Access to justice for European Works Councils

A hands-on overview for practitioners

With the financial support of the European Union

MORE DEMOCRACY AT WORK

CONFEDERATION SYNDICAT EUROPEAEN TRADE UNION

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Romuald Jagodziński & Sjef Stoop

DISCLAIMER ABOUT USING THIS PRACTICAL OVERVIEW

In attempts at dispute resolution EWCs are strongly advised to seek contact and support of the relevant European Trade Union Federation (European-level sectoral trade union) and to involve the ETUF into joint decision making about every step of the litigation and its preparation (see section 2.2 for more detail). To avoid many pitfalls decisions concerning dispute resolution and litigation should be taken by the EWC with the trade unions present in the different countries where a given transnational company operates, under the coordination of the ETUF.

For more information about the specific legal provisions in each EU country, please find the links to the *country fiches* in section 7 (p. 52) and on our Democracy at work website www.democracyatwork.eu.

The aim of this practical overview is not to encourage litigation, but to promote knowledge about access to justice.

TRADE UNIONS' SUPPORT FOR EWCS

To best support EWCs and facilitate the coordination between EWCs and trade unions, the European Trade Union Federations* may appoint an EWC coordinator, that is a trade union officer, usually from the country of company headquarters, entrusted to be the EWC privileged trade union contact person. When no EWC coordinator has been appointed, you are strongly advised to contact the relevant European Trade Union Federation.

Get in touch with your Coordinator or the relevant ETUF as early in the dispute as possible – the sooner (s)he is involved the more options for actions by the EWC will be available and the greater the scope of responses.

It is essential that the EWC liaises and decides jointly with the relevant ETUF on every step of the process of going to court. It is important that you engage directly the relevant ETUF, as the latter are best placed and equipped to deal with transnational disputes and have the biggest experience in supporting EWCs. Once the relevant ETUF is involved it will advise you, coordinate the litigation process and ensure that also national trade unions from countries where the company operates are properly involved. Practice and research (e.g. De Spiegelaere, Jagodziński and Waddington 2021) show that EWCs perform best when trade unions are involved and when EWCs are used as trade union tools for defending workers' rights. In litigation disputes the organisational power and legal anchorage of trade unions in national industrial relations systems add the essential leverage to EWC actions and remedy numerous imperfections of the EWC legal frameworks. The conjunction of forces of EWC and trade unions under coordination of the relevant ETUFs allows to pull together more resources, provides a targeted expertise and more outreach thus substantially increasing chances of success.

The relevant European Trade Union Federations based on sector of activity.

EFBWW/FETBB European Federation of Building and Woodworkers, info@efbww.eu

EFFAT European Federation of Food, Agriculture and Tourism Trade Unions, effat@effat.org

IndustriAll European Federation for Industry and Manufacturing workers, info@industriAll-europe.eu

EPSU European Federation of Public Service Unions, epsu@epsu.org

ETF European Transport Workers' Federation, etf@etf-europe.org

UNI-EUROPA European trade union federation for services and communication, uni-europa@uniglobalunion.org

***** *European trade union federations (known in the past as European Industry Federations) are constituent members of the European Trade Union Confederation (ETUC). The European industry federations are organisations of trade unions within one or more public or private economic sectors. They represent the interests of workers in their sectors at the European level, principally in negotiation.*

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Foreword

European Works Councils (EWCs) have been fora of social dialogue at company level for over three decades now. Social dialogue, however, not always means that the parties always agree as they sometimes have to deal with highly contentious issues, such as employment prospects, working conditions and company restructuring.

Basic rights to information and consultation are often breached and the potential for conflict between EWCs and management is significant. In case a conflict cannot be solved by between the partners by referring to the EWC agreement, the legislation provides for a solution through legal recourse. However, regarding access to justice, evaluations by the European Commission and the European Trade Union Institute (ETUI) have identified numerous shortcomings in both the EWC Directive (2009/38/EC) and in national legal frameworks.

Many violations and infractions of EWCs rights can be settled through alternative dispute resolution mechanisms between the parties. In a certain number of them, however, alternative resolutions are not possible and the EWC has to try and solve the issue by going to court. Many EWCs find it difficult to use this option. In some countries, employees are not used to take their company to court. This is aggravated by the lack of easily accessible information for EWC members on the possibilities of defending EWC rights in courts and made even more complicated by the fact that EWC agreements are usually subject to the law of the Member State in which the company head office is located. As a result, most EWC members have to operate within a legal system that is unfamiliar to them.

Therefore, the European Trade Union Confederation (ETUC) together with the sectoral European Trade Union Federations (ETUFs) decided that a practical 'hands-on' overview for EWCs, experts and trade unions supporting them on 'access to justice' is highly needed. This project is conducted under the aegis of the ETUC framework *'More Democracy at Work'.* The objectives of this hands-on overview are to:

- Present different judicial avenues for EWCs to file a complaint in different Member States of the European Union and seek enforcement of their rights through court;
- Present an overview of options available to EWCs seeking conflict resolution, discuss various aspects of litigation and provide advice based on real-life experience of experts and EWC members involved in litigation;
- Highlight shortcomings of the current European (and national) legal frameworks and areas which would need to be adapted and improved.

This practical overview provides an overview of the state of play and a useful toolkit, including technicalities and available means of access to justice in each EU Member State.

It is meant as a hands-on guidance for EWCs, trade union coordinators and experts supporting EWCs and other practitioners; it is not meant to encourage or discourage litigation. The practical overview aims at offering insight into litigation as a possible conflict solution, but is not meant to replace direct trade union advice, support or specific guidelines (for those the reader is encouraged to always seek contact with the relevant trade union).

The present practical overview consists of two main parts. In part 1 the authors discuss the different options to solve a dispute, how an EWC can make an informed decision on them. Should the best option turn out to be litigation, we present some points of consideration to make sure the EWC prepares for it as well as possible. In the final chapters of Part 1, we will go step by step through the process. Part 2 (available in digital form at www.etuc.org) presents an overview on relevant aspects of the national enforcement frameworks relating to EWC rights in all EU Member States plus the UK. The latter part is meant as a quick reference guide and a general overview of the respective national regimes, but in no way replaces the need to discuss the idea of launching litigation with the relevant European Trade Union Federation and national (preferably, trade union) lawyer competent for the area of law in question.

Authors & the ETUC project team

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Introduction: EWC related court cases: pioneers and recent developments

1

The Renault Vilvoorde case

"The Belgian Labour Court in Brussels ruled on 3 April 1997 that Renault had ignored the legal procedures regulating collective dismissals under collective labour agreement no 9, as well as the obligation to inform and consult the works council under collective labour agreement no 24. In a praetorian judgement, the decision to close down the plant was annulled by the President of the Labour Court until such time as the procedures for information and consultation had been complied with. The Court also called on the parties to reconsider the closure of the site and seek alternative solutions. On 4 April 1997 the Nanterre County Court (Tribunal de Grande Instance) in France, emergency ruling, ordered "Renault to desist from the implementation, including through its subsidiaries, of the closure of Vilvoorde under its management powers until such time as it has fulfilled its obligations towards the European works council". This judgment was upheld by the Versailles Court of Appeal on 7 May 1997. However this latter court, contrary to the arguments put forward by the judge of the County Court (Tribunal de Grande Instance), posited that the obligation to inform and consult the European works council is not of a general order, but to be assessed on a case by case basis in the light of the extent to which such a procedure may be deemed useful."

Source: *Schömann, I. Clauwaert, S. and Warneck, W., 2006: 11-12*

The pioneers of litigation

In 1998 the first court case to involve an EWC materialised and it came with a bang. It marked a milestone in clarifying the meaning and scope of European information and consultation rights. Renault had announced in a press conference to close its Belgian plant in Vilvoorde (outskirts of Brussels), entailing 3,100 job losses directly and about 1000 among its sub-contractors. In parallel, in France 3,000 dismissals were announced. Renault's decision was presented as final and irrevocable, leaving no space for any consultation by workers' representatives or discussions on social measures to milden the consequences of restructuring for the workforce. Renault's management argued that the transnational nature of the decision to restructure was not covered by Community law, with transnational restructuring not being subject to the law on employee information and consultation.

However, the Belgian and French courts made it very clear that Renault did not fulfil its obligations to information and consultation under national and European law and annulled the closure decision on this ground.

The Renault Vilvoorde case marked a milestone. The court case was exceptional in several respects. Firstly, because the workers' representatives had the courage to take on a legal battle in completely unchartered waters, i.e. based on the recently adopted EWC legislation that had never been tested in courts to that date. Secondly, because the successful outcome of the case was a result of exemplary coordination by the Belgian, French and Spanish trade unions on two levels: among the trade unions and among the unions and the EWC. In this case the EWC was successfully leveraged as a tool of trade union policy to defend workers' rights. It was the Belgian unions ABVV/FGTB and ACV/CSC (in cooperation with the employers' (!) Federation of Belgian enterprises VBO and the Flemish

Federation of Enterprises, VEV) who were able to immediately mobilise workers and organise a 50 000 people demonstration, followed on by coordinated strikes in France and Belgium (symbolic Euro-strikes). The unions, supported by the ETUC and the European Metalworkers Federation (EMF, today: IndustriAll), and the EWC had to cooperate and coordinate their actions across the borders, which was a pioneering effort at the time. Thirdly, the EWC case did not rest solely on the ground of the EWC Directive, but made reference to the rights enshrined in the European Directive on Collective Redundancies – something that hardly any EWCs have attempted since[1]). Fourthly, the EWC immediately drew out the big guns and successfully demanded an annulment of management's decision. Finally, the case was symbolic, because it concerned a plant situated virtually in Brussels – the very city where the revolutionary EWC legislation had been adopted four years earlier. The Renault EWC put a foot in the door of hitherto unrestrained managerial voluntarism and sent out a clear message that workers' rights are to be respected. It was a true breakthrough.

The 1998 Renault Vilvoorde case was followed by a stream of other cases that improved the interpretation of rights enshrined in the EWC Directive. The initial stream of unequivocally successful litigation was later interspersed also with judgements unfavourable to the interests of workers' representatives. Nonetheless, the favourable judgements definitely prevail in number, contributing to a comprehensive interpretation of EWC rights. Currently, the ETUI database of EWC-related jurisprudence[2] lists some 147[3] court cases involving directly or indirectly EWCs at both the EU (European Court of Justice) and national level. Topics of litigation cover all aspects of EWC operation, however, the following contentious matters prevail:

- timing and quality of information and consultation or often lack thereof (especially in context of company restructuring);[4]
- confidentiality and withholding of information by management;[5]
- the link between EWC and national level worker representation structures;[6]
- resources (e.g., translation and interpretation) for EWC operation;[7]
- and transnational character of information.[8]

The catalogue of litigious topics keeps expanding continuously and covers new phenomena, with a stream of Brexit-related cases and disputes over the use videoconferencing in the recent years.

1 To see the full palette of workers' rights to information and consultation please consult Jagodziński R. and Hoffmann A. (2018) 'The palette of workers' participation rights', ETUI available at: (12) (PDF) Palette of workers' rights to information and consultation (researchgate.net).

2 See www.ewcdb.eu/search/court-cases.

3 Thanks to an ongoing update of the database, it is estimated that another 50 cases of EWC litigation may be added to the list.

4 Examples of cases include: Renault Vilvoorde EWC, 1998, France and Belgium; GDF – SUEZ cases, various courts 2006-2007; CAC ruling on Oracle EWC (Case Number: EWC/17/2017); Alcatel EWC, case n° RG 07/52509, 2007, France; British Airways EWC vs. the Central Management, Brussels Labour Court, 2006.

5 Examples of cases include: Walgreens Boots Alliance European Works Council, Case Number EWC/30/2020, CAC, UK; Verizon EWC, Case Number EWC/22/2019, CAC, UK; Exxon Mobile EWC, case KG 08/9/C, Belgium, 2008.

6 Examples of cases include: Vesuvius EWC, CAC, UK, 2019; Kuehne and Nagel EWC, LAG Rheinland-Pfalz, 16.07.2015 – Az.: 5 TaBV 5/15, Germany; Amcor EWC, Landesarbeitsgericht Baden -Württemberg, Beschluss vom 2. Oktober 2014 – 11 TaBV 6/13, Germany; Engie EWC, GDF-SUEZ, TGI Paris, 2011, France; Goodyear European Information and Communication Forum, Versailles Cour d'Appel, 2010, France; Alstom EWC, n° RG 03/02164, 2003, France; Beiersdorf EWC, n° RG 06/00357, France.

7 Examples of cases include: Princes Group EWC vs. Princes Group at the CAC, 2020, UK; Verizon EWC vs. The Central Management of Verizon Group, 2019, EWC/22/2019, CAC, UK; Emerson Electric European Works Council and Others and Emerson Electric Europe, EWC/13/2015, CAC; Mayr-Melnhof Packaging EWC vs. The Central Management, Vienna Labour and Social Tribunal, 2022.

8 Examples of cases include: British Airways EWC vs. the Central Management, Brussels Labour Court, 2006; Dana EWC vs. Central Management of Dana Corporation, Essen Employment Tribunal, 2019; Veolia Transdev EWC, TGI Nanterre, 2014, France; Vesuvius EWC, CAC, UK, 2019.

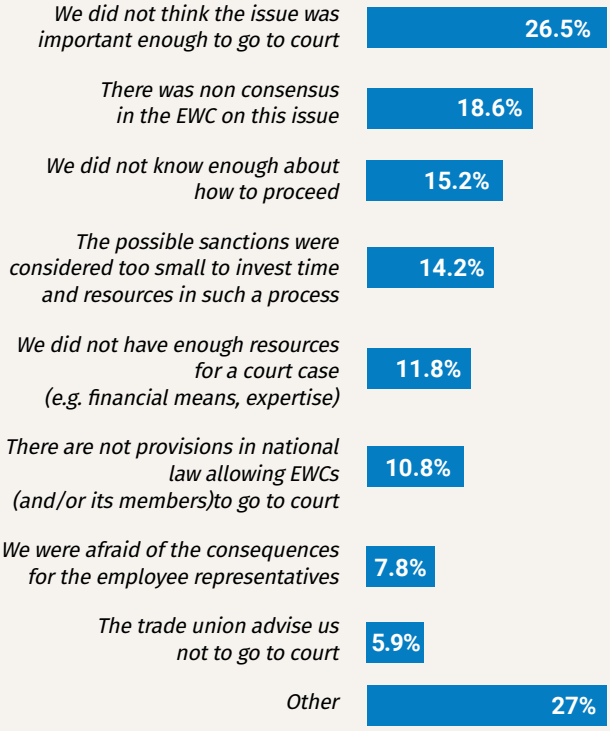
1.1 Structure of the practical overview and for whom it may be useful

It is instructive to consider not only the reasons for going to court (see, among others, Section 2.3 'The red lines'), but also the motives for which other EWCs decided not to start litigation (De Spiegelaere and Jagodziński, 2019: 79). When asked in a survey (2018), EWC members reported that, despite a serious dispute with management, they ultimately did not press on with court case because they faced:

- Doubts about whether it is worth it: whether the dispute is important enough to go to;
- Problems with resources (financial, time, knowledge) and high costs of litigation;
- Problem with legal frameworks (legal capacity, procedures, weak sanctions, protection standards for EWC members);
- Problems with achieving consensus within the EWC.

These issues are elaborated on and discussed in the following chapters of this publication.

Why do EWCs not start litigation



Source: *De Spiegelaere S. and Jagodziński R. (2019) Can anybody hear us? An overview of the 2018 survey of EWC and SEWC representatives, ETUI, Brussels. (p. 79)*

Facing a dispute with management

2

A court case, most of the time, does not come out of the blue. Research shows that only 20% of EWCs are informed and consulted on time, i.e. before the central management finalises their decision (De Spiegelaere and Jagodziński 2019: 39). Many EWCs experience a growing frustration over not being properly informed and consulted. On top of this comes frustration over being repeatedly refused access to information on grounds of confidentiality. Another highly conflictual area is the transnational competence of EWCs and frequent managerial refusals to discuss a matter because of an alleged lack of transnational dimension, or generally a refusal of consultation on these grounds.

EWCs hardly ever go to court at the very first violation of their rights. Litigation is commonly considered as a means of last resort. Many EWCs, thus, make repetitive efforts to make management respect workers' rights: they send letters to management and insist on management that next time they inform the EWC on time or allow for an extraordinary meeting. Sooner or later, after systematic denial and/or repeated violations of their fundamental rights the affected EWCs come to a pitchfork point. The choice is then:

1. Continue insisting on management to respect EWC rights, albeit without much hope for a change;

2. Give up trying to get management to respect their rights;

3.Escalate the actions to a level that management cannot ignore any longer.

In certain situations, the third option may be the only reasonable solution remaining. Failure of all non-litigious efforts and solutions may lead an EWC to consider going to court. It is thus clear that the decision to launch litigation rarely comes as a surprise as it is the result of a certain streak of managerial violations followed by a process of a building-up frustration over an impossibility to make the other party respect the agreed rules. At a certain moment, usually triggered by a specific event, the EWC decides that enough is enough and decides to launch litigation.

Throughout this practical overview we show the legal and practical obstacles that may occur in a litigation process, and the available tools to overcome some of them, and some important considerations that need to be made when considering litigation.

During every step of the process the constant coordination with the relevant trade union organisation is of paramount importance. Their involvement and support to a joint decision about the litigation (see section 2.3 for more detail) is all the more important as EWCs do not operate in a vacuum. Every court case adds to the body of the jurisprudence, either strengthening or weakening the position of all EWCs. Trade unions provide the experience, expertise, legal anchorage and organisational power that is essential for EWCs seeking conflict resolution, including through litigation: in some countries, the unions can be an accessory party to bring a case to court, in other countries the unions are the only party that can bring a case to court (Table 1):

TABLE 1 EWCs legal capacity and trade union capacity to represent EWCs in court

COUNTRY NAME	EWC LEGAL STATUS	REPRESENTATION BY TRADE UNIONS
Austria	Legal personality	No
Belgium	Only individual members and trade unions (the usual option)	Yes
Bulgaria	Legal standing / Capacity to act in courts	Partly (unions can send a notification to Labour Inspectorate)
Croatia	Legal standing / Capacity to act in courts	Unclear
Cyprus	No	
Czechia	Legal standing / Capacity to act in courts	Can assist
Denmark	No for EWC. SNB and trade unions in labour courts	Yes
Estonia	No	Yes
Finland	No	Yes
France	Legal personality	Can participate in a court case as an organisation with an interest in the legitimate operation of EWCs
Germany	Legal standing / Capacity to act in courts	Possible (can initiate cases)
Greece	Legal standing / Capacity to act in courts	
Hungary	Legal standing / Capacity to act in courts	
Ireland	Only individual workers' reps	
Italy	Limited: only with trade unions	Trade unions can bring a case to court, rather than to the Conciliation Committee
Latvia	No	Possible
Lithuania	Limited	
Luxembourg	Only individual workers' reps	
Malta	No	
Netherlands	Legal standing / Capacity to act in courts	
Poland	Limited: in confidentiality cases	Potentially / Under debate
Portugal	Legal standing / Capacity to act in courts	
Romania	Legal standing / Capacity to act in courts	
Slovakia	Legal standing / Capacity to act in courts	Yes
Slovenia	Legal standing / Capacity to act in courts	Yes
Spain	Legal personality	Trade unions can bring a case to court on violation of collective rights
Sweden	Legal standing / Capacity to act in courts	
United Kingdom	Legal standing / Capacity to act in courts	
Iceland		Yes

Source: *R. Jagodziński (2022)*

Getting support through the unions is invaluable at all stages of the process, starting from its early phases of the dispute when they can help EWCs assess the merits of the case, chances of success, legal basis, possible sanctions, preparation of evidence, find and address the competent court (geographical and material competence), inform the EWC about the course of action and procedure at court, whether an EWC has the necessary legal standing to pursue litigation, etc.

2.1 Assessing seriousness of a dispute with management

Before an EWC starts considering the preferable way of handling the conflict it should assess its seriousness.

The process of assessing seriousness of a dispute and engaging in further steps of dispute resolution with management, whether it will lead to litigation or not, is complex and challenging. Determining the gravity of any dispute depends on multiple factors both relating to 'objective' characteristics of the case and to its 'subjective' assessment.

The objective factors related to a case can be referred to as the 'red lines'. They are enshrined in legislation and define the operation of an EWC. These are, among others, rules defining what proper information and consultation means, how confidentiality may be imposed and how meetings are to be held. This framework is set by national transpositions of the EWC Directive and arrangements in the EWC agreement. Assessing the 'red lines' requires good knowledge of the legal sources – the EWC Recast Directive, your national law (both that of the EWC agreement and of your home country) and your EWC agreement.

On top of this, subjective factors may lead to various perceptions of a conflict (see chapter 3.1).

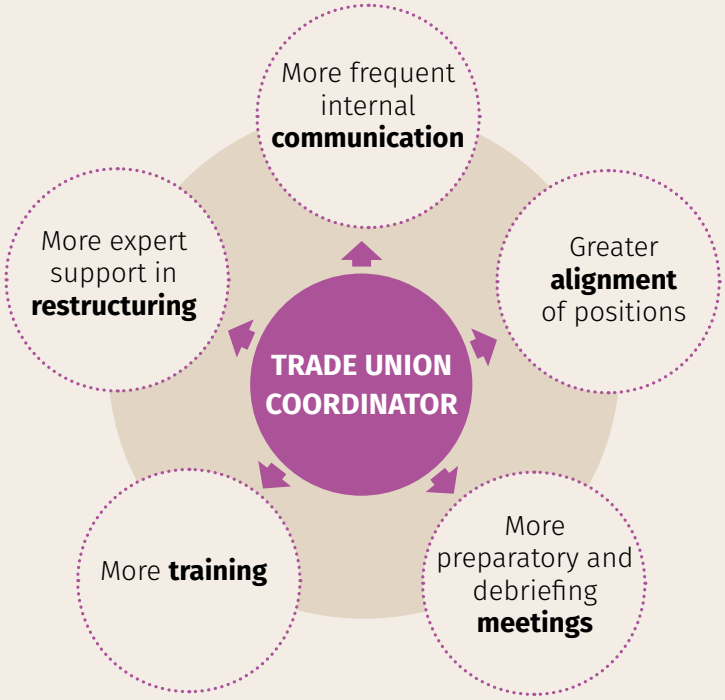
2.2 Cooperation with the relevant trade unions

A joint response to managerial violations by EWCs and trade unions is the most efficient and thus recommended course of actions. There are concrete possible benefits that EWCs draw from involving the relevant trade union in dispute resolution and preparation for litigation:

- Obtaining an **objective assessment of the seriousness of the dispute** with management, which may otherwise be difficult to get;
- **Experience-based consultation** on options and means of handling the situation. The trade union coordinator will help you complete various aspects of your cases' analysis and decide about the most effective and efficient course of actions;
- **Access to additional resources including, sometimes free, legal assistance by trade union lawyers.** Depending on the situation, the ETUF or national trade union may be able to offer legal assistance[9] or else recommend a tested lawyer to represent you at court, should you go for litigation (instead of a random barrister inexperienced in such cases) and/or may offer to be auxiliary prosecutors in the process (see also Section 4.4 in this practical overview);
- In specific situations trade unions may offer your EWC financial assistance and/or ideas on alternative sources of financing your court case. For instance, the European Public Services Union has a special fund to assist EWCs should they go for litigation. Such assistance is extremely important since provisions on financing litigation by EWCs are only general and vague, while relevant arrangements in EWC agreements scarce;
- **Contact to other EWCs** that were involved in similar disputes or litigation in the past. Providing contact to them gives you the opportunity to obtain first-hand experience and to further inform your EWCs' decision about going for litigation;
- Access to **a more strategic perspective** and evaluation by trade unions that can identify the prospects for precedence-setting of the case, but also possible consequences of a failure at court that may be consequential for other EWCs.

Impact of trade union coordination on the operation of EWCs

67% of EWC members consider their trade union coordinator crucial for the EWC, including 59% of non-union members who think so. The positive impact on operation of EWCs is visible in the following areas:



Source: *De Spiegelaere and Jagodziński (2019) Can anybody hear us? p. 88.*

9 The European Public Services Union established a dedicated fund to support EWCs seeking justice via litigation.

2.3 The 'red lines'

Social dialogue at company level should take place in spirit of cooperation and consensus. But even cooperation and consensus seeking require a framework, especially when workers and management have conflicting interests.

Many EWCs report they have disputes with management, but do not know when a conflict is serious enough to go to court. To address this challenge we provide firm points of reference: **red lines** defined by the legal frameworks.

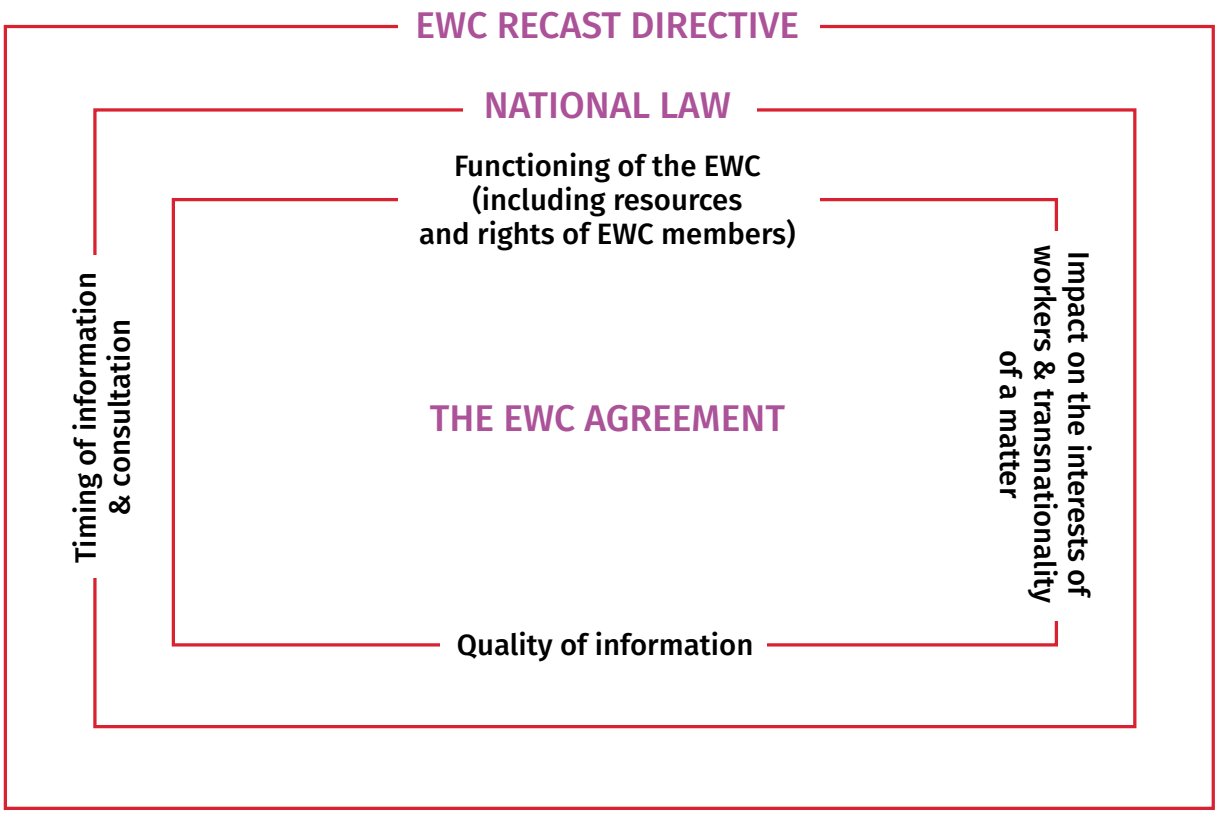
There are two sources where hard-line criteria for determining managerial infractions, and consequently, serious dispute can be found:

1. National law

The national act (a dedicated act, labour code, or collective agreement in some countries) transposing the EWC Directive 2009/38/EC is the primary and most important source of rights and obligations defining operation and competences of any EWC. Directives are not directly applicable at national level, i.e. they need to be implemented into national law. The national transposition thus 'translates' the objectives of the EWC Recast Directive into concrete provisions binding the management (and your EWC). It is thus noteworthy that as such, the EWC Recast Directive (just as any EU directive) is not directly applicable to your EWC.

2. The EWC agreement

The EWC agreement is meant to operationalise the general provisions of the binding national law. It defines how EWCs' rights, competences and duties as well as management's obligations are to be applied in the case of a specific EWC and company. It is obvious that arrangements in the EWC agreement need to respect the more general provisions of national law and cannot contradict them.



Source: *R. Jagodziński, 2022, own compilation.*

Both the national legislation and the EWC agreement contain basic rules that should always be respected:

Standards of information and consultation: quality and timing

The EWC Recast Directive (Art. 2.1 f and g) provides definitions of information and consultation that, in turn, are transposed (usually word by word) into national legislation.

The definitions state that EWCs should be **informed and consulted in time**, that the information must be **of good quality,** i.e. allow to form an opinion and that the consultation must be meaningful. 'In time' means that for a meaningful consultation the EWC needs to be informed and consulted before the management takes final decisions (Recital 46; Art. 2 of the EWC Recast Directive).

Unless these criteria are fulfilled, the results of consultation have hardly any potential to be taken into account in the decision-making process and thereafter to influence company decisions.

Quality of information

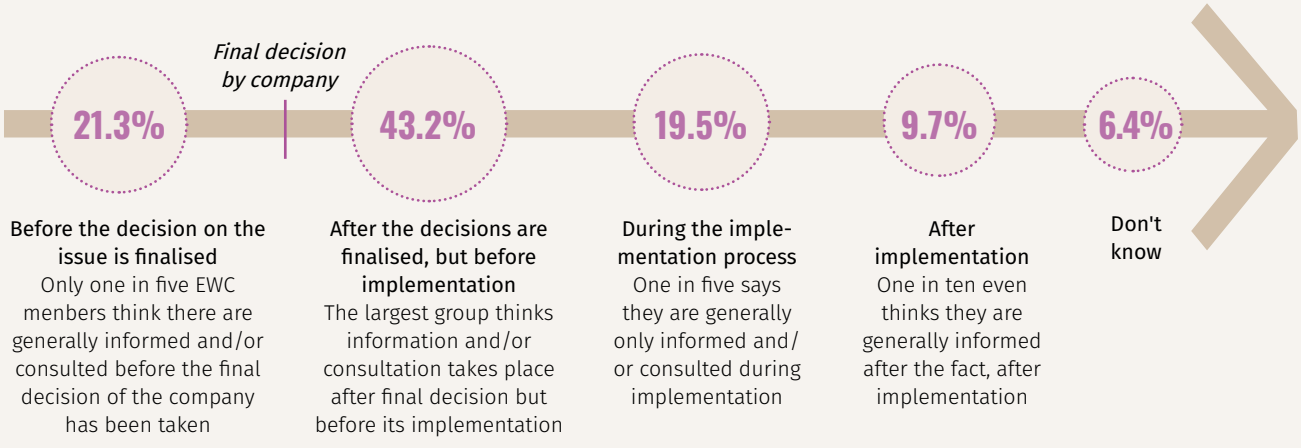
When asked about the quality of information, EWC members reported on all agenda items (mainly economic and financial information, corporate strategy, new technology, information on closures and cutbacks, relocation of production) that such data was often presented to EWCs (between 84-98% of cases), but the information presented was rarely useful (only in case of closures and cutbacks one in two EWC members reported the information to be useful, while on all other topics useful information was reported by less than 50% of respondents).

Source: *De Spiegelaere and Jagodziński (2019), p. 38.*

Timing of information and consultation

In the 2018 survey among EWC members they were asked 'In general, when does the information exchange or consultation take place?'

Source: *De Spiegelaere and Jagodziński (2019), p. 38.*



Only one in five EWC members reports they are generally informed and consulted in a timely fashion, i.e. before the final decision has been taken by management. By the same token more than 70% of EWC members think they are not informed on time according to the law.

Source: *De Spiegelaere and Jagodziński (2019), p. 39.*

There are several other points to consider[10]:

- carrying out 'information' and 'consultation' procedures at a single meeting would constitute a violation of the Directive;
- a simple disclosure of the final decision by management cannot be accepted as a valid and duly completed consultation procedure;
- information and consultation procedure is not a simple formality, but should be normal part of the decision-making process;
- as EWC you should be able to ask for more detailed information or different information (data) if you conclude that the data provided to you so far does not allow to examine the matter sufficiently.

Limits to the managerial use of confidentiality

When considering access to information **confidentiality** may be a serious limitation; at the same time, it is a double-edged sword, as it sets 'red lines' also for management that it cannot cross.

Based on the provisions of the EWC Directive (Art. 8.2), when management refers to confidentiality of information and obliges EWC members not to convey it or share it with other EWC members, you should check whether management indicated:

- what pieces of information are specifically covered;
- why the information is deemed confidential;
- how long the confidentiality shall apply;
- to whom specifically confidentiality applies and whether the information can be shared with other employee representatives;
- the way in which conveying the information could harm the company's interest according to objective criteria.

Moreover, EWC members have the right to appeal to administrative or judicial authorities when they do not agree to the imposed confidentiality.

Effectiveness (effet utile) of consultation

It must be verified if, based on the information received and consultation, the EWC can meaningfully **influence company decisions.** When asked about the role played, most EWC members report that the EWC is mainly useful as a source of information, but much less so when it comes to consultation or influencing managerial decisions (only one in five EWC members thinks their EWC delivers on those objectives; De Spiegelaere and Jagodziński 2019).

Impact on workers

Information provided and consultation conducted should be completed in such fashion and with such content as are appropriate to enable employees' representatives to undertake an in-depth assessment of the possible impact on the interests of the workers they represent (Art. 2.1 f), including the 'possible' or 'potential' impact (Recital 16 of the Recast Directive). It is the prerogative of the EWC to assess what the interests of workers are and if they may be potentially affected.

It should also be underlined that EWCs are entitled to be informed and consulted about all decisions which affect employees' interests. This does not have to be only a negative effect. What matters is that the decisions at stake are of 'importance for the European workforce in terms of the scope of their potential effects', regardless of their possible positive or negative outcome for employees.

Confidential information

When asked, almost four in ten EWC members report that management often refuses to convey information by referring to the necessity of maintaining the information confidential (De Spiegelaere and Jagodziński, 2019: 67). A slightly smaller group of EWC members (33.4%) on the other hand, reported that management does not impose confidentiality often.

Several court cases have demonstrated, however, that EWCs can be successful in challenging management on the (ab)use of confidentiality as a method to restrict information flows (Jagodziński and Stoop, 2021).

10 More detail can be found in Picard S. (2010) European Works Councils: a trade union guide to directive 2009/38/EC, Brussels: ETUI, available at: www.etui.org/publications/reports/european-works-councils-a-trade-union-guide-to-directive-2009-38-ec.

Transnational character of the subject matter

Provisions defining what matter is transnational are quintessential to defining EWCs' competence to be informed and consulted on these topics. Qualification of what matters are transnational is also one of the most contentious issues between EWC and management: a majority of 30% of EWC members report that there are frequent discussions about it (De Spiegelaere, Jagodziński and Waddington 2021: 212). An allegedly lacking transnational character of a matter is among the most frequently used reasons that central management names as grounds for not informing and consulting EWCs; as such, it has been the subject of many court cases too (either as the central issue, as in British Airways EWC in 2006, Vesuvius EWC in 2019, Verizon EWC in 2020, Veolia Transdev EWC in 2014, or in combination with other disputed matters; see www.ewcdb.eu/search/court-cases.

Functioning of the EWC (including resources and rights of EWC members)

The last, but not least, 'red line' is associated with the operational resources for EWCs and EWC members. The EWC Recast Directive (and national transpositions) specifies that the means (financial and material) for the operation of an EWC should be determined in the EWC agreement (Art. 6) and that in any case it is the management that is responsible for providing the members of the European Works Council with the means required to apply the rights arising from the Directive and to represent collectively the interests of the employees' (Art. 10).

It may be worthwhile to decide collectively on these 'red lines' and criteria for assessing conflict – even before a dispute arises. Get in touch with the trade union and seek their support in the process. It may also be important to consider if the present dispute is the first disagreement in an otherwise cooperative relation with management or rather another example in a longer streek of violations of the rules of the game. Consider if the violation is intentional and if it touches on the core of your information and consultation rights and of the workforce's interest.

Finally, the obvious truth should be emphasised: an ability to determine the 'red lines' requires good knowledge of the legal sources – the EWC Recast Directive, the national law (both that of the EWC agreement and of your home country) and the EWC agreement (see also Table 9.1 *Knowledge about EWC regulations* in De Spiegelaere, Jagodziński and Waddington 2021).

LOSING IS NOT AN OPTION

"You cannot afford to lose a case, because that damages the legal position of all EWCs."

Senior EWC Coordinator

Deciding to go to court or not

3

If an EWC considers going to court to defend their rights, several steps have to be taken.

Firstly, involve your trade union to make a joint evaluation of the situation, assess the seriousness of a dispute and jointly elaborate a comprehensive strategy for the EWC to resolve the conflict, which may include litigation. Keep in mind that litigation is a means of last resort. Secondly, the EWC has to figure out the question about the goal of litigation: what is its intended objective and what desired effect should it produce? And thirdly, the EWC has to make an informed choice between the different ways in which the issue could be solved.

3.1 Perception of conflict

The 'red lines' defined by the legal framework are helpful in assessing the seriousness of a dispute, but they are not automatic determinants. It still takes a degree of discretion to apply them. In order to take action in response to a dispute or conflict with management an EWC has to reach consensus. This means aligning the views of a majority of EWC members (depending on the rules set in the EWC agreement or internal rules of procedure) and of their trade unions (ETUF, national) that a conflict is serious enough to take legal steps. In practice, EWC members and the supporting trade unions will likely have differing perceptions of conflict and varying opinions on its seriousness. They may thus have different views on the best possible ways of handling the conflict.

The very first step in assessing seriousness of a dispute is noting its presence. Already at this seemingly very basic level individual perceptions play a key role: it is common that within the same EWC some members and trade union representatives report presence of a serious dispute with management and others do not qualify the same disagreement as conflict. Those differing views are associated with a variety of factors:

1. Factors linked to individual representative's function and profile within the EWC and the profile of the EWC. Depending on the representative function performed within the EWC, a person may have a particular perception of conflict (see infobox "perception of conflict"). The length of service on the EWC as well as the knowledge of the rules (legal framework, EWC agreement) may have an impact on the perception of conflict

2. National backgrounds of EWC members. Depending on the EWC member's origin, a person may have a different perception of conflict. The views may stem from cultural backgrounds, industrial relations frameworks and traditions; litigation affinity in the home country, social perception of conflict and litigation, efficiency of enforcement mechanisms etc.

3. Individual (personal) factors: individual perception of conflict, preference for conflict resolution method, personal upbringing, etc. For instance, hesitation for going to court may stem from lack of knowledge, lack of confidence and lack of trust in efficient judicial enforcement of information and consultation rights and, consequently, resignation and acceptance of managerial infractions as commonplace.

'Perception of conflict and function within EWC'

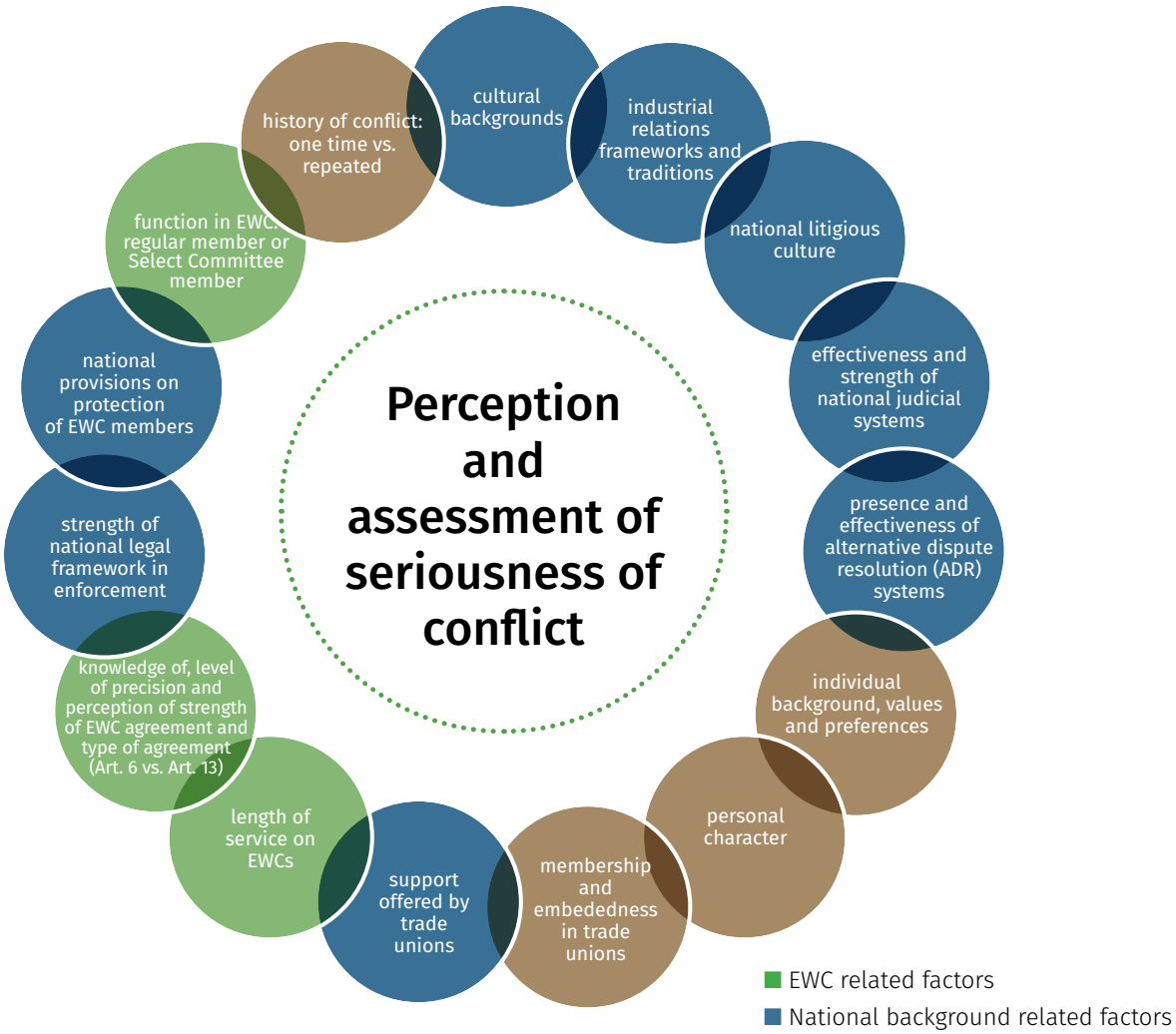
TETUI survey data (De Spiegelaere and Jagodziński, 2019) confirms that differences in perceptions of frequency and seriousness of conflict depend on the performed EWC function: office holders (chairpersons, select committee members) reported serious conflicts far more frequently than other members (respectively 23,3% vs. 12,1%) or substitute members (8%) (Figure 2). Similarly higher rates of perception of conflict were reported by trade-unionists and members of EWCs where a coordinator is present.

In case of office holders the explanation is that they are simply closer to the centre of events and engage more often in direct exchanges with management; they are thus more directly and frequently exposed to disagreements and conflict with management.

Where an EWC is assisted by an EWC coordinator and/or if there are trained unionised EWC representatives on board the higher perception of conflict can be explained by their better knowledge of the rules applying to the EWC and of the required standards that information and consultation need to meet..

FIGURE 1

Various factors affecting perception and assessment of seriousness of conflict



Source: *R. Jagodziński (2022).*

Note: *all these perceptions overlap and may occur within a single EWC*

3.2 Is the EWC eligible to go to court?

A necessary step before starting litigation is to check whether the EWC can actually legally approach a court and be recognised as a party in legal proceedings according to the national law on which the specific EWC agreement relies.

The EWC Directive does not uniformly grant EWCs any specific legal form or status and leaves it up to national legislation to 'ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced' (Art. 11.2 of the Recast Directive 2009/38/EC). The capacity of EWCs or trade unions to seek legal redress on behalf of EWCs varies from one EU Member State to another (Figure 3).

FIGURE 2 EWC legal status across the EU legal status across the EU

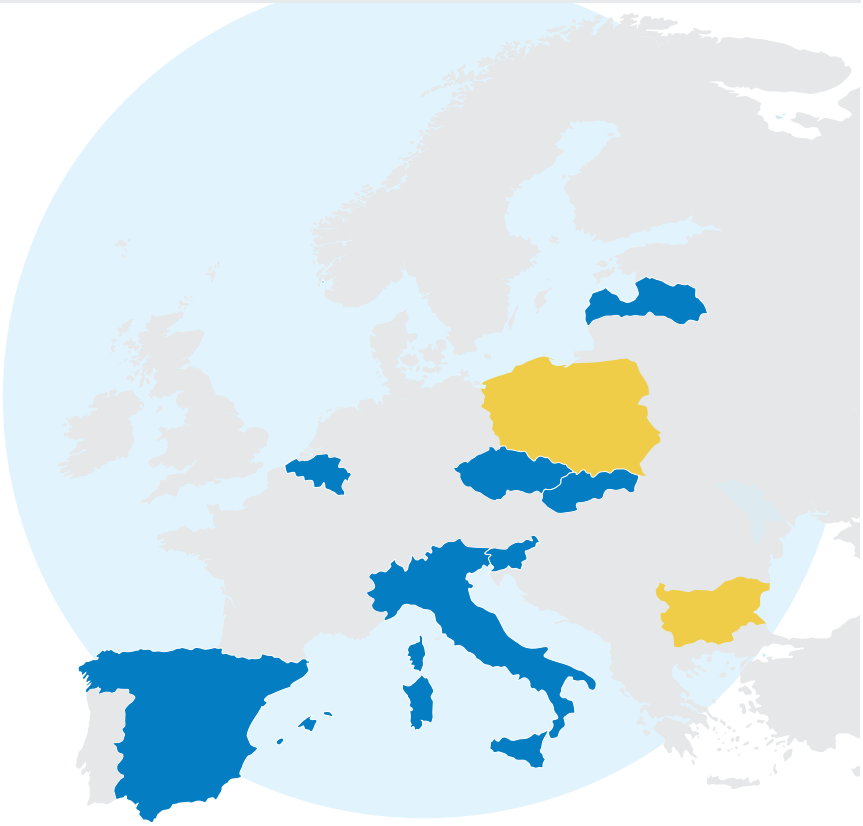
- Legal Personality
- Legal capacity to act in courts
- Limited legal capacity
  - **Belgium:** Only individual member and trade unions
  - **Denmark:** Only SNB and trade unions in labour courts
  - **Ireland:** Only individuals workers representatives in protection cases, otherwise only arbitration (no access to courts)
  - **Italy:** Only with trade unions
  - **Luxembourg:** Only individual workers representatives
  - **Poland:** EWC only in confidentiality cases
- Legal status lacking

Source: *R. Jagodziński (2022).*

- **In three Member States (Austria, France and Sweden) EWCs have full legal personality, allowing EWCs' representatives to initiate judicial proceedings on behalf of the EWC and to represent the EWC in relations with third parties;**
- In further 9 countries (Czechia, Finland, Germany, Latvia, Lithuania, the Netherlands, Romania, Slovakia, Spain and Hungary) EWCs can be a party in legal proceedings; in addition, in Poland this capacity is limited only to confidentiality disputes, while in Lithuania the capacity is limited to provision of information and confidentiality.;
- In four Member States (Belgium, Denmark, Italy, Luxembourg) only EWC members are granted the legal capacity to act in justice an action on EWC matters;
- As a consequence, there are five Member States where EWCs lack any legal status to seek justice: Cyprus, Estonia, Finland, Latvia and Malta; in Denmark reportedly only SNB members can initiate a dispute at court, but not EWC members; in Norway the EWC has no legal status and it is unclear if individual members can act on its behalf in courts);
- In Ireland only infringements of rules pertaining to protection of employee representatives are enforceable in courts, while in several other aspects (interpretation or operating of EWC agreements as well as confidentiality and withholding of sensitive information) only arbitration is possible, without access to courts;
- In Italy disputes between EWCs and management can only be resolved in a conciliation procedure at the Ministry of Labour, without access to courts (however, with the aid of trade unions cases can be brought to labour courts).

FIGURE 3

Litigation via trade union



■ Trade Union can initiate court proceedings on behalf of EWCs

■ Under legal debate

Notification to labour inspectorate and debated (In Poland)

Source: *R. Jagodziński (2022).*

In countries where EWCs have a limited legal capacity it is thus necessary to double-check if an EWC is collectively eligible to bring a case to court, or whether this action can only be performed by individual workers' representatives being members of the EWC or by trade unions on behalf of the EWC (see Table 2 below). To avoid legal uncertainties and consequently problems, the EWC should contact the relevant ETUF (either directly or via the national trade union organisation) to get help and advice on the matter.

FIGURE 4

EWC legal status and ways of circumventing formal limitations

COUNTRY NAME	EWC Legal status	Ways to circumvent lacking legal status of EWC
Austria	Legal personality	
Belgium	Only individual members and trade unions (the usual option)	Via trade unions
Bulgaria	Legal standing / Capacity to act in courts	Notification by trade unions to the Labour Inspectorate
Croatia	Legal standing / Capacity to act in courts	
Cyprus	No	
Czechia	Legal standing / Capacity to act in courts	via trade unions
Denmark	No for EWC. SNB and trade unions in labour courts	
Estonia	No	Trade unions or by individual EWC members (at least in confidentiality cases).
Finland	No	Through the criminal proceedings, where any natural person can report an offence (usually done by the trade union actors on behalf of the EWC or SNB). Also, an individual EWC/SNB rep can issue the report to the police. Or to the Cooperation Ombudsman.
France	Legal personality	
Germany	Legal standing / Capacity to act in courts	
Greece	Legal standing / Capacity to act in courts	
Hungary	Legal standing / Capacity to act in courts	
Ireland	Only individual workers' reps	By individual EWC members starting litigation
Italy	Limited: only with trade unions	Via trade unions
Latvia	No	Via trade unions
Lithuania	Limited	
Luxembourg	Only individual workers' reps	
Malta	No	
Netherlands	Legal standing / Capacity to act in courts	
Poland	Limited: in confidentiality cases	Under legal debate whether trade unions could represent EWCs. Possible to notify the Labour Inspectorate.
Portugal	Legal standing / Capacity to act in courts	
Romania	Legal standing / Capacity to act in courts	
Slovakia	Legal standing / Capacity to act in courts	Via trade unions
Slovenia	Legal standing / Capacity to act in courts	Via trade unions
Spain	Legal personality	Not needed, but: trade unions can file a lawsuit (class action / collective dispute)
Sweden	Legal personality / Capacity to act in court	
United Kingdom	Legal personality / Capacity to act in court	
Norway	No / unclear	Yes
Iceland		Trade unions[1] (collective) or individual[2]

Source: *R. Jagodziński (2022).*

3.3 What does the EWC want to achieve?

Once your EWC has established that a conflict or dispute is serious enough to take legal action there are another two questions to consider:

1. What goal does the EWC and the trade union want to achieve by going to court?

2. Are there alternative options apart from litigation and can they be more efficient than litigation?

These are central questions to be asked when considering litigation. Below we present only some key considerations and options for action. **It is key for EWC and their trade unions under the coordination of the relevant ETUF to discuss and elaborate a concrete strategy BEFORE deciding to go to court.**

3.3.1 GOALS AND MEANS TO AN END

The first question to ask is: what does the EWC together with the coordinating trade union want to achieve by responding to a given dispute with management? A starting point to consider is the question: is the present situation reparable? For example, if the goal is to obtain the information that management refused, is it still possible to obtain the information yet or has the conflict already developed beyond this point? Other reparable issues can comprise obtaining the necessary resources for EWC's operation, such as access to experts. In a situation of transnational restructuring involving collective redundancies the goal might be to improve directly the situation of workers, e.g. by reducing the number of redundancies.

In cases where the issue is not reparable and seeking resolution by courts seems the most effective solution, the possible goals of litigation against management may be:

1. To make a strong point towards the management e.g. about respecting the rules and insist that in future management respects the EWC agreement.

2. To confront management about a repeated infringement or practice that has been pursued already in the past.

3. To obtain an independent court's interpretation of a problematic arrangement in the EWC agreement.

4. To explore some new legal avenues or pointing out problems with national legislation as not meeting the standards of the EWC directive (e.g. addressing the European Court of Justice on interpretation of the EWC Directive) as a part of a broader trade union litigation strategy.

Often, reparable issues are easier to solve without recourse to legal action than disputes over issues no longer reparable by management. **In any of these considerations make sure to decide jointly with the trade union supporting your EWC (preferably the ETUF relevant for your sector) about the above-mentioned considerations concerning goals and the best way to proceed.**

Often, protecting EWC rights against violations by management would require a quick decision of the courts. A court ruling after the disputed measure has already been implemented by management with its consequences for the workforce may not serve its purpose. In such situations, legal systems in some Members States (in Estonia, France, Germany, Spain, Romania, Denmark, Finland, Ireland) ensure fast-track (summary) procedures allowing the EWC to request a suspension order from the courts (an injunction) are available. Such suspension orders have the power of blocking management from implementing the disputed decision until a court issues its judgement on the case (i.e. these are not sanctions, but preventive mechanisms against permanent damage). Any EWC in such situation is best advised to consult a national trade union lawyer to determine the exact procedure to obtain a suspension order.

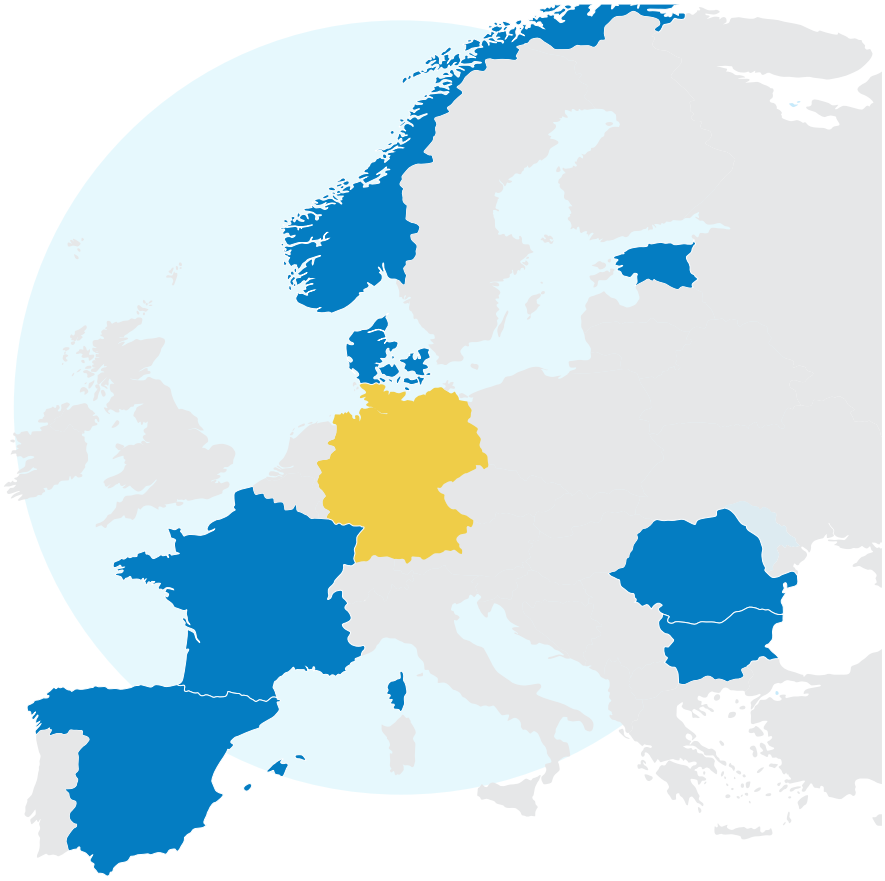
FIGURE 5 Litigation via trade Union

■ Preliminary injunctions available to EWCs or SNBs

■ Under legal debate

Germany: preliminary injunctions available to works councils (German Works Councils act), but not explicitly to EWCs

Source: *R. Jagodziński (2022).*



A crucial aspect to consider is the timeframe necessary to go through with litigation and obtain a judgement in EWC cases. EWCs as collective bodies can sue the management under jurisdiction of countries indicated in the EWC agreements. In some countries it can easily take months or even years to obtain a court's ruling. As a consequence the efficiency of litigation as a fast problem-solving mechanism for EWCs may be limited in some countries.

A final legal issue to consider is whether the legal regime under which the EWC operates sets deadlines within which a case has to be brought to court. Even where no time between the violation of EWC rights and the moment of appeal to court is formally (explicitly) stipulated in the given country's law, it may be ruled by the court. In the court case of Exxon Mobile in 2007 (appealed against in 2008) the French court ruled that a challenge to management's application of confidentiality is possible only at the time of the release of confidential information or shortly thereafter – an undue delay renders the EWC right to a legal challenge invalid.

TIP 3 prepare the decision

If there are fixed timeframes to bring a case to court or if the EWC wants to act swiftly, there is a way to make sure that the litigation can start without delay. If the need to start litigation is the result of a sequence of violations of EWC's rights, and the EWC has repeatedly protested against such breaches in earlier cases, the decision to go to court can be prepared in advance. Jointly with the trade union the EWC can then write a warning letter to management along the lines: *'you have breached the EWC agreement and the law again, the next time you do it we shall take the case to court'*. It is a reportedly effective time-management tactic for an EWC that allows to prepare the ground for litigation long before a court case emerges as a viable option, i.e. already when the previous breach by management occurred (see also section 3.4).

3.3.2 ALTERNATIVE MEANS

Even if a specific case may seem perfectly straightforward and clear, a degree of risk is always involved until the court's final ruling. A vast majority of cases launched by EWCs and/or unions produced judgements favourable to arguments presented by workers' representatives (and in that sense the litigation was an 'effective' means), but there is also the possibility that a judge will see things differently and may yield to arguments of management.

Litigation is the last resort in dispute resolution and other prior actions should be considered and undertaken before going to court. It is for the EWC and the trade unions under the coordination of the relevant ETUFs to carefully consider alternatives and decide what action to take and at what time.

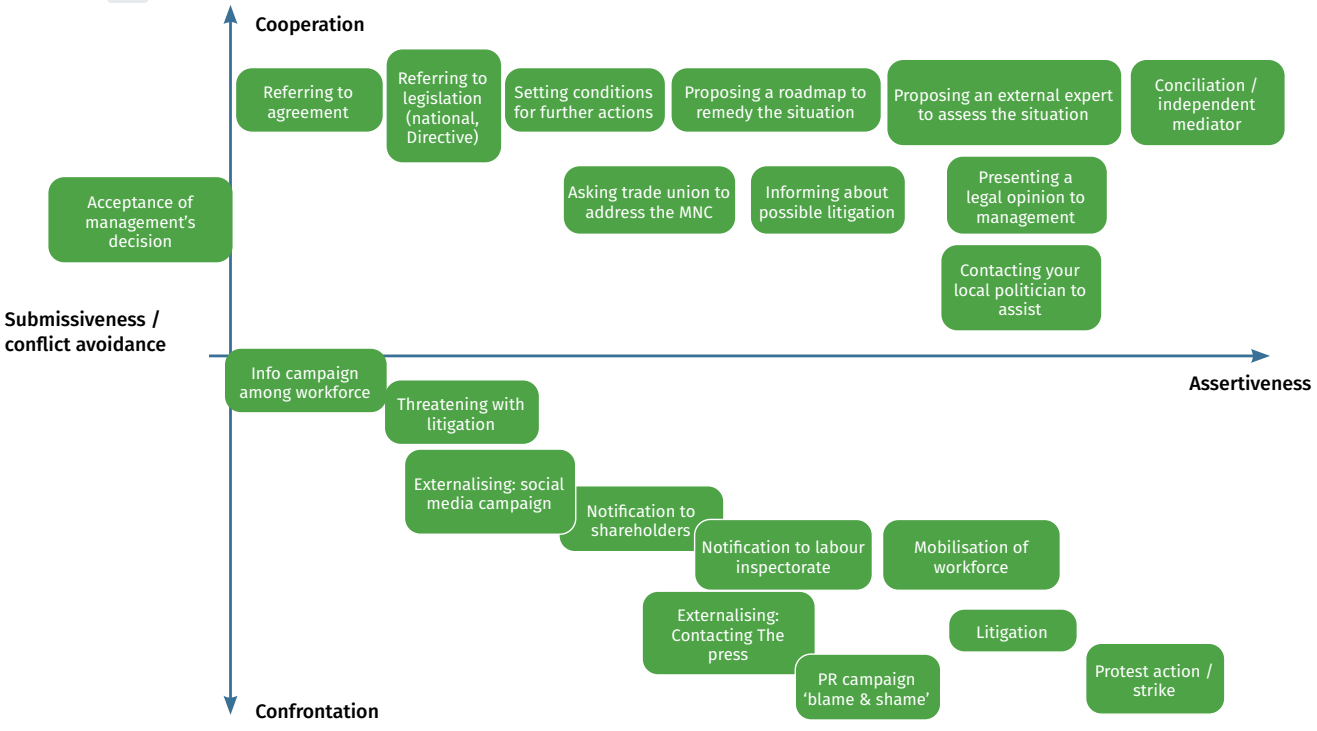
Since litigation is only one of the possible options to solve a conflict, before resorting to it, it may be useful to list other possible actions an EWC can undertake, for example:

- Try contacting an elected member of local/territorial government and seek his/her support in solving the conflict (it helped in the Renault Vilvoorde case in 1998, see 'Introduction');
- Consider involving a facilitator/mediator and informing an authority responsible for supervising social dialogue (e.g. labour inspection, ministry of labour);
- Mobilise workers (by organising a protest action, strike, initiate a formal collective dispute, gather signatures, etc.) to raise pressure and remind the management that EWC members are representatives of the workforce and have their backing. It is obviously demanding in terms of resources and requires quite some organising power. It may be a powerful tool, but is relatively rarely used by EWC members (it helped in the Renault Vilvoorde case in 1998);
- Seek legal help by the trade union and/or ask a lawyer to write a letter to the company (in any case you should do it before resorting to litigation) listing how managerial actions represent violations.;
- Expose double standards that management or the company apply, by e.g. communicating facts that may compromise its public image of a socially-responsible undertaking. In such cases making the issue public may be a more effective alternative to litigation (see chapter 4.6.2).

The trade union (preferably the relevant ETUF) should be involved as early in the process as possible, through the trade union coordinator of the EWC, who should act as a link.

There are various options available to EWCs between passively accepting another violation by management and going to court. They vary, amongst others, in their level of assertiveness and in terms of being more or less cooperative / confrontative in their approach. Figure 6 shows different options and how they rank in these terms

FIGURE 6 Various options to resolve a dispute



Source: *R. Jagodziński (2022).*

The main message is: do not fall into a trap of 'all-or-nothing' way of thinking and always consider available alternatives.

While being the last resort, litigation is not necessarily the ultimate confrontative tool: it is an institutionalised and civil manner of handling serious disputes. In this sense referring to court for a ruling is a far better and more civilised solution than resorting to social unrest, physical confrontation, or a continuous verbal warfare.

3.4 Coming to a comprehensive strategy of the EWC to resolve the issue

In the previous section we listed several options for responding to a conflict with central management. However, within these options, further variations are still available: for instance, when you think about going public, there are options that are less confrontational than others, as Figure 7 shows. Social media are less public than papers and television, a public campaign does not have to be a 'blaming & shaming' crusade against the company. The different options can be used as escalating steps in a strategy, with increasing confrontation and assertiveness. Choosing the best option requires experience and good knowledge of the broader context. EWCs are thus best advised to decide on the strategy of conflict resolution jointly with the trade union (preferably the relevant ETUF or a national trade union).

A useful tool in this regard may be the 'Escalation Ladder' of actions (Figure 7).

FIGURE 7 Escalation ladder (an example)

- Go to court
- Hire a lawyer and send an official 'last call' to management
- Go to the press
- Expose the problem via online media (social media, website)
- Seek support of relevant authorities (labour inspection, ministry)
- Seek support of a (local) politician
- Contact the shareholders in the General Shareholders Meeting
- Contact the BLER (Supervisory Board, Board of Directors)
- Send a letter to the bosses' boss
- Talk to the bosses' boss
- Mobilise workers for a protest action
- Communicate/inform all colleagues
- Involve a facilitator/mediator
- Write a demanding letter (signed by a lawyer)
- Write a 'kind' letter
- Ask a trade union for help
- Raise it (again) during an informal meeting
- Refer to your 1. EWC agreement, 2. Legislation (national act, Directive)
- Require 'formal' meeting with central management'
- Schedule a consultation meeting

Escalating responses to management step by step has the advantage that the option to find a solution to the conflict remains open until the last moment (launching a court case), and the pressure on management to compromise is increasing with each step. This is confirmed by EWC practice: around 27% of EWC members who reported a serious dispute with management and threatened to bring a case to court, eventually did not do so because of 'other reasons'; the most likely explanation is that after undertaking the first steps towards litigation, management started to take the dispute seriously and was willing to come to some consensus with the EWC (De Spiegelaere, Jagodziński and Waddington 2021: 234). To be effective, escalation should be performed and communicated with transparency from the very beginning.

Where an EWC decided to apply the step-by-step escalation strategy, it is of importance to always communicate the next steps that will be taken if the management is not willing to compromise and undertake the presently demanded action. Such an approach allows the management some time to think whether it wants to escalate the conflict to the next level and to respond accordingly. This will only work, however, if the EWC has a plan of several moves ahead and is resolved to take and execute the next step it indicates. Otherwise it will undermine its credibility and inflict damage to itself and its cause.

Finally, when as an EWC you put in a complaint to management, rather than just pointing out a breach, you should inform them about what you want them to do better and what standards you expect next time. Give the management space to rectify their wrongdoing. If the management addresses the problem you refer to – you have reached a success; and if they ignore your offer it may strengthen your case when you go to court (as long as you make sure to document all your efforts towards the management in the process leading up to the court case; see also Section 4.5 in this overview). A reportedly useful technique is also to warn the management at this point that the next time they breach the rules you will seek justice at court.

3.5 The costs of litigation

Litigation is a possible way to get your rights respected. However, it is important to remember that it does not come free of charge.

When considering litigation, the EWC and the coordinating trade unions have to consider several types of costs associated with legal actions.

3.5.1 FINANCIAL COSTS

First of all, there are financial costs:

- cost of **legal advice** (legal counsel, etc.) to evaluate the case (its merits, chances of success, potential problems, etc.) in a preparatory phase to inform your decision about launching litigation (trade unions can provide assistance in contacting an experienced lawyer);
- **costs of arbitration/mediation** or cost of **court fees** payable for registration and processing of the case by the court. Those fees vary by country (see Part 2 of the practical overview);
- costs of **legal representation** by a barrister/lawyer. Those costs need to be negotiated individually with the lawyer, as well as what is covered in the lawyers' remuneration. In some countries it is not formally required by law to hire a lawyer to represent the EWC and the EWC members or trade union officers on their behalf may present the case themselves (see Table 3). However, normally it is not advisable;
- additional costs, including for instance travel costs for meetings with the lawyer (can be minimised thanks to modern means of communication, but in-person meetings will be needed at some point), travel and leave from work for attending the case in courtroom, gathering and preparing evidence, obtaining opinions by another experts (e.g. in financial affairs); and any possible contingent costs that may arise.

TABLE 3 Representation by non-lawyers in EWC court cases

COUNTRY NAME	No lawyer required	Lawyer required
Austria	At District Court, cases up to 5000 EUR	In Regional Courts, cases > 5000 EUR
Belgium		Yes
Bulgaria		Yes
Croatia		Yes
Cyprus		Yes
Czechia	No	Yes
Denmark	Not required in civil courts, but usually by lawyer	Usually
Estonia	??	Yes
Finland	Not in civil court	Yes
France	Not in district court (1st instance)	Generally yes
Germany	In a Local Court (Amtsgericht), cases <5000 EUR	Generally yes
Greece	Not in: district civil court (Irinodikio), (2) provisional remedies, (3) to prevent an imminent danger (Article 94(2) of the Code of Civil Procedure), and (4) labour proceedings conducted before the single-bench court of first instance	Generally yes
Hungary	Yes	Sometimes
Ireland	Sometimes	Sometimes
Italy	Sometimes*	Generally yes
Latvia		Yes
Lithuania		Yes
Luxembourg		Yes
Malta	No	Yes
Netherlands	Not in civil court	Enterprise Chamber of the Amsterdam Court: Yes
Poland	Not in civil court (sometimes)	Generally yes
Portugal	Not in civil court <5000 EUR	Generally yes
Romania	Sometimes	Generally yes
Slovakia	Not in civil courts	Generally yes
Slovenia	Possible in district courts	In higher instances
Spain		Generally yes
Sweden	Not required in civil courts	Generally yes
United Kingdom	Possible	Advisable
Iceland	No / unclear	
Liechtenstein		
Norway	Not required in civil courts	
Switzerland		

Source: *R. Jagodziński (2022).*

Not all costs may be applicable in every case. Costs vary from country to country (see Part 2 and country reports). It is important to consider these costs and discuss how they will be covered with the trade union(s) coordinating the EWC.

The EWC directive contains a general clause that: '(...) the European Works Council shall have the means required to apply the rights arising from this Directive, to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings.' (Art. 10 para. 1 of the Recast Directive). This implies that operational expenses of EWCs, and SNBs should be covered by management (it is good practice to write them down in the EWC agreement). However, the EWC Directive and its national transpositions do not contain specific clauses on the costs for legal procedures. According to the European Commission (2018: 34) these general clauses are clear and represent a sufficient basis for obliging management to cover litigation costs, but practice in many EWCs teaches otherwise. In some cases, national courts also confirmed the management's obligation to cover EWCs legal costs (e.g. in the recent case of 2020 Princes Group EWC vs. Princes Group at the CAC, UK; or in the Verizon EWC & The Central Management of Verizon Group, 2019, EWC/22/2019, CAC), but in another earlier case the court insisted it was a matter of agreement between the parties (e.g. Case Number: EWC/13/2015, Emerson Electric European Works Council and Others and Emerson Electric Europe, CAC). In 2022, the Vienna Labour and Social tribunal ruled on a lawsuit filed by the European works council of Mayr-Melnhof Packaging that in order to clarify legal issues and justify positions to the central management of such a large and internationally active group, an opinion from an expert specialised in the field of EWC law is necessary and must be paid for by the company.

Whether or not the EWC can claim legal costs with the company, depends in the first place on what is stated in the EWC Agreement.[11] To at least partially remedy the situation, it is thus advisable when (re)negotiating the EWC agreements to include clear arrangements on covering legal expenses in case of a dispute (see Box 'Examples of arrangements in EWC agreements on financing of legal costs').

Since only a fraction of EWC agreements contain arrangements clearly securing coverage of legal costs by management, many EWCs must either get into a legal battle first to get these costs covered (or reimbursed following a court's decision) or find external funding. Financial support comes mainly from national or European-level, sectoral trade unions, the European Trade Union Federations (e.g. European Public Services Union runs a special fund available for EWCs that consider or have entered litigation with management).

Examples of arrangements in EWC agreements on financing of legal costs

- art 6. (viii) *The members of the Forum shall have such legal rights, and recourse to dispute resolution machinery and such courts of relevant jurisdiction, as are necessary to vindicate their duties, rights and entitlements under this Forum agreement*

  (Zimmer Biomet European Works Council, installation agreement of 2019);

- The SE *Works Council may not be ordered to pay the costs of such [court] proceedings. Article 261 and following of the Dutch 'Wetboek van Rechtsvordering' shall apply. (Art. 15.2)*

  (AEB SE Works Council, installation agreement of 2018)

- *(...) in cases where a legal procedure is necessary, always in relation to the Law but not related to Article 20 of the said Law [Cypriot transposition of the EWC Directive], the expenses for launching a legal procedure shall be covered by the Group under the condition that the latter shall be informed beforehand about this cost and that it only relates to procedures necessary for the application of the legislation provisions*

  (Laiki Group EWC, installation agreement of 2007)

- *Cost for litigation paid by the company regardless of the outcome*

  (Assa Abloy EWC, renegotiated agreement of 2006)

- *The Central Management shall bear the costs of all necessary financial and material resources of the EWC, the EA and the working groups. These shall include, in particular, (...) the costs of any necessary mediation and any court and lawyer fees.*

  (Yazaki Europe Limited EWC, installation agreement 2018)

- *The Central Management shall assume the costs incurred for the proceedings before the board of arbitration and the courts*

  (Abertis Group EWC, installation agreement 2012)

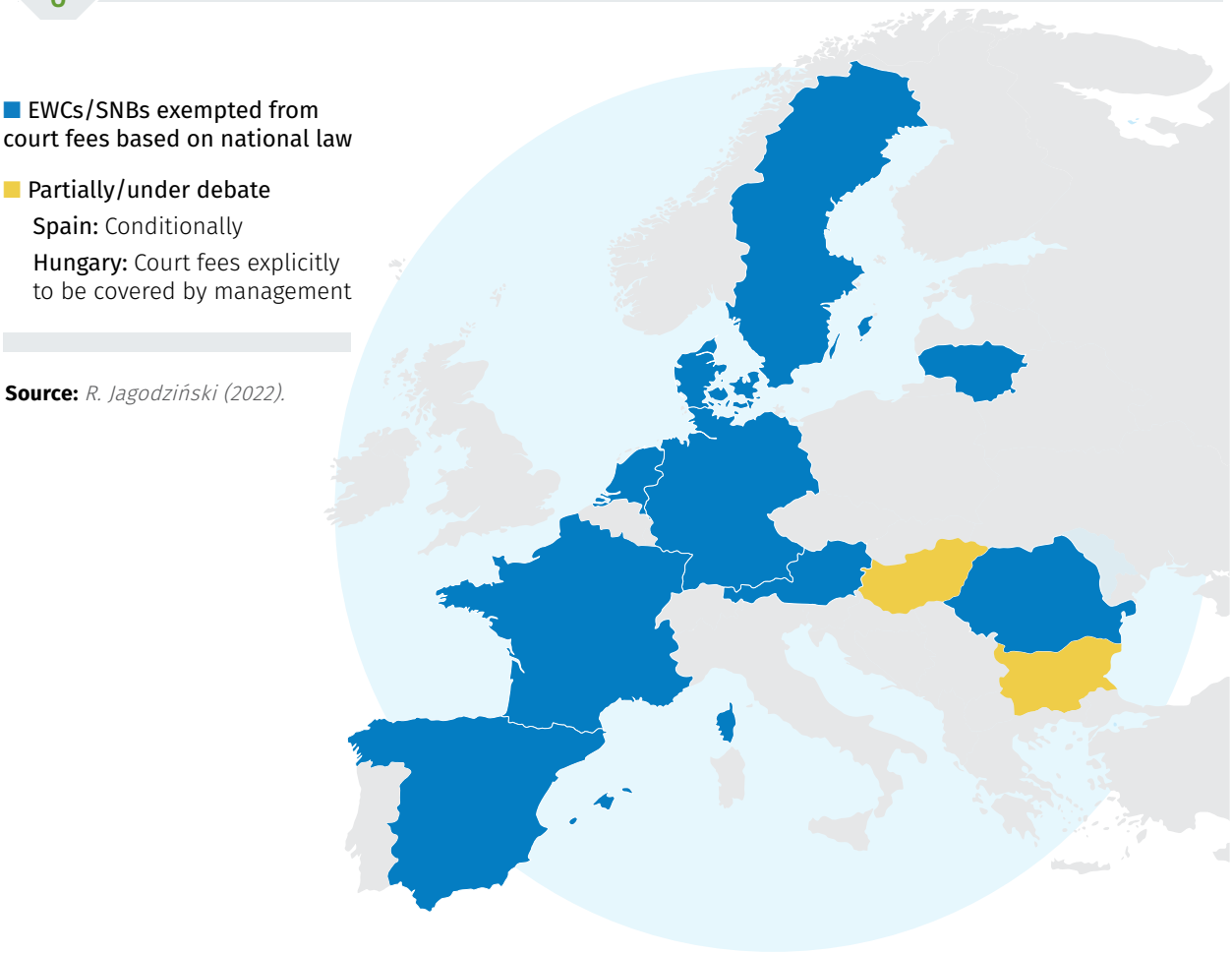
Source: *R. Jagodziński (2022) based on ETUI database of EWCs, www.ewcdb.eu.*

11 For SNB and Art 6: any expenses relating to the negotiations shall be borne by the central management so as to enable the special negotiating body to carry out its task in an appropriate manner (Art. 5 para. 6 of the Recast Directive); EWC (subsidiary requirements): 'the operating expenses of the European Works Council shall be borne by the central management' (Art. 6 of the Annex 1).

COURT FEES IN YOUR COUNTRY

Check if court fees (cost of registration and processing of your case by the court) are due in the country where you want to start litigation with management (refer to the respective Country Fiche in Part 2 of this practical overview).

FIGURE 8 EWCs exempted from court fees in national law



Source: *R. Jagodziński (2022).*

Remember[12]:

- **Only 8 countries do not require payment of court charges** to start proceedings (Austria, Lithuania, Spain [conditionally], Bulgaria, France, Germany, Romania, Sweden, the Netherlands). **In the following countries (among others) the management is specifically obliged to finance litigation:**
- Hungary: The EWC members shall have the means required to exercise the rights provided to the EWC, **including the commencement of legal disputes** relating to the violation of the rights to information and consultation of employees;
- The Netherlands:
  - The Enterprise Chamber of the Amsterdam Court stipulates fees for for legal and natural persons, but the SNB or the EWC are neither.
  - The **cost of taking legal action included in the costs paid by the central management** provided that the central management has been notified in advance of the expense involved;
  - An SNB or the members thereof and an EWC established under the transposition **may not be ordered to pay the costs of the proceedings** at the Companies Division of Amsterdam Court of Appeal.

In some countries there are public authorities that can support EWCs in their access to justice. E.g. in Finland the Corporate Ombudsman can assume a supervisory role in a conflict. The Ombudsman has the right to request all relevant information, including confidential or stock market related data, and in principle can act very swiftly.

12 The information was provided in 2022. Court fee provisions may have changed since in the relevant member state.

A crucial issue to consider is the timeframe for this kind of cases in the national legal system that rules over the agreement. In some countries this can easily take months or even years, which may render the problem-solving effects of the legal system for EWCs to almost zero.

In chapter 4.4 we will go in more detail on the issue of the cost of a lawyer and how the EWC can make sure the company can pay for these expenses.

3.5.2 RELATIONSHIP WITH MANAGEMENT

Experience of EWCs involved in litigation in the past shows that there are various possible scenarios of how litigation will affect your present and future relationship with management. The spectrum of possible scenarios is broad, but limited by the following two extremes:

- **Best-case scenario:** The management starts to view the EWC as a more serious partner than in the past. The EWC gains respect as a formal institution strong enough to be reckoned with in future and management is more inclined to constructively cooperate with workers' representatives. This is the optimal scenario that any EWC hopes for – it improves the initial position of the EWC and makes future constructive cooperation possible;
- **Worst-case scenario:** the litigation fuels (pre-existing) enmity between management and EWC, and results in a constant open war. Future constructive cooperation is hardly possible unless some important game-changer occurs (change of management, structural change within company, shift in corporate culture, new composition of EWC, etc.).[13] Future disputes resulting possibly in court case(s) are likely;
- When considering possible managerial responses do not get bogged down in too detailed deliberations, but do take some time to anticipate your management's responses and prepare your responses or counter-actions.

GAIN RESPECT

"Management that is confronted by a EWC with a legal case, is never happy about this. But they will also appreciate the opportunity to get an objective and expert authority to clarify who was wrong and who was right. In my experience, a court case always led to management taking the EWC more seriously, even if the EWC did not win the case. A management that loses a case may be removed, but I have never seen cases of retaliation against an EWC."

Senior EWC Coordinator

13 Open hostility is reported by only a small minority (7%) of EWC members (De Spiegelaere, Jagodziński and Waddington 2021: 200).

3.5 The costs of litigation

To conduct a comprehensive assessment of various aspects and estimate the cost-benefit ratio of the litigious route of solving a given conflict, various factors and their impact on the decision must be considered. The SWOT model can be of use here – a simple, quick and widely used tool in decision-making. SWOT stands for 'strengths', 'weaknesses', 'opportunities' and 'threats'.

Figure 10 presents an example of classification of general considerations about litigation as a route for conflict solving by EWCs. In this table 'strengths' and 'weaknesses' are internal factors (i.e. those that are within your control) and the remaining two are of dynamic nature, meaning that the outcome is not in the EWC or in the trade unions' own hands.

FIGURE 9 SWOT analysis of launching a court case: an example

STRENGTHS	WEAKNESSES	OPPORTUNITIES	THREATS
▸ More respect from management (perception as a more serious partner); ▸ Drawing a 'red line' for management to respect EWC rights and the agreement in future; ▸ If a case is won: the given infraction is sanctioned and rectified; ▸ More cooperation with management in future ▸ Prospect of litigation may convince the management to give in without actually going to court.	▸ Requires substantial resources (financial, organisational, time, mental); ▸ Requires getting everyone within the EWC on-board; ▸ Is a confrontational rather than conciliatory solution ⟶ makes going back to cooperation difficult or impossible.	▸ Possibility to integrate and tighten EWC actions and agenda; ▸ Possibility to reset cooperation with management; ▸ Possibility to re-negotiate the EWC agreement; ▸ Tightening cooperation with your respective trade union; ▸ More visibility among the workforce you represent; ▸ Clarifying a specific rule/provision (e.g. via a request for preliminary ruling from the European Court of Justice).	▸ Worsening of relationship with management in future: alienating or enmifying, less cooperation, more difficult operation of EWC; ▸ Internal dissent and/or disintegration within EWC; ▸ Potential harassment of EWC members by management; ▸ Unfavourable ruling of the court for your EWC; ▸ Unfavourable ruling of the court setting a negative precedent for other EWCs; ▸ Management sticking to bare legal minima and blocking operation of an EWC for formal reasons; ▸ Repeated conflict in future.

SWOT-analysis of the alternative solution

A similar SWOT analysis could be even done for the option of not going to court. It could inform of similar aspects of a situation in which the EWC and the trade unions do not go to court, and thus help consider the strengths and cost of an alternative solution. Comparing outcomes of the SWOT analysis for both the litigious and conciliatory ways of solving a dispute with management may clearly indicate the more efficient option in a given case.

Litigation

4

In the previous chapter we discussed the steps and considerations that may lead up to the decision to go to court. At least three more steps are normally necessary to start a court case. The absolute requirement

4.1 The relevant jurisdiction and competent court

for EWCs to be able to seek justice is to have specific legal status: either legal personality or legal capacity to act in courts. The legal status of EWCs and SNBs is regulated by national law and differs across the EU (see section 3.2).

The country of jurisdiction and the court competent to adjudicate in case of disputes should be mentioned in the agreement establishing a EWC and in any renegotiated version thereof. However, issues may arise because:

- the agreement lacks a (clear) clause on jurisdiction;
- if, in case of a dispute concerning the SNB rights, the SNB has not yet been established, companies may dodge the request to install a SNB by refusing to clarify which of its subsidiaries in Europe is responsible to deal with such request. Even though the Recast Directive contains clear criteria to appoint the legal entity (subsidiary) within a multinational company or group that should take on this responsibility (Art. 3 of the EWC Recast Directive), companies can sometime hide behind complex legal structures. In such cases, often a long legal battle follows.[14]
- In many Member States, there are no or only unclear legislative provisions for an automatic establishment of an EWC in case of failure of SNB negotiations. It may be difficult to obtain a ruling setting up a default EWC (based on subsidiary requirements, Annex 1 to the Recast Directive).

There might be legal trajectories at court for different types of issues. For instance, in a dispute over an unreasonable demand for confidentiality by management a different court may be competent than in a dispute over failure to properly inform and consult the EWC, or an obstruction to the establishment of an SNB. Since many countries have not yet gained experience with EWC-related cases, courts may differ amongst themselves about which of them is the appropriate (competent) court (geographically and content-wise) to take on a given dispute[15].

Collective disputes between the entire EWC and the management are ruled by courts in the country indicated in the EWC agreement. Legal issues that concern individual EWC members, however, like protection against unfair dismissal and rights of EWC members to resources, must be addressed at the court of the country where the individual EWC member is employed.

In some Member States, undertaking an attempt at conciliation (or mediation or arbitration, collectively known as Alternative Dispute Resolution, ADR) might be required as the first step before being allowed to start litigation in court (e.g. Italy, Spain, UK). Alternatively, such an obligation may be written down in the EWC Agreement. The option of using an independent mediator is being included to a growing extent in more recent EWC agreements as an obligatory step before externalising a dispute and taking it to court.

14 A known case is the Kuehne and Nagel EWC court case (C-440/00) that took several years to establish an EWC.

15 Cases in point are court cases of Manpower EWC (2014), Zalando SE works council (2016), Hamilton Sundstrand (2008), a German case (11 BVGa 5/18 of 2018), Visteon EWC (2012), and others.

Exploiting conciliation or mediation can be helpful and considered a good practice in some cases. However, it is of crucial importance that the EWC agreement includes guarantees of the necessary resources for the EWC when engaging in such form of dispute resolution (e.g. access to experts or lawyers). It could thus be useful to specify in the EWC agreement some details: whether arbitration, mediation or conciliation will be called in (see section 4.6.1 for details), whether the parties will request a binding ruling and who will appoint the person(s) involved (some of these modalities can also be determined at the beginning of the ADR process).

Finally, there is the question of eligibility and access to courts for voluntary pre-Directive EWCs established on the basis of Art. 13 of the Directive. The situation of Art. 13 EWCs differs across the EU (see Table 4).

TABLE 4 Access to courts for Art. 13 EWCs

Country name	Presence of legally based administrative or judicial conflict solving procedures for Art. 13 EWCS
Austria	Excluded from penal provisions of the arbvg (act on ewcs)
Belgium	Unclear / tacitly included
Bulgaria	Tacitly included
Croatia	No mention/differentiation in law between art.6 And art.13
Cyprus	Excluded
Czechia	No mention/differentiation in law between art.6 And art.13
Denmark	Unclear
Estonia	Excluded
Finland	Unclear
France	No mention/differentiation in law between art.6 And art.13
Germany	Ebrg does not apply to art. 13 Agreements unless it concerns a significant structural change in the company
Greece	No mention/differentiation in law between art.6 And art.13
Hungary	Excluded
Ireland	Excluded
Italy	Excluded
Latvia	No mention/differentiation in law between art.6 And art.13
Lithuania	No mention/differentiation in law between art.6 And art.13
Luxembourg	No mention/differentiation in law between art.6 And art.13
Malta	No mention/differentiation in law between art.6 And art.13
Netherlands	No mention/differentiation in law between art.6 And art.13
Poland	Excluded
Portugal	No mention/differentiation in law between art.6 And art.13
Romania	No mention/differentiation in law between art.6 And art.13
Slovakia	No mention/differentiation in law between art.6 And art.13
Slovenia	No mention/differentiation in law between art.6 And art.13
Spain	Excluded
Sweden	Unclear
U. Kingdom	Excluded
Iceland	
Liechtenstein	No mention/differentiation in law between art.6 And art.13
Norway	Yes, separate procedure at norwegian dispute resolution board
Switzerland	

Source: *R. Jagodziński (2022).*

An additional issue may arise in case of joint type EWCs (i.e. consisting of employee representatives and presided by a company representative, sometimes called the French model). Since many successful EWC court cases were brought to French courts by French EWCs, it seems that the joint composition of an EWC is no serious obstacle to seeking justice.

4.2 Getting the entire EWC on board

There are usually two types of handling a dispute with management within EWCs and coming to a decision about starting litigation. In the first scenario: thanks to good internal communication the entire EWC is regularly kept in the loop about all infringements by management. In such case, the entire EWC attempts to obtain information and resolve a dispute. Having followed all the developments, the EWCs is rarely divided over the decision of litigation as the next step, because everyone feels it is the last, yet necessary resort.

In the second scenario, EWCs are more Select-Committee-centred and coming to a common decision within an EWC may look differently. Here, before the EWC and the supporting trade unions take a final decision most considerations about the possible / planned court case are conducted within a smaller circle of EWC members (such as the Select or Steering Committee, usually in cooperation with trade unions). Of course, in many cases the other EWC members will already have some information on what the Select Committee is preparing. This means that once all the stages of analysis, decision-making and preparation of the case have been completed, it is necessary to discuss the court case with the entire EWC.

If in coordination with the trade unions, the Select Committee decides to make a recommendation to the entire EWC to start litigation, it is advisable to take the time to properly share its analysis which led to such a recommendation with all members in the EWC.

When presenting the case to the entire EWC, the Select Committee should consider addressing the following points:

- Context: history of past cooperation with management (especially worthwhile for new EWC members and trade union coordinators) as well as the current situation and what is the core of the dispute;
- Description of the various attempts and options of resolving the conflict that have been employed or considered by the EWC;
- The SWOT analysis of the preferred option and of its alternatives (e.g. of not going to court);
- Possible scenarios;
- Costs associated with litigation as well as auxiliary (non-financial) cost of alternative solutions (e.g. not going to court);
- How this proposal will support the EWCs and workers' goals and objectives.

Under legislations where the complaint does not address the company itself, but where a concrete individual (a manager) shall be held liable, it might be difficult to get all EWC members behind a decision to start litigation. Especially if personal sanctions may be applicable to the individual perpetrator. It should be clear that the purpose of litigation by an EWC is not personal. The legal action is not taken to attack or punish a specific person, but to improve the compliance with EWC regulations and defend collective rights of EWC members and employees. In this sense, sanctions should not be considered the goal of litigation – they are a means to an end: to make the company respect the rules and possibly right its wrongdoing.

For procedural reasons, it is absolutely key that the EWC conducts a formal voting if it is to decide to go to court. EWCs are thus best advised to keep meticulous recording (archiving) of any decision-making procedures or votes they undertook to decide about starting litigation (check the EWC agreement and/or any other rules of procedure or internal order). This also emphasises the importance of adopting clear internal rules in the EWC on voting modalities and especially conditions for holding a valid vote. The internal rules should be best codified in a single document (Internal Rules of Procedure; Internal EWC order, etc.). On top of voting modalities they should also clarify the question of (legal) representation of the EWC towards external actors/institutions.

Proof of the vote about suing the management and of the vote mandating a member of the EWC to represent the EWC towards the external lawyer and court must be carefully kept. There have been

(rare) cases where the EWCs mandate for starting litigation was questioned or, where the mandate of e.g. the EWC Chairman to represent the entire EWC at court (power to attorney) was put in doubt due to lack of proof that all the right procedures had been followed.

Sometimes, time pressure may force you to hold an online voting e.g. by email. In such cases, first check if the EWC agreement or Internal Rules of Procedure allow so, or at least that these rules do not contain provisions explicitly forbidding such a voting procedure. Secondly, in order to keep the online voting within the necessary time frame in the email to EWC members, you may specify that not receiving a reply by a given deadline will be considered that a given EWC member does not raise objections to the proposed motion in favour of going to court.

EWCs in times of the Corona pandemic

'Had we met face to face as an EWC the decision not to go to court would have been different'.

A trade union coordinator explained to us why an EWC that faced an obvious violation of its rights and had a clear case to go to court, in the end did not launch litigation against the company. The reason was that the vote on going to court in the full EWC was divided and unconclusive, and the Select Committee did not obtain such mandate. One of the most important reasons why the EWC was divided on the decision was the Corona pandemic and the lack of physical EWC meetings throughout this period. As a consequence, the regular EWC members were not getting a full insight into the case and felt disconnected from it. The reason was lack of opportunity and time to connect during the usual breaks and lack of live contact to exchange information among the EWC members. It turned the EWC, which in 'normal' times was proactive and militant, into some disarray.[16]

A final advice comes from an experienced EWC coordinator: if good communication within the EWC is established and the entire EWC is regularly involved and informed about the infringements, there is rarely a problem with getting everyone on board for a decision to go to court.

16 Similar problems with regard to online meetings were reported by EWC members participating in an online study among more than 500 EWC members conducted by the ETUI in 2021 (De Spiegelaere, Hoffmann and Jagodziński, 2021).

4.3 Steps in the litigation process

An EWC decision (in liaison with the trade unions) to bring a case to court is not the final step in the process. Rather, it sets in motion an entire new cycle of actions. In practice, the following steps need to follow (not always in this particular order) once the EWC took the decision to bring a case to court:

1 Announcement to the management that the EWC will solicit the services of a lawyer. Depending on the specific legal requirements of the country of jurisdiction and/or of the EWC Agreement, the EWC might be obliged to also include a cost estimate. In that case the EWC should already choose a lawyer and ask for a cost estimate to be included in this announcement to management (see step 2).

2 Seeking out and choice of a lawyer (in cooperation with the trade unions) in the country of jurisdiction who is knowledgeable, experienced and specialised in representing workers, works councils and trade unions.[17]

3 The lawyer will contact management, stating that he/she have been asked to support the EWC in bringing this specific case to the court. Depending on the national legal system and the approach of the lawyer, this letter may include more specifications and/or also include other messages (such as information about the fees for the lawyers service) or questions to management.

4 Depending on the answer from the company, the lawyer will decide together with the EWC and the trade unions, to file an official application to the appropriate court to formally start the proceedings in the case.

5 Upon the decision of the court to admit the case, dates for the legal proceedings will be set and both parties will start compiling their documents (evidence, supporting documents, motions, etc.) to argue the case, to be handed in at a set date.[18]

6 The court may start with the first hearing or may react by asking both parties to provide additional questions and explanations in writing. Some procedures might be without any hearings, other trials may include a number of hearings. In all cases, but especially where only one hearing is foreseen, make sure to properly prepare your case, arguments, evidence and demands (see section 4.6 for more detail).

7 The court will pass on a judgement and publish its decision.

Each of the steps opens the possibility for management to try to solve the issue out of court or without the court making a final decision. As we noted earlier (see section 3.4), it actually happens quite often that somewhere midway, cases are settled out of court. For the company, this avoids a lot of negative publicity, on top of saving considerable costs. The management may already make an offer to settle a dispute out of court directly after the EWC has communicated the launch of legal proceedings. When the EWC informs central management that it is hiring a lawyer and communicates the costs to management, the latter may already feel the necessity to try and solve the issue out of court. However, in case of no reaction, the EWC should undertake the steps it announced: hire a lawyer and have him/her send a letter to management informing that she/he has assumed her/his function.

For the EWC and the trade unions, however, it normally would be bad tactics to count on management to capitulate so easily. If the EWC in liaison with the trade unions takes the first step on the above list, the EWC should be ready to go through the entire process. Backing down somewhere in between, without any good reason, such as a decent offer from management to solve the issue, might mean that in future the EWC will not be taken seriously anymore.

4.4 Hiring a lawyer

Finding a lawyer to assist the EWC is reportedly difficult. The most important qualities to be sought are expertise in EWC legislation and experience with representing workers' interests. The best way to find an appropriate lawyer is to contact the trade union organisation (ETUF, national or local), as the unions

17 Having made sure that the costs of this lawyer can be paid (by the company, trade union, works council), is something that needs to be discussed jointly with trade unions well before the decision to bring the case to court is taken. See also examples in agreements.

18 Refer to section 4.5 in this manual to prepare evidence.

may have in-house lawyers experienced in such cases and/or else may be able to recommend a verified external legal counsellor.

Representation at court usually takes place via a certified lawyer. Due to the importance and complexity of EWC-related disputes as well as their transnational context, this is the recommended option, even if, representation via an accredited lawyer may not always be required by the law governing a given EWC agreement. If the legislation does not require a party to be represented in court by a lawyer, the company might insist that these costs are not necessary. This can be argued by management in the case of countries where the first or only way of conflict resolution is through alternative dispute resolution mechanisms (conciliation, mediation, arbitration, collectively called ADR; e.g. under Irish legislation).

TABLE 5 Representation at court by an accredited lawyer

Country name	Representation via an accredited lawyer NOT required	Representative via an accredited lawyer required
Austria	At District Court, cases up to 5000 EUR	In Regional Courts, cases > 5000 EUR
Belgium		Yes
Bulgaria		Yes
Croatia		Yes
Cyprus		Yes
Czechia		Yes
Denmark	Not required in civil courts, but usually by lawyer	Usually
Estonia		Yes
Finland	Not in civil court	Yes
France	Not in district court (1st instance)	Generally yes
Germany	In a local court (amtsgericht), cases <5000 eur	Generally yes
Greece	Not in: district civil court (irinodikio), (2) provisional remedies, (3) to prevent an imminent danger (article 94(2) of the code of civil procedure), and (4) labour proceedings conducted before the single-bench court of first instance	Generally yes
Hungary	Yes	Sometimes
Ireland	Sometimes	Sometimes
Italy	Sometimes	Generally yes
Latvia		Yes
Lithuania		Yes
Luxembourg		Yes
Malta	No	Yes
Netherlands	Not in civil court	Enterprise chamber of the Amsterdam court: yes
Poland	Not in civil court (sometimes)	Generally yes
Portugal	Not in civil court <5000 eur	Generally yes
Romania	Sometimes	Generally yes
Slovakia	Not in civil courts	Generally yes
Slovenia	Possible in district courts	In higher instances
Spain		Generally yes
Sweden	Not required in civil courts	Generally yes
U.Kingdom	Possible	Advisable

Source: *R. Jagodziński (2022).*

It is advisable to inform management in writing that the EWC and the trade unions are going to solicit the services of a lawyer and communicate the anticipated costs of his/her engagement. Do not jump over this step, as the EWC agreement may even stipulate this as a condition to get the legal costs paid for by the company. The central management is responsible for covering the costs of a lawyer and the lawyer should inform the management that he/she will be issuing invoices for his/her services to be paid by the company. Such information communicates to central management that the EWC in liaison with the trade unions are resolved to start a court case and may act as the final alarm to avoid litigation.

In some cases, the management may refuse to pay the costs of a lawyer and the court will have to rule on this, as part of the judgement (the lawyer will have to make sure that such a demand will be included in the motion to court). Sometimes companies claim that the right of EWCs to be provided with the 'means necessary to apply rights stemming from this directive' does not cover the cost of legal counsel (as was the case in the case of British UNITE involvement for the Emerson Electric EWC case in Central Arbitration Committee, EWC/13/2015).

The company may also sometimes attempt a claim that it will not reimburse the cost of a trade union lawyer/expert, because it is a trade union mandate to support EWCs free of charge; or having consulted a trade union (even without incurring costs for company) the EWC is not entitled to further paid legal advice. Such argumentation was unsuccessfully presented by management in several cases where the British CAC decided the company was obliged to cover the cost of legal counsel for EWC (among others, a 2020 case Princes Group EWC vs. Princes Group; 2019 Verizon case at the CAC).

One piece of advice from an experienced EWC coordinator is to use the 'expert clause' in the EWC agreement, should the management persistently refuse to cover costs of legal representation at court by a lawyer. The EWC can then book the lawyer's costs as expert fees and claim reimbursement from company in this way. If the EWC agreement contains a clause that only allows for one expert and an EWC would need for instance both financial and legal support, the financial expert can step back until legal matters are resolved and take up his/her expert role again. It is, reportedly, a much simpler way to ensure that the company covers legal counsel costs than to claim it under the general clause of law stipulating the central management's obligation to ensure the means required to use the rights provided for EWCs.

In a vast majority of cases management will itself be represented by several highly paid expert lawyers (or a big law firm), who may use very complex legal lines of reasoning. To have equal footing at court, the EWC should also have the right level of legal support. For EWCs a lawyer is essential also at the pre-trial preparation stage of the proceedings. Practising lawyers know the procedure, what is going to happen, what traps to avoid, what may go wrong, etc. and thus what preparation is necessary.

Not in every country, the EWC members mandated to represent the EWC at court will be questioned or given opportunity to testify in the courtroom. In Spain for instance, lawyers handle the entire procedure. In other countries, EWC members who bring a case to court can be exposed to an exhaustive cross-examination. Depending on the national court involved and national procedural law, as one experienced EWC member reported, courtroom proceedings may resemble a criminal court cross-examination. At the same time, the company's representatives may try to overcomplicate the matter and muddy the waters by providing an overload of documents. It is thus important for the EWC not only to collect the relevant evidence, but present and explain it in a transparent, coherent and possibly simple way.

Don't try to be like them

An advice from an experienced EWC coordinator is 'do not try to be or act like a lawyer' and get up to the level of corporate legal counsellors. Oftentimes this goes awfully wrong. Do not try to look too smart – act normally, as the everyday employee representative that you are and who just wants her/his rights and those of the employees he/she represents respected.

Example: EWC under Irish legislation struggling to find legal support

In a dispute in Ireland the management argued that coverage of costs for legal support were guaranteed neither in the law nor in the EWC agreement and, thus, the EWC did not need professional lawyer's services to bring a case to the Irish Workplace Relations Commission (WRC; the body competent to adjudicate in labour disputes in Ireland). In the spirit of a level playing field, the company itself would be obviously represented at the WRC by at least one professional lawyer. This resulted in a serious practical impediment for the EWC and a limitation to assert its rights as it could not find a law firm that was willing to take the case to the WRC if payment of the fees was so uncertain (it is decided by the court as part of the ruling). The EWC finally managed to find a retired legal expert (but formally, not a lawyer) in Ireland who was willing to take on the case, even if no pay was guaranteed. Additionally, the EWC got a former German minister who was willing to support them. The former German minister liaises closely with the legal expert in preparing all legal communication with the management.

4.5 Preparing evidence

An essential part of case preparation is gathering, archiving and processing evidence. It will be necessary for the lawyer to get full details of the case and to start working on it. A record of evidence is necessary for the lawyer taking on the case to get both: the full picture (history of relationship with management, prior infringements, etc.) and insight into the details of the case. The more complete the evidence, the easier it is for the lawyer to prepare a coherent, strong and convincing line of argument for the court.

In a court trial there are specific rules and procedures for qualification, use and presentation of evidence as well as the proof of facts in legal proceedings. These rules differ between various countries. Generally, in each country there is a set of rules and principles which govern the use of evidence in legal proceedings. These rules determine what evidence is admissible and what evidence must not be considered by the court in reaching its decision. The law of evidence regulates various aspects of evidence in a trial: the amount, quality (how reliable such evidence should be considered), and type of proof needed to prevail in litigation. Moreover, there are important rules that govern admissibility of evidence, authentication, relevance, witnesses, opinions, expert testimony, identification, etc. The rules vary depending upon the area of law concerned (and will be specific to labour law) and may vary by court's jurisdiction. These various standards of evidence must be considered and the (trade union) lawyer can assist your EWC with counsel in this regard.

One important difference between court proceedings concerns the extent to which the court will only deal with the specific issue at hand, or whether the history leading up to this case can also be considered. The EWC and the trade unions might want to show that the serious issue of non-compliance with the EWC-agreement or EWC legislation that is currently on trial, has already been committed by management several times and that the EWC has made a few attempts to address managerial breaches in the past. It may add strength to the case if the EWC can show that each time it tried to solve a conflict without recourse to a legal procedure, it failed. But then again, it might be that the court declares such evidence is not relevant for the case at hand, so be prepared for either option.

The important aspect is that the evidence must be strong enough to meet the legal burden of proof in a given situation. It also must allow the lawyer to build a convincing line of argument and allow him/her to present it in a way that fits the customs and traditions of a court.

There are several types of evidence, depending on the form or source, that you may consider when preparing for a court trial. The type of evidence to focus on depends on the matter of your dispute, but it may comprise:

- correspondence between the EWC and management (emails, records of internal communication system chats, various versions of proposals for amendments of the EWC agreement, etc.);
- official documents provided to the EWC (financial accounts; business reports, presentations by central management at EWC meetings) to show e.g. that the scope and quality of information shared by management were insufficient;
- screenshots during presentations by members of management (some material will only be shared with you on screen and you will never see it again!);
- unofficial/internal management's documents that the EWC may have got hold of (in the 2006 British Airways case a whole court case about a transnational restructuring project was built on internal documents not destined for the EWC and shared with an EWC member accidentally);
- documents and information from the local or national level management that individual EWC members may have been provided with in their country (as EWC members or in other capacity of workers' representative, e.g. as members of the works council.);
- description and record of facts and events, especially concerning the time when the management informed the EWC, when the EWC made clear it demanded consultation and when the EWC first signalled that the quality and/or the timing of the information process was not according to the requirements of the EWC-agreement or of the applying legislation;
- documents associated with expenses of EWC members (e.g. flight tickets, invoices for expert services or training, etc.);
- information published officially by the company or otherwise publicly available to general public (particularly relevant in disputes / cases when management refused to share information on grounds of confidentiality).

The safe rule is that anything that may be of relevance should be properly recorded (including records of internal votes). The evidence should be then discussed and assessed with the lawyer, who will make the final decision of what to include into the submissions to the court. The more the EWC keeps proper records, the easier it will be for the EWC to address the requirement of the 'burden of the proof' in a convincing way. Records should also include evidence of any prior:

- violations of the EWC agreement or legislation by management: to show that the offence was committed by the management in the past or has even become a regular practice;
- requests by EWC to management to respect the agreement or legislation: to show efforts to safeguard EWC rights;
- attempts at conciliation or amicable conflict resolution: to show that the present court case is the pinnacle rather than a starting point of the conflict.

Once the facts are established beyond any reasonable doubt the court's focus will be on their interpretation rather than their qualification as admissible, relevant or trustworthy.

Meticulous evidence preparation is important especially in countries where court or tribunal hearings may be held without physical participation of the parties (e.g. the UK). Not in every country, a case will lead to a court hearing - sometimes cases are handled through a written exchange of enquiries, submissions and answers. This may be the case in preliminary proceedings/hearings or in the principal part of the case in a pandemic when physical meetings are limited or impossible. If this is the case, it is important to know how many rounds of enquiries (by the court) and answers (by the litigants) there will be, but a safe bet is to put all the arguments and accompanying evidence on the table at once in the first round of written statements or in the first set of answers to court's enquiries. If there is an opportunity to react to the arguments or the presentation of facts of the other party, the lawyer or the EWC should respond to all points they disagree with, even if they seem irrelevant or plainly absurd. You never know exactly if the court might see some sense in such arguments and infer that since the EWC is not disputing them it tacitly accepts them.

Go beyond proofing what went wrong

In its appeal to the court, the EWC can do more than proving how management did not comply with the rules. If the issue is reparable, the EWC should include a request to the court to issue an order to redress the situation. If the litigious matter is not reparable, the EWC could include a proposal to the court to issue an order concerning what the company should do better in future.

4.6 Contacts with management

Even if the EWC in liaison with the trade unions have decided for the litigation option and even if it is awaiting a court hearing, it is advisable to stay in contact with management and carefully manage the communication with management, wherever possible.

It is important because once the management becomes aware that the EWC with the backing of trade unions are resolved to go to justice, they may consider to back out of conflict and seek conciliatory solutions. The management may thus approach the EWC with a proposal for conciliation, mediation or arbitration and insist these routes be exhausted first before a confrontation in court. Moreover, despite bringing a case to court the EWC will still have to handle ongoing business with management (e.g. a planned restructuring process, organisation of the next plenary EWC meeting, etc.). Furthermore, depending on country of litigation the dispute may continue for several months or even longer than a year, so the relation with management cannot be broken off completely. Appropriate communication with management is an expression of goodwill and professionalism as well as an instrument to help keep the relationship civil, despite the conflict.

4.6.1 CONCILIATION, MEDIATION AND ARBITRATION

Some EWC agreements and/or national legislation stipulate that EWC and management should try to (or are obliged to) find amicable solutions, or use alternative conflict resolution methods before a dispute can be taken to court (see Table 5). There are three types of alternative conflict resolution mechanisms: conciliation, mediation and arbitration.

Conciliation and mediation are amicable dispute settlement mechanism employing assistance of a neutral third party to find an out-of-court solution to a dispute.

Conciliation is an alternative dispute resolution (ADR) process whereby a conciliator meets with the parties, both separately and together, in an attempt to facilitate solution-finding and resolve their differences. Conciliation is mainly based on attempts to lower tensions and thus improve communication between the conflicted parties. It will also include attempts to encourage parties to explore potential solutions and assist them in finding a mutually acceptable outcome. Conciliation differs from arbitration in that the conciliation process, usually has no strictly legally defined framework and the conciliator usually has no authority to seek evidence or call witnesses, does not draft a final decision, and makes no award in the dispute.

Mediation is, like conciliation, a voluntary solution finding process in which services of an external mediator are used. Mediation is a structured, interactive process where an impartial third party assists the disputing parties in resolving conflict through the use of specialized communication and negotiation techniques. Mediation is a process primarily focused upon the needs, rights, and interests of the parties. The mediator, whose primary task is to facilitate solution-seeking through improving interaction, dialogue and communication between the parties, uses a wide variety of techniques to guide the process in a constructive direction and to help the parties find their optimal solution.

The main difference between conciliation and mediation proceedings is that, at some point during the conciliation, the conciliator may be asked by the parties to provide them with a non-binding settlement proposal. When proposing a settlement, the conciliator will not only take into account the parties' legal positions, but also their commercial, financial and / or personal interests. The parties are free to accept or to decline the proposal. If they accept the proposal, it will typically be written up as a settlement agreement. While the settlement agreement itself is usually not directly enforceable, in some countries it can become enforceable having it notarised and/or in other countries by having it put into an arbitral award (consult your trade union and a lawyer about the details for your country).

A mediator, by contrast, will in most cases and as a matter of principle, refrain from making such a proposal.

Both in conciliation and mediation proceedings, the ultimate decision to agree on the settlement remains with the parties.

Arbitration (especially binding arbitration), on the other hand, is a more direct substitute for the formal process of a court. Binding arbitration is typically conducted in front of one or three arbitrators (e.g. one appointed by each party, and a third one agreed among the two arbiters). The process resembles to some extent a more formalised trial rules of evidence, etc. Typically, arbitration is faster and cheaper than court proceedings. The main difference to conciliation or mediation is that it is the arbiter(s) who makes the ultimate decision about the conflict's resolution, rather than the parties themselves. Arbiters' decisions are typically final, although depending on national legislation, they may or may not be appealed against to regular courts.

The EWC agreement must always be checked first to verify if any of the ADR mechanisms is mandatory in case of a dispute with management. Following this, the EWC may check requirements of the national law (in some countries ADR is a mandatory step before you can address the court in labour disputes). This is a task best to be done by the involved union or lawyer. Lastly, if the EWC would opt for ADR, it is useful to see if there are any national level ADR institutions (public and private associations, chambers, etc.; see country fiches in part 2 of this overview) in the country under which law the EWC agreement operates (further information and advice on alternative conflict resolution is usually available from such institutions).

TABLE 6 Alternative dispute resolution in EWC cases

Country name	Conciliation	Mediation	Arbitration	Institutions organizing the process
Austria				
belgium	Possible, organised by the labour ministry			Ministry of labour—belgian federal public service employment, labour and social dialogue
Bulgaria		Possible, in confidentiality disputes	Possible, in confidentiality disputes	
Croatia	Possible on voluntary basis	Possible on voluntary basis	Possible on voluntary basis	
Cyprus		Possible under tripartite mechanism		
Czechia		Voluntary mediation		
Denmark	Mandatory before arbitration and court	Mandatory before arbitration and court	Customary (by industrial arbitration tribunals)	Statens forligsinstitution
Estonia	Unclear: "extra-judicial proceedings" by the labour inspectorate	Unclear: "extra-judicial proceedings" by the labour inspectorate		Labour inspectorate, national conciliator institution
Finland		Possible	Possible	Arbitration institute
France	First step before litigation in employment tribunals	Judicial mediation possible before all courts	No	
Germany	No	Theoretically possible (rare in practice)	No	
Greece	Ambiguous	Ambiguous	Ambiguous	

Note: green = mandatory mechanism

Country name	Conciliation	Mediation	Arbitration	Institutions organizing the process
Hungary	Possible	Possible (mainly in civil disputes)	Possible	
Ireland	No	No	De facto the only option	
Italy	Compulsory before litigation (special dispute resolution committee by the ministry of labour)	Possible, local or central authorities can act	Only for individual disputes (not in collective disputes)	Prefecture, ministry of labour
Latvia		Mandatory before arbitration and court	Possible	Conciliation committee
Lithuania	Possible			
Luxembourg	Possible	Possible	Possible	
Malta		Possible	Possible	The malta mediation centre (mac)
Netherlands	No	No	Optional, can be put in the ewc agreement (but uncommon)	Joint sectoral committees (from the social and economic council), only for conflict between works councils and employer.
Poland	No	No	No	Ministry of family, labour and social policy. Social dialogue council
Portugal	Possible	Possible	Possible	Ministry of work, solidarity and social security. Directorate-general for employment and labour relations dgert
Romania		Voluntary mediation	Possible	
Slovakia		Possible	Voluntary arbitration possible	
Slovenia		Voluntary mediation		
Spain		Possible		The autonomous communities (employment mediation bodies which specialise in such matters). At national level, the servicio interconfederal de mediación y arbitraje, sima, (interconfederal mediation and arbitration service)
Sweden		Possible	Possible	Industrial democracy board
U. Kingdom	First step	Second step	Third step (first instance in court procedure)	Arbitration and conciliation acas (advisory, conciliation and arbitration service), central arbitration committee
Iceland	Possible	Possible		State conciliation and mediation officer
Liechtenstein				
norway		Possible (common)	Possible (common)	Dispute resolution board

Source: *R. Jagodziński (2022).*

Sometimes the company ignores or stalls your attempts at resolving the conflict in an amicable way. As reported to us in the interviews, sometimes companies decide to go to court because of ideological reasons, namely due to a hard-headed lack of willingness to share information and allow for consultation with employees as such, or because the management views the EWC in a narrow, pre-conceived way as trouble-makers. Surprisingly many multinational companies can and are willing to afford the costs associated with litigation, because these costs are relatively small. In such cases efforts at amicable conflict solution may be futile as the company will only bend to a court's ruling.

Finally, it is very important to keep your communication (especially written correspondence) with management very civil, diplomatic and formal - any mail written when a case is potentially building up, and, even more so, when the controversy has started, should be carefully drafted. Any offensive or aggressive language must be avoided as it may be presented at court and used against the EWC.

4.6.2 PUSHING THE RIGHT BUTTONS

It would be naïve to expect that every management will always change its stance at the very sign of a looming court trial. Therefore you should consider other aspects of driving relationship with your central management. Such a strategy should always be developed in close coordination with the trade unions.

Below, you can find some examples of how to trigger an accurate reaction by management:

- companies usually care a lot about their social image. Thus, they may want to avoid reputational damage in the area of corporate social responsibility (CSR) and social sustainability (as part of ESG: environmental, social, and governance). Sometimes the threat of litigation may be enough to make management comply or be more accommodating. Check if the company publishes regular CSR or sustainability reports, and if it partakes in CSR initiatives such as the Global Reporting Initiative or the Sustainability Accounting Standards Board, SASB). Indicating to the company that their violations of information and consultation rules are at odds with the declared support for CSR or ESG standards is an option you can consider. Additionally, pointing out that revealing such information to the public could damage the company's image as a 'socially aware' actor may help bring the company to senses.

Social standards reporting

More than 90 percent of S&P 500 companies now publish ESG reports in some form, as do approximately 70 percent of Russell 1000 companies.

Source: *Sustainability reporting in focus, G&A Institute, 2021.*

EU rules on non-financial reporting currently apply to large public-interest companies with more than 500 employees. This covers approximately 11 700 large companies and groups across the EU, including

- listed companies;
- banks;
- insurance companies;
- other companies designated by national authorities as public-interest entities.

Under Directive 2014/95/EU, large companies have to publish information related to, among others, social matters and treatment of employees and respect for human rights.

On 21 April 2021, the Commission adopted a proposal for a Corporate Sustainability Reporting Directive (CSRD) which would amend the existing reporting requirements of the NFRD. The proposal extends the scope to all large companies and all companies listed on regulated markets (except listed micro-enterprises), requires the audit (assurance) of reported information, introduces more detailed reporting requirements, and a requirement to report according to mandatory EU sustainability reporting standards. These new tools shall give new leverage and new tools also to EWCs.

Source: *Corporate sustainability reporting (europa.eu)*

- Some companies rely heavily on their ability to conduct business with public authorities. Public authorities sometimes include social clauses in requirements in calls for tender in frames of Socially responsible public procurement (SRPP) promoted by the European Commission (DG Employment). Check if the company is benefiting from such contracts or is applying for such public contracts. Consider pointing out to the management that violations of workers' rights to information and consultation may have a negative impact on the company's success in obtaining such contracts. Check if the company received contracts from national or local governments and how these governments could be contacted.
- At some point the EWC may want to communicate the problems with the company not respecting their basic rights directly to the public. It is a powerful, but tricky tool that can increase leverage on the company but also bury all efforts at once. Communication to the press may be viewed by the company as the ultimate declaration of war, but cases are also known when it has brought the management back to negotiating table. If you are a member of an EWC in such a situation, do make sure to decide about it jointly with the ETUF/trade union coordinator. You may also want to consider taking part in a training course 'Public communication for trade unionists within the EU Context' by the European Trade Union Institute.

Lessons learned in courtrooms[19]

5

Bringing a case to court or another competent body (e.g. an arbitration tribunal) is often a 'black box' for most of EWCs. This is because the process is unpredictable, but also only few have gone through this process and can share their knowledge until today. The below chapter is based on interviews and presents some punctual lessons learned, thoughts and tips (some may have been included in earlier part of the overview) by EWC members and trade union experts who went through a court case.

How a case is brought to court differs from country to country (see Part 2 of the practical overview). Below we present a few pieces of universal advice.

- How to and who can file a case against management?;
- The EWC has to file a case with a specific court (or, depending on the country, other authorities, such as the Ministry of Labour, an Ombudsman or Arbitration authority or even the police, where violations of EWC rights are considered to be criminal offences[20]). Figuring out where to go and what are the steps to take can be quite complicated.

Hesitant courts

An interesting case is that of the IAG EWC. The legal dispute even led to a complaint to the European Commission (see Chapter 6). IAG is headquartered in the UK, but incorporated in Spain and the EWC agreement was signed under Spanish law. The issue was about lacking consultation on mass redundancies of over 10,000 employees within the UK from British Airways, one of the companies operating under IAG. The first problem encountered was that it was not clear which court the EWC should go to. Of the three relevant options, the Labour Inspectorate, the Tribunal in Madrid or the High Court, the EWC choose the highest instance possible. This led to the High Court referring the case back to the Madrid Tribunal. Consequently, it led to some back and forth between the courts. It appears that the courts are hesitant to decide on a case in Spain that would lead to a possible court order addressed to a company headquartered in the UK. The case was eventually taken up by the Supreme Court.

I AM ASHAMED...

"I am not proud that we won the court case, because I am an employee of the company, I am proud to wear the uniform of the company (sales man). I am ashamed that my management went to court against its employees."

19 The following part is based on interviews with practitioners (EWC members, European and national level trade union officials and coordinators assisting EWCs, experts) who were directly involved in EWC-related litigation at courts of law.

20 E.g. in Finland.

An obstacle may be that it is not clear who is liable in a case of non-compliance: is it the CEO, the head of the company's European management team (usually denominated EMEA: Europe, Middle-East, Africa), or, for example, member of the management team who handled the information and consultation in this specific case. In some countries managers may be personally liable for non-compliance. In such cases, the question of who specifically is liable becomes even more crucial. And what if that person has left the company by that time...?

- In some countries, a complaint in an EWC case is handled as a criminal offence and, thus, has to follow criminal procedure. It may thus be mandatory to file a case with the local police that has absolutely no notion of EWC laws. The problem is not limited to the police, though. In many countries, the authorities having to deal with EWC complaints, including courts and tribunals, lack the awareness, experience and expertise to deal with such violations. Another problem with criminal procedure is that usually such violations need to be reported within a specific time, otherwise the crime can no longer be enforced. Yet another problem is that in some countries where the EWC has to go through a criminal procedure, an appeal procedure may be lacking. An EWC may be thus confronted with a refusal to start a legal procedure (e.g. when the police refuses to accept a notification about an alleged violation of EWC rights by management, or when an Ombudsman decides not to go forward with the case) without a possibility to appeal against such refusals;

- The purpose of litigation by an EWC is not to upset or take revenge on management. Therefore, the EWC should make clear that the legal action is not taken to blame a specific person, but to improve the compliance with EWC regulations. In this sense, sanctions should also not be the goal of litigation – they are a means to an end: to make the company respect the rules;

- When you feel that an issue or a dispute can potentially end up in court, make sure that the communication network between the EWC, its Select Committee, the ETUF coordinator and any external experts is working fine as it will be essential for the success of any litigation;

- In some countries there are public authorities that can support EWCs in their access to justice. (e.g. in Finland the Corporate Ombudsman can assume a supervisory role in a conflict. Such (state) institutions (e.g. the Labour Inspectorate) may have vast competences, including the right to request all relevant information, including confidential or stock market related data. Make sure to use them, if available;

- Be united. All EWC members must be aware of the plan and of advantages of litigation;

- The determination and resolve of the Select Committee need to be strong and clearly communicated to management: 'we are ready to go through with the case all the way, even to the European Court of Justice, if needs be';

- Knowledge matters – having followed a training course may help the EWC and its Select Committee to understand the legal system in a given country and make the whole process of starting ang going through a court case easier;

- Whether and to what degree EWC representatives at court may be exposed to cross-examination depends on the country of jurisdiction and national procedural law, court type and even an individual judge. Experts who went through courtrooms advise: do not fear 'grilling', as it may never happen, but be prepared for this eventuality. Speak to your lawyer/barrister. And remember, the management may be exposed to similar cross-examination as EWC members;

- In court hearings companies may try to bring up every single case from the past just to overload EWC representatives and the judge with information and muddy the waters. Judges may sometimes get irritated by such practices, which may work to your advantage;

- Complexity of cases differs in function of the litigious issue. Reportedly, technical issues (e.g. articulation between the European (EWC) and national levels of information and consultation; elections to EWC or SNB) are the most difficult ones, while violations in the area of transnationality of an a managerial decision or timeliness of information and consultation belong to the category of more straightforward cases;

- Companies try and give priority to stock market rules and regulations wherever possible (especially in disputes about confidentiality). Remember, however, that in many countries stock market rules (and jurisprudence) contain exceptions with regard to communication of data to workers representatives and works councils (e.g. in the UK the law specifically says that confidential information can be revealed to worker representatives). In such cases make sure to check the national stock market regulation for any such exceptions.

Conclusions & future outlook

6

Readers who have been patient enough to stay with us until this final chapter will have noticed that for an EWC the option to take a dispute to court is both sometimes necessary and always challenging. It may be necessary because the potential for conflict is high: EWCs deal with contentious issues that may not always be solved by dialogue and a vast majority of them is informed and consulted too late. The EU and the Member States have agreed that employees need to be given a legally guaranteed voice in transnational companies. As a consequence, the EU and the national legislators must provide for a framework that makes this work possible. Implementation studies, surveys among EWC members, case studies and other research show that legal frameworks are sometimes incomplete and vague. This is a real problem since an EWC agreement cannot be just a fair-weather promise - it needs to provide the employees with a voice and protection of their rights, especially when disputes with management arise and social dialogue reaches its limits.

Unfortunately, despite general guarantees of access to justice enshrined in the EWC Recast Directive and repeated in national legislation, in practice it is very hard, and sometimes impossible, for EWCs to stand up for their rights in courts. EWCs face (too) many obstacles when trying to defend their lawful interests and those of the workers they represent. Some of the obstacles arise from the dynamics of a transnational representation of employees confronted with the power of a multinational company. We discussed these issues in the first three chapters of this practical overview. Experience teaches that the best insurance policy against such problems is ensuring high trade union membership among EWC members and regular contacts with the respective European Trade Union Federation via a coordinator.

More difficult, however, are the obstacles stemming from inadequacies in the legal systems of many EU Member States, partly originating from unclarities and loopholes in the EWC Recast Directive itself. In chapter 4 we dealt with these issues, which contain, amongst others:

- unclarities with regard to the question who can bring a case to court on behalf of the EWC;
- which court is competent to deal with a given case;
- uncertainties if the legal costs of the EWC will be covered by the company;
- a general absence of fast-track procedures and injunctions available to EWC to ask for a suspension order to protect its rights against irrevocable consequences of managerial decisions.

On top of all this, comes the problem with enforcement of the rights: in many countries sanctions for companies infringing EWC rights are not serious (effective, dissuasive and proportionate) enough to make companies respect the law. It has to be made clear that too many first-hand reports from practitioners involved in litigation confirm that money is not important for the starkest offender-companies (financial sanctions), as they have enormous resources at their disposal. Engaging in litigation for such companies is more a display of an ideological disregard towards social dialogue at company level. Such a stance can never be corrected with financial penalties, but requires a more principal response: introduction of invalidity of managerial decisions taken without information and consultation with workers

Case: complaints to the EC on the inadequate transposition of the EWC directive in national legislation

Because of loopholes in legislation resulting in lack of legal certainty as to how to defend EWC rights in courts and practical difficulties, unions in different countries have filed complaints with the European Commission.

Any person can contact the European Commission about any measure (law, regulation or administrative action), absence of measure or practice by a country of the European Union that the applicant thinks is against Union law.

The European Commission can only take up a complaint if it is about a breach of Union law by authorities in an EU country. It does not deal with complaints about the action of a private individual or company body (unless the applicant can show that national authorities are somehow involved). Obviously, these kinds of complaints need to be part of a strategy agreed in advance with trade unions.

The first instance of a complaint to the European Commission pointing out inadequate transposition was the letter of Finnish trade unions (2017) pointing out problems with having an EWC case registered by the police, which was a mandatory step in the Finnish criminal procedure for EWC violations.

The second example concerns the Irish EWC law that refers to the involvement of an arbitrator *'who shall be paid, from moneys made available for that purpose by the Oireachtas (Parliament), such fees as the Minister, with the consent of the Minister for Finance, may determine'.* However, these funds have never been made available. Further problems are apparent in Ireland: the Irish system excludes the possibility of starting litigation at court for EWCs. Following a complaint to the Irish government which was unsuccessful, the Irish trade union SIPTU turned to the European Commission in 2021, criticising the insufficient access to legal recourse and the low sanctions a company faces for breaking the law. Following the complaint, in May 2022, the European Commission launched the first ever infringement procedure against the Republic of Ireland.

The third complaint was submitted concerning the Spanish law. In the IAG case a problem of transnational competence of national courts was exemplified. The complaint argued an inadequate transposition of the EWC directive in Spanish legislation with regard to provisions of article 11(2) of the EWC Recast directive, namely that the Spanish government has not fully transposed the directive to ensure that the appropriate administrative or judicial procedures are available to allow the fulfillment of the obligations derived from the directive. Currently, two years after the issues arose, the case is still pending resolution and no specific date is given for a decision but in the meantime the workers have been made redundant.

An important remark from courtroom practice should be added here: criminal sanctions against individual managers are not effective or appropriate for EWC purposes because, by nature, they cause the dispute to become personal (the alleged culprit is a specific person, not the company as an organisation). The inefficiency of such solution is that it may require action by a public prosecutor/authority, who are rarely knowledgeable about EWCs. Finally, what is acutely missing, according to practitioners, experts and trade unions alike, are commonly available preventive suspension orders and injunctions that could be quickly issued by court to prevent companies going through with decisions taken without information and consultation with workers' representatives. This is directly linked to the Directive's purpose and effet utile: there is little use in receiving a court ruling after several months (or even years) granting that the company broke the law back in the day, when nothing can be done about it anymore.

Removing these obstacles requires changes in legislation, both in the EU Directive and subsequently in national transpositions. As a result of such problems with access to justice, unions in several countries (Finland, Spain, Ireland) needed to act as whistle-blowers and prepared cases against their own governments for failure to implement the EWC Directive. The European Commission is aware of this problem, but mostly decided not to act (cf. European Commission 2018). For the moment, EWCs need to seek workarounds and use, learn and disseminate the experiences gained in legal disputes against management. It is hopefully clear from this practical overview that litigation is not to be easily encouraged and that it is a means of last-resort, but sometimes one that is necessary and inevitable.

The authors hope that this practical overview will be a vessel useful in spreading the relevant knowledge and that it will prevent EWCs from having to start from scratch time and time again.

country fiches

7

You can find the country fiches on the ETUC's Democracy at work website (www.democracyatwork.eu)

You can find them under *TOPICs → European Works Councils*

Or

in the *Document Library*

According to the frequent changes in the national legislation, we regularly update the country fiches.

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Croatia	https://www.etuc.org/en/media/289	**Luxembourg**	https://www.etuc.org/en/media/306
Cyprus	https://www.etuc.org/en/media/290	**Malta**	https://www.etuc.org/en/media/307
Czechia	https://www.etuc.org/en/media/291	**Netherlands**	https://www.etuc.org/en/media/308
Denmark	https://www.etuc.org/en/media/292	**Norway**	https://www.etuc.org/en/media/309
Estonia	https://www.etuc.org/en/media/294	**Poland**	https://www.etuc.org/en/media/310
Finland	https://www.etuc.org/en/media/295	**Portugal**	https://www.etuc.org/en/media/311
France	https://www.etuc.org/en/media/296	**Romania**	https://www.etuc.org/en/media/312
Germany	https://www.etuc.org/en/media/297	**Slovakia**	https://www.etuc.org/en/media/313
Greece	https://www.etuc.org/en/media/298	**Slovenia**	https://www.etuc.org/en/media/314
Hungary	https://www.etuc.org/en/media/299	**Spain**	https://www.etuc.org/en/media/315
Iceland	https://www.etuc.org/en/media/300	**Sweden**	https://www.etuc.org/en/media/316
Ireland	https://www.etuc.org/en/media/301	**UK**	https://www.etuc.org/en/media/317
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