'EWC Recast Directive:
Its impact, problems and outlooks'
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Too little, too late?
Changes to the EWC Recast Directive:
passing evidence
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Current situation

‘EWC Recast Directive: its impact, problems and outlooks’

Plenary Session 2: European Works Council

XII European Regional Congress

International Society for Labour and Social Security Law
Czech Society for Labour Law and Social Security Law

20-22 September 2017

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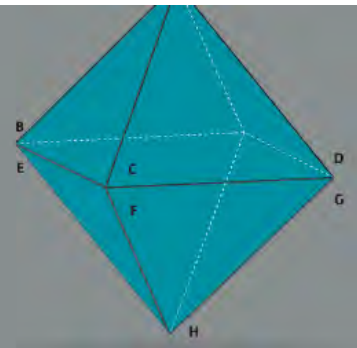
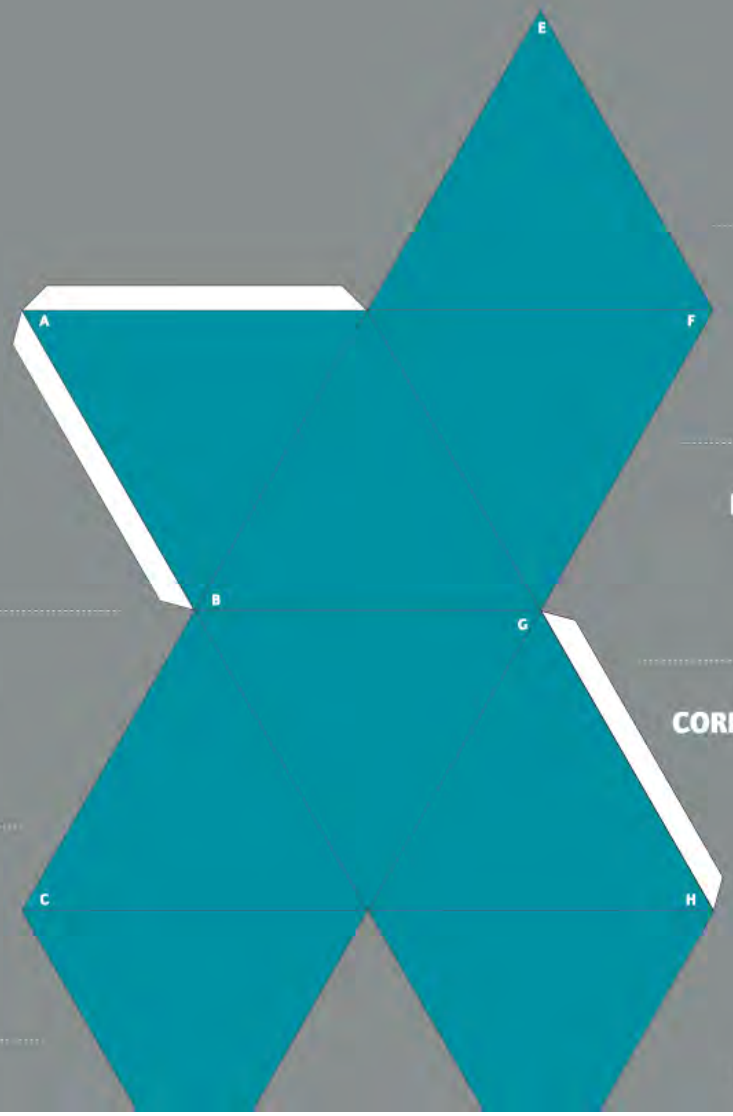


Workers' participation

Information, consultation, board-level employee representation



A
LINKING TOGETHER PROCESSES, STRATEGY & ACTION ACROSS LEVELS AND COUNTRIES

B
EMPLOYEE REPRESENTATION AT COMPANY LEVEL

C
TRADE UNIONS AND THEIR MEMBERSHIP; WORKERS' MOBILISATION

D
COLLECTIVE BARGAINING

E
INDIVIDUAL AND COLLECTIVE EMPLOYMENT LAW

F
POLICY-MAKING, REGULATION: ACTORS, PROCESSES AND INSTITUTIONS

G
COMPANY LAW AND CORPORATE GOVERNANCE

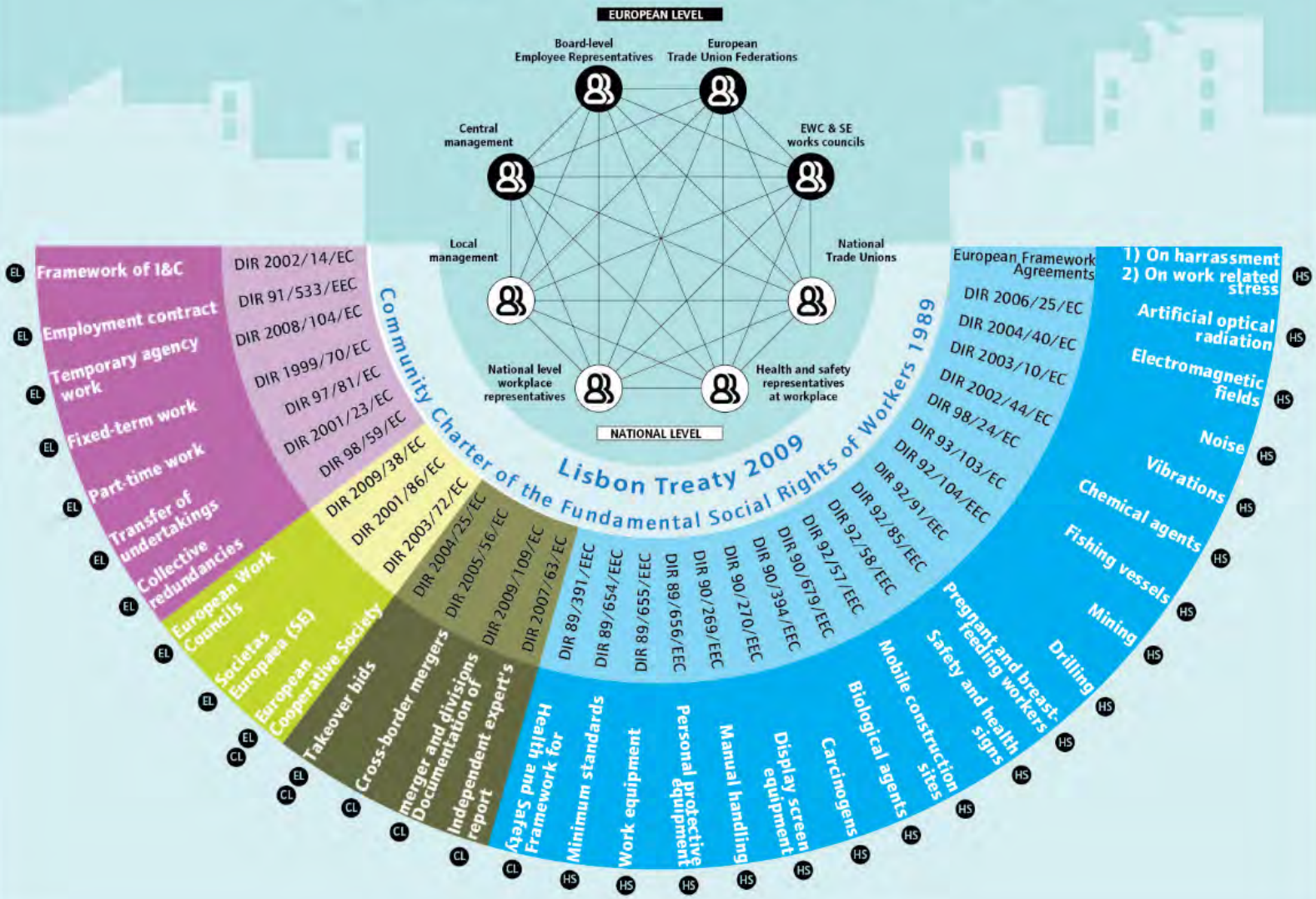
H
MULTINATIONALS' STRATEGY

I
EU SOCIAL DIALOGUE DATABASE

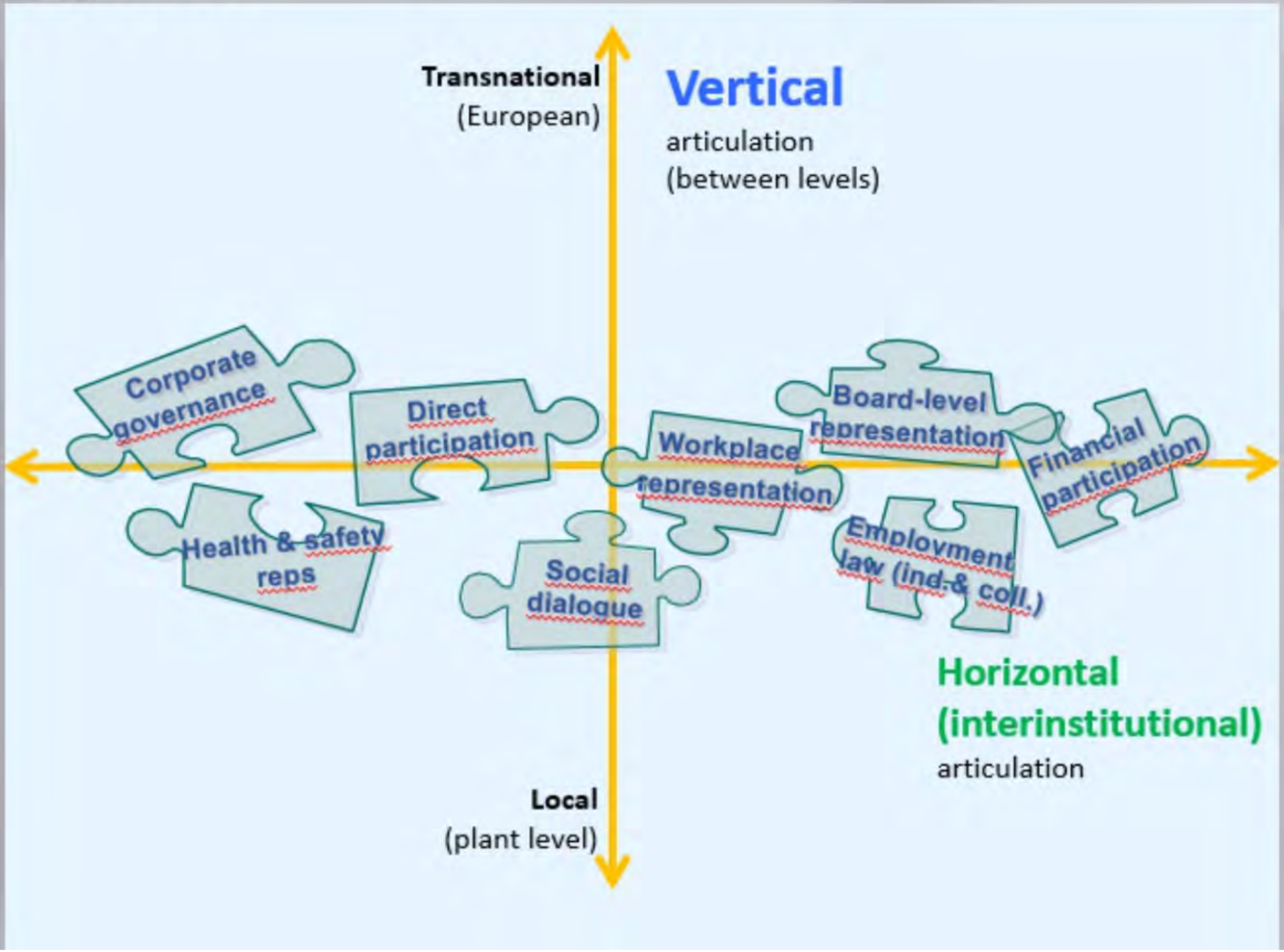
The palette of workers' participation rights

there are 35 pieces

of EU legislation guaranteeing employees`rights to information and consultation at company level.

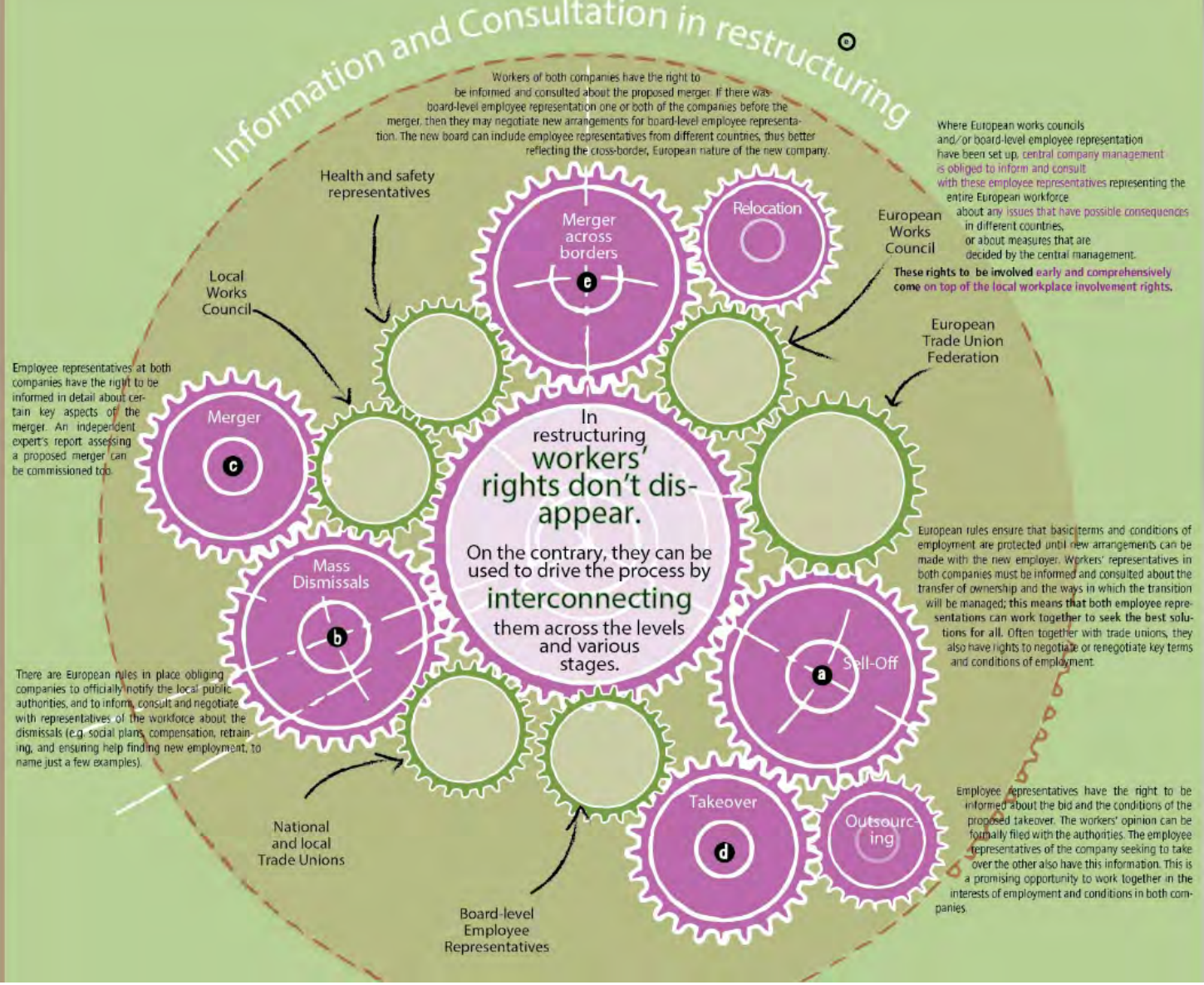


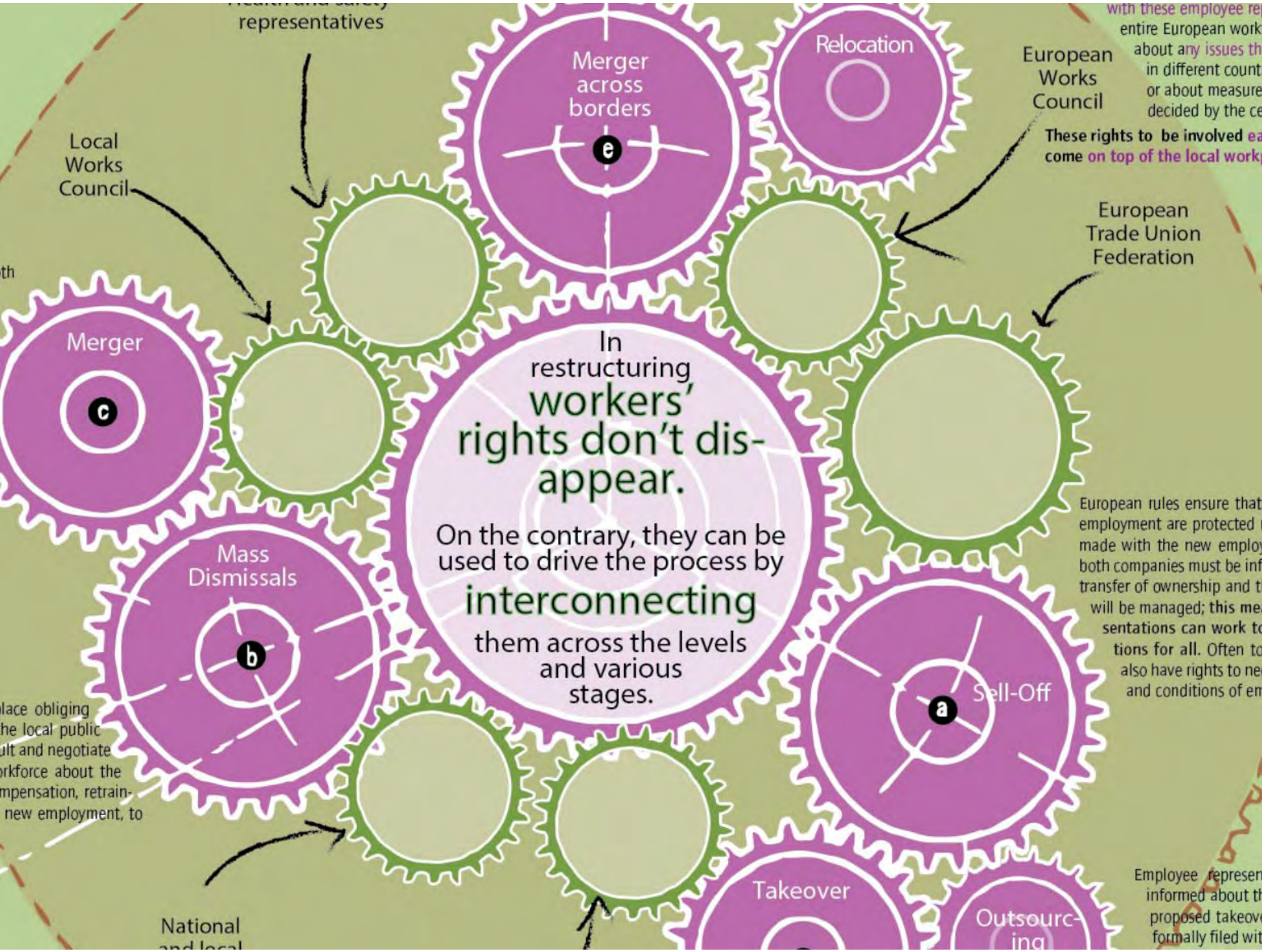
Articulation - how do we make the pieces work together?



Finetuning workers' rights in restructuring

Company restructuring opens up whole range of different mechanisms for workers' representatives to get involved –at the local level and at the European level of the company. And this applies across Europe. If all workers' representatives in the company use their rights, then they can avert being played off against one off against one another. And what's more: if they combine those rights effectively across borders, then they can achieve a better outcome for the whole European workforce. In cases of restructuring, employee representatives have the right to know all about the restructuring plans, the steps, and their potential consequences.




In restructuring workers' rights don't dis-appear.
On the contrary, they can be used to drive the process by interconnecting them across the levels and various stages.
Merger across borders
e
Relocation
Merger
c
Mass Dismissals
b
Sell-Off
a
Takeover
Outsourc-ing
Local Works Council
European Works Council
European Trade Union Federation
National and local
with these employee re
entire European work
about any issues th
in different count
or about measure
decided by the ce
These rights to be involved ea
come on top of the local work
European rules ensure that
employment are protected
made with the new emplo
both companies must be inf
transfer of ownership and t
will be managed; this me
sentations can work to
tions for all. Often to
also have rights to ne
and conditions of em
lace obliging
he local public
ult and negotiate
orkforce about the
mpensation, retrain-
new employment, to
Employee represen
informed about th
proposed takeov
formally filed wit

Directive's 2009/38/EC modifications

	Issue	Article	Recital
1	Transnational character of information & consultation / competence of EWC	1.2 10.1	12, 16
2	Minimum burden on companies	2.1 g	9
3	Minimum limitation of decision making power of management	1.2	14
4	Information and consultation – definitions	1.2; 1.3; 2.1 f and g	14, 15, 21, 22, 23, 36, 37, 43
5	Relationship EWC – national bodies of information & consultation	12	21, 29
6	Information to commence negotiations for an EWC	4.4; 5.2 b and c)	25
7	Role of trade unions	2.2 c); 5.4	27
8	Termination & renegotiation clauses in agreements	6.2 g)	28
9	Select Committee	6.2 e)	30
10	Agreements in force and adaptation clause	6.2 g); 13; 14	39, 40
12	Content of agreements	6.2 b), c), e) and g)	
13	Informing back employees	10.2; 12.2	33
14	Entitlement to training	12.4	
15	Sanctions		36
16	Means for EWCs	10.1	
17	Notification about the launch of negotiations	5.2 c)	

Loopholes and lacunas of the recast directive 2009/38/EC

- Loopholes / shortcomings
  - Right to training (art. 10.4) 'in so far as this is necessary for the exercise of their representative duties in an international environment…'
    - *Who defines what is necessary? What in case of dispute?*
    - *Who pays for the training?*
  - Transnational competence
    - definition in the body not changed
    - Missing explicit link to Art. 10.1
    - Key terms in the recitals rather than in the body
  - Adaptation clause
    - Vague term 'significant structural changes'
- Lacunas
  - Sanctions: Recital 36
  - Procedures for establishment of EWC after 3 years of fruitless negotiations + 6 months after application
  - Articulation between the levels (despite art. 12.1)

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Too little, too late?

Evaluating the European Works Councils Recast Directive

Stan De Spiegelaere - ETUI

The objectives of the Recast

More EWCs

Better EWCs

EWC Recast

Definitions

Rights & obligations

Adaptation clause

Trade union role

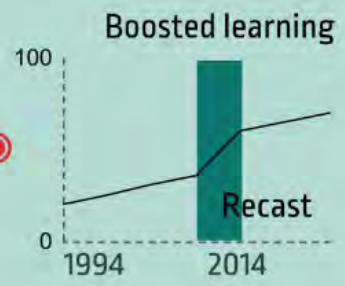
The results

More EWCs ?

31 EWCs can be considered as Art 14.1b EWCs.

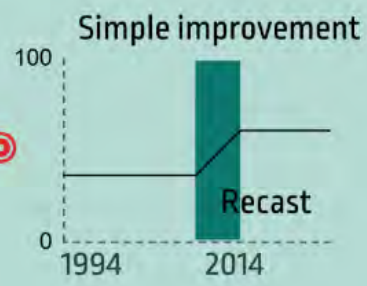
Better EWCs ?

Recast effect
Yes



Information and consultation definitions

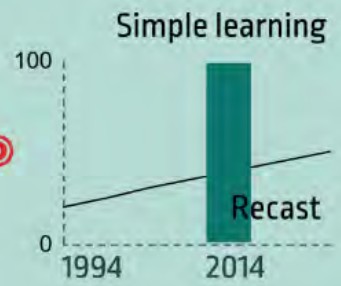
Recast effect
Yes



Definition of transnational competences

Clause on reporting back

Recast effect
No



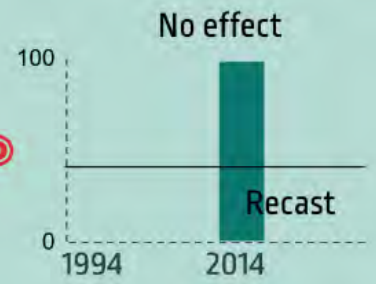
Training

Trade Union rep.

Pre- & debriefing meeting

Access to premises

Recast effect
No



Select committee

Termination & renegotiation clause

Conclusion

Too little & too late

- Slowing growth rate
  - ↳ Lack of incentives

- Ineffective adaptation clause
  - ↳ Lack of instruments to overcome obstacles

- Confirming, not forming reality

- No incentives for real innovation

Future

More & better

Policy which drives innovation

Rights and the levers to use the rigths

Capacity building

Knowledge dissemination

Monitoring

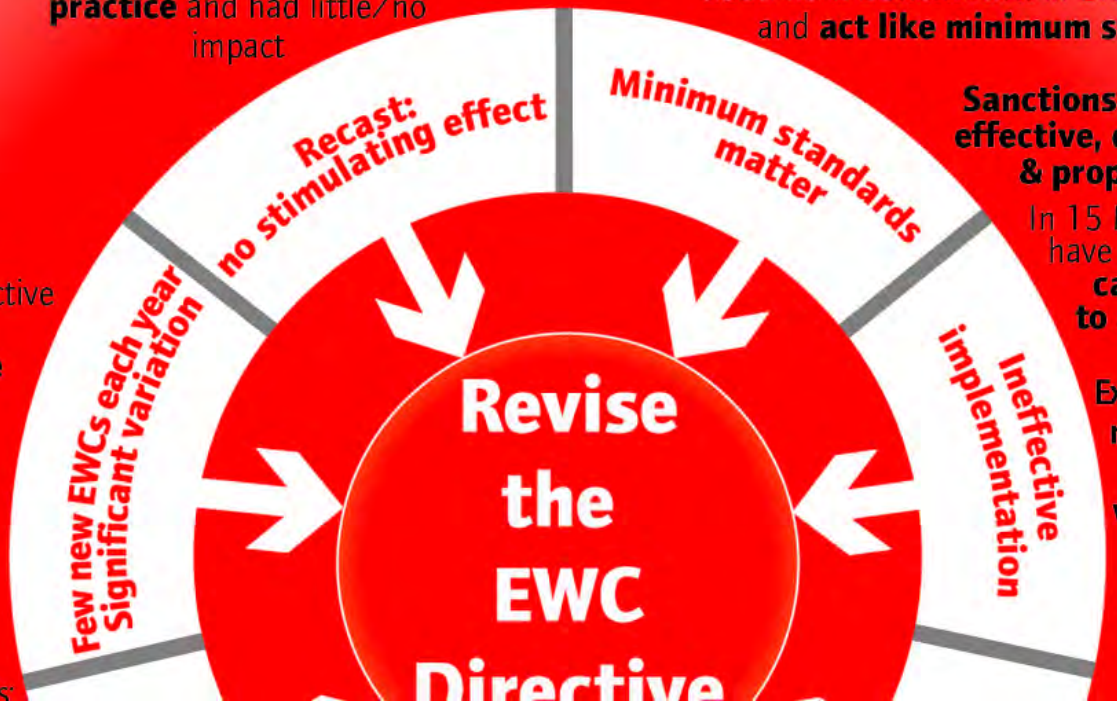
Clarity on objectives

Changes to the EWC Recast Directive: pressing evidence

EWC Recast Directive **only confirmed existing practice** and had little/no impact

Subsidiary requirements **used as a benchmark** in EWC negotiations and **act like minimum standards.**

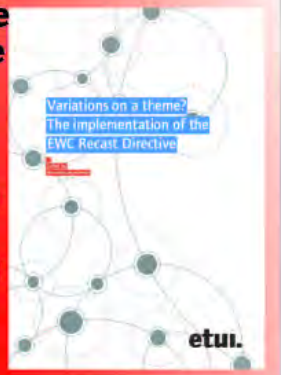
In 2016:
42% of EWCs active still **exempted from EWC Directive**
=
No level-playing field for all EWCs & workers excluded



Sanctions not **effective, dissuasive & proportionate**

In 15 MS EWCs have **no legal capacity to approach courts**

Expiry of SNB negotiation term - what after?



Problems with definitions: transnationality & confidentiali-

EWCs:

Plenary meetings

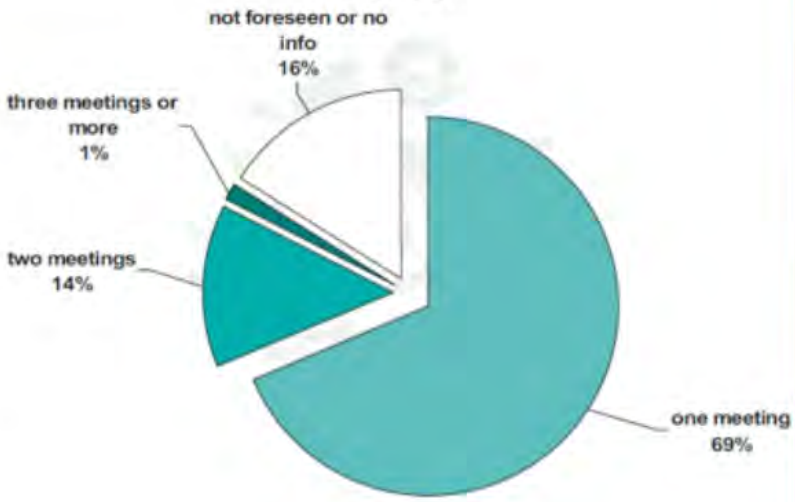
EWC Survey 2015: Improvements and positive impacts

*"**resources** for plenary meetings (...) often mentioned as an area of improvement"*

Figure 21 **Plenary meetings**

2015

2006



1/4 of EWCs meet more than **once a year** in a plenary meeting

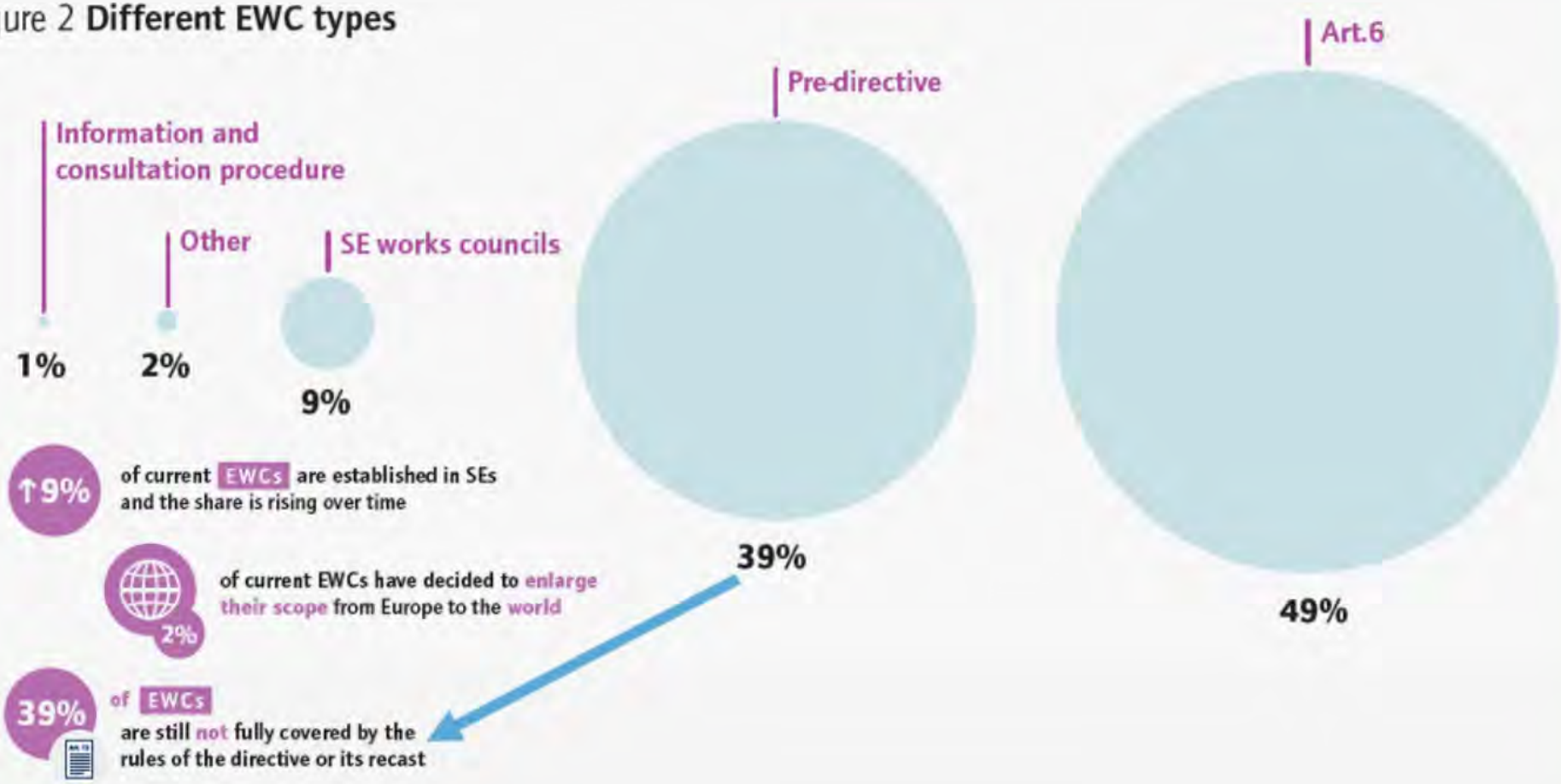
In 50% of the EWCs the plenary meetings are spread **over more than one day**

Figure 22 **Preparatory & debriefing meetings**

44% of EWCs foresee an **employee-only** preparatory and debriefing **meeting**

types of EWCs

Figure 2 **Different EWC types**



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EWC Directive

Few ne
Signi

ion

very few EWCs involved in strategic decision-making

EWCs unable to influence decision-making

disregard for the role of trade unions

&

EWCs: **very limited impact on restructuring**

Recast Directive had **limited impact on agreements & practice**

Problems with **confidentiality**

EWCs largely **unable to play their role** (timing, meaningless, restructuring)

Better **coordination** between local, national and European levels **essential; insufficient resources**

Problems with definitions: transnationality & confidentiali-

EWCs with trade union support more efficient.

Sources:
1) ETUC (2016) 'European Works Councils. Assessment and Requirements. Report to the ETUC.
2) De Spiegelaere S. & Jagodzinski R. (2015) 'European Works Councils and SE works Councils in 2015. Facts and Figures, ETUI, Brussels.
3) Jagodzinski R. (ed.) (2015) 'Variations on a theme? Implementation of the EWC Recast Directive. ETUI, Brussels.
4) De Spiegelaere (2016) 'Too little, too late?', ETUI Report 138.
5) Waddington et al. (2016) 'Managers, BusinessEurope and the development of European Works Councils', ETUI Working Paper 2016.06
6) Pulignano V. and Turk J. (2016) 'European Works Councils on the move: management perspectives on a development of a transnational institution for social dialogue'. KU Leuven / CeSO
7) European Commission (2015) 'Study to evaluate the effectiveness of the European Works Councils in the transport sector', a study by ICF

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Changes to the EWC Recast Directive: trade unions' demands

EVIDENCE

Subsidiary requirements are **used as a benchmark** in EWC negotiations and a**ct like minimum standards.**

PROBLEMS

Vague rules on **confidentiality too often used to abuse, block information flow**, withhold information & limited rights to **appeal to court**

Sanctions for violations of EWC law not up to the standard of **effective, dissuasive & proportionate** (as low as 4 Euro)

Vague definition in the body of the EWC Directive; Clear definition only in the Preamble

In 15 out of 28 MS EWCs have **no legal capacity to approach courts**

No national rules

Subsidiary Requirements

Confidentiality rules

Enforcement

Definition of 'Transnational character of a matter'

Access to Justice

Improved

Role of

Revise the EWC Directive

Revise the EWC Directive

character of a matter'

to Justice

Improved & clarified SNB negotiation rules

Role of European Trade Union Federations

Article 13 agreements

Definition of 'controlling undertaking'

Articulation between levels

o national rules hen negoti-ations for an EWC fail or exceed 3 years and/or when no reply to request for an SNB within 6 months

approach courts

EWCs wit trade unio support mo efficient: Right for trade union representatives to participate in all EWC and Select Committee meetings & access

In 2016: **42% of EWCs** active still **exempted from EWC Directive = No level-playing field** for all EWCs & workers excluded

Currently **contract management, franchise systems and joint ventures excluded. Objective criteria** to determine location of 'representative agent' & 'central management' **lacking**

Better **coordination between local, national and European levels essential. Resources and rights** must be guaranteed

urces:
ETUC position paper - For a modern European Works Council (EWC) Directive in the Digital Era
dopted at the ETUC Executive Committee on 15-16 March 2017 in Malta

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Problems: some facts and figures

- EWCs: **coverage rate & slow creation rate**
  (De Spiegelaere 2016, De Spiegelaere & Jagodzinski, 2015)
  - **ineffective legal procedures** (Jagodzinski 2015)
  - SEs: **circumvention at registration** (ETUI 2017: 2979 SEs, aprox. 130 with workers' reps)
  - **lacking registry** / knowledge gaps

- recognition of unions and **trade union rights &** unionisation / organisation challenges
- **union resources shortages**... (transnational) --> transnational WP not a priority
- **quality** of information and consultation & timing (Waddington 2010, 2nd edition 2017-19)

- lacking framework & prospects for EWC role in **TCB**
- **Brexit**
- **Articulation:** limited & still **falling presence of works councils** (2002/14/EC; 2015 EWCS by Eurofound), especially in CEEC, EL, PT, Baltics

Advantages of workers' participation & ESM - research evidence

strengthen workplace democracy

- **democractic legitimacy** for corporate decision-making (Bruun 2010)
- workers' rights recognised as **fundamental rights** (2010 Lisbon Treaty)
- **collective voice**
- control & self determination of workplace as **means against alienation** and **higher motivation**

50% of workers without representation

ALARMING

(EWCS 2015, Eurofound)

support companies, EU + MS in combining economic competitiveness with social progress

- 'ESD could constitute ***a tool for the modernisation*** (...) for ***all key issues*** on the EU agenda' (EC 2002)
- ESD should be considered ***'a force for innovation and change'*** (EC 2002) in the guise of partnership for change in an enlarged Europe (EC 2004)
- **benefits for companies:**
  - **3 channels** (Wigboldus et al. 2014):
    innovative: identify problems + solutions
    social: communication + involvement --> better mgtm plans & higher acceptance & smoother implementation
    political: reduce opportunistic mgtm behaviour & checks on damage to company
  - performance of listed companies (Vitols 2010)
  - improved performance when mgtm indifferent (Vitols & De Spiegelaere 2017)

Do we need a NEW all-encompassing framework on information, consultation and board level representation rights?

SYNDICAT EUROPEAEN TRADE UNION CONFEDERATION proposal for **a new EU framework for ICP (2016)**

- an **integrated architecture** (single reference) for workers' involvement in European company forms
    - ICP, BLER, company law, CBM, CB divisions, CB transfer of seat
- pledge for common level-playing field for BLER
- **sustainable vision of EU company law**: common, coherent standards across EU
- **non-regression clause**
- **stronger I&C rights** (extend to subcontracting, temp work, data protection, environmental, etc.)
- **confidentiality**
- BLER in all companies above 50 employees

- is this **enough**... & **feasible in the current circumstances**?

- **What level** should the solutions (policy intervention) be applied at?
    - Revision vs. stricter implementation review
    - Coherence of definitions / key rights vs. national diversity?

7. Quality of I&C and the consultation competence of EWC

Both managers and EWCs report:

- EWCs are for information, consultation
- EWCs are for implementation of decisions, not for decision-making
- EWCs don't influence the content of decisions
- BUT, concern: they may slow down decision-making

- Managers say:
  - *'EWCs are primarily for implementation of corporate decisions, rather than for participation in corporate decision-making'*

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The position of BUSINESSEUROPE on EWCs:

(09/02/2017)

- recognises that EWCs ***'can improve information flows*** *in a company,* ***support employee engagement*** *and facilitate introduction of* ***cross-border initiatives'***

- limited experience of practical operation of the Recast Directive = **more time needed to assess the full impact** on EWCs

- the **current framework is 'fit for purpose'** = no need for a revision (uncertainty for companies and pressure on well functioning EWCs to renegotiate)

BusinessEurope ***'opposed to a revision of the Recast Directive'***

What elements are still missing from the puzzle?

- **Transnational Collective Bargaining**: legal framework
- **EU collective action** (strike) (but it's about union power...)
- EU level **ADR**
- coherent framework for ICP rights & recognition of **trade union rights**
- **articulation**: practice or legal framework(?)
- more **definitions**, stricter definitions (e.g. confidentiality, controlling undertaking, etc.)?
- upgraded **enforcement**
- **EU registry** of companies + corporate reporting
- lower **thresholds**?
- **EU Labour Authority** (Juncker's State of the Union speech 13/09/2017) ???

Current situation

- political climate: the 1990s social climate and Lisbon Strategy times are gone...

- complete exclusion of workers' participation from the Europe 2020 strategy (underappreciated & underplayed)

- despite references to **'promoting quality in industrial relations'**

- complete **lack of workers' participation** in
  - **the EU Social Pillar (2017)**
  - **'A renewed Industrial Policy strategy'** (Juncker's State of the Union speech, 13/09/2017)

- **deregulatory approach** towards ESD
  - in EC's CSR and memorandums of understanding
  - hostility of some MS governments towards CB and ESD (ETUI and ETUC 2016)
- stagnation / phasing out of **European Social Dialgoue** (growing reluctance of employers)

- is this **enough**... & **feasible in the current circumstances**?

- **What level** should the solutions (policy intervention) be applied at?
    - Revision vs. stricter implementation review
    - Coherence of definitions / key rights vs. national diversity?

Thank you for attention

Questions & comments welcome

Contact: rjagodzinski@etui.org

Further resources:

www.ewcdb.eu

www.worker-participation.eu

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