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Implementation of enforcement provisions of the European Works Councils Recast Directive: are sanctions really 'effective, proportionate and dissuasive'?

Romuald Jagodzinski

Policy recommendations

Romuald Jagodzinski is a senior researcher at the ETUI in Brussels.

The Recast EWC Directive of 2009 imposed for the first time on the Member States explicit requirements with regard to sanctions, stating that these must be 'effective, proportionate and dissuasive' (Recital 36). Our analysis shows the importance of proper implementation of sanctions for the overall efficiency and implementation of the goals of the EWC Recast Directive. Firstly, sanctions and, more broadly, enforcement frameworks (including access to courts) must be taken seriously into account in the context of the prospective evaluation of the implementation of the Recast EWC Directive planned for 2015/16. Secondly, we argue that if the EU really wishes to maintain EWCs as an important actor in the field of European industrial relations, the Commission must, in its implementation report, become more demanding and decisive in its evaluation of sanctions; specifically, the differing types of sanction, as well as the inordinate differences in levels and severity, should be critically scrutinised and judged against the criteria of Recital 36. Thirdly, sanctions must be evaluated in the context not only of their appropriateness within the legal systems of individual Member States but also of their comparative status in the EU as a whole.

Introduction

In 2009, fifteen years after its adoption, the original European Works Councils (EWC) Directive (94/45/EC) underwent a review that resulted in the Recast EWC Directive (2009/38/EC).

The Recast EWC Directive brought several important improvements including amended definitions of information and consultation, clarification on the setting up of EWCs, the possibility to renegotiate agreements in the wake of significant structural change, and access to training (Jagodzinski 2009; Dorssemont and Blanke 2010; Blanpain 2009).

This Policy Brief focuses on one important, albeit partial, improvement, namely, the inclusion in the Preamble (Recital 36) of the requirement to ensure 'administrative and judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence'[1]. While the question of the binding character of the preamble has been subject to debate[2], preambles are used by judges to interpret the Directive and they provide clarification on the purpose and intent of the legislation in question. Even though it may not be the case that they constitute a direct legal obligation for national implementation, preambles can be invoked in court proceedings and *may* provide a foundation for the national court seeking clarification from the European Court of Justice on compatibility between national and European measures.

1 It should be noted, however, that already in 1995 it was suggested by the Working Party preparing recommendations for implementation of directive 94/45/EC under the auspices of the European Commission that these three criteria should be applied (European Commission 1995: 172).

2 'Whilst a recital in the preamble to a regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule.' (European Court of Justice, Case 215/88 Casa Fleischhandels [1989] ECR 2789, paragraph 31).

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The improvement of the Recast EWC Directive addresses a loophole in the original EWC Directive that had given rise to legal uncertainty for EWCs (Picard 2010; Jagodzinski 2010; Dorssemont and Blanke 2010), and had, furthermore, resulted in substantial differences in levels of sanctions across the EU.

The non-existence of enforcement requirements in the original EWC Directive can no longer be accepted as a justification for the Member States' and the Commission's leniency in this regard; indeed, the 1995 Working Party[3] had already referred to principles laid down by the European Court of Justice (ECJ) and emphasised that:

— 'the (...) legal remedies must not be such that it is impossible in practice to enjoy the rights which courts are obliged to protect (the principle of effectiveness);

and that:

— the sanctions must be effective, proportionate and dissuasive.' (ibidem).

These recommendations were not taken on board by the Member States at the time. While welcome, the improvement effected by the 2009 Recast EWC Directive is only partial, however, since it merely repeats the earlier recommendations and does so in the form of a preamble which is rarely transposed directly into national law.

Such an approach is regrettable since according to the European Court of Justice, enforcement provisions are not a technical but a substantial matter ensuring the effectiveness of Directives. It has also been pointed out that '[w]ithout adequate sanctions, the provisions of the EWC Directive would have no more value than a declaration of good intentions' (Picard 2010: 126).

As part of its standard procedure aimed at monitoring the quality of implementation of European Directives, the European Commission is expected to provide, by 2016, an implementation report on the Recast EWC Directive.

In spite of the importance of the question of sanctions, little attention has been devoted to their analysis hitherto[4] and, in the above context, this Policy Brief aims to contribute to the forthcoming evaluation of the national transpositions with regard to their enforcement.

Enforcing the original EWC Directive: the 2000 Implementation Report

The original EWC Directive included only a general requirement for the Member States to provide for 'appropriate measures in the event of failure to comply with this Directive', and more specifically, to ensure that 'adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced'. The provision specified no further details, nor did it establish a uniform process or lay down any criteria concerning the enforcement procedures to be adopted.

The evaluation of judicial procedures in the Implementation Report (European Commission 2000) was only superficial, addressing mainly the question of whether or not any arrangements were provided for. No evaluation from the perspective of efficiency, availability and/or EWCs' access to judicial procedures was undertaken. Any discussion of levels of sanctions was omitted from the analysis. Most importantly, no deficiencies were identified, no remedies suggested and no corrective actions required from the Member States. Thanks to this formalistic approach, the European Commission arrived at the comforting conclusion that all Member States have 'smoothly integrated [the Directive] into the industrial relations systems' (European Commission 2000). The Commission, admittedly, recognised a potential for 'disputes'; yet the quality (effectiveness) of national transposition measures in the area of judicial procedures was not taken up as a criterion in the Commission's assessment of the EWC Directive's implementation, and arrangements for litigation were mentioned only incidentally (see Jagodzinski 2014 forthcoming).

Does the Recast EWC Directive oblige the Member States to amend the enforcement provisions?

The situation changed entirely with the Recast EWC Directive which introduced criteria for sanctions and obliged the Member States to amend their national enforcement systems so that they would conform to the new standards.

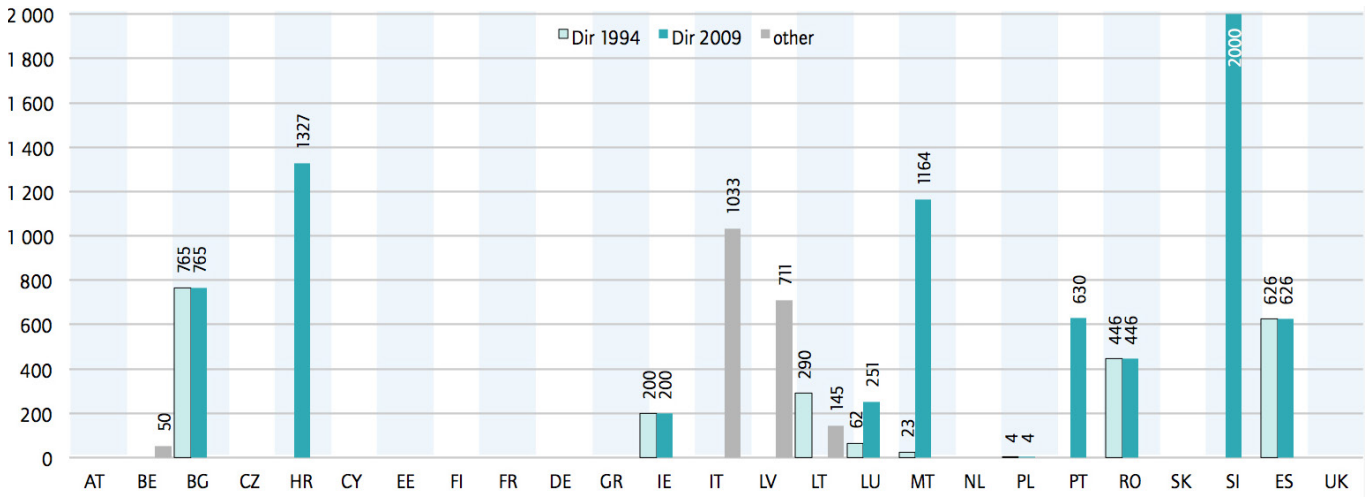
At the same time, the preamble provisions concerning sanctions, being not directly binding, were generally ignored in many Member States which decided to leave their enforcement provisions unaltered. Some Member States did make slight adjustments: in Austria, Bulgaria, Denmark, Estonia, Hungary, Lithuania, Latvia, Portugal, Slovakia, Slovenia and the UK some changes to provisions regulating access to justice were introduced; only in France, Malta, Austria, Greece, Slovenia and the United Kingdom were sanction levels substantially amended (see Figures 1 and 2).

The fairly widespread decision of national governments not to introduce amendments to enforcement frameworks suggests that the national sanctions already introduced under transposition of the previous EWC Directive were regarded as meeting the criteria of effectiveness, dissuasiveness and proportionality. The data presented below demonstrates that such a view is ill-founded.

3 Established at the request of the Council, coordinated under the auspices of the European Commission and composed of national experts representing the respective Ministries of Employment, Labour and/or Social affairs. Founded to provide a forum for coordinating and discussing the transposition of the EWC directive into national law.

4 The evidence on sanctions for breach of EWC regulations provided in this Policy Brief is the result of a broader ETUI research project analysing the EU and national legal frameworks in the area of access to courts for EWCs and enforcement of sanctions. Considering the possible effect of national enforcement frameworks on the frequency of lawsuits (Jagodzinski 2010) and the scant attention paid to sanctions in existing research, a more systematic analysis was undertaken.

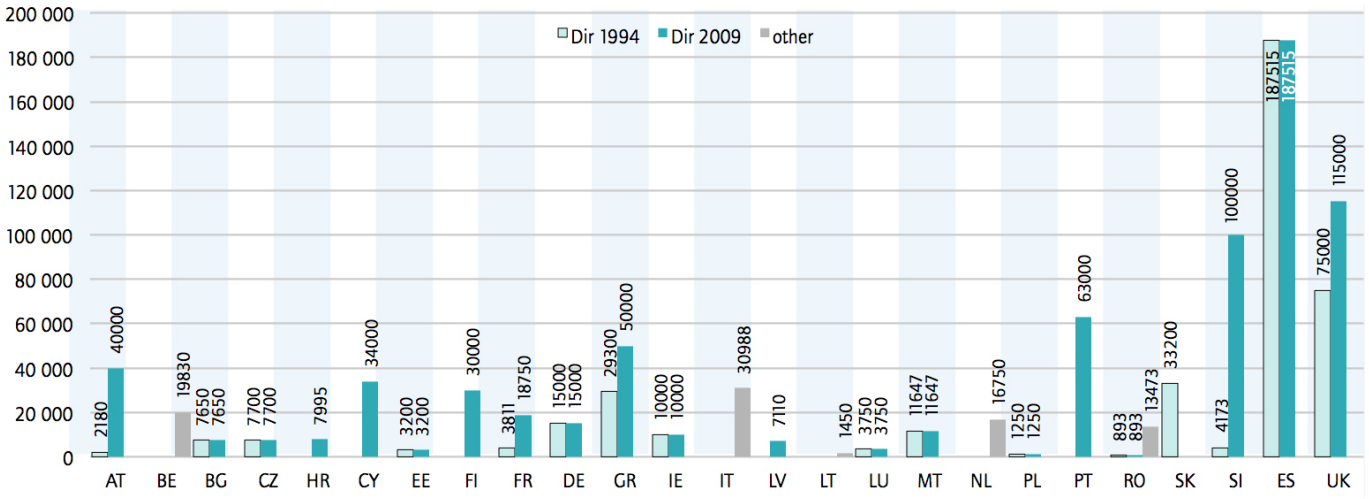
Figure 1 **Minimum fines for breach of EWC regulations before and after implementation of the Recast EWC Directive in selected EU member states (€)**



Source: Jagodzinski (2014, forthcoming)

Note: 'other' refers to legislation other than EWC transposition

Figure 2 **Maximum fines for breach of EWC regulations before and after implementation of the Recast EWC Directive in selected EU member states (€)**



Source: Jagodzinski (2014, forthcoming)

Note: 'other' refers to legislation other than EWC transposition

Sanctions in the Member States: how much diversity is too much?

One of the consequences of the leniency of the Commission's implementation report of 2000 was that the Member States enjoyed a great deal of discretion regarding enforcement of the Directive, the result being a high degree of variation in the policy approaches adopted in implementing the Recast EWC Directive. Most striking in this respect are the significant discrepancies in levels of minimum and maximum financial penalties for breach of EWC rights (Figures 1 and 2). In some countries, depending on the type of violation[5], the minimum fines can be as low as 4 EUR (Poland) or 23 Euro (Malta). Insofar as the maximum fine can be understood as a determinant of the potential to deter violation, the situation is hardly better: in some countries the maximum fine is around the 1000-EUR level (Estonia, Poland, Romania, Lithuania, Latvia), while in others it can theoretically be as high as 100 000 EUR (Slovenia), 115 000 (the UK) or even 187 515 EUR (Spain). Such considerable gaps in levels are hardly justifiable given that all EWC legislation shares an origin in EU legislation and represents a means of fostering the cross-border dimensions of information and consultation

5 Violations of EWC legislation take various forms. These range from obstructing the formation and/or operation of EWCs or tampering with EWC elections, through providing information at an inappropriate juncture and/or lacking the requisite content, to failing to respect the standards of consultation with workers.

processes. Since transnational information and consultation rights have a Europe-wide dimension, it surely stands to reason that comparable standards should be in place in all Member States and that national provisions ought to be evaluated according to common criteria. This is necessary if the principle of effectiveness and the requirement of coherence of the EU *acquis* are to be respected.

Invalidation of managerial decisions: the missing element?

Most importantly, however, in no single Member State does the legislation explicitly include provision for what is arguably the most severe sanction of last resort, namely, the legal invalidation of managerial decisions taken in violation of information and consultation rights. Such a demand lacks neither grounds nor precedent, insofar as judicial practice in some Member States (FR) includes this type of sanction which has even been handed down in EWC cases (e.g. Renault-Vilvoorde, or the Gaz de France-Suez merger). It can be safely claimed that the risk of having to go back to the beginning with a restructuring or any other form of managerial process and initiative in the event of violation of workers' information and consultation rights is the only type of sanction multinational companies would have difficulty in stomaching. Since personal responsibility and obstructionism on the part of individuals in information and consultation situations can be very difficult to prove in a court of law, and due to the fact that the available financial penalties are notoriously too low – even at their ceiling levels – to have any deterrent effect on multi-million international multinationals, the possibility of having a decision declared null and void by the court appears as the only sanction that, from the standpoint of law enforcement, would prove dissuasive, effective and proportional.

Due to the specific nature of workers' rights to information and consultation, provision for a sanction consisting in nullification of managerial decisions is required if punitive measures are to serve any real purpose. As with postulates developed in relation to environmental law (Faure 2010) for example, it can be convincingly argued that merely punishing the perpetrator does not represent a sufficient remedy, since the harm done to the collective of workers persists even if a company is ordered to pay a financial penalty. Taking this into account, it may be argued that, with regard to information and consultation laws, provision for ensuring restoration of the former state of affairs *('restitutio in integrum')* should be included in the design of sanctions that meet the new requirements of the Recast EWC Directive. For punitive measures to fulfil this function, it is necessary to allow for sanctions to undo the effects of the violation. In this sense, the judgements of the courts in the Gaz de France-Suez merger case declaring the merger invalid and ordering a repeat of the process with the proper inclusion of information and consultation procedures are promising – albeit relatively isolated – cases.

6 Directive 2014/57/EU.
7 Directive 2004/35/EC.

Criteria for evaluating the compatibility of sanctions with the requirements of the Recast EWC Directive

Unlike some other Directives (e.g. market abuse[6], environmental liability[7]) the Recast EWC Directive does not set specific levels of sanctions. Instead, it sets three criteria (effectiveness, dissuasiveness and proportionality) to be met by the penal measures applicable on the national level. Since these, therefore, are the criteria to be used by the European Commission in its evaluation of the implementation of the Recast EWC Directive, it is of primary importance to take a closer look at their meaning and familiarise oneself with the relevant legal concepts:

1. Effectiveness (Kelsen 1967; Coleman 1994). Any test of the effectiveness of a sanction may not be considered in separation from consideration of its dissuasive effect, i.e. a magnitude of threat sufficient to deter potential perpetrators tempted to obstruct the achievement of the Directive's goal. In other words, a penalty will most certainly be effective in ensuring improved information and consultation if/when it has the requisite magnitude to dissuade potential offenders from violating the law. At the same time, the effectiveness of the sanctions is interlinked with their proportionality.

2. Dissuasiveness. The dissuasive potential of a sanction originates from the theory of deterrence, which emphasises that the prospect of punishment should be sufficient to prevent future instances of the offense (see Nagin 1998). The deterrence theory is generally grounded in the assumption that the potential criminal, like other citizens, is a rational actor (Carlsmith *et al.* 2002) who bases his/her decisions on a cost-benefit analysis (Becker 1962 and 1968). A cynical multinational company applying a strict cost-benefit logic to its obligations of including information and consultation of workers in a decision-making process will thus, according to the deterrence theory, calculate whether the cost of non-observance (i.e. the sanctions) of the EWC legislation is lower or higher than the benefit represented by swift decision-making in, for example, a merger case. The sanction represents not a theoretical but a real threat: in the execution of environmental law it has been found that when the sanctions (fines) are too low, a 'perverse learning effect' occurs (Faure 2010: 263), which actually encourages recidivism.

With regard to the dissuasive character of sanctions and its relationship to the benefit to be derived from breaking the law, the Commission has actually conceded that, when providing for sanctions, the benefit to be derived from a violation should be taken into account and that 'a fine that is not considerably higher than the benefit that may be gained from a violation will have only a limited dissuasive effect' (European Commission 2010).

3. Proportionality can be described as an appropriate relationship between the (seriousness of the) offence and/or its aspects (such as type, severity, harm/damage, wilfulness, etc.) and the size and type of the penalty.

The doctrine of proportionality for corporate wrongdoings is no novelty. Both a doctrine and relevant tests of proportionality (of penalties) exist, and these allow, for example, the factoring in of corporate turnover when setting financial sanctions. As Moor van Vugt (2012) has demonstrated, this approach is common in EU competition law: the amount of the fines levied relates not only to the seriousness of the infringement and its consequences for the market, but takes into account also the turnover of the companies involved, the period of time the infringement has lasted and any other aggravating consequences. The European Commission has already demonstrated its recognition of the usefulness of factoring the corporate turnover (and profit from violating the law) into sanctions in other contexts; for example, in its Communication on reinforcing sanctioning regimes in the financial services sector, it recommended listing corporate turnover of perpetrators as one of the 'appropriate criteria' to be included in applying sanctions (European Commission 2010: 13).

It can be concluded that individual aspects of punitive measures (i.e. effectiveness, proportionality and dissuasive potential) are strongly interlinked and that, taken together, they amount to what could be described as the 'severity of sanctions'.

Conclusion and policy recommendations

Sanctions and enforcement regulations guaranteeing effective judicial procedures are not mere legal technicalities, but are of fundamental importance for attaining the goals of the Directive. In the ECJ case Coote v. Granada Hospitality Ltd, the Court found that a lack of effective means of pursuing a 'judicial process' has the potential to jeopardise implementation of the goals pursued by the Directive to be implemented:

> 'The principle of effective judicial control (...) would be deprived of an essential part of its effectiveness if the protection which it provides did not cover (...) legal proceedings brought by an employee (...). Fear of such measures [against an employee, RJ], where no legal remedy is available against them, might deter workers (...) from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the Directive.' (ECJ Case C-185/97, Point 24)

The effectiveness of sanctions is a complex issue. It comprises the magnitude of sanctions as a factor in their dissuasiveness; the deterrent function of sanctions, which is in turn a complex variable covering aspects such as severity, inevitability of the punitive measures, and courts' inclination to pronounce sufficiently severe, rather than excessively lenient, sanctions. If the potential sanctions are not efficient, the risk is that enforcement of information and consultation rights will be undermined and the fundamental workers' right to information and consultation trivialised (compare Faure 2010: 262).

Given the Commission's plans to launch a new implementation review, several policy recommendations can be formulated:

Firstly, that sanctions and, more broadly, enforcement frameworks have to be taken seriously into account as part of the prospective evaluation of the implementation of the Recast EWC Directive. As outlined above, ECJ jurisprudence itself clarifies that, even if the criteria for evaluation of sanctions are iterated only in the Preamble to the Directive, this does not remove the responsibility of the Member States to ensure 'adequate administrative or judicial procedures' (Art. 11.2 Recast EWC Directive) and the effectiveness of the Directive. It lies also within the European Commission's responsibility as 'the guardian of the treaties' to evaluate what judicial procedures, and types and levels of sanction are 'adequate' in light of the criteria of Recital 36 (ibid.).

Secondly, it is highly to be recommended that a holistic approach to enforcement should be adopted. An approach of this kind should not look exclusively at sanctions and at whether any judicial procedures are in place but should take into account EWCs' effective access to justice with regard to aspects such as their legal status (legal personality, capacity to act in courts), finance (e.g. whether financial means to seek legal counsel are substantially secured in practice; court charges and fees) and transparency (clarity concerning the competent court, its type, and the sanctions it can adjudicate) (see Jagodzinski 2014 forthcoming).

Thirdly, in the context of the above evaluation of enforcement frameworks, the levels and severity of sanctions should be thoroughly and critically judged against the criteria of Recital 36 of the Recast EWC Directive. Moreover, in order for the evaluation to be reliable and robust, the vast legal research output and theory on effectiveness, proportionality and deterrence of penalties (see Jagodzinski 2014 forthcoming; Faure 2010) should be taken into account and applied. The criteria set by Recital 36 and Art. 11.2 of the Recast EWC Directive should be evaluated individually, but also as a whole, thus approximating the composite characteristics of 'severity' of sanctions. More specific policy recommendations can be formulated with regard to:

- **Proportionality** of sanctions that should take into account the economic characteristics of the perpetrator, i.e. companies' turnover and revenue, some monetary measurement of the value of managerial decisions taken without informing and/or consulting the workers.
- **Dissuasiveness of sanctions:** in view of the limited deterrent potential of relatively low financial penalties for multi-million international companies, jurisprudence in France and Belgium has shown that the most dissuasive and efficient sanction proves to be nullification of managerial decisions taken in violation of information and consultation rights. It is thus recommended that the European Commission verify that the Member States provide national courts with the possibility to declare managerial decisions null and void. This measure should be backed up by the introduction of a requirement that court injunctions decided in summary proceedings should be available and allow an immediate stoppage/suspension of managerial decisions that may be in breach of EWC law, in the interest of avoiding irreversible damage to workers' interests.

Fourthly, enforcement frameworks and sanctions should, as a rule, be evaluated not only in the context of individual Member States, but in their overall European context. Specifically, the recommendation is that the European Commission should address the severe differences in the magnitude of sanctions available in different EU countries as part of the requirement to ensure coherent application of EU law.

It is very much open to question whether the European Commission will confront these problems in a spirit of decisiveness comparable to that displayed in other Community policy areas. In this respect the Commission, in its communication on strengthening sanctioning regimes in the financial services sector (European Commission 2010), recognises its own twofold obligation to act when Member States fail to apply proper sanctions: to produce proposals to introduce specific provisions (European Commission 2010): 14) and to 'take action to improve the legal framework' (European Commission 2010: 15).

It can be concluded that the type of enforcement framework most in line with the requirements of the Recast EWC Directive would be a policy mix, i.e. a combination of financial penalties, possibility of criminal sanctions (such as incarceration) and, most importantly, the sanction that decisions taken in violation of the law should be declared null and void.

It is to be hoped that workers' rights, nowadays recognised as Fundamental Rights, will be seen to be just as high on the European agenda as financial or environmental matters.

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