondents, however, openly speaks about their dissatisfaction

with what they receive: “no, absolutely not. We get some information orally, but then it is not reflected in the papers delivered to us”.

### 6.5. Form in which employers release the information

In Bulgaria, the respondents claim it is “Almost always […] on paper. In very rare cases, the provision of .doc, .docx, or .pdf files is available by e-mail without including any protection of confidential data (not usually provided). Only in isolated cases is password protection provided, without strong encryption”.

In Croatia, the forms of communication vary according to the informants. In some cases it is simply e-mails and PPTs, while in the other there seems to be an advanced internal policy on secure data distribution: “we have access to ‘secure data room’, special company online place with all documents. We were asked not to share information by e-mail or put it on some outside cloud service, don’t use Google translation or something like this. All documents are translated in our native languages”. In another company “we have minutes of meetings”.

In Italy, PPTs and paper format are said to be the dominant forms of communication. Confidential information is communicated either verbally or on paper. There are often differences between PPT slides and paper, which is described as a way of protecting information that may not be officially classified as confidential but the company still seeks to prevent its wide circulation.

In Spain, PPTs and paper format are reported as the key ways of communication. The practice of removing some information from the print-out versions of PPT presentations is also observed.

In Poland, the forms of communication slightly vary between EWCs, as the informants say. However, the dominant forms are PPTs and paper. Confidential information is passed sometimes in a verbal form only or explicitly marked as such.

In Romania, it is either electronic/PPT format or paper, according to the informants. Confidential information is absent from paper versions or explicitly marked as such.

### 6.6. What type of information can be released further and what is forbidden?

In Bulgaria, it is reported that “in most cases, EWC members are careful handling the information, whether confidential or not. Often, those who actually work as EWCs members do so in cooperation with the Trade Unions and get the necessary guidance to deal with the

information from there." There is an interesting observation included that "there are isolated cases in which EWC members have misused the information, primarily after termination of their employment with the respective Employer, as a form of retaliation".

According to the Croatia's report, it is relatively well-known what can be and what should not or must not be shared. Sometimes it is clear-cut "Almost every document is marked as confidential", sometimes it is rather implicit "they know because they are talking about it with the employer and with other EWC members in the headquarters.

In Italy, according to the respondents, "they usually know", which is facilitated by relevant company training and forms of communication because "all non-confidential information is reported in summary form in the minutes of the meeting", so the boundary between confidential and non-confidential is drawn in a negative way.

In the eyes of respondents from Spain, the issue is said to be unclear and a source of doubts for EWC members, "who are not sure what they can share at the national level". It is sometimes a matter of customary regulation: "all that is released on paper may be basically passed forward".

In Poland, the practices reported by EWC members fall into two categories. One can be described as 'non-regulation' and is similar to what is observed in Spain: "general knowledge, "it is left to our 'sense'". The other is a systemic approach where confidential information (which is subject to restrictions in distribution) is clearly marked as such or there are written guidelines provided. Finally, a simple but presumably effective formula is employed by one company: "everything we hear, we can release".

In Romania, in general the issue is said to be subject to internal regulations although at various stages of complexity and detail. In some cases the restricted areas are drawn in relation to certain activities, products or assets of the company, for example: contracts, technology, financial data. In other instances it is announced on a meeting-by-meeting basis or described in general terms specifying what information can be or cannot be made public or can be taught in a formal way (training for members).

### 6.7. Good and bad practices observed in the course of EWC operations

In the Bulgarian report, there is only a very general and vague statement provided: "The EWCs in Bulgaria have not been successfully implemented and the related practices are more negative than positive". In Croatia, the following good practice is reported from one EWC: "we

established working groups with an aim to have information about many processes in the Company, and we get more information which is very useful for local works council. We coordinate information between local works council and the EWC". There is also another good practice reported, when EWC "has signed an agreement called the New European Programme which ensures that all workers will have the same rights in every company in terms of bonuses, different benefits, education, health and safety, etc. The agreement also emphasizes the importance of diversity & inclusion, youth employment, work life balance etc." In Italy, good practices are reported from an upper level, the federations. That is why they are more general in description (and may seem superficial at first glance as a result), yet the spectrum is very wide (which gives us the big picture) and covers such achievements as joint declarations signed on important issues, impact on local and national social dialogue, cooperation with local national trade unions, joint training of EWC delegates with managers on health and safety, diversity and training issue; discussion among all delegates from the different countries involved and prompt intervention in the event of a crisis. In Spain, the reporting is scarce in words, yet concrete. One good practice is about passing the information down to employee representatives in specific countries. Another good practice is providing simultaneous translation at plenary sessions in eight languages is appreciated. In Poland, the following good practices have been described: rotating the locations for cyclical EWC sessions in different countries; no taboo topics present and wide access to information; cyclical organization of meetings, preparation of questions by the steering committee several weeks before the meeting; agreement on three-month long negotiations in the event of a planned site closure or redundancy, framework agreements; very good atmosphere between EWC members and Board members at the meetings; more control over and influence on management in specific countries. In Romania, numerous good practices are reported of various significance. These include: translation in all the required languages (11); negotiation of agreements that have become obligatory in all countries (Training, Equal opportunities, Against commercial pressures, Work-life balance); the meeting of the Restricted Committee 4-8 times a year, as needed; regular EWC meetings – twice a year; transmission of the materials discussed within the CEI at least 5-7 days in advance; presence of the Group CEO at all EWC meetings and the possibility to ask questions and receive answers on the spot; free English courses for all EWC members; courses on the role of EWCs for new representatives and for all deputies.

As for bad practices observed, there is only a very general and vague statement provided by a in Bulgarian EWC member, which is quoted in full length: "by far the most negative practice

associated with EWCs is the attempt by some Employers to liquidate Trade Union Organizations in their companies." In Croatia, there are some bad practices named by the respondents, such as the sale of one of the members of the Group, when "the EWC did not receive the necessary information on the disposal of redundant employees on time" or actions of management who "want to decrease the level of influence of the EWC in the Company". In Italy, a number of bad practices are named. Just as the good practices, they are also reported from the higher level of federations. While they are general in description, the spectrum is wide. The bad practices explicitly named include: wrong timing of the information making consultation practically non-existent; using the EWC as "a court of appeal", when representatives of a given country bring to the table questions they cannot solve in their country of origin; disregard of the EWC by managers who treat it as a recreational moment and do not take it seriously; inclusion of company representatives in the place of workers' representatives in certain countries with no unions in the workplace. Most importantly, however, "the most common bad practice in Italian parent companies is to provide the preparatory documentation for plenary meetings at the last minute". In Spain, bad practices are named by only one respondent, and are as follows: lack of financial information, slow in replying to requests for information, pressure put on delegates from some countries (especially from Eastern Europe) who often happen to be elected by the board themselves. In Poland, not all respondents provide examples of bad practices. The five questionnaires where the question is actually answered name such practices as: slow preparation of minutes of the meeting, no translation to official English at the meetings, throwing massive Power Point presentations at delegates, which "steals" time for discussion and questions to board representatives; company representation line-up is not what it should be according to the agreement and no representatives of Central Management at EWC meetings. In Romania, the examples of bad practices recalled by the respondents include: information provided is too general; proposals to eliminate interpretation costs (and translation of materials) as the official language of the group is English; rare cases of consultations.

### 6.8. Cooperation with experts who are not EWC members

In Bulgaria, the experts with whom EWC members collaborate are reportedly those known on a personal level. Most often they are trade union experts. "The issue of confidentiality in such cases does not arise, as experts process the relevant confidential information in the required manner. They themselves do not receive any information directly, but only through the EWC members with whom they cooperate".

In Croatia, the following examples are provided: “At every EWC meeting [trade union federation] has one permanent representative and there is one independent legal expert” and “If it’s necessary, TU representatives as EWC members use trade union legal experts”.

In Italy, as the respondents claim, use of external experts is a common practice: “EWC can use union experts who have unlimited access to information”. There is one more very interesting pattern: “Italian parent companies’ agreements signed by my Federation foresee the role of “Coordinator” who is an expert of the union appointed by the European trade union federation, in agreement with all the national unions that have members in the Company. The Coordinator participates in all the activities of the EWC and carries out the activities in agreement with the Company’s HR.”

In Spain, there is a practice reported that “the EWC may use both union experts (designated by the European union federation) and an external expert […] When it comes to external experts, in some cases the board is reluctant to let them in and tries to circumvent the law”. Members of another EWC admit to using union advisors. If external experts participate they usually have access to “information related to their field of expertise”, and information is released to “everyone at the same time”.

In Poland, some EWCs do not reportedly use expert services. Other admit to do that: “financial experts come from an external company named by the delegates”. In another case EWC cooperates with a firm “which prepares a report based on data from company and those they collect themselves”. A member of yet another EWC says that while “there has been no such situation yet, according to the agreement the EWC may use expertise and appoint an expert”. There is a EWC that collaborated with a union expert only while they were “setting up the structure”. In another EWC, “experts always come from unions, are always present at meetings and have full access to information. It is all determined by the agreement”.

According to the Romanian report, in most cases EWCs confirm using experts, usually coming from union structures (UNI Europa, UNI Global, IndustriALL-Europe are specifically mentioned) but also from external companies (Syndex). Experts are said to enjoy the same access to information as the EWC members, which in some cases means they are not given confidential information.

## Chapter 7. Mechanism of handling information by EWC members – developed on the basis of screening legal environment and practices in the countries covered by the project

### 7.1. What to ask for, how to handle the information: background and practical advice

Research findings show that there is no single definition of confidential information on which members of the EWC could rely. The definition of confidential information applicable to information received by members of EWCs may be specified in the agreement, national law and EU law.

Article 8 of the Directive identifies two types of confidential information:

(a) in paragraph 1: the information provided to the members of the EWC,

(b) in paragraph 2: the information which the central management is not obliged to transmit to the members of the EWC.

The information referred to in point (a) is confidential information provided to EWC members, which, however, on the basis of Article 10(2) of the Directive, cannot be transferred to the national level. Depending on the translation of the directive, this is information 'of confidential nature' (Polish version) or, more frequently, information which has been marked as confidential by central management (e.g. the English version).

As research findings show, there are cases where almost all the information transmitted by the central management to the EWC is marked as confidential. This is an abuse which contradicts the aim of the Directive as it paralyses EWC activities by blocking the flow of information to the national level.

Where the central management marks non-confidential information as confidential, which leads to results contrary to the objective of the directive, this constitutes a breach of the principle of the prohibition of abuse of rights. The principle of the prohibition of abuse of rights arises from CJEU case law, according to which legal entities cannot invoke EU law to abuse their powers (C-251-16 CJEU judgement of 22 November 2017 in the Cussens case). In Case C-212/97 CJEU judgement of 9 March 1999, Centros case, the Court provided guidance to clarify the concept of 'abuse of rights'. Behaviour that goes beyond the objectives to be achieved under EU law and behaviour that has the object or effect of violating the rights of third parties constitute an abuse of rights. In other words, it is an abuse of rights to take advantage of the formal possibilities offered by EU law contrary to its objectives. According to the case law of

the Court of Justice of the European Union, an abuse of rights under EU law is not subject to protection (C-110/99 judgement of 14 December 2000, case Emsland-Starke GmbH vs. Hauptzollamt Hamburg-Jonas). What it means is that EWC members who transmit to the national level any non-confidential information that has been marked as confidential with the intention to prevent it from being transmitted should not be subject to any sanctions on that account.

So how to determine whether a particular item of information which has been provided to EWC members and marked as confidential is indeed confidential? As indicated earlier, although Member States chose not to create a legal definition of confidential information for the purpose of implementation of Directive 2009/38/EC, they used definitions of e.g. business secret, financial market secrecy, and personal data protection to decode the scope of that term. In order to create a mechanism for decoding whether a particular item of information can indeed constitute confidential information, we will use the characteristics of information covered by these definitions and the definition of confidential information contained in Article 7(1) of Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (hereinafter: MAR).

The following types of information do not constitute confidential information within the meaning of the Directive:

- information obtained from a source other than the central management;
- publicly available (published) information, regardless of the source of the publication;
- out-of-date information;
- information about information;
- information with no market value.

How to determine whether a particular item of information is confidential? With regard to information provided by the central management and marked as *confidential*, the questions listed below should be asked to the management, so that the management should justify (demonstrate) that the information marked as *confidential* is indeed confidential.

**Questions:**

1. Does the information have a commercial value because it is covered by secrecy?

If YES, ask a follow-up question: What value?

2. Is the information protected against disclosure in any way (not only against disclosure to EWC members but disclosure in general)? If YES, ask a follow-up question: In what way?
3. Is the information precise?
4. Does the information relate directly to the undertaking (group of undertakings)?
5. Is the information likely to have a significant (not just any, but significant) impact on the price of e.g. the company's shares? If YES, ask a follow-up question: How significant?
6. Does the information relate to an individual, identifiable person?
7. Would a disclosure of the information disrupt the functioning of the undertaking according to objective criteria? If YES, ask a follow-up question: In what way?
8. Would a disclosure of the information be harmful to the company? If YES, ask a follow-up question: In what way?
9. Is the information generally known or readily available (for those who deal with this type of information)?
10. Is the information published on the company's websites or in other available records (this refers to the legal obligation to publish)?

*'**YES**' answers to questions 1 to 8, with convincing answers to the follow-up questions as well as '**NO**' answers to questions 9 to 10 indicate that the information under consideration may be confidential.*

*In addition to Question 10.*

Provisions of both national and EU law impose a number of information obligations on listed companies. These include the requirement to publish certain information, as well as current and periodic reports.

The mandatory information made available by issuing companies on their websites provides investors with a basis for assessing the economic and financial situation of the issuer concerned and its prospects for development. It can also serve as a valuable source of information for EWC members, in addition to the information received from the central management. The information obtained from that source is not confidential within the

meaning of Directive 2009/38/EC.

A notification of a proposed concentration indicates whether a Community-scale undertaking is planned to transform and specifies the extent of such transformation. The concentration may have a national and a Community dimension. The merger control system in the European Union was established by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings and Commission Regulation (EC) No 802/2004. Concentrations with a Community dimension must be notified to the European Commission. Transactions of a lesser scope do not have to be notified to the European Commission. Where the intention to concentrate does not need to be notified to the European Commission, such intention, in principle, must be notified to the Head of the competent national office. This is the application of the "one-stop shop" principle, as laid down in Regulation 139/2004, governing the control of concentrations between undertakings by the European Commission.

The following page contains all the currently open merger cases investigated by the European Commission:

http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_merger_ongoing

Thus, parties seeking data on the ongoing concentration proceedings and on the decisions taken in these cases can therefore monitor them on the websites indicated above. The information contained therein relating to the undertaking concerned will not constitute confidential information within the meaning of Directive 2009/38/EC.

### 7.2. Possible sanctions that EWC members may face for revealing the confidential information to unauthorized persons

Members of the EWC are obliged to respect confidentiality of some of the information obtained from the central management. It includes the prohibition of providing information to unauthorized persons and the unauthorized use of information, e.g. stock market speculation. Recital 36 of the EWC Directive states that administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate to the gravity of the crime, should apply in the event of a breach of the obligations arising from the EWC Directive. The EWC directive does not provide further guidance on sanctions arising from violations of the EWC directive, including revealing the confidential information to unauthorized persons**,** leaving detailed regulation to Member States.

The sanctions to which members of the EWC may be subject to for the transmission of confidential information to unauthorised persons may have different sources. Such sanctions may be prescribed by the provisions of the EWC agreement itself, or by national and European regulations.

There are different definitions of confidential information, so it is not possible to list all sanctions in advance. In national and European law the type of sanction will vary depending on the type of information covered by the sanction, e.g. business secret and banking secret, national security secret etc. The agreements provide for a wide range of sanctions extending from general administrative sanctions to disciplinary sanctions (including removal from the EWC), civil sanctions (the obligation to compensate for the damage or pay a penalty), to criminal sanctions.

E.g. *"Any employee representative or substitute or expert who breaches the obligation of confidentiality set out in …… will* ***at the discretion of Central Management be removed from the EWC*** *and may be the subject of disciplinary and/or legal proceedings."*

At the national level we rely on the responses provided by the NLEs. In Bulgaria, sanctions for disclosure of confidential information are defined by the law, as a disciplinary violation, and in some cases as a criminal offence. It is added that "various financial sanctions (fines, penalties) are listed in the EWC agreement and/or in the internal regulations of the Employer". In Croatia, sanctions are also defined by national legislation. No cases of revealing the confidential information are known to respondents. One agreement reportedly includes a "provision which protects EWC members from discrimination due to their lawful activities, and an EWC member has protection against layoff and other sanctions according to the national legislation and best practice of their countries". In Italy, the possible sanctions are twofold, 1) defined by national law and 2) internal regulations of companies. The sanctions envisaged by law include "dismissal, if confidential information is provided that can damage the value of the shares". Legal sanctions (civil but presumably criminal as well) for insider trading are confirmed as possible by other respondents. Interestingly, no specific sanctions are defined in EWC agreements: "we have not established penalties for the delegates, because we should also have included sanctions for the company if it does not comply with the terms of the agreement". In Spain, sanctions are defined by national law (but in one case the collective agreement is also mentioned). In Poland, in only two cases the respondents make reference to specific clauses in EWC agreements. In the former, there is article in the agreement that envisages the possibility of sanctions in the form of dismissal and/or financial compensation

for damage. In the latter, the agreement cites a specific regulation of a national-level law. In the remaining questionnaires the respondents either point to legislation or claim no such sanctions exist, or admit they do not know. In Romania, respondents either do not have any knowledge of sanctions or point to national legislation as a source. In general, the respondents refer to the law at the national level for sanctions.

### 7.2.1. Employment relations

National labour law or employment contract may foresee the employee's widely understood obligation to care for the good of the workplace. In this case, breaching the obligation of confidentiality is breaching the basic obligation of an employee's duty and may provide a basis for a disciplinary termination of employment.

### 7.2.2. Civil sanctions

Some countries refer to business secrets in their definitions of confidential information. Therefore, the provisions of Directive 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure should be applied when determining what penalties may be imposed.

#### Damages

Violation of business secrets may result in obligation to pay damages. According to article 14 of the abovementioned directive "Member States shall ensure that the competent judicial authorities, upon the request of the injured party, order an infringer who knew or ought to have known that he, she or it was engaging in unlawful acquisition, use or disclosure of a trade secret, to pay the trade secret holder damages appropriate to the actual prejudice suffered as a result of the unlawful acquisition, use or disclosure of the trade secret. Member States may limit the liability for damages of employees towards their employers for the unlawful acquisition, use or disclosure of a trade secret of the employer where they act without intent.

When setting the damages, the competent judicial authorities shall take into account all appropriate factors, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the trade secret holder by the unlawful acquisition, use or disclosure of the trade secret. Alternatively, the competent judicial authorities may, in appropriate cases, set the damages as a lump sum

on the basis of elements such as, at a minimum, the amount of royalties or fees which would have been due had the infringer requested authorisation to use the trade secret in question.

### 7.2.3. Financial market administrative sanctions

At present, the direct source of regulation of the definition of confidential information regarding the financial market and the regime for dealing with it in Member States is Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on fraud on the market (Regulation on market abuse) and repealing Directive 2003/6 / EC of the European Parliament and of the Council and Commission Directives 2003/124 / EC, 2003/125 / EC and 2004/72 / EC, so called: MAR Regulation. The MAR Regulation introduces for the first time a uniform definition of confidential information in all Member States. Article 30 of the MAR Regulation provides that Member States, in accordance with national law, may apply administrative sanctions and other administrative measures through their authorities.

As explained in recital 71, the actual amount of administrative fines imposed in specific cases may reach the maximum level provided for in this Regulation or the higher level provided for under national law for very serious infringements, while fines significantly lower than the maximum level may be applied for less significant breaches or in the event of a settlement.

This Regulation does not limit the possibility for Member States to introduce stricter sanctions or other administrative measures. Article 30 paragraph 2 letter i) in respect of a natural person, maximum administrative pecuniary sanctions of at least:

> (i) for infringements of Articles 14 (insider dealing and of **unlawful disclosure of inside information**) and 15 (market manipulation) , **EUR 5 000 000** or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014;
>
> (ii) for infringements of Articles 16 (Prevention and detection of market abuse) and 17 (Public disclosure of inside information), EUR 1 000 000 or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014; and
>
> (iii) for infringements of Articles 18(Insider lists), 19 (Managers' transactions) and 20 (Investment recommendations and statistics), EUR 500 000 or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014.

According to Article 10, unlawful disclosure of inside information may occur if a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties.

Pursuant to Article 17 central management may provide EWCs with confidential information that has not yet been made public, provided that EWC members are obliged and undertake to maintain confidentiality. Otherwise, under the provision, when this information is provided, a simultaneous obligation arises to disclose such information fully and effectively.

### 7.2.4. Criminal sanctions

Sanctions are regulated in Directive 2014/57 / EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse. The so-called MAD is addressed to EU Member States and requires implementation into their national legal order by July 3, 2016. The directive provides for the obligation to introduce in national law of EU Member States criminal penalties for natural persons and legal provisions for infringements provided for in the MAR Regulation. The directive sets minimum standards/sanctions, and thus individual Member States can, at their own discretion, introduce or maintain stricter criminal provisions on fraud.

"Confidential information" means information within the meaning of Art. 7 item 1-4 of Regulation (EU) No 596/2014 (Article 2 point 2 of the Directive)

In accordance with Article 3 of the Directive, the use of confidential information occurs when a person is in possession of confidential information and uses that information when purchasing or selling, on his own account or for a third party, directly or indirectly, the financial instruments to which that information relates.

This provision applies to all persons who hold confidential information because of:

a) being a member of the administrative, management or supervisory bodies of the issuer or emission allowance market participant;

b) holding shares in the capital of the issuer or emission allowance market participant;

c) having access to information on employment, occupation or duties; or

d) involvement in criminal activities.

This Article shall apply to any person who has obtained inside information in circumstances other than those mentioned in the first subparagraph, where that person knows that the information in question constitutes inside information.

According to Article 4, Paragraph 1 of the Directive, unlawful disclosure of inside information constitutes a criminal offence at least in serious cases and when committed intentionally.

Article 4, Paragraph 2 states that unlawful disclosure of inside information arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties, including where the disclosure qualifies as a market sounding made in compliance with Article 11(1) to (8) of Regulation (EU) No 596/2014.

Offences of insider dealing, recommending or inducing another person to engage in insider dealing and offences market manipulation are punishable by a maximum term of imprisonment of at least four years (Article 7, Paragraph 2).

Offence of unlawful disclosure of inside information is punishable by a maximum term of imprisonment of at least two years (Article 7, Paragraph 3).

These were examples of sanctions. Other sanctions may be regulated in national or EU law.

In view of the doubts regarding the admissibility of the transmission of confidential information to national organisations, appropriate rules could be prescribed in EWC agreements. For example, in practice, certain agreements require a written consent of central management to the transmission of confidential information.

As indicated by both the legal analysis and the survey results, there are different sources of sanctions for EWC members who transmit confidential information to unauthorised persons and they are regulated in acts of different scopes: in EWC agreements themselves, in national law (also by references to national law included in EWC agreements) and in European law. The overlap between several legal systems, including those of a normative and contractual nature, makes it practically impossible for EWC members to easily determine the scope and limits of their responsibility for the transmission of confidential information to unauthorised persons without any further legal expertise. The provisions of Article 10(2) of Directive 2009/38/EC which indicate that unauthorised third parties will also be those referred to in the provision, i.e. representatives of employees of the establishments or undertakings belonging to a Community-scale group of undertakings or employees of those undertakings, should be taken into account here. Thus, unauthorised entities in the case of confidential information will be the entities whose obligation to provide information is imposed by the Directive itself.

This situation is compounded by the uncertainty as to the actual nature of the information marked as confidential by the central management.

When discussing sanctions, the costs of any litigation to be incurred by an EWC member accused of transmitting confidential information to unauthorised persons should be borne in mind. Given the limited financial resources, the procedural situation of a sued or accused EWC member would be dramatically worse than that of a transnational company.

Because of the combination of the identified and abovementioned factors: unclear status of the information received (confidential or non-confidential), potentially severe financial and criminal sanctions, and high attorney fees, EWC members, wishing to avoid the risk, choose not to provide some of the information. Sometimes this also applies to non-confidential information marked as confidential which should, in accordance with the objectives of the Directive, be transferred to the national level. As a result, the flow of information from EWCs to authorised parties is impeded, contrary to the purpose of the Directive.

For these reasons, it is necessary to remove the elements of legal uncertainty which contribute to blocking information at EWC level.

Several scenarios can be used.

1. Replacing the Directive with a regulation governing the establishment of a European Works Councils and the procedure for informing and consulting employees in Community-scale undertakings or Community-scale groups of undertakings. Regulating the matters of establishment and operation of EWCs by means of a regulation should help to reduce the differences in EWCs' operation, currently arising not only from the dissimilar ways of implementing the Directive, but also from the differences in the culture of social dialogue in different countries. Regulating the matters of establishment and operation of EWCs by means of a regulation will help to apply the principle of the right to information as expressed in Article 27 of the Charter of Fundamental Rights of the European Union through strengthening the communication of information by harmonising the rules of operation of the EWC.
2. The proposed legislation would also regulate, in a comprehensive manner, the matter of appropriate sanctions for infringements of the regulation, i.e. the type of sanctions and the maximum penalty, liability or legal consequences.
3. Specifying explicitly, by means of the regulation, the scope of sanctions for the transmission of confidential information to unauthorised persons by an EWC member.

4. Specifying explicitly, by means of the regulation, the sanctions against central management for breaches of the regulation, e.g. lack of information or consultation or communication of information in a manner and with a delay that make it impossible for the EWC to express its opinion before the effects of the decision covered by the information are produced. These sanctions might include exclusion from participation in public procurement or suspension of the merger procedure (ineffectiveness of the submission of a concentration request) until the obligation is fulfilled.
5. While clarifying the sanctions for the transmission of confidential information by an EWC member to unauthorised persons, it is also necessary to provide a precise definition of confidential information. The current legislation (Article 8(1) of the Directive), which equates confidential information with information marked as confidential allows for a situation where non-confidential information is marked confidential by central management. As indicated above, this leads to a number of abusive practices by central management. It may also lead to an absurd situation where sanctions are imposed for the transmission to third parties of non-confidential information which has been identified as confidential by central management.
6. Stipulating, in a regulation, the requirement of precisely specifying in an EWC agreement the issue of sanctions for the transmission of confidential information by EWC members to unauthorised parties, without the possibility of routinely referring to national or EU law in that agreement. The advantage of this solution is that sanctions will be individually tailored the nature of the company and the possible effects that the company may suffer.
7. Stipulating, in a regulation, the requirement of precisely specifying in an EWC agreement the issue of sanctions for breaches of the EWC agreement by central management.

The implementation of these proposals requires the involvement of the European legislator.

Recommendable is also:

1. Gradual introduction of provisions into existing and newly made EWC agreements, to comprehensively settle the matter of sanctions, without reference to national or European legislation, for breaches of the agreements, including for the transmission by EWC members of confidential information to unauthorised persons.

2. Gradual addition of clauses to the agreements that would provide for the establishment of a team or procedure to amicably resolve any interpretation uncertainties, also as to the nature of information marked as confidential, or disputes arising from the application of the agreement. The implementation of this proposal requires the involvement of the social partners, including the support of industry and European partners.
3. Yet the main challenge for both European and national lawmakers seems to be active promotion of dialogue and cooperation between the social partners at European and national levels, so that achieving the objective of the Directive is ensured.

The case of EWC founded on the Polish law suggests that social dialogue culture may matter more than legal regulations themselves. The EWC was originally set up under Swedish law. The high, Scandinavian standards of social dialogue were established in the group, meaning a high culture of cooperation between the social partners and this would be reflected in other countries where the company operated, even though such culture of social dialogue was not popular there. What is important, the high culture of social dialogue has not changed after the transfer of the company's principal place of business to Poland and establishment of the EWC under Polish law. The level of cooperation and communication, and the quality of information communicated is not due to the fact that the currently EWC operates under Polish law, but to the high level of social dialogue in the capital group, as the Polish member of EWC asserted. So the conclusion is as follows: it is not just good law but promoting of social dialogue and cooperation between social partners that are necessary for attaining the objective of the Directive.

### 7.2.5. Use of confidential information

How to handle confidential information? First and foremost, with care. As already mentioned earlier, some countries indicated personal data as confidential information. Therefore guidelines on how to handle confidential information may be provided by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), known as the GDPR. Article 5 of the GDPR, laying down the rules of personal data processing, can be used as a model for drawing up guidelines on how to handle confidential information.

1. Purpose limitation principle – when obtaining confidential information, the question should be asked whether the data received is really necessary and for what purpose, from the point of view of employees' interests.

2. Data minimisation principle – keep only the confidential information that will be useful to achieve a specific purpose. Do not obtain unnecessary confidential information, and if provided together with useful data – delete the unnecessary information. The less confidential information, the less risk of accidental loss and liability.

3. Data protection principle – confidential information should be stored in a manner ensuring its protection against loss or unauthorised access. The storage medium containing confidential information should be protected to an appropriate extent, e.g. by a password or code.

4. Principle of lawfulness – confidential information should be processed in accordance with the law. This principle may have several practical dimensions:

a) Prohibition of transmission of confidential information to unauthorised parties, e.g. third parties, who are not obliged to maintain confidentiality. Where necessary, confidential information may be provided to parties bound by professional secrecy, e.g. a lawyer or a legal advisor.

b) Article 12(2) of the Directive provides that the arrangements for linking information between the European Works Council and national employee representation bodies should be determined by the agreement. Therefore, council members should follow both the provisions of the national law and the EWC agreement when providing information obtained from the central management to the national employees' representatives. The agreement may, e.g., provide for the preparation of minutes of EWC meetings, the content of which, with the exclusion of confidential information, may be communicated by the EWC members to the national level.

c) Where an EWC agreement does not contain provisions governing the arrangements for the links between the information of the European Works Council and national employee representation bodies, and decisions are planned which may lead to significant changes in the organisation of work or in the employment contracts, pursuant to Article 10(2) of the Directive, EWC members may communicate to the national level the information that decisions are planned which may lead to significant changes in the organisation of work or in employment contracts, without providing further details. The

information about information will enable the employees' representatives at national level to request the competent authorities of the undertaking to provide the relevant information.

A practical example showing how confidential data is used:

Article 10(2) of the Directive prohibits EWC members from transmitting confidential information to the national level. Therefore, one of the capital groups adopted the principle according to which negotiations in companies at national level should be conducted in the presence of an EWC member as a union advisor. Having access to information at transnational level, he/she can verify whether the data transmitted by the management of individual companies at national level are true. This way, confidential information can be used at national level without being transmitted to that level.

While concluding that part of the report it should be reiterated that the aim of Directive 2009/38/EC is to support and complement Member States' in the field of information and consultation of employees (Recital 9) insofar as they are affected by the decisions taken by undertakings or groups of undertakings operating in two or more Member States (Recital 10).

The way in which Article 12 of Directive 2009/38/EC is implemented, as indicated in the report, in many cases involves duplication of the provisions of the Directive in national law, without adapting them to national specificities and in particular to the level of social dialogue. As a result, the arrangements for links between the information of the European Works Council and the European employee representation bodies are not always contained in the EWC agreement. Consequently, in many cases this issue is not regulated in the EWC agreement, which places EWC members in a situation of uncertainty as to how and when to communicate information obtained from central management. As mentioned earlier, because of the difficulty in determining whether an item of information marked by central management as confidential is indeed confidential (in the context of the possibilities and practice of abuse of such marking) and the fear of sanctions for breach of regulations in respect of the provision of confidential information, some EWC members refrain from transmitting some of the information to the national level. The practice should not surprise anyone, as it arises from legal uncertainty. However, it leads to results contrary to the objectives of the Directive.

1. We propose amendments to the law to regulate the establishment and operation of EWCs by means of a regulation. As an EU legal act, directly applicable in national

law a regulation will settle important issues in a uniform way, which should significantly reduce the negative effect of minimum harmonisation achieved by means of a directive.

2. The second proposal as regards dealing with information is to stipulate in the regulation that the arrangements for linking information of the European Works Council and national employee representation must constitute a mandatory part of an EWC agreement, in particular, as regards correlating the time limit for central management to communicate information to the EWC and the time limit within which members of the EWC can transmit this information to the national level. Laying down the rules for linking information between EWCs and national employee representation bodies in the regulation should produce a number of positive effects. Reinforcement of the existing but not always applied obligation to establish the rules for linking information transfer between EWCs and national employee representatives in the EWC agreement should also promote the objectives of the Directive by reducing the legal uncertainty in which EWC members operate and, consequently, minimising the risk of failing to provide vital information to employee representatives at national level.

3. The task for employee representatives at European and industry levels is to draft appropriate contractual clauses concerning the rules for linking the transmission of information to the EWC and national employee representative bodies and to provide support to the special negotiation body when negotiating the inclusion of these clauses in the EWC agreements. These clauses should emphasize with particular force the aspect of the appropriate time for the communication of information. For example, if the agreement stipulates that minutes of EWC meetings should be prepared, the content of which, excluding confidential information to be transferred to the national level, the agreement should also include a time limit for drawing up such minutes. Should such a time limit be exceeded without justification, EWC members would not be liable for transmitting the information to national level.

4. It is good practice to make provision in EWC agreements for the establishment of an internal dispute resolution procedure relating to the operation of the EWC. Thus, an additional challenge for industries will be to develop rules for the functioning of a mediation team in each EWC, seeking to resolve, through internal mediation or arbitration, any disputes arising from the interpretation or implementation of the

EWC agreement. Each EWC agreement should contain clauses on the establishment of such a team, whereas the role of the European and industry trade union structures would be to create a formula for the functioning of such teams, taking into account the specific characteristics of the industry and the company concerned. The task of the union structures is thus also to support the special negotiating body to ensure that relevant provisions are laid down in the EWC agreement.

## Chapter 8. Set of priorities on the exchange of financial information

### 8.1. Introduction

Below is a basic list of documents and information regarding the Transnational Company (TNC) or entities that comprise a TNC, which should be reviewed periodically by trade unions operating in them, their counsel and advisors. This is not a definitive (exhaustive) list.

In extraordinary situations, such as restructuring, relocation of the workplace, mergers and acquisitions etc., trade unions should request additional information.

Unless otherwise indicated in the request, documents should be made available in a digital version (excel or pdf files), for the period from [20xx] to [20xx] (or for the last full accounting year) and should include all amendments, supplements and other ancillary documents.

If any of the items requested by trade unions does not exist or is not relevant to the TNC or entities that comprise the TNC, management should inform about it, indicating which information is missing and which information is not applicable to the TNC or entities that comprise the TNC and should explain why it is not applicable.

If there is any change in the circumstances after a response to any of the requests below, the TNC or entities that comprise the TNC should promptly notify trade unions and provide them with any additional documents that may be necessary to understand the TNC's and its entities' current situation.

### 8.2. Basic set of information that should be requested by trade unions operating in a Transnational Company (TNC) or entities that comprise a TNC.

Whenever a company is mentioned, it means the TNC and / or its entities.

1. **Organization and Control:**
   - 1.1. Structure of the legal entities that comprise the TNC (including any helpful diagrams or charts);
   - 1.2. Current by-laws of the TNC or its entities;
   - 1.3. List of the officers and directors of the TNC or its entities and a brief description of their duties;
   - 1.4. List of all jurisdictions in which the TNC is qualified to do business and a list of all other jurisdictions in which the TNC owns or leases real property or maintains an office and a description of the business in each jurisdiction;

1.5. List of all subsidiaries and other entities (including partnerships) in which the TNC has an equity interest – an organizational chart showing ownership of such entities and any agreements relating to the TNC's interest in any such entity.

**2. Legal Information:**

2.1. The Statutes of the TNC or its entities;

2.2. Detailed ownership information and member register;

2.3. Details of any other investment or ownership interest in any other entity held by the Company;

2.4. Detailed information about all litigation, claims, investigations, proceedings, arbitrations, grievances or other legal procedures in the past, present or pending;

**3. Financial Information about the Company or its entities:**

3.1. Reviewed Financial Statement including:

3.1.1. Balance Sheet (or Statement of Financial Position);

3.1.2. Income Statement;

3.1.3. Cash Flow Statement;

3.1.4. Statement of Changes in Owners' Equity or Stockholders' Equity;

3.1.5. Financial Statement Notes;

3.1.6. Description of accounting methods and treatments (accounting policy);

3.1.7. Disclosure of any accounting issues;

3.2. All current budgets and projections including projections for product sales and cost of sales;

3.3. Any auditor’s (internal and external) letters and reports to management for the past [xx] years (and management's responses thereto).

**4. Employees, Benefits and Contracts:**

4.1. Detailed org. chart including information on departures of key employees within the last [xx] years;

4.2. Copies of the Company's employee benefit plans as most recently amended, including all pension, profit sharing, thrift, stock bonus, ESOPs, health and welfare plans (including retiree health), bonus, stock option plans, direct or deferred compensation plans and severance plans;

4.3. Copies of any collective bargaining agreements and related plans and trusts relating to the Company (if any);

4.4. Description of labour disputes relating to the Company within the last [xx] years;

4.5. List of current organizational efforts and a projected schedule of future collective bargaining negotiations (if any);

4.6. Copies of all employee handbooks and policy manuals (including affirmative action plans);

4.7. Copies of all Occupational Health and Safety reports or complaints;

4.8. The results of any formal employee surveys;

**5. Taxes:**

5.1. List of all local and foreign jurisdictions in which the Company pays taxes or collects sales taxes from its retail customers (specifying which taxes are paid or collected in each jurisdiction);

**6. Miscellaneous:**

6.1. Copies of any studies, appraisals, reports, analyses or memoranda within the last [xx] years relating to the Company (i.e., competition, products, pricing, technological developments, software developments, etc.);

6.2. Copies of any analyst or other market reports concerning the Company known to have been issued within the last [xx] years;

## Chapter 9. Discussion and conclusions

The empirical results provided by the project partners and analysed in this report clearly suggest that there are still different worlds of industrial relations across Europe. In our sample not all systems of industrial relations are included, we are missing for instance liberal Anglo-Saxon, continental corporatist or Nordic clusters. However, there are countries representing the 'old' and the 'new' EU, the East and the West with all their historic and institutional legacies. This provides a useful platform for analysis.

While this is not a ground-breaking observation, it still should be considered important, because it is made on a relatively poorly explored field of analysis that is constituted by European Works Councils. In our case it is manifested by the simple fact that in both Western countries there are EWCs operating in corporations domiciled there and founded on Italian and Spanish law respectively (whereas they are absent from the New Member States, the sole Polish exception, with its complicated background, does not make any difference). And this is evident that in both countries EWCs are embedded far deeper in institutional and cultural terms. Notwithstanding, regardless of their origins and composition in terms of the countries represented, EWCs face common problems, which arguably are rooted in the legal environment, first and foremost the Directive. EWCs are not furnished with powerful prerogatives, neither are they established everywhere they should be. In a way the old accusation of Streeck ("neither European, nor works councils"), despite being controversial, remains an important frame of reference in discussions on the present and future of that supra-national institution of worker representation. And this is reinforced by our research findings. Facing the question, whether according to their own experiences, EWCs have ever made an impact on the boards' decision, the respondents were hesitant. In CEE countries a pessimistic assessment is seemingly prevailing.

In Bulgaria, for instance, such decisions are mostly related to updating Corporate Social Responsibility policies in line with the parent company in Western Europe. In Croatia, no such case ever has occurred. In Poland, there is little impact of EWCs reported. It is said that while information exchange occurs, there is hardly any consultation. It is also stressed that issues present in one country would not be put on an EWC's agenda. However, one case was reported where a sale of one of the subsidiaries (production sites) was considered. The subsidiary was eventually sold because the site was generating substantial losses. In the meantime, for four years, restructuring activities were also carried out in consultation with the EWC. In Romania, no substantial impact has been recorded. Interactions are "purely

informative – actually there are no consultations". In the Western countries the picture painted by EWC members is bleak as well. In Italy, "this is hardly the case". On the one hand, information is often provided late, which does not allow for effective consultation. On the other, the information provided is quite general in content. So EWCs have more of a 'passive' or 'reactive' role, rather than an anticipatory one. In Spain, only in two out of seven EWC cases, it is reported that EWCs have had occasionally some impact on the board's decisions. In particular, the situations concern outsourcing, insourcing of some production activities or closure of a production site. However, no strategic decisions (such as on mergers or acquisitions) have been influenced by EWCs. In the remaining cases, EWC members inquired maintained they had no say in any decision.

The voluntary nature of establishing EWCs has an impact on the content of agreements, also by making issues like passing the information more difficult. In Bulgaria, even in enterprises where social dialogue is good, EWCs are rarely used. In Italy, it is admitted that "the voluntary nature of EWCs and the need to find an agreement on the provisions which regulate the disclosure of information and the functioning of the EWC can make the framework less stringent and open to interpretation as regards the company duty to provide relevant and timely information". There is a structural asymmetry between company management and workers' representatives, who must rely on the former for obtaining information, especially confidential data. It is questionable to claim that stricter rules and mandatory procedures may be more effective than negotiations and joint agreements in making relevant information available to workers. For that reason, the most relevant step seems to be reinforcing the EWC's role in the procedures which follow the announcement of relevant information, either to the EWC or to the public, in order to make the right to consultation more effective. This could be achieved for example by naming specific issues, such as reorganisation and restructuring, but also company policies in the fields of training and conciliation, and establish that they must be discussed within the EWC before implementation at the national level, or by granting a coordination role to the EWC. However, since many initiatives, such as reorganisations, take place within a regulatory framework established at the national level, such a development would require a significant revision of the overall approach, both in terms of legislation and policies and of company practices. If the latter is to happen, probably the negotiation and agreement perspective can be more promising than the strictly statutory path. In Spain, no straightforward answer is possible. On the one hand such possibility is not overruled but because there is no frame of reference or data for making comparisons, no clear

explanation could be provided. In Poland, the impact of the voluntary nature of establishing EWCs is acknowledged as a major force shaping the content of agreements. However, the assessment of that is multifaceted. On the one hand, there are opinions that the voluntary nature is a factor stimulating the employee representation's commitment to the body and processes of social dialogue it carries (it helps avoid "taken for granted" attitudes). On the other hand, there are more (presumably) realistic voices pointing to the fact that multinational corporations' voluntarism in an environment of weak institutions in the countries of Central and Eastern Europe should meet resistance from a rigid regulatory framework. With no legal requirements explicitly binding on the enterprises, they would likely escape any self-imposed obligations in the field of labour relations. This is illustrated by first-hand examples: "if there were no legal obligations, there would be no EWCs. There are many sites all around Europe but only those from the EU countries are represented in the EWC. For instance, Russian sites have no representative because the Directive does not require it". In Romania, it is also admitted that the "voluntary nature of EWCs has an impact on the agreements which are underlining the informative nature of the EWC" and, even when "EWC members are consulted and oppose some measures which are to be taken – it does not mean much because the management takes the voice of workers into consideration very seldom".

EWCs are subject to voluntaristic policies of employers, with the employee side being rather reactive. There are some worrisome signals coming from our project partners (e.g. from Spain and Croatia) suggesting that employers tend to weaken and disempower EWCs, despite their already limited agency. This goes hand in hand with the well-known growing trend in the number of EWCs that are non-unionised. EWCs remain a platform for information exchange, while consultations rarely take place.

Confidentiality (and related notions such as business secrets) seems to be used as a convenient excuse for blocking and limiting the flow of information. According to the survey made with Questionnaire 2b, almost every piece of information can be classified as confidential, and in many instances – as our data shows – this is what is actually happening. As a result, the flow of information can be obstructed, and trade unions and employees in general may be deprived of knowledge in a critical way. Bad practices highlighted in the report show that it is not just a matter of speculation, it is in fact the reality. Such attitudes of employers – which translate into strategies – are reinforced by the current tendencies in regulation (which in turn have been triggered and sustained for decades by resilient political influences of neo-liberalism): a growing role of commercial (corporate) law at the expense of labour law. In our case, this is

manifested by a reportedly wide usage of stock market regulations to stop information-sharing with institutions of workers' representation. Another allegedly effective technique (in the light of our data) to avoid the release of information to EWCs is claiming that the issue about which the inquiry is made is irrelevant to the entire corporation (group) and as such should be confined to the national level and any communication can take place between a subsidiary and national-level social partners only.

Confidentiality *per se* may be and, as our data shows, has been put into use as a means of obstructing and ritualizing social dialogue but it is not the only device. Employers reportedly delay transmission of information (even if it is not deemed confidential) and structure its content so it is vague and general (constant complaint made by the respondents) and use their dominant position with regard to power resources such as language barriers – although it appears to be a lesser problem from the perspective of delegates than is usually said and written – or lack of expertise of delegates themselves (formal aspects of communication: user-unfriendly forms, saturation of materials passed to EWC members with unintelligible data, especially of financial nature). Use of experts is reported but their room to manoeuvre is often said to be limited (they can also be denied information or be forced not to share it due to confidentiality, just like the delegates).

Despite the recognised weaknesses, EWCs are an institution that is very much needed. Nation-states and traditional institutional actors tied to them, such as trade unions and non-union bodies at the local level (works councils) cannot match transnational corporations. "Chasing" global enterprises (with a view of establishing a fairly effective transnational regulatory regime) requires the presence of global actors. Currently, in the area of industrial (or work and employment) relations there is no viable alternative to EWCs. Therefore, the institution must be protected and possibly enhanced. On the other hand, trade unions – including European federations – should be very cautious about the process of EWC evolution and strive not to lose grip on the institution as a result of their 'deunionisation'. Pushing unions out of EWCs and replacing them with management nominees may in the long-run lead to EWCs being transformed into employer-controlled entities, yet another tool of corporate Human Resources policies, and even – if the bleakest scenario materialises – into a union-busting device.

Whether the Directive is revised again is debatable (despite some signs of political will to go ahead with this at the EU-level), but this should be highly recommended. If it ever happens, confidentiality clauses should updated. Otherwise, the diagnosis formulated by Meylemans

and De Spiegelaere (2019), “what is said in European Works Councils, stays there” is likely to remain valid.

Meanwhile, union-based delegates should continue to make an effective use of the opportunities offered by EWCs, despite their limitations. EWCs have proved to be a great forum for networking, exchanging knowledge, experiences and informal communication which on countless occasions bring benefits to unions and workers (e.g. in the context of relocations or new HR practices tested in semi-peripheral countries). In the light of the data those opportunities have not been fully utilised. Furthermore, communication among EWCs seems to be an objective worthwhile of pursuit, as the delegates inquired often complain that they are isolated from other EWCs (even those where their fellow union members are present) and unaware of their operations.

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The list of EWCs covered (identified by the parent company name)[3]

- A1 Group
- Accor
- Airbus

[3] The Italian case is different from the others in that the respondents do not represent EWCs (union organisations) directly but the federations associated with the CISL confederation. If we count the Italian responses in, the material gathered using Questionnaire 2b reflects the situation in 109 EWCs (29, if we consider only the first-hand opinions of EWC members from the remaining countries in the sample).

- ArcelorMittal
- Arctic Paper
- Atos
- Bridgestone
- Coca Cola Company
- CRH Liberty House
- Danone
- Deutsche Telekom
- DXC
- Electrolux
- FEMCA-CISL (energy, fashion, chemistry and related sectors)
- FIRST-CISL (banking and insurance)
- FISTEL-CISL (telecom, graphics, publishing)
- FLAEI-CISL (energy sector)
- Henkel AG & Company
- Honeywell
- Leonardo
- Mars
- MOL
- Nestlé S.A.
- Nokia
- OMV
- Prosegur
- Raiffeisen Bank International AG
- Roca Sanitario
- Schneider Electric
- Tenaris
- Yazaki Corporation