

European Works Councils and Confidentiality Rules

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Presentation round

- Where are you from (country, which EWC, EWC function, how long in EWC, trade union)?



Legal framework recap - European Works Councils (EWCs) and confidentiality



EWC Recast Directive 2009/38/EC

- 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.
- same applies to employees' representatives in the framework of an information and consultation procedure

EWC Recast Directive – response to first stage consultation

European
Commission
Staff Working
Document 26
July 2023

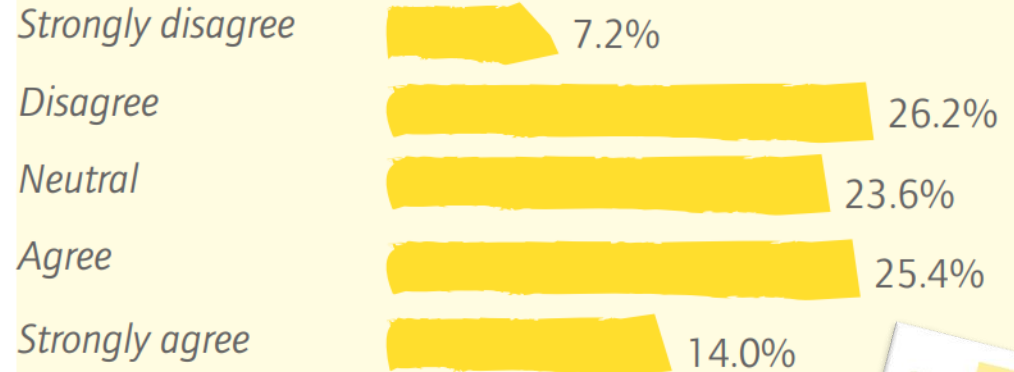
Second stage
consultation
closed 4 October
2023

- preventing abuse of confidentiality **rightly identified** by Commission as major issue – confidentiality often misused for objectively non-confidential matters, hindering EWC work
- exploring need to specify **further conditions** under which management can impose confidentiality of information shared with EWCs or withhold it from EWCs
- clarify with objective criteria on **what grounds**, under **what circumstances** and **how long** a company may withhold information, and on what grounds EWC members' right to share information with stakeholders can be restricted
- **judicial procedures to challenge management** (Article 11(3)) not fit-for-purpose – policy options to enable effective access to court, remedies and sanctions
- **facilitating sharing of information** from management by EWCs to national and local works councils and national or local union representative
- legislative proposal – by January 2024

Problems with confidentiality

- evidence from the ETUI's 2018 EWC survey
 - managers often refuse to give information on grounds of confidentiality

Management often refuses to give information on the grounds of confidentiality



... with serious consequences

EWC effective at influencing decisions

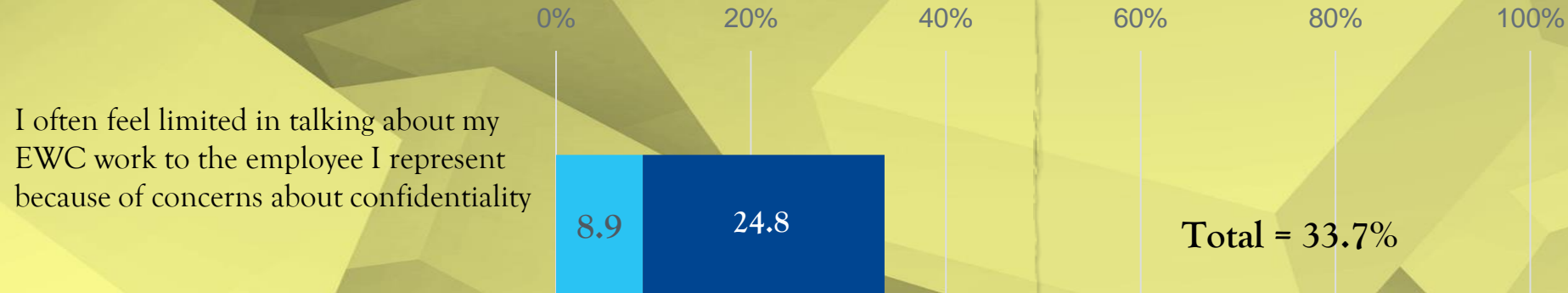


 Effective  Very effective

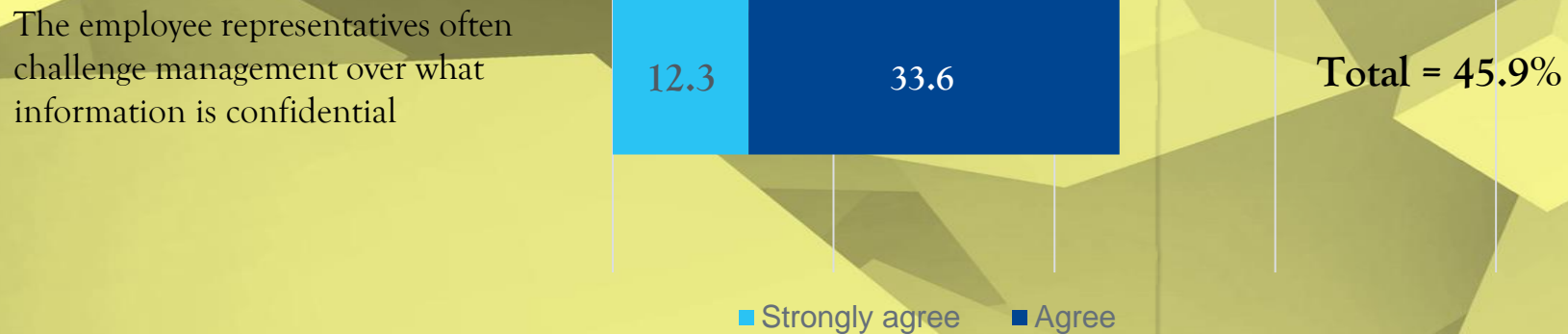
Almost 40% of EWC members think management often refuses to share information

Confidentiality – implications

Confidentiality limits articulation between EWC and local level/consituencies



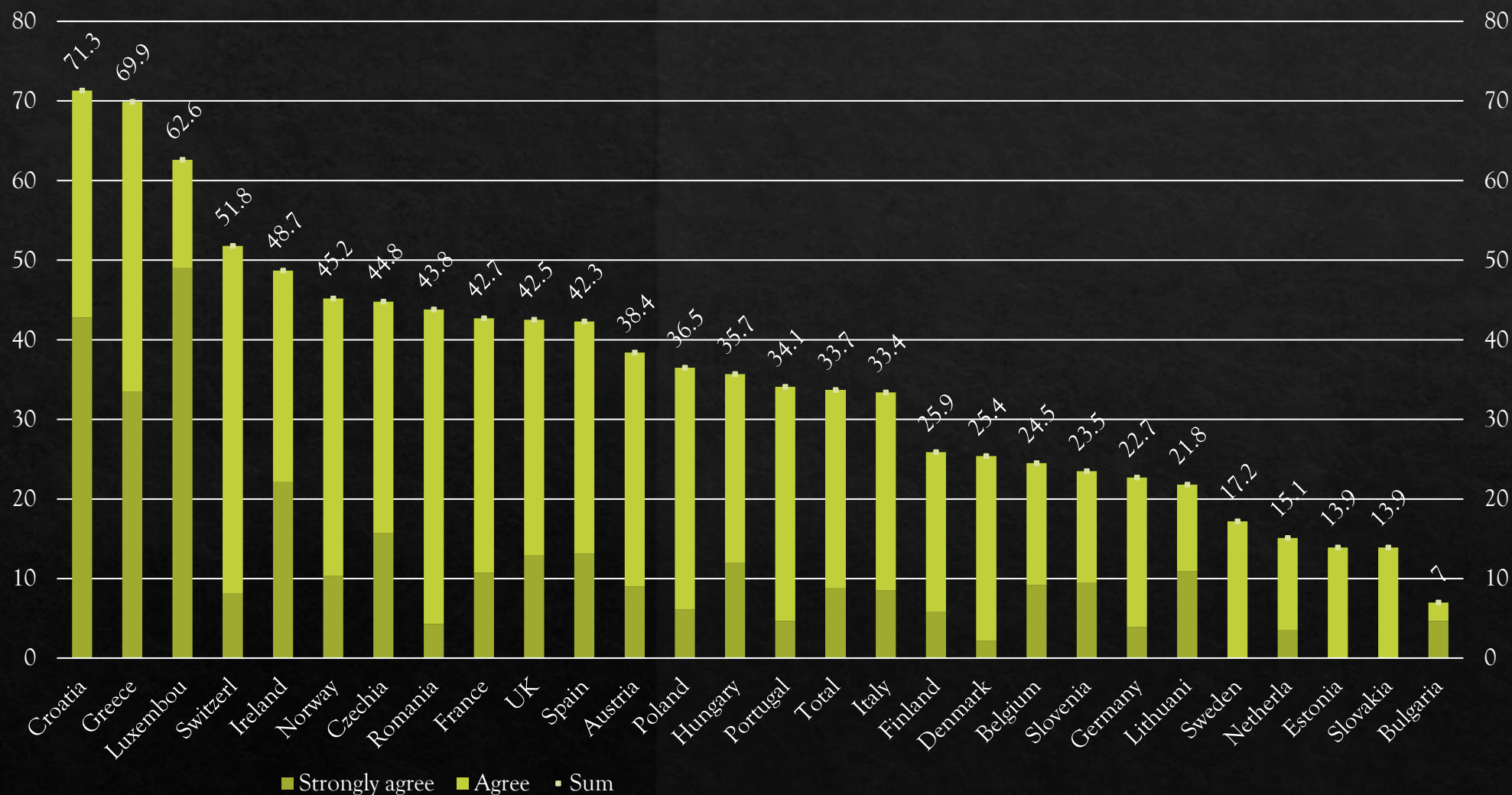
... but EWCs challenge management only to a limited extent



- Court cases
- few taken
- access to justice problems

Confidentiality – national perceptions

Because of confidentiality I often feel limited in talking about my EWC work to the employees I represent



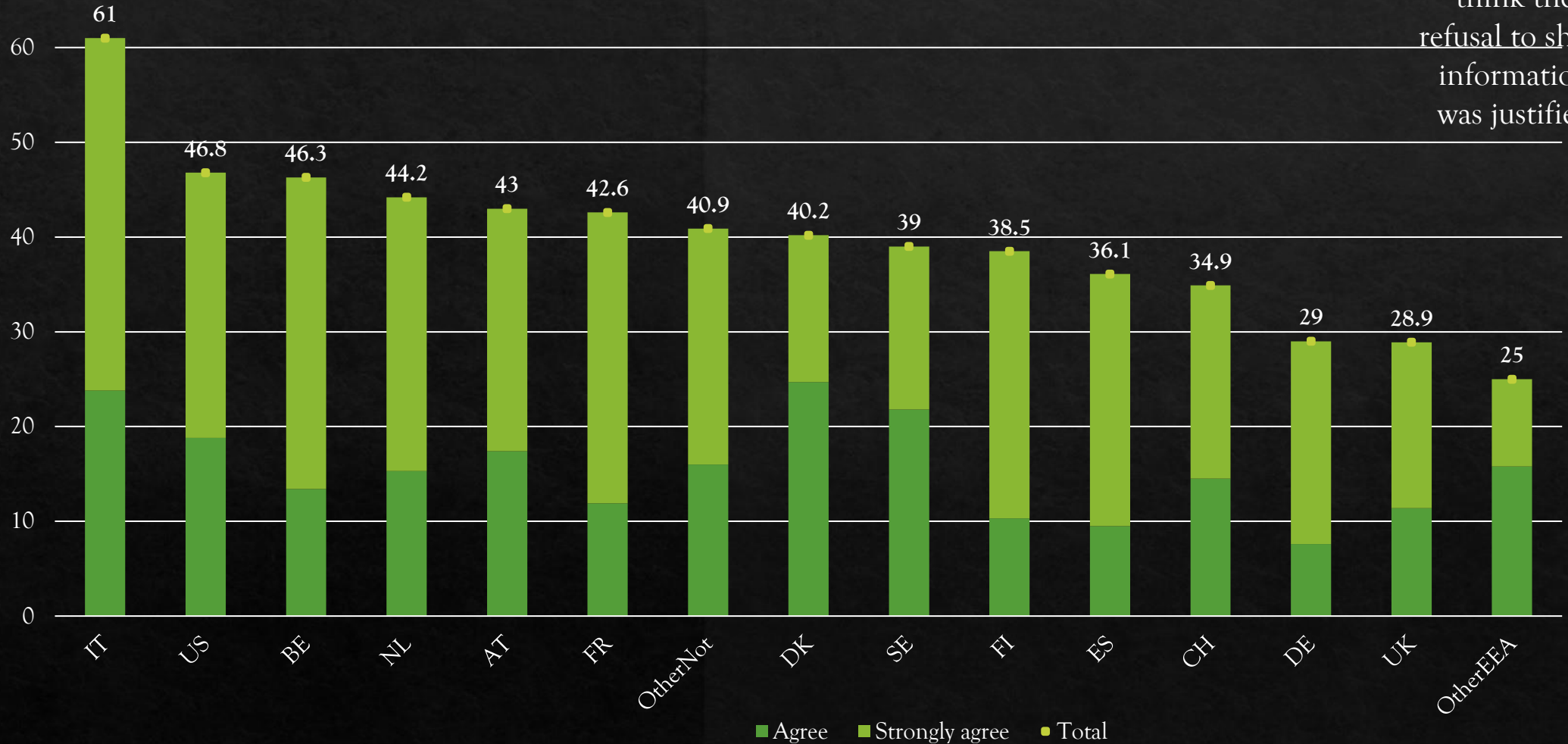
Source: De Spiegelaere et al. (2022)

Management's approach to confidentiality

Management often **refuses to share information** on grounds of confidentiality, by HQ of company

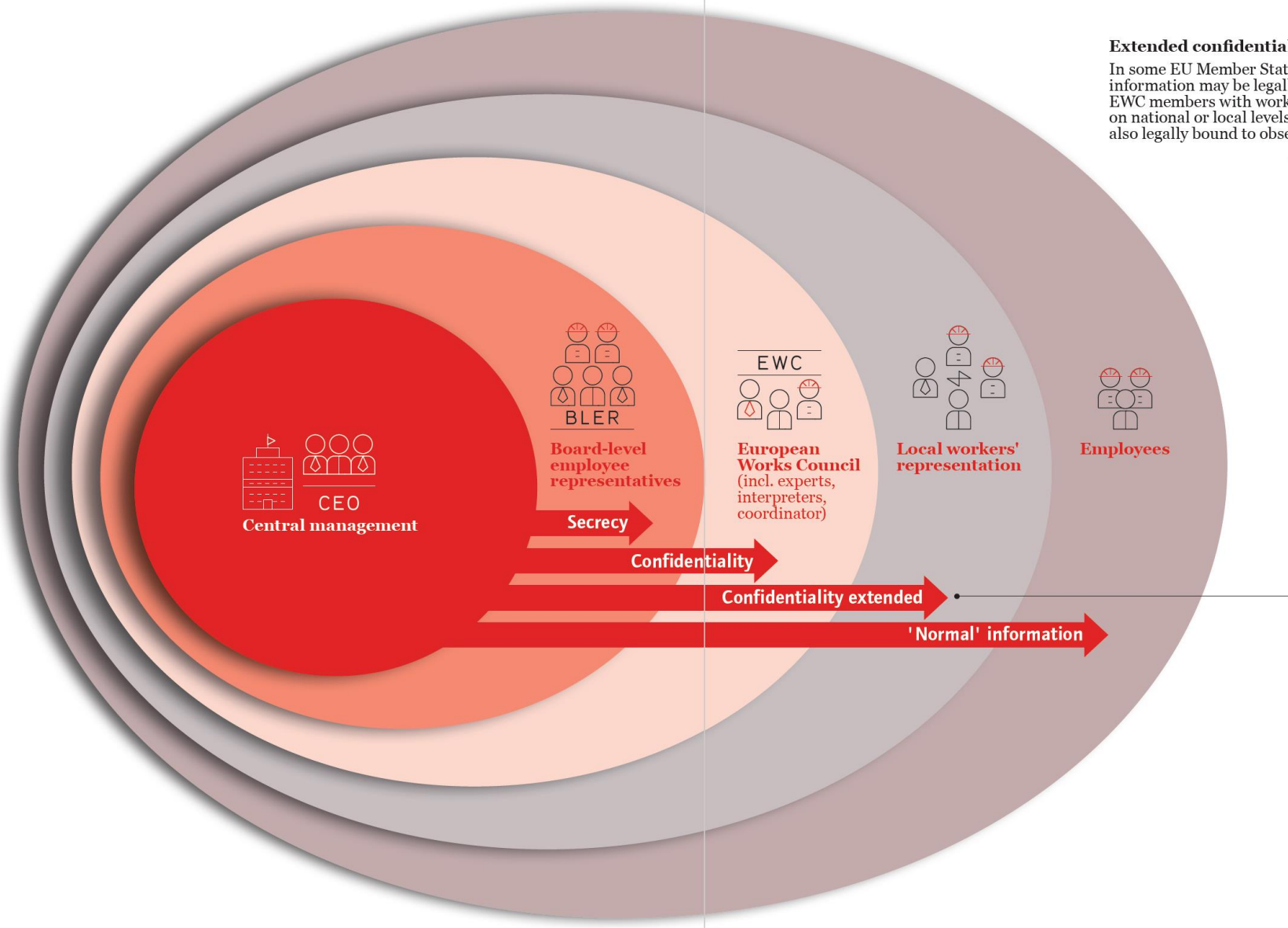
only
1/3

employee reps
think the
refusal to share
information
was justified



Source: De Spiegelaere et al. (2022)

Infographic 1 **EWC: confidentiality and secrecy**

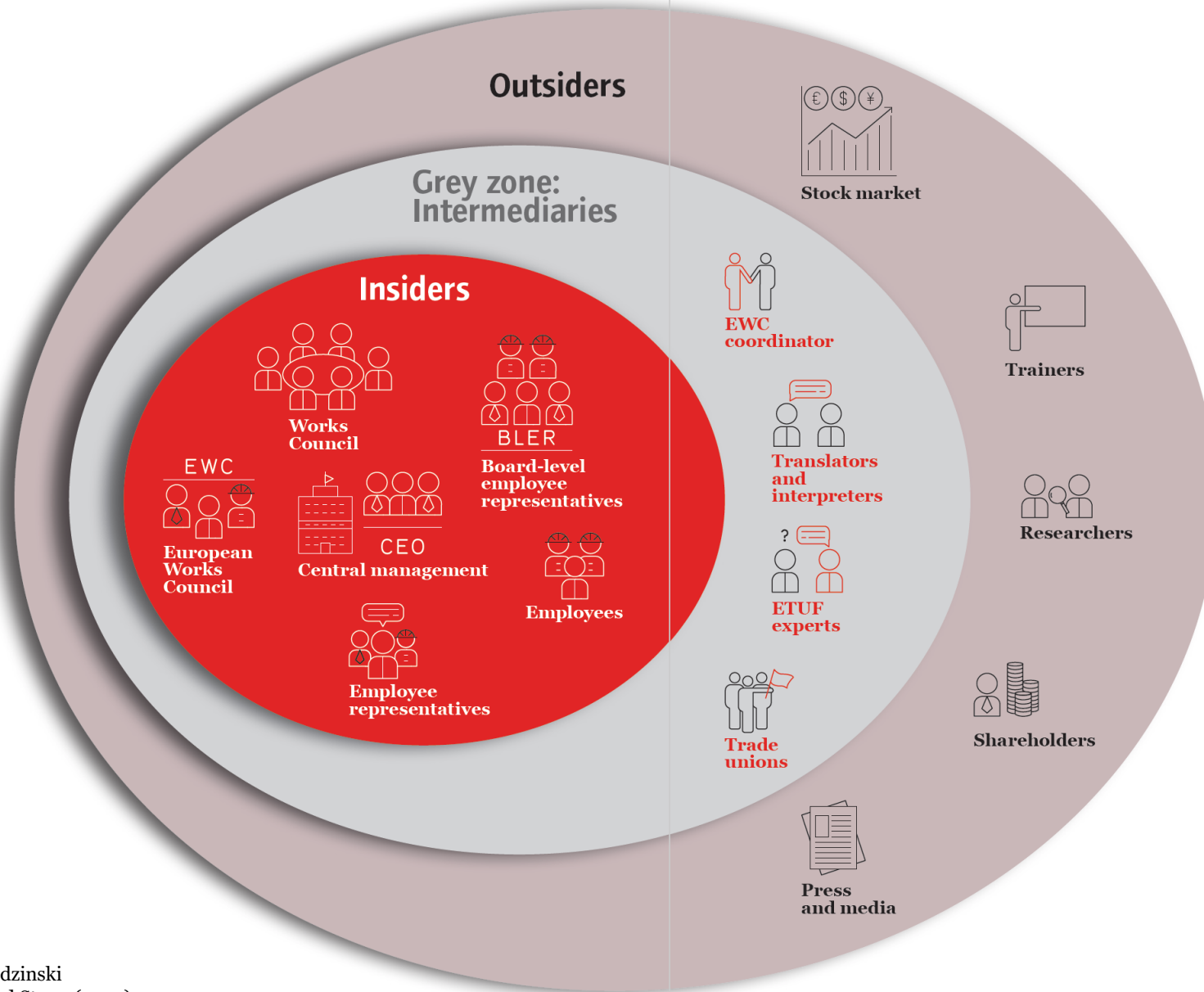


Extended confidentiality
 In some EU Member States confidential information may be legally shared further by EWC members with workers' representatives on national or local levels, as long as they are also legally bound to observe confidentiality.

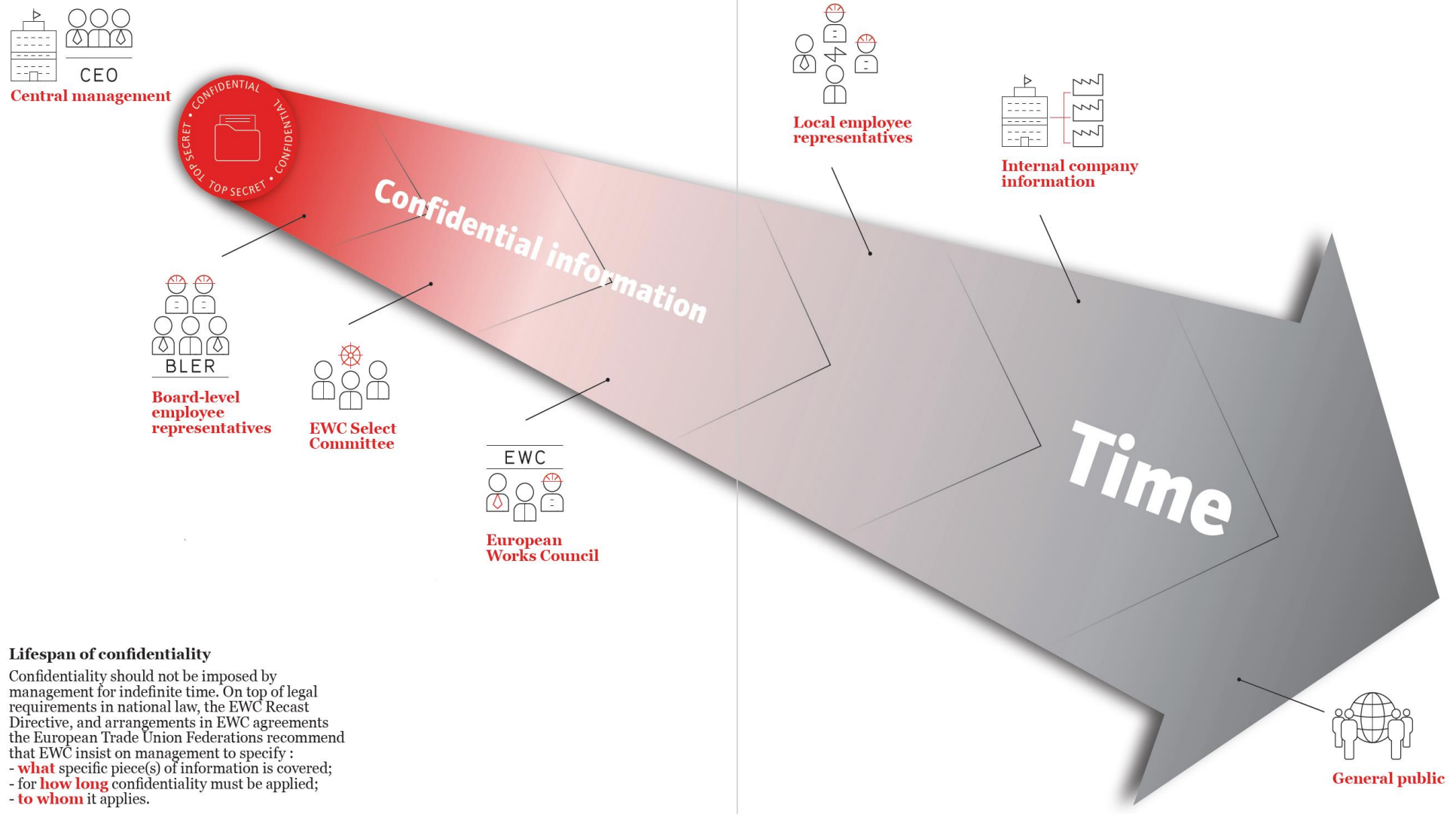
How confidentiality should work – and caveats

confidentiality and secrecy

Infographic 2 **Confidentiality: insiders and outsiders**



Infographic 3 Confidentiality: the time dimension

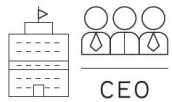


Lifespan of confidentiality

Confidentiality should not be imposed by management for indefinite time. On top of legal requirements in national law, the EWC Recast Directive, and arrangements in EWC agreements the European Trade Union Federations recommend that EWC insist on management to specify :

- **what** specific piece(s) of information is covered;
- for **how long** confidentiality must be applied;
- **to whom** it applies.

Infographic 4 **Circles of confidentiality**



Central management

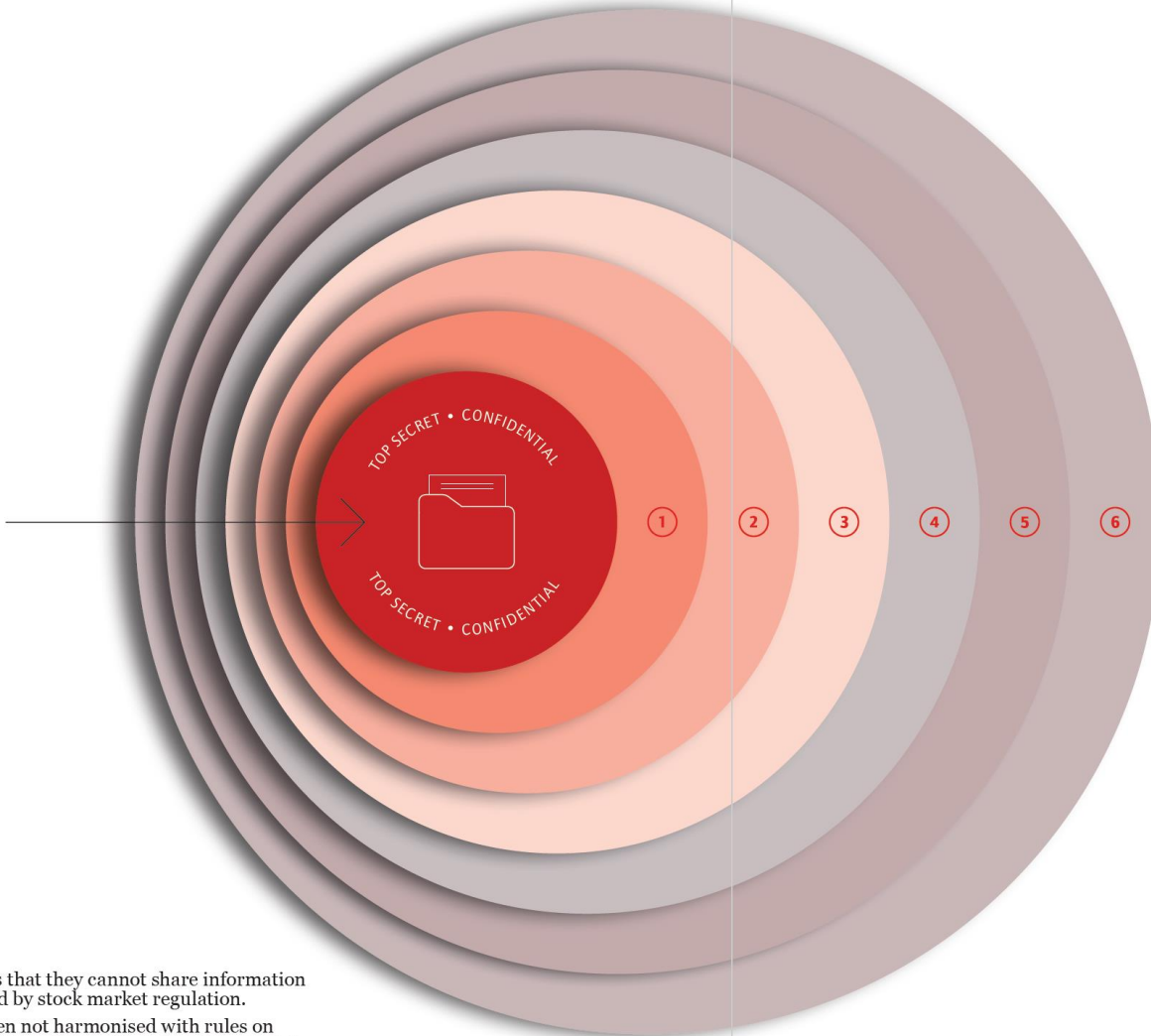
The central management is the source of information and decides whether to label information as confidential or to refuse to disclose it altogether. The management must take these decisions based on the law and within its boundaries. Management's decision regarding confidentiality or withholding information can be challenged in court.



Stock market rules

Management often argues that they cannot share information due to limitations imposed by stock market regulation. Stock market laws are often not harmonised with rules on workers' information and consultation. Only in a few countries (e.g. France) does stock market regulation explicitly take priority over workers' rights to information and consultation.

Important: stock market regulation is addressed to actors who are **outside** of the company.



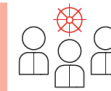
1



BLER: Board-level employee representatives

As members of the supervisory or management boards they have access to all information that he other directors receive (including the most secret company data).

2



EWC Select Committee

Management may sometimes prefer to give information only to the Select Committee. This is highly controversial and makes communication problematic between the Select Committee and the rest of the EWC.

3



European Works Council

Information may only be discussed between EWC members (for a specific period)

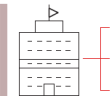
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Employee representatives

A next level of confidentiality concerns information that can be shared only with employee representatives within the company (such as the local or group works council or the EWC).

5



Internal company information

Information on this level can be shared with all employees inside of the company, but not with the outside world

6



General public

Such information has often already been made public by the company beforehand and can thus be shared broadly.

Tips and tools to limit the imposition of or to challenge management over confidentiality (1)

- having an EWC coordinator
- challenging managerial use of confidentiality clauses and withholding information - earlier engagement in decision-making process and seeking to go beyond information
- ask which clauses in law are referred to (then have their union or expert check the criteria)
- critically assess the need for confidentiality
- insist on being informed why information is confidential, which parts are confidential; until when; and who is privy to information
- conditions under which confidentiality is applied should be mutually agreed in each case (+ EWC agreement)

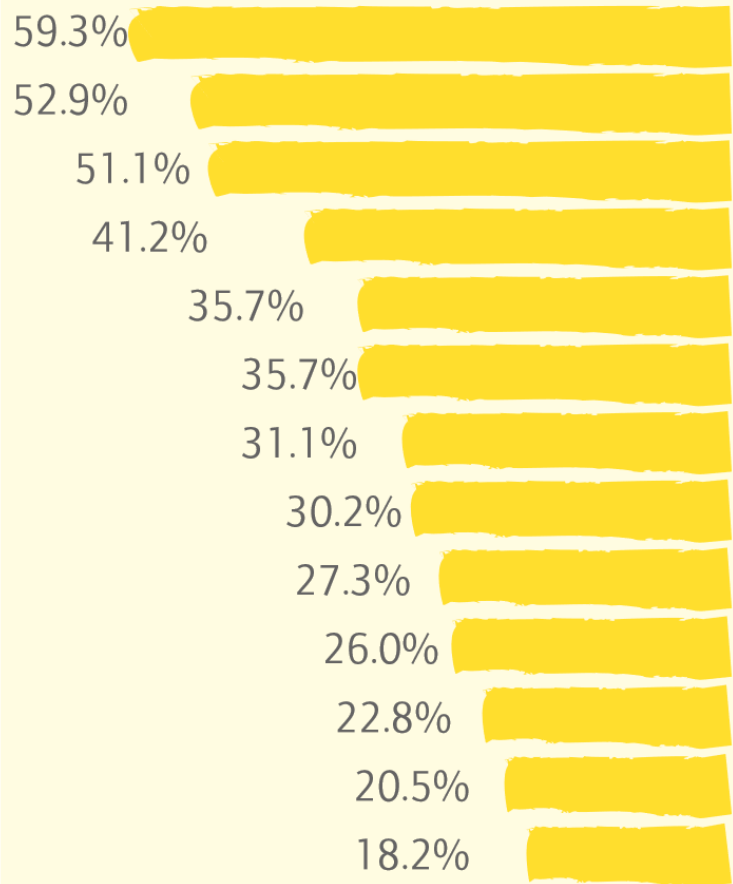
Tips and tools to limit the imposition of or to challenge management over confidentiality (2)

- copy general clauses from national legislation into specific rules of an EWC agreement
- in most countries, an EWC can go to court (or similar) if it disagrees with management on the need for confidentiality – court competency
- EWC members' sensitivity in approach to receive information in confidence rather than not at all
- **articulation:** if EWC and local employee representation bodies are informed at the same time, no need to impose confidentiality on EWC reps with local reps (secure in EWC agreement)
- pay attention to the clause in the EWC agreement, including wording on the right to appeal

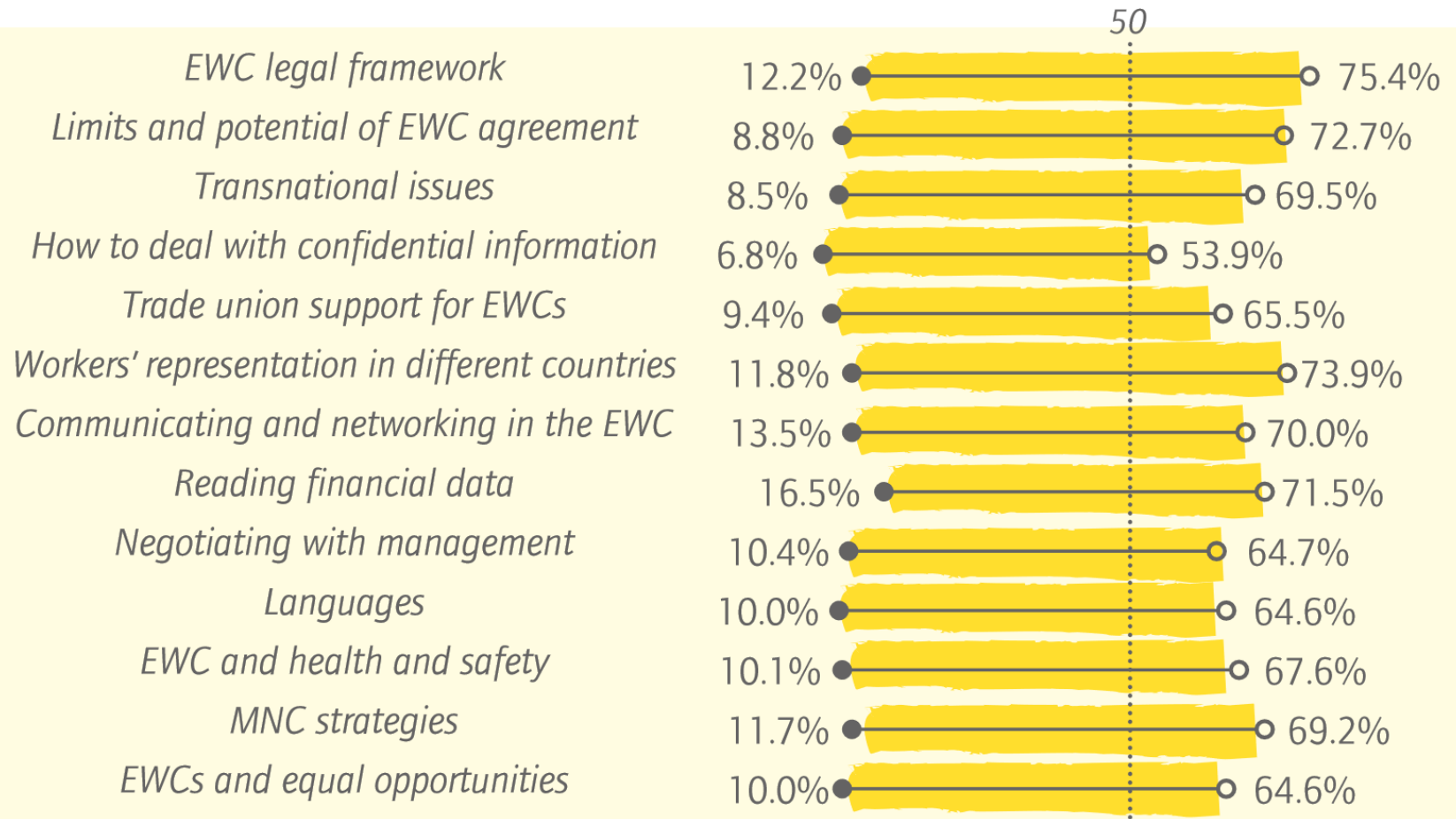
Tips and tools to limit the imposition of or to challenge management over confidentiality (3)

- check clause on confidential information - it should make clear that management can only impose a confidentiality requirement on reasonable grounds
- training, particularly around awareness of the issue of confidentiality, and on expectations and behaviours of all EWC members
- developing an internal 'protocol', starting with training (e.g. a session on handling issues and conflicting interests when dealing with confidentiality)
- knowing the ETUC's demands
- citing and using positive examples
- meaningful penalties

Training received



Need more training



● Training received on topic ○ No training received on topic

Source: De Spiegelaere et al. (2022)

Let your vote be heard: It's vote time!

Join at menti.com use code 8981 442

1. As an EWC member I feel limited in talking about the employees I represent because of concerns of confidentiality

Main take-aways

- confidentiality is fundamental for I&C rights
- imprecise & incoherent frameworks
- problematic access to justice
- watch for possible changes to the Directive
- understanding how confidentiality works ‘in action’



Resources

- De Spiegelaere, S., Jagodzinski, R. and Waddington, J. (2022). Contested and still in the making. ETUI, Brussels.
- Jagodzinski, R. and Stoop, S. (2021) How to deal with confidential information: EWC Manual, ETUI.
- Second-phase consultation of social partners under Article 154 TFEU on a possible revision of the European Works Council Directive (Directive 2009/38/EC) (26 July 2023)
- Parker, J. (forthcoming). Comparative report on legal provisions in Member States. ETUI.

Your advice

What would you advise others about confidentiality matters?

- Dos & don'ts
- caveats & risks
- Managing strategies
- Conflict (management, inside EWC)
- Perceptions
- Changes needed