

# Social policymaking and workers' participation

## Introduction

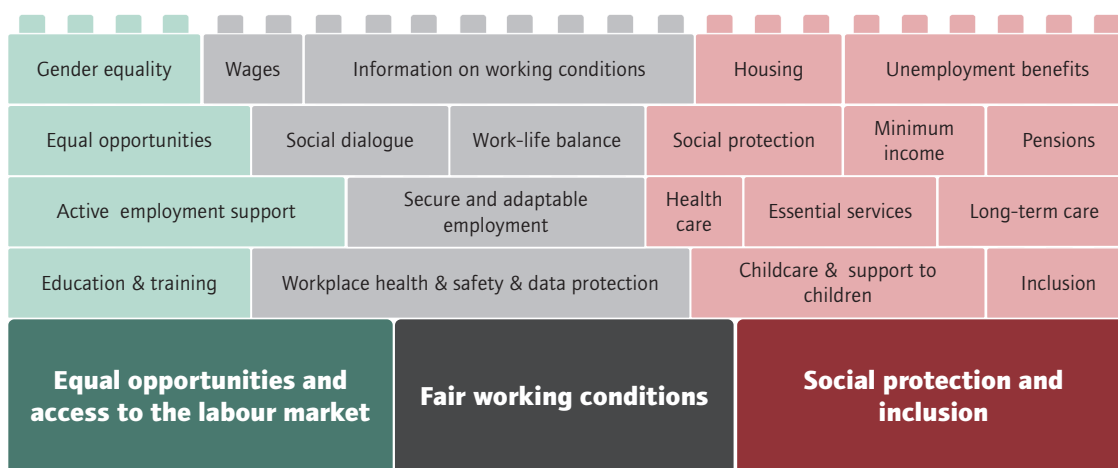
This chapter builds upon the assessment of social policymaking in Chapters 2 and 3. Taking stock of recent developments in social policymaking and particularly workers' participation, this chapter concludes that the overall trend is one of stagnation as we continue to wait for long-promised reforms and improvement. A brief overview of the potential contribution of the European Pillar of Social Rights towards strengthening the social dimension of the EU is followed by a critical look at its impact on workers' rights in particular. Building upon this, we take a critical look at the underlying rationale of the Commission's Regulatory Fitness and Performance (REFIT) programme and explore some of its actual social outcomes. Turning to workers' participation, we bring together research evidence and practitioners' experience with European Works Councils (EWCs), focusing on their conclusions about the current state of play and target areas for improvement. We identify an east-west divide among EWCs and, with dwindling hopes for a reform of the legal framework, we look at the potential for individual EWCs to pull themselves up by their bootstraps by renegotiating their founding agreements; we also identify the factors which continue to hamper the establishment of new EWCs. We explore the dynamics and impacts of workers' voice more generally. Turning to board-level employee representation, we look at the myriad ways in which mandates have been negotiated in the Societas Europaea (SEs), take stock of initiatives to promote gender equality in company boards, and explore the links between territoriality and workers' rights in this area. Finally, in anticipation of the EU Commission's long-announced 'company mobility package', we assess the limited available evidence, particularly with respect to its impact on tax justice.

## Topics

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# The European Pillar of Social Rights

Figure 5.1 The Social Pillar



Source: Author's own compilation.

## Quo vadis?

It was hoped that the 2017 European Pillar of Social Rights (EPSR) would give some 'new momentum' to Social Europe by reviving EU social ambitions. Indeed, every 15 years or so, an ambitious proposal to 're-balance' the EU's economic dimension with its social one is tabled (Pochet 2017). This, the latest of such proposals, was awaited with particularly high expectations by the stakeholders, including trade unions.

Indeed, the EPSR is the most encompassing social initiative to have been adopted by the EU in the past decade. Its three chapters lay out 20 broad principles in three areas: 1) equal opportunities and access to the labour market; 2) fair working conditions; and 3) social protection and inclusion.

The EPSR not only extends across social policy and labour law, it also seeks to confer new rights – rights previously absent in the EU realm. For example, the EPSR introduces for the first time 'the right to [...] adequate unemployment benefits or reasonable duration' (#13) and the obligation (for the Member States) to provide adequate shelter and services for the homeless. It also states that everyone lacking sufficient resources has the right to adequate minimum income benefits (#14).

Concerning workers' rights, the 'right to fair wages' is completely new (#6), especially since the EU lacks the legislative competence to regulate pay. In many ways the EPSR therefore sounds very promising.

However, despite its promise of upward convergence, the EPSR is quite disappointing in terms of its legal form. In fact, the implementation and enforcement of this brand-new instrument raises more questions than answers (Rasnača 2017: 37). The EPSR consists of a recommendation and a proclamation, and both are soft law instruments without legally binding force. The three legislative initiatives issued together with the EPSR (on work-life balance, on the revision of the Written Statement Directive, and on access to social protection) merely make reference to the EPSR rather than set out to implement its principles. Furthermore, despite repeated requests, the Commission has thus far declined to issue a Social Action Plan of future legislative initiatives for implementing the EPSR.

The only area in which the Commission has promised a meaningful role for the EPSR is the European Semester process (European Commission 2017c: 9). Until very recently, however, the country-specific recommendations failed to reflect this promise (Clauwaert 2017: 16). The Social Scoreboard's set of

indicators for monitoring the 20 EPSR principles (ETUI, Scoreboard: 7) have also only very recently been defined (see also Chapters 2 and 3). Therefore, for now the prospects of meaningful implementation and enforcement of the EPSR seem bleak.

At the same time, there are various ways in which the EPSR could be used to strengthen the EU's social dimension in a significant way.

First, a strong (political) commitment to its implementation and enforcement is needed, together with a concrete action plan, be it from Member States at the national level or from the EU legislator.

Second, independently of political will or the lack thereof, the EPSR could acquire some role in future litigation before the CJEU, perhaps similar to that played by comparable instruments in the past (Rasnača 2017: 33).

Third, it could serve as a shield against attempts to further deregulate social protection (e.g. via the European Semester or EMU mechanisms).

Finally, the EPSR could be used to reach a consensus on at least a few of its principles (such as unemployment insurance) that are essential for the smooth functioning of the EMU (Rasnača and Theodoropoulou 2017: 1). Conceivably, a legally binding framework could be built around such a consensus.

## Workers' rights and the Social Pillar

Figure 5.2 Workers' rights and the Social Pillar



Source: Author's own compilation.

### Old wine in new bottles?

Politically, the European Pillar of Social Rights (EPSR) reaffirmed social and labour law's place squarely on the EU agenda. It also raised some hopes for convergence towards higher pan-European legal standards. However, when we look specifically at workers' rights, we see that hardly anything new has been proposed.

For the most part, the EPSR merely reiterates rights that have already long existed in the EU acquis. Prime examples of this are the right to equal pay for women and men, the right to equal treatment in employment, and the right to be informed and consulted in cases of business transfer, restructuring and mergers.

There are very few new rights proclaimed in the EPSR. The most promising, and most frequently mentioned, is the right to fair wages (see also Chapter 4). The EPSR also adds a deadline to the existing right to be informed about the terms and conditions of employment: this information should be given at the start of employment, instead of within the first two months, as is currently foreseen in the Written Statement Directive. With respect to dismissals, the EPSR establishes the right to a

reasonable notice period and the right to be informed about the reasons for the dismissal. Finally, while the Merger Regulation states that workers have to be informed about the merger, the EPSR adds the right to consultation.

In this way, the EPSR to a certain extent complements some of the already existing rights. This, however, has mostly been done to remain aligned with the secondary law proposals that were issued alongside the EPSR proposal (on work-life balance, the revision of the Written Statement Directive, and access to social protection).

The Commission's proposed revision of the Written Statement Directive already proposes that the information on working conditions should be given to the worker on the first day of their employment (European Commission 2017a: 12). Therefore, the EPSR does no more than implement the Commission's proposal. Similarly, the Commission's proposal on work-life balance, in line with Principle #9 of the Pillar, envisages that the right to parental leave should provide flexibility in how this leave will be taken (e.g. part-time, full-time or in flexible forms) (European Commission 2017d: 12). Here, again, it can be argued that the Pillar seeks to implement the Commission's legislative proposal, rather than vice versa.

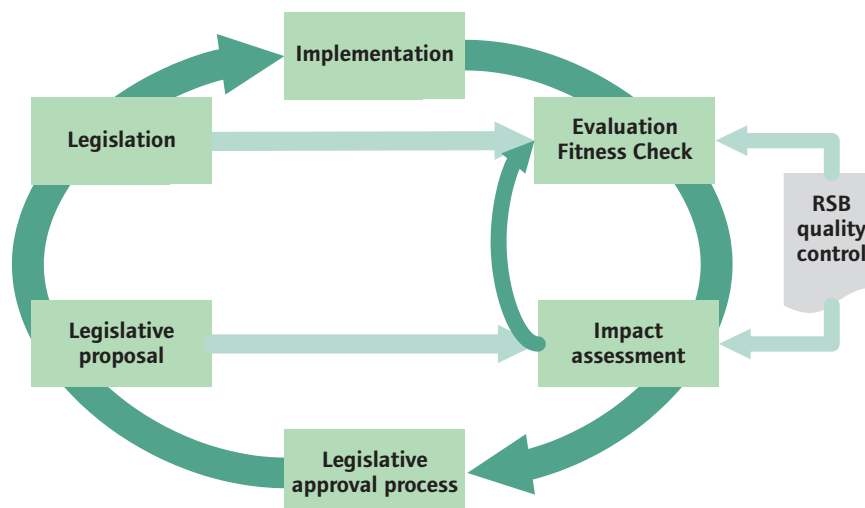
Furthermore, the Pillar itself requires specific legislative measures to

be adopted in order for its rights to be legally enforceable (Recital 14 of the Preamble). In this way the EPSR fails to use the opportunity to strengthen the implementation of workers' rights embedded in EU secondary law.

What does the EPSR actually mean then for workers' rights at the EU level? In legal terms at least, nothing much beyond reaffirming the existence of already existing rights. Although to a limited extent it adds to existing rights, a major question mark remains hanging over how they will be enforced, and any meaningful enforcement will require the adoption of further (implementing) measures either at national or EU level, and with all the accompanying legislative struggles. A political commitment to the principles which guide social policy is essential.

## REFIT: social outcomes

Figure 5.3 Better regulation cycle



Source: Better Regulation toolbox.

### An inadequate process...

The Better Regulation agenda has become one of the key elements in the policy-development process within the Commission. Having to a great extent reshaped the way that the Commission works, it now affects practically all relevant EU policy and legislative initiatives, both those newly proposed and those long existing.

The Commission's Regulatory Fitness and Performance (REFIT) programme is one of the main constitutive elements of the Better Regulation agenda. It aims to keep EU law simple, remove unnecessary burdens and adapt existing legislation without compromising on policy objectives.

While this ambition does not in itself seem threatening, the REFIT process has been heavily criticised, especially by trade unions and NGOs. Their key charge is that it furthers an exclusively deregulatory agenda.

Indeed, since the REFIT process inevitably puts measures under review into a defensive position, it underscores the perception that regulation is a burden by default (Van den Abeele 2014: 27). Further costs of the REFIT process arise

due to the necessary redirecting of scarce resources within the Commission. For example, instead of working on problems of enforcement and implementation in the Member States, in compliance with existing EU labour law measures, or on developing new social policy and labour law initiatives, the Commission's scarce administrative and expert resources are spent on justifying new and existing social *acquis* before the Regulatory Scrutiny Board (RSB).

The major critiques that can be directed at the REFIT process, however, concern its underlying rationale. Legally, the REFIT process is rooted in the principles of subsidiarity and proportionality (i.e. acting only where necessary and in a way that does not go beyond what is needed to resolve the problem). Economically, it is based on cost-benefit analysis and uses the Standard Cost Model (SCM) to evaluate policy measures. The SCM has a significant methodological bias and has been criticised as 'a propaganda tool for spinning a deregulation agenda' (Vogel 2010: 45). Briefly, the SCM consists of three steps: 1) dividing regulation into measurable units; 2) calculating the cost of the regulatory and administrative burdens of each segment; and 3) proposing the removal of elements of regulatory and administrative burdens deemed to be pointless, redundant or too costly. It is therefore inevitably oriented towards cuts and deregulation. In sum, the *raison*

d'être of the REFIT process is inevitably deregulatory and based on the idea that the EU should act only where it is really necessary and in as limited a manner as possible.

Moreover, for the social *acquis* in particular, this process poses additional problems. First, it is very difficult to quantify (in any way) the benefits of labour law and social policy measures, and even more so those of fundamental social rights. How does one calculate the benefit that limited working time gives to the worker? How can one quantify the benefits of non-discrimination legislation? While it may be obvious that such measures are necessary and extremely relevant, they do not lend themselves easily (or even at all) to the underlying logic of the REFIT process.

Unsurprisingly, therefore, the REFIT process has been met with extreme caution and much criticism.

## REFIT: social outcomes

Figure 5.4 Overview of the published REFIT evaluation reports on workers' rights

| Year | Document number    | Topic   |
|------|--------------------|---|
| 2013 | SWD(2013)293 final | EU law in the area of information and consultation of workers |
| 2016 | SWD(2016)350 final | Access to the occupation of road transport operators          |
| 2017 | SWD(2017)10 final  | EU occupational safety and health directives                  |
| 2017 | SWD(2017)205 final | 'Written Statement Directive'                                 |
| 2017 | SWD(2017)184 final | Social legislation in road transport                          |

Source: Author's own compilation.

### ...promoting (unforeseen) convergence?

Considering the previous section's negative evaluation, it may come as a bit of a surprise that the actual outcomes of the REFIT process have so far fostered greater (upwards) convergence and unity across the EU social *acquis* than perhaps expected.

The main REFIT evaluations in the areas of EU labour law and social policy have so far concerned: 1) EU law in the area of information and consultation of workers; 2) access to the occupation of road transport operator; 3) the occupational safety and health (OSH) directives; 4) the Written Statement Directive; and 5) social legislation in road transport.

All of these REFIT evaluation reports, rather than containing deregulatory recommendations, have instead duly indicated the gaps in enforcement and also in the level of protection offered by the said measures that should be closed.

First, the REFIT review in the area of information and consultation of workers came to the conclusion that the three EU directives in this field are all

relevant and provide such benefits as increased trust between management and labour, the protection of workers, and the establishment of a more level playing field among companies (European Commission 2013: 2). Furthermore, among the problems that require (possibly EU-level) solutions, the review listed the lack of information and consultation bodies in many establishments and the often only formal involvement of workers, as well as the gaps in the scope of application of the directives and the inconsistencies concerning the definitions used.

Second, the major evaluation of the OSH *acquis* (comprising 24 directives) came to quite similar conclusions. While the legal framework was seen as relevant (European Commission 2017d: 4), the REFIT report pointed out that the lack of coverage of SMEs poses significant problems that should be solved, and that for some issues, novel working methods, technological changes and new scientific knowledge necessitate an update of the the legal framework (ibid: 69-70). Furthermore, such matters as work-related cancer, musculoskeletal disorders, and mental health might require new (and possibly legislative) solutions at the EU level (ibid: 70).

The REFIT evaluations concerning access to the occupation of road transport operator, the Written Statement Directive, and the social

legislation in road transport came to similar conclusions to the two reports cited above.

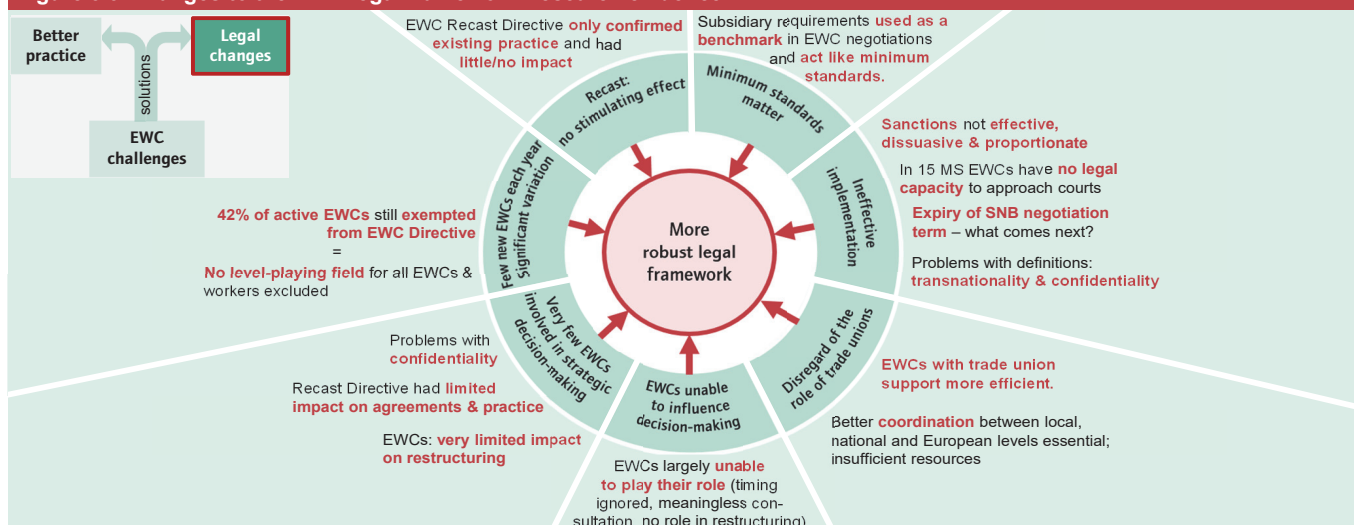
Among the key issues raised in all the available reports one finds: 1) the suggestion to limit the existing exclusions from the scope of application of the measures, and 2) the need to address implementation deficiencies (by either fostering better compliance via new tools that could control or facilitate implementation, or by adopting special implementing measures.) Finally, and contrary to expectation, one further common conclusion about the social *acquis* being subjected to the REFIT process has been that the measures are relevant across the board and that they do not create undue burdens for businesses.

Therefore, in the light of its underlying methodology, the results of the REFIT process in the area of labour law and social policy have overall been rather unexpectedly positive so far. Moreover, they even suggest the need to achieve more upwards convergence (via legislative means) at the EU level.

While underlying problems with this process still remain, the defence strategies adopted both within the Commission and by the (social) stakeholders have proven capable of halting the deregulatory attempts that were expected to have shaped the REFIT process.

## European Works Councils

Figure 5.5 Changes to the EWC legal framework: research evidence



Source: R. Jagodziński, own compilation.

## Converging evidence

In the area of European Works Councils, 2017 was spent waiting for the Commission's long overdue report on the implementation of the EWC Recast Directive. Originally due in 2016, it was repeatedly postponed and then promised to be announced as part of the Social Pillar in spring 2017. This promise could not be fulfilled either.

The least likely obstacle to the publication of the report seems to be the availability of research evidence and evaluations on the topic. The various pieces of research published between 2011 and 2017 concur in their diagnoses and solutions.

First, several of the EWC studies published (European Commission 2015; ETUC 2016; Pulignano et al. 2016; Waddington et al. 2016) concur that despite the modifications to the Recast Directive, EWCs are still unable to play their role. The reasons range from insufficient safeguards concerning the content and timing of information and consultation, as well as the management's reluctance to endow information and consultation with a good faith intention to make it a meaningful part of the company's decision-making process.

Second, as the above pieces of research indirectly suggest and three further studies explicitly put forward, the Recast EWC Directive had only a marginal impact in the two main goals it set: 1) increasing the number of new EWCs and the quality of the existing ones (De Spiegelaere 2016; De Spiegelaere and Jagodziński 2015); and 2) improving the quality of implementation, legal certainty, effectiveness and transparency of national legal frameworks (Jagodziński 2015). Admittedly, the Recast Directive did have an effect in that it encouraged management and labour to adopt some new definitions when renegotiating the agreements (mainly thanks to the support from trade unions and to learning processes within EWCs), but the overall low share of renegotiated agreements limits this impact.

Third, studies conducted on EWCs in the past years point towards some key issues where the Recast Directive failed to make a difference. One such example are definitions that were only partially amended: while information and consultation were more precisely delimited, no similar upgrade was applied to definitions of the transnational competence of EWCs, the confidentiality of information, or sanctions (ETUC 2016; Pulignano et al. 2016; Waddington et al. 2016; Jagodziński 2015). Furthermore, these studies also identify the persistent problem of inadequate links between the

EU level of information and consultation (EWCs) and national structures as a factor which has diminished the potential impact of the Recast Directive.

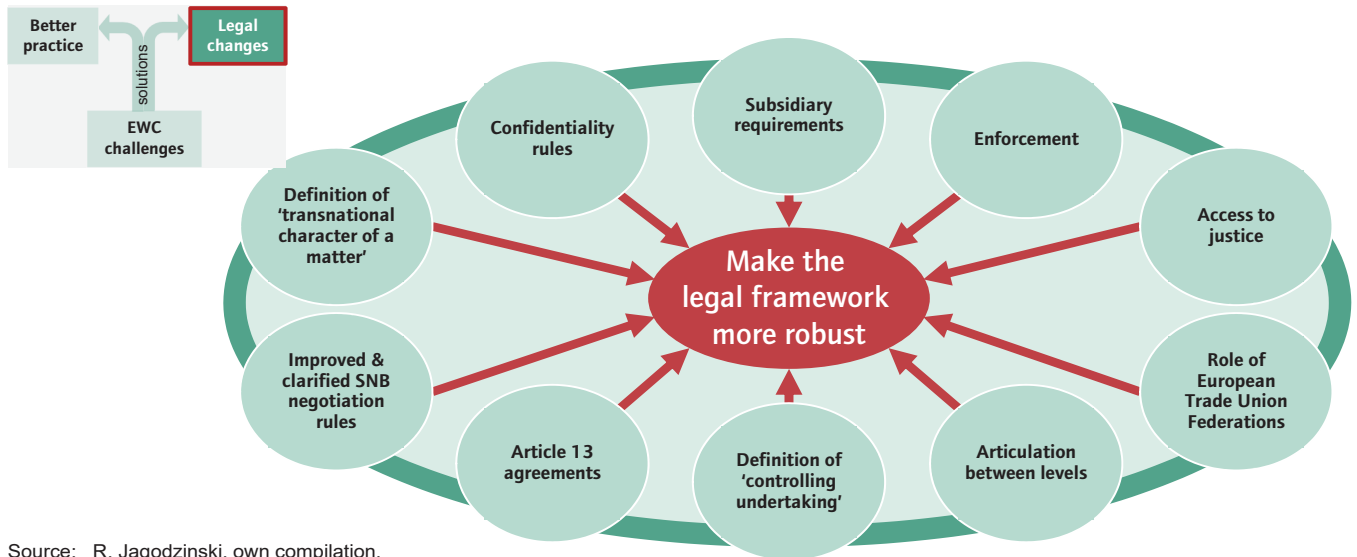
Fourth, the studies share the common conclusion that EWCs do not have access to appropriate and sufficient resources to fulfil the expectations placed in them (De Spiegelaere and Jagodziński 2015; ETUC 2016; Jagodziński 2015). These resources comprise both the institutional facilities (access to justice; means of enforcement; a single annual meeting) and the material ones (no defined budget; managements' strategies to limit operational costs; limited access to training or trade union experts, etc.).

Finally, research also concludes that the gap between well-functioning and poorly functioning EWCs is growing at an even greater rate than it was in the past (ETUC 2016; De Spiegelaere and Jagodziński 2015).

Not all of the above problems can be resolved solely by improving legal frameworks for EWCs; many of the solutions rely on improving the daily and strategic practice of EWCs and their members. Nevertheless, the Commission's long-awaited report on implementation represents an important milestone. If it not only identifies but also suggests ways to correct the myriad shortcomings laid out above, it may even prove to be a game changer.

## European Works Councils

Figure 5.6 Changes to the EWC legal framework: trade unions' assessment



Source: R. Jagodzinski, own compilation.

### Trade unions demand more robust rules

While not dismissing the need to improve practice, European trade unions presented a catalogue of demands for changes to the current legislative foundations for EWCs (ETUC 2017a). These demands are largely built upon the foundations of solid research evidence (see Figure 5.5) and are clearly supported by the practical experience gained by unions in coordinating hundreds of EWCs.

The ETUC catalogue of ten key demands can be grouped into several clusters. The first cluster comprises demands for the improvement of the existing definitions in the EWC Recast Directive. The first definition in this group is the central notion of the 'transnational character of a matter' (Art. 1.4); it is currently formulated too generally and vaguely, hence EWCs are too often denied the right to information and consultation by companies unilaterally classifying matters as purely national. Trade unions demand that the existing definition of transnationality be complemented with the criteria set out in the Preamble (Recital 16).

A second definition requiring review is the exemption of the so-called Article 13 agreements (i.e. pre-Directive agreements) from the standards of the Directive. In 2018, 22 years after the entry into force of the EWC Directive, 37% of active EWCs still operate on the basis of such exempted pre-Directive agreements (www.ewcdb.eu, January 2018). Trade unions rightly argue that the reasons to maintain the exemption (which was originally designed as an incentive to stimulate the establishment of EWCs prior to 1996) can no longer be justified and should finally be abolished.

The third definition for which the trade unions demand improvement is that of the 'controlling undertaking' (Article 2.1) which currently excludes common forms of corporate organisation, such as contract management, franchises, or joint ventures. Furthermore, the lack of objective criteria to determine the location of the 'representative agent' of companies whose headquarters lie outside the EEA invites arbitrary 'regime shopping'.

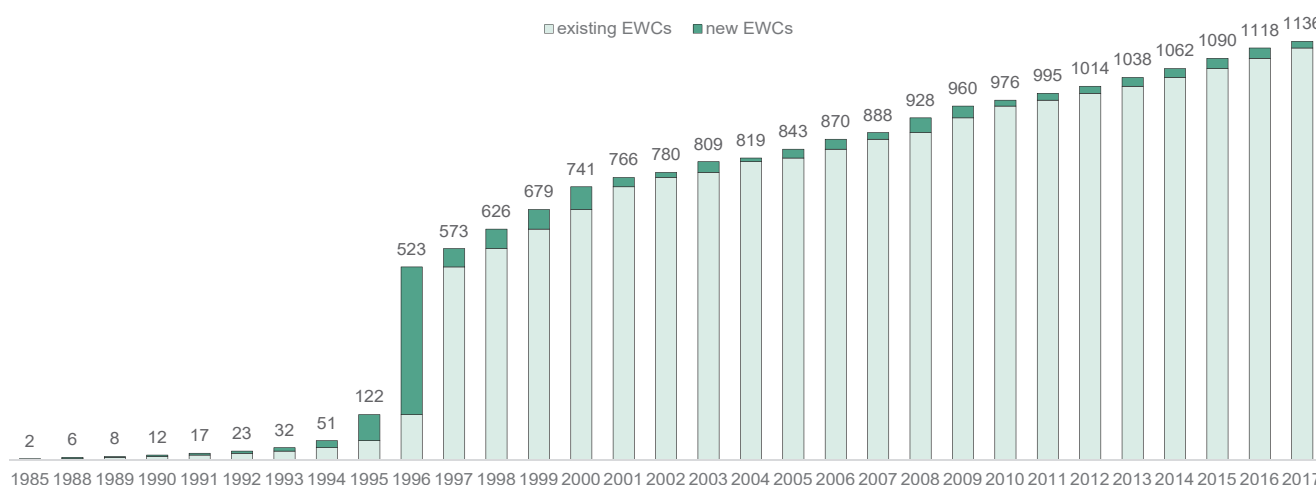
The fourth area for improvement are the vague and excessively restrictive provisions concerning confidentiality which are found in many negotiated agreements; too often, these are used to exclude or block information and consultation processes. When combined with the limited options of seeking judicial clarification or remedies, these definitions effectively cripple EWCs.

Other trade union demands point to the quality of the subsidiary requirements (see also ETUI 2014: 98 on their standard-setting impact), the lack of access to justice, and the enforcement of EWC rights. One of the most glaring examples of the latter is the lack of an unambiguous statutory obligation to set up EWCs where requests to set up Special Negotiation Bodies (SNBs) have been ignored, or where SNBs have negotiated fruitlessly for three years. As evidenced by research (Jagodziński 2015), the national frameworks in this area leave much room for improvement and this remains a significant hurdle for attempts to set up EWCs in the first place.

The last cluster of demands concerns the lack of resources for EWCs. Firstly, as practice shows, EWCs with trade union support operate more efficiently; the problem remains, however, that trade unions are too often denied access to EWCs. One remedy is to formalise the right of experts to participate in all EWC and Select Committee meetings and all other activities of EWCs. Secondly, more resources and rights need to be geared towards an appropriate, issue-driven interlinkage between the EU level of information and consultation and its national counterparts. Provisions to ensure this are currently left to the Member States to define, yet none have done so in any meaningful way.

## European Works Councils

Figure 5.7 EWCs, SE WCs and SCE WCs (growth over time)



Source: ETUI database of EWCs, [www.ewcdb.eu](http://www.ewcdb.eu) (January 2018).

## How to establish more EWCs

The ambition of the Recast of the European Works Council (EWC) was clear: creating more and better EWCs. However, the subsequent policy interventions did little to boost the creation of new EWCs (De Spiegelaere 2016). Figure 5.7 shows that there was no surge in the amount of EWCs after the adoption of the Recast EWC Directive.

Research has identified four factors as crucial to the establishment of more EWCs: (1) awareness, (2) information, (3) capacity and (4) priority.

EWCs are not installed automatically when companies pass a certain threshold of employees. The initiative needs to be officially taken from the employer or employee side to start a negotiation process which eventually leads to the creation of an EWC. Unless the actors (employees, trade unions, representatives, management) are aware of the possibility to install an EWC, there will be no initiative and no EWC.

A first hurdle to overcome in the road to more EWCs is therefore ensuring that the stakeholders know about the option to install an EWC.

Even when there is awareness, the actors also need information: information

about whether or not their specific company meets the thresholds, how to correctly take the initiative and how the negotiations should be pursued.

Yet even if employees are aware and informed, the largest hurdles are still waiting for them. Before creating an EWC, they must have the capacity to negotiate and run an EWC. This means they need to know employee representatives of other countries, have the resources to liaise with them, and be able to communicate with them. This capacity is not only related to the resources of the employee representatives or trade unions, it is also a legal issue, since the current EWC rules give little recourse to employee representatives if management simply ignores the request for negotiations or undermines the negotiations themselves.

Last but certainly not least is the issue of priority. Employee representatives might be aware of the possibility, have the necessary information and have the capacity to conduct negotiations, but an EWC still needs to be on their priority list. They need to see the added value of having an EWC. And this added value needs to be larger than the envisaged investment.

An effective strategy to create more EWCs must address all these points simultaneously, but many of them require different forms of intervention.

To address the information problem, an obligation for companies to

report country by country on employee figures could easily solve the issue. Capacity issues could be tackled by providing targeted support and legal interventions.

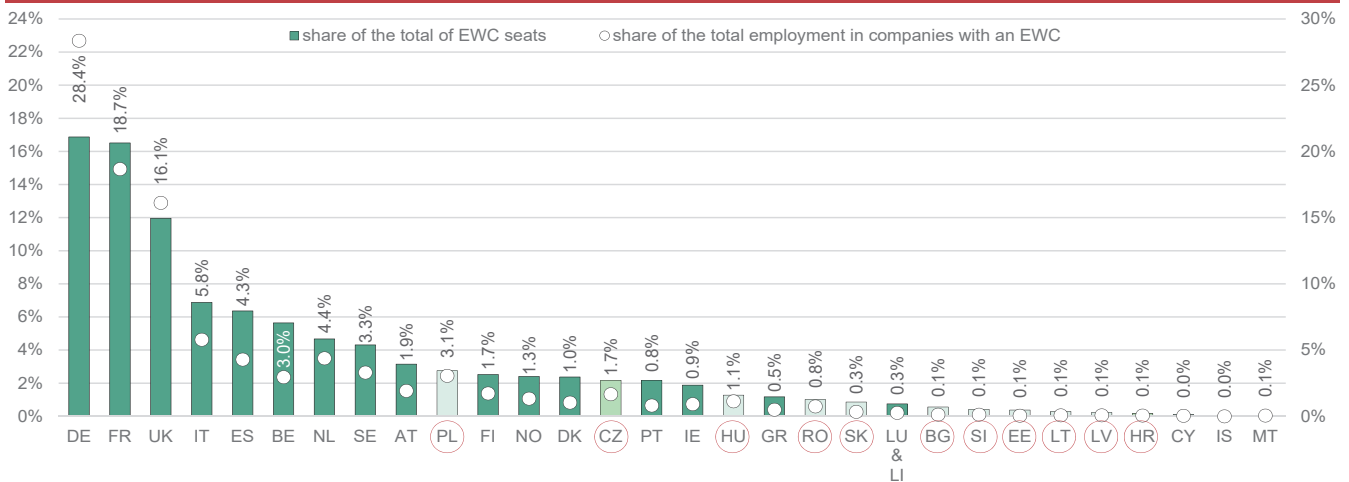
However, one policy intervention could kill many birds with a single stone: strategic strengthening of the trade unions, specifically the European Trade Union Federations. They are the organisations best equipped to raise awareness in multinational companies and inform the employee representatives. But more importantly, with sufficient resources they can compensate for scarce local capacity by providing legal and material backing to employee representatives who seek to establish an EWC. They are best placed to develop European views on employee matters and encourage local representatives to do the same.

At the national level, many policy-makers have seen the value in supporting trade union activities to enable fruitful social dialogue at the company level. To foster genuine social dialogue in Europe's multinationals, European trade unions deserve more support.



## European Works Councils

Figure 5.8 EWC seats per country of origin of representatives



Source: ETUI database of EWCs, [www.ewcdb.eu](http://www.ewcdb.eu) (January 2018).

Note: Share of seats per country calculated on the basis of analysis of provisions pertaining to mandate distribution in an active EWC with currently valid EWC agreements.

### An east-west divide in EWCs?

As recent research evidence on EWCs suggest (see Figure 5.5), EWCs are at risk of growing apart in several respects, such as the quality of EWC agreements, the effectiveness and quality of practice and dialogue with management, or regarding the statutory guarantees as provided by national legal frameworks (ETUC 2016; De Spiegelaere and Jagodziński 2015; Jagodziński 2015). One of the striking axes of division, however, remains the east-west split, which reflects the dichotomy that can still be seen between the 'old EU' and the 11 'new Member States' which joined the EU after 2004 (NMS13, excluding Cyprus and Malta), despite the fact that most of the so-called 'new' countries have been in the EU for 14 years now. The question is whether, in the area of EWCs, this divide is justified by the numbers.

The first numerical indication often referred to is a cleft between the number of EWCs established in the 'old' and the 'new' Member States: among the currently active 1138 EWCs, only six were set up in companies headquartered in the central-eastern countries (two in Hungary, and one each in Czechia, Poland, Slovakia and

Slovenia ([www.ewcdb.eu](http://www.ewcdb.eu), January 2018). Arguably, these figures say little about the east-west divide since they mainly reflect differences in economic development: most multinational companies that qualify to set up an EWC are headquartered in the 'old' EU.

An alternative measure of the east-west divide could thus be the distribution of seats and composition of EWCs. At first sight this data is telling too: it shows that workers' representatives from the 10 Member States that joined the EU in 2004 are involved in only 30% (341) of active EWCs; representatives from Bulgaria and Romania are involved in only 11% of active EWCs; and representatives from Croatia are members in only 3% of EWCs. In terms of the number of seats, the cleft seems undisputable: only 11% of seats on active EWCs are occupied by representatives from NMS.

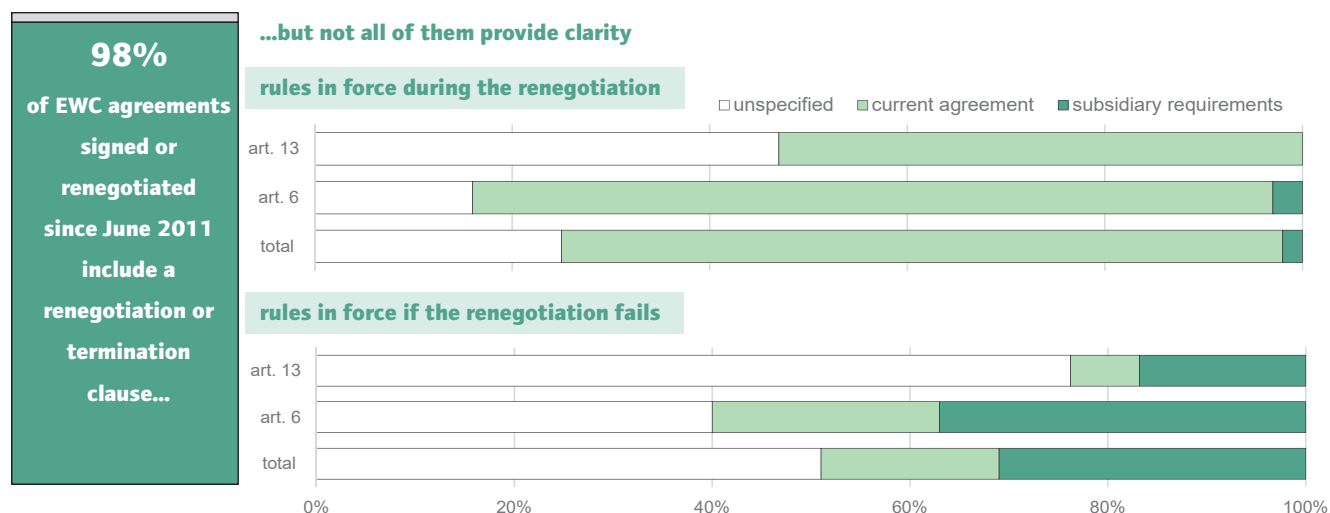
All the arguments based on numerical data are, however, quickly dismissed if one compares the number of seats per country with the workforce employed: the number of seats is approximately proportionate to the number of employees in each country. Indeed, Czechia, Slovakia, Bulgaria, Slovenia, Estonia, Lithuania, Latvia and Croatia may be slightly over-represented, although this finding is possibly driven by error margins in available employment data per company.

In conclusion, it must be emphasised that the source of the

reported rifts between the east and west in EWCs is not discrimination against representatives from these countries. Rather, there are stark differences in political resources which representatives are able to bring to their role. These resources are determined by the rights and material resources provided through their national legislation for them to perform their functions. ETUI research has found that these are often highly limited compared to those of their western counterparts. (Jagodziński 2015; Jagodziński and Hoffmann 2018, forthcoming). Substantial differences between the CEE countries and the rest of the EU in their industrial relations models (ETUI and ETUC 2012: 57), corporate culture, trade union power, and worker representation models also create differences in the way representatives function and the expectations, interests and ideas they have about EWCs. This distinctive background often explains why members from NMS often see EWCs as an alternative to malfunctioning national systems of information and consultation, rather than a complement and extension thereof, as their western counterparts do. Any future EU initiatives should thus address these institutional differences to bridge the real east-west divide.

## European Works Councils

Figure 5.9 Renegotiation clauses in European Works Council agreements



Source: ETUI database of EWCs, [www.ewcdb.eu](http://www.ewcdb.eu) (January 2018).

## Renegotiating in a legal fog

Another issue which is generally overlooked, but which arguably has a decisive impact on the ability of European Works Councils (EWCs) to fulfil their role is the lack of robust rules for renegotiating the founding agreements.

As with any contract, EWC agreements should include rules on how to terminate and renegotiate an agreement. Yet when looking at the EWC agreements made before 1998, Marginson and colleagues (1998) found that only one in five agreements included renegotiation and termination clauses. A study carried out in the German metal sector 10 years later (Hoffmann 2008) showed that while many more agreements specified rules, these still lacked essential information, such as the notice period, the duration of the renegotiation, what rules apply during the renegotiation and what happens if negotiations fail. The legal uncertainty caused by a lack of clear procedural rules amounts to a stark disincentive to embark on renegotiations in the first place, even if an agreement may be decades old.

The EWC Recast Directive of 2009 thus specifies that every EWC agreement must include rules on the procedure

of terminating and renegotiating an agreement (Art. 6).

The question is, therefore: did the quality of renegotiation and termination clauses improve? To study this, a selection of 100 Article 6 EWC agreements signed after the Recast EWC Directive entered into force, as well as 50 pre-Directive EWCs (also called Article 13 EWCs), was analysed.

The analysis showed that almost all agreements mention termination and renegotiation procedures (98%). Almost half of these clauses also specify which majority one needs to call for a renegotiation. Most agreements also specify a notice period, generally between one and six months. Far fewer specify how long the renegotiations could run; only about one in four agreements include such a period, which is generally one year. This means that 75% of these agreements are expected to enter into open-ended negotiations.

A further worrying gap arises around the question of which rules apply, both during the renegotiation itself, and if the parties should fail to reach a new agreement. About one in four recently signed EWC agreements do not specify which rules apply during renegotiations. Of those who did, the large majority states that the agreement currently under renegotiation continues to apply.

But what if the parties fail to come to a new agreement? In about 50% of the

agreements, it remains unclear which rules will apply if negotiations are fruitless. This makes the termination of an unsatisfactory agreement akin to jumping off a cliff's edge.

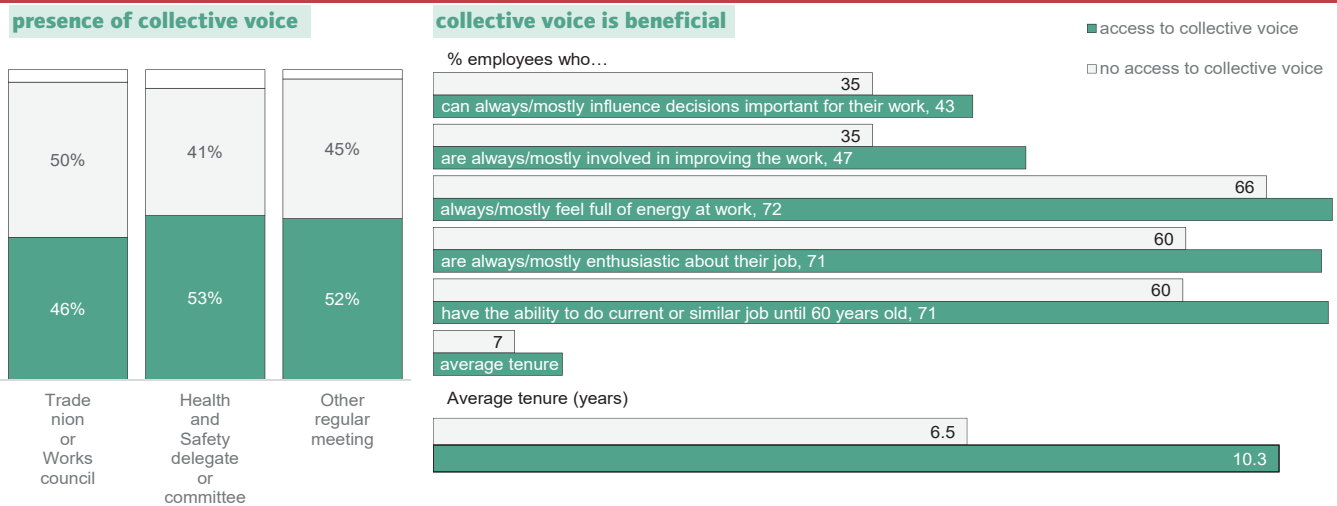
Of those agreements which do have rules, most provide for the application of the subsidiary requirements laid down in the law. But over 10% of the agreements require the current agreement to remain in force, effectively locking EWCs into the results of negotiations which might be decades old.

The analysis further shows that renegotiation and termination clauses in Article 6 EWCs are generally more detailed than those found in pre-Directive EWCs. Despite some signs of convergence towards Article 6 agreements, the persistent lack of any robust rules in pre-Directive agreements underscores the need to make all EWC agreements subject to the EWC Recast Directive.

While there has been a welcome increase in the share of EWC agreements which at least mention termination and renegotiation, essential provisions concerning the actual terms of renegotiation are still missing in a worryingly large share of agreements. The fact that EWCs must decide whether to improve their lot in the face of such legal uncertainty is a significant impediment to their ability to improve their functioning by formalising good practice or taking up legislative improvements.

## Workers' voice

Figure 5.10 Presence and benefits of collective voice



Source: European Working Conditions Survey. Data for EU 29.

## Collective voice: an asset for all

Demanding higher pay, safer workplaces or changes in work organisation is a challenge. Individuals putting forward these demands risk provoking a conflict and recriminations. Even if the individual's situation is improved, it is not necessarily improved for all. So why should individuals take these risks? If all employees reason the same way, then the employer may have no way of knowing if anything is going wrong, and the organisation (and the employees) might suffer.

To this typical problem of collective action there is a simple solution: collective voice. Employees elect representatives who can voice ideas and complaints on behalf of the workforce. Unions, works councils and similar institutions serve to provide such a collective voice, to the benefit of both the employees and the companies.

Already in 1984, Freeman and Medoff described this role of trade unions and works councils and predicted that having such an institution would have beneficial consequences: (1) more employees would be willing to voice their ideas and concerns about what is happening in the company, (2) employees

would be more motivated and (3) employees would be more likely to stay in the company.

Using data of the 2015 European Working Conditions Survey of the European Foundation for Living and Working Conditions in Dublin we can check whether this is correct, and the results look promising.

As can be seen in Figure 5.10, employees with access to collective voice are 35% more likely to say they are involved in improvements in their work and 22% more likely to say they can influence decisions in the workplace. So where employees have the opportunity to voice ideas and concerns collectively, they also tend to share them more as individuals. Collective voice and individual voice go hand in hand.

Employees with access to collective voice also seem to be more motivated. More than 70% of the employees with access to collective voice say they are mostly or always full of energy at work and feel enthusiastic about their job. For those without access to collective voice this is only 66% and 60% respectively.

Whether or not employees with access to collective voice are less likely to leave the company is more difficult to check using the European Working Conditions Survey. The only two questions related to somebody's intention to leave is one on whether or not the employees think they could do

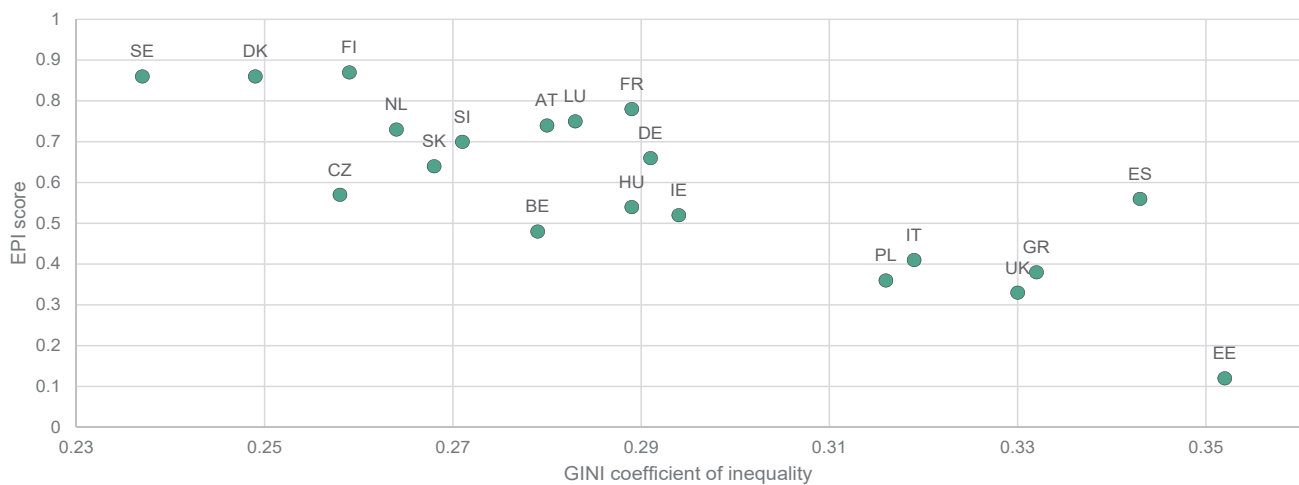
the same or a similar job until they are 60 years old, and a second question about the length of their tenure in the company.

Although these are not perfect indicators, the results also show that employees with access to collective voice are more likely to intend to stay in their current (or a similar) job: 71% compared to 60%. They also have significantly longer tenure than employees without access to collective voice (10.3 years vs. 6.5 years).

As Freeman and Medoff already said in 1984, employees can react differently to issues in their jobs, although one reaction (voice) is clearly preferable to the other (exit). Collective voice in the form of a union or a meeting in which representatives of employees can (collectively) voice concerns is beneficial. It is associated with more employees individually voicing ideas for improvement, being more motivated and being less inclined to leave the job. Even when controlling for possible effects of the company size, the country, the employee's occupation and the sector, the shown relations still stand: collective voice in the shape of a trade union, a works council or similar institution is an asset for employees and therefore also for companies.

## Workers' voice

Figure 5.11 European Participation Index and GINI coefficient of income inequality, by country (mid-2010s)



Source: Vitols (2018b) and LIS Cross-National Data Center in Luxembourg (<http://www.lisdatacenter.org>).

## Countries with stronger 'worker voice' are more cohesive

Increasing income inequality around the world has become a major source of concern. While reducing the wage gap has always been an issue for trade unions, accelerating inequality in recent years has led many international organisations to also voice concern. For example, the World Economic Forum's 2017 Global Risks Report ranked rising inequality as the greatest risk to the world economy (WEF 2017).

Unfortunately, these organisations rarely, if ever, call for the strengthening of collective bargaining and worker representation to help reduce inequality. This is despite the fact that extensive research shows that declining union density and collective representation is one of the main factors driving this trend (Janssen 2016).

One indicator of the importance of collective representation for social cohesion is the strong relationship between the European Participation Index (EPI) and the Gini coefficient, one of the most frequently used measures of income

inequality. The EPI, which has been calculated by the ETUI for the late 2000s and mid-2010s, is a three-part measure of the strength of 'worker voice' in different European countries (Vitols 2010; 2017). The first component measures the strength of worker representation on company boards. The second component measures the percentage of the workforce with formal collective representation at the establishment level. The third component measures collective bargaining influence, which is an average of the percentage of the workforce covered by a collective agreement and the percentage of the workforce that are trade union members. Countries receive a score between 0 (no worker voice) and 1 (strong worker voice) on the EPI. The vertical scale on Figure 5.11 indicates the EPI score of different European countries.

As seen in Chapter 3, there are multiple factors shaping income inequality as measured by the Gini coefficient: the effectiveness of social protection is one, and workers' voice is another and is used here to measure income inequality.

The Gini coefficient can vary between 0 and 1, with higher levels indicating greater levels of inequality, and lower levels more equality. As can be seen in the horizontal axis in the figure above, the Gini coefficient in Europe varied between 0.23 and 0.35 in the mid-2010s.

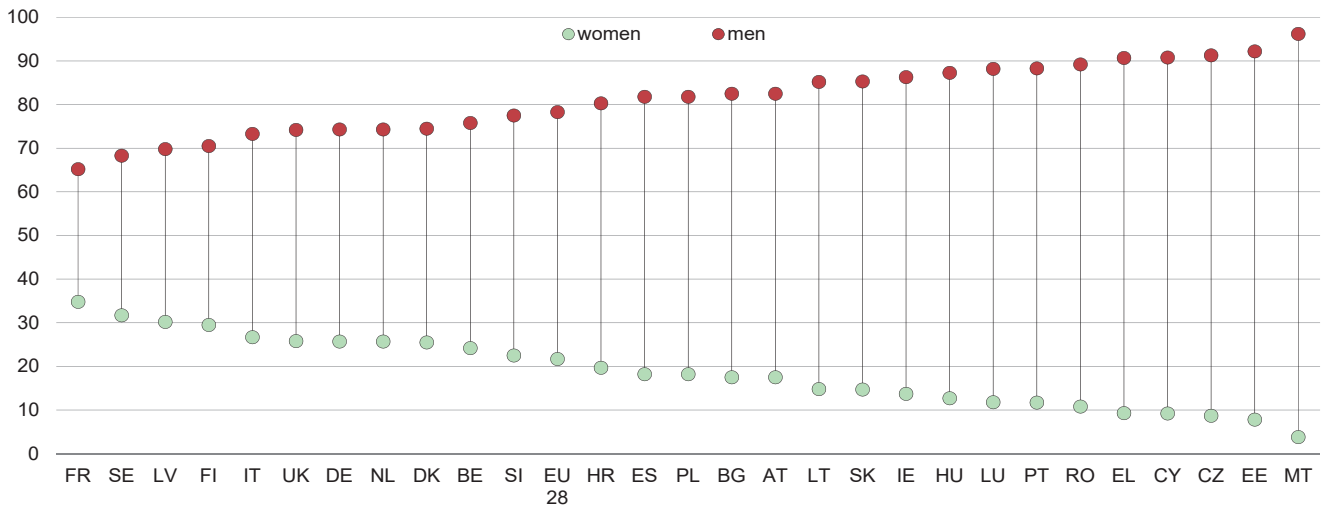
The figure indicates a very strong relationship between the strength of

worker voice, as indicated by the EPI, and inequality, as indicated by the Gini coefficient. The Nordic countries, in the upper left part of the figure, have a particularly strong level of worker voice and the lowest levels of income inequality in Europe. At the other end of the scale, Estonia has both the lowest level of worker voice and the highest level of inequality, followed by the UK and Greece. Since not all European countries participate in the Luxembourg study, it was not possible to include all Member States in this analysis.

Although income inequality is influenced by many factors, including tax and other governmental policies, the strength of worker voice and collective representation is certainly one of the main explanatory factors for the level of inequality. Increasing worker voice through extending collective bargaining and strengthening worker representation at the workplace and in company boards should thus be among the top measures implemented in the interests of reducing income equality and increasing social cohesion in Europe and beyond.

## Women on boards

Figure 5.12 Gender gap in supervisory boards or boards of directors of large listed companies, by share of members and sex



Source: EIGE, 2018, Gender Equality Index – Domain of power- Sub-group Economic Power (data for 2015).

## Gender inequality in the boardroom

Data from the European Institute for Gender Equality (EIGE) reveal persisting gender inequality in powerful corporate positions. The 'domain of power' indicator measures gender balance in decision-making positions across the political, economic and social spheres. For the economic sphere, Figure 5.12 shows the proportion of women and men sitting on a representative number of the largest listed company boards in the EU28 (EIGE 2018); these figures apply to both the 'shareholders' bench' and the 'employees' bench', where these exist.

In comparison to men, women are broadly underrepresented (21.7% women against 78.3% men on average: a gap of 56.7 points). No country reaches parity, and most are far below the 40% target that the European Commission seeks to achieve. France has the smallest gender gap (30%) while Malta has the biggest (over 92%). With some exceptions (i.e. Latvia, Italy, Ireland, Austria and Luxembourg), post-socialist and southern European countries generally have greater gaps than the EU28 average, while Nordic and western European countries score better in terms of equality.

The reasons behind this profound gap are diverse and intertwined. The underrepresentation of women on corporate boards is only one aspect of gender inequality in the labour market. Different attitudes about and national measures for board-level representation also play a role, and the adoption and implementation of public regulation has visibly contributed to reducing the gap in certain countries (see Figure 5.13).

Two main arguments converge in the public discourse, supporting the need to increase women's representation on corporate boards (WoB). The first draws on economic, stakeholder and human capital approaches: diversity of gender, age, national origin and education in the boardrooms produces better, more innovative and efficient decision-making due to the variety of perspectives. Countless studies have shown that diversity on boards has positive impacts on performance (e.g. Nielsen and Huse 2010).

The second argument draws on political and legal debates. Article 23 of the EU Charter of Fundamental Rights states that 'equality between men and women must be ensured in all areas, including employment, work and pay', and that 'measures providing for specific advantages in favour of the under-represented sex' do not breach the equality principle. Article 20 of the European Social Charter recognises the 'right to equal opportunities and equal

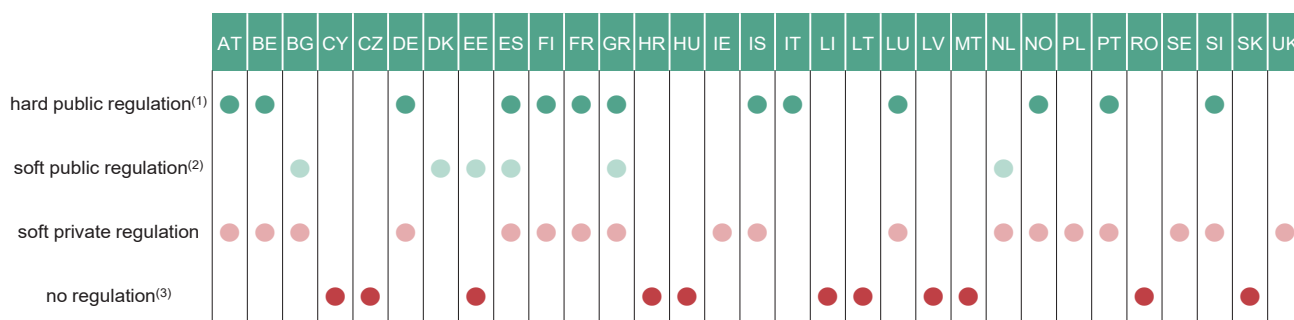
treatment in matters of employment and occupation without discrimination on the grounds of sex' and compels signatory countries to take measures to ensure and promote gender equality in 'career development, including promotion', among other areas.

In 2012, the European Commission proposed a Directive to promote gender-balanced company boards (the GBB Directive) which would require 40% of non-executive board members or 33% of all directors to be of the underrepresented sex by 2018 in public undertakings, and by 2020 in large listed private companies. It also proposed an obligation to report on WoB; this is least partly covered by the obligation for non-financial reporting in Directives 2013/34 and 2014/95.

However, while the European Parliament backed the proposal, the proposal was blocked in the Council: several Member States (i.e. Denmark, the Netherlands, Poland, Sweden, the UK and Czechia) opposed it, arguing that it did not comply with the subsidiarity principle, but also displaying conflicting views on quotas. However, it has gone through several amendments (Council of the European Union 2017) and remains one of the European Commission's top priorities in its larger strategy to break the glass ceiling and combat vertical segregation (European Commission 2017e). WoB is thus still inching along in the EU legislative pipeline.

## Women on boards

Figure 5.13 National regulations on women quota in company boards (EEA)



Source: Based on Waddington and Conchon, 2016; Deloitte, 2017; Senden and Krusinga, 2018 and own research.

<sup>(1)</sup> ES, FI, GR, LU, SI: only public sector. <sup>(2)</sup> EE: only public administration, GR: credit institutions. <sup>(3)</sup> EE: only private sector.

## National rules on 'diversity' converging?

The underrepresentation of women on company boards (WoB) is widely interpreted as a social problem that should be addressed, yet EU Member States have very different policy approaches to tackling the issue (Senden and Krusinga 2018: 9; Deloitte 2017; Terjesen et al. 2015).

As Figure 5.13 shows, some have established public binding regulation with mandatory obligations for companies to either set or have a target for a gender quota as the most suitable way to foster an increase of WoB. Hard law has proven more efficient in bringing about such change (Waddington and Conchon 2016: 214). Other countries, however, prefer soft law or voluntary approaches. Soft rules, such as recommendations of targets, guidance or comply-or-explain rules are found in public regulations, but most typically rely on codes of corporate governance. In some cases, countries apply mandatory rules for the public sector, but soft regulations for the private sector. Finally, a third group of countries has not addressed the issue of WoB at all

from a regulatory perspective; these are mostly post-socialist countries.

This categorisation of regulations does not show the diverse range of measures, sanctions and procedures developed to redress the lack of WoB presence (Seierstad et al. 2017). Regulations (either hard or soft) are different in scope, and may affect state-owned enterprises, public administration, and/or large (often listed) companies in the private sector.

Defining employee figures and company-size thresholds provides hard criteria to define the scope: it avoids the risk of companies escaping WoB regulations simply by changing company form (Seierstad and Huse 2017: 28-29). Some regulations introduce direct obligations (or recommendations) for a gender quota in the composition of boards (usually from 30% to 40%), while other measures set obligations for targets, zipped lists, and/or stricter non-financial reporting to include data on women's representation in corporate decision-making bodies.

In some cases, regulations establish transition periods or are even adopted for a limited period, at the end of which a change in board composition is expected (e.g. Italy or the Netherlands).

The approach to sanctions varies greatly. Those proposed in hard and soft public regulations range from strong and enforceable financial sanctions for

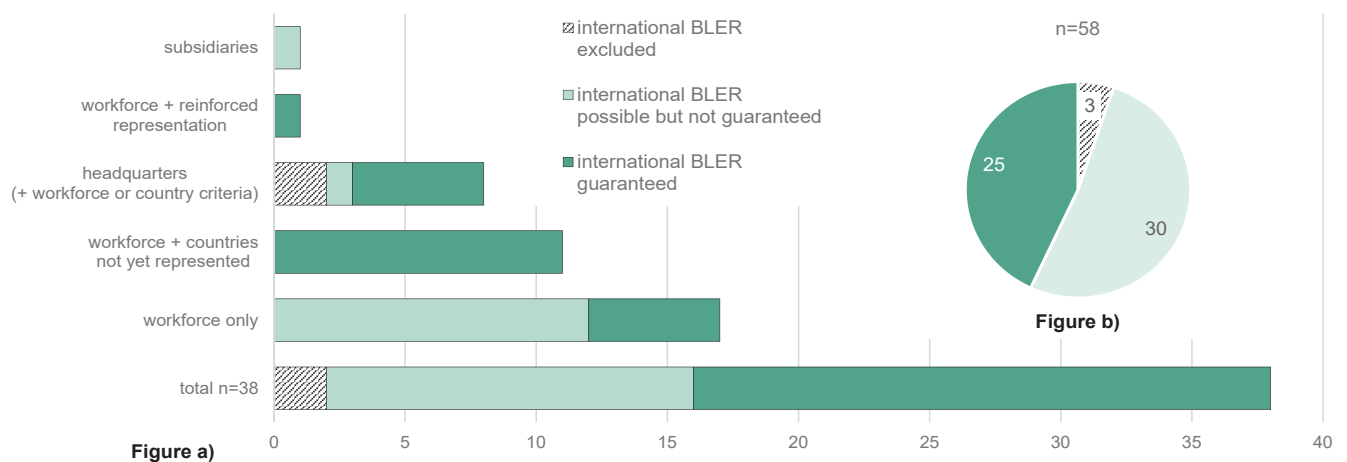
non-compliance, to comply-or-explain procedures, or simply no sanction at all. This renders the categorisation of regulations as 'binding' particularly difficult.

Finally, some regulations concern the whole board, while others apply to only certain members of the board (e.g. non-executive directors or shareholders). In countries with systems of board-level employee representation, these rules may or may not affect the composition of the workers' bench on the board (Waddington and Conchon 2016: 79).

Despite the diversity of approaches, most country regulations converge around the belief that positive action and gender quotas are an appropriate means for achieving more diversity and equality in corporate decision-making. Still, quotas should not become the final upper limit, the real objective being a broader cultural and social change requiring complementary and comprehensive policies on gender equality at other levels (Levrau 2017: 167). Boiling down gender inequality to board diversity may hide multiple underlying dimensions. On the other hand, reducing diversity to a 'women quota' could downplay other dimensions of gender, ethnic or cultural discrimination (Constantinescu 2016: 177), while the combat against gender inequality also risks being blurred when integrated into more mainstream diversity policies.

## European board-level employee representation (BLER)

Figure 5.14 SE agreements' allocation criteria and internationalisation of BLER seats



Source: ETUI database on SE agreements' BLER provisions, 2018 (as of 1 February 2018).

### BLER in SE agreements

As a rule, in the case of European Companies (SEs), management must negotiate with employees about their involvement in the future SE. Negotiations always concern information and consultation rights, but can also include participation rights (i.e. the right for employees to appoint, recommend or oppose members with full voting rights to the SE board), if such rights existed before an SE conversion or applied to 25% or 50% of the workforce before an SE is established by a merger, as a holding or a subsidiary, respectively (Conchon 2011).

To establish an SE, negotiations must lead to an agreement, otherwise standard rules apply as transposed in applicable national law. SE agreements thus constitute the first governing rules for board-level employee representation (BLER) in SEs where participation rights are established. In such cases, SE agreements must specify the number of employee representatives sitting on the SE board, their appointment procedure, and their rights.

ETUI research demonstrates that these decentralised rights to negotiate company-specific arrangements give rise

to a bewildering array of solutions.

74 SEs have negotiated BLER rights (ETUI, 2018a). The few studies which exist have only explored the provisions for BLER in SE agreements based on German law (Rose and Köstler 2014; Eidenmüller et al. 2012). To fill this gap, the ETUI analysed in depth the BLER provisions contained in 62 available SE agreements (ETUI 2018b).

In the sample, most SEs are based in Germany (53) but others are based in France (6), Austria (2) and Cyprus (1). They mostly have two-tier corporate structures and are active in different sectors, ranging from metal to financial services. Most SEs result from conversions (49) or mergers (16), and are group parents, while only 8 SEs are subsidiaries. This affects the composition and functioning of codetermined boards.

The SE agreements do not always comply with the minimum content the SE Directive requires. They hardly ever fully lay out the applicable regime and can only be understood in relation to national laws. Furthermore, the SE agreements reveal not only the power relations underlying negotiations but also the impact that these have on the structural features of BLER. Particularly relevant in this respect are the allocation of BLER mandates and the procedural rules for appointment.

The analysis shows the diversity of solutions found. Leaving aside possible deviations in the *de facto* implementation

of the rules laid down in the agreements, most agreements do secure the representation of more than one country in the BLER delegation. Still, the findings suggest increasing divergence between individual SEs, as well as between and within Member States, particularly so for German SEs (Keller and Werner 2012: 638). This seems the obvious consequence of having to devise a tailor-made and nationally adaptable solution to regulate an institution which touches upon the

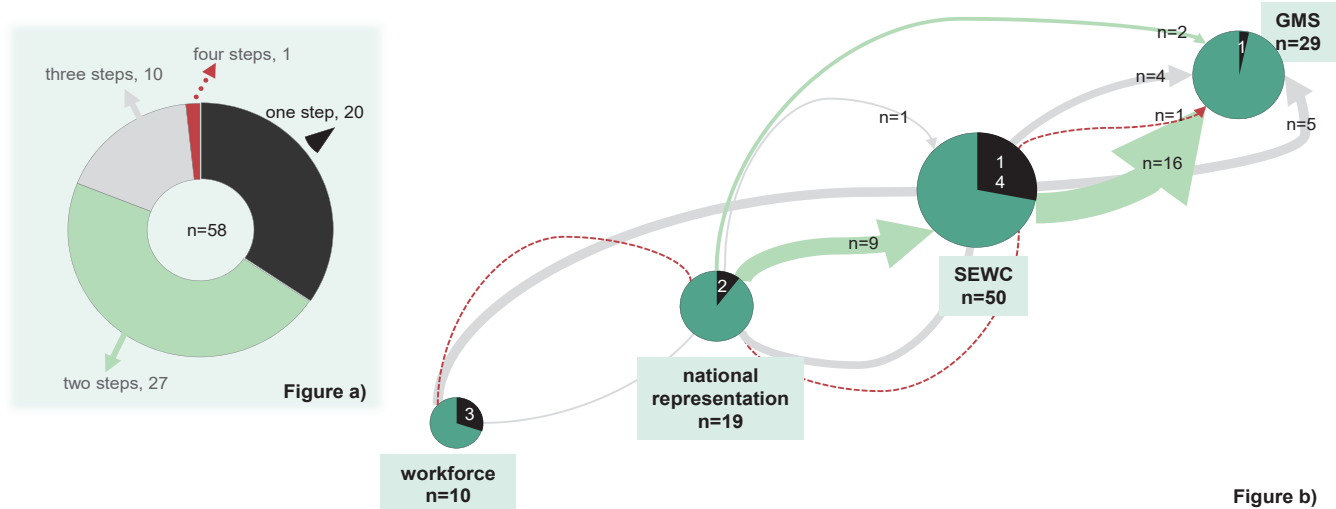
### Seat allocation and internationalisation

company's heart of power: the board. When agreements provide for seat allocation rules (43 cases), this allocation is left entirely to the SE-WC (5 cases) or SE agreements to define specific criteria to allocate seats across countries (38 cases).

Proportionality according to workforce distribution across countries is the preferred criterion (17). However, this alone may not suffice to mathematically allocate the seats; hence, in 11 cases, an additional seat is granted to a workforce not yet represented if only the proportionality rule was applied, echoing the German transposition law.

## European board-level employee representation (BLER)

Figure 5.15 SE agreements' BLER appointment procedures, by actors and network involved



Source: ETUI database on SE agreements' BLER provisions, 2018 (as of 1 February 2018).

Some cases deviate from this rule by granting reinforced representation to countries (1) or by specifically reserving seats for the headquarters country (8). Finally, seats are specifically distributed across group subsidiaries (rather than countries) in one case (Figure 5.14a).

As for the international composition of BLER delegations, SE agreements can either exclude multinational BLER, render it possible, or prescribe it. Out of 58 SE agreements (4 were excluded, because they either failed to cover the size of the BLER delegation or there was only a single BLER foreseen), 25 cases require that BLER come from at least two countries. In 30 cases, the agreements render it possible for the BLER to be international, but do not require it. BLER internationalisation is only excluded in three cases, mostly as a transitional provision (see Figure 5.12b).

In practice, however, mono-national BLER is far more common than these SE agreements would suggest. For the same sample, the EWPC database identifies 21 cases in which all employee representatives in the board hail from the same country. 24 SEs have international BLER, while no data are available on mandates' nationalities for 13 SEs (ETUI 2017).

### Many roads to BLER

Another source of very wide variation is the procedures whereby BLER are appointed. This is particularly interesting because it demonstrates the clear need to secure the legitimacy of BLER in a multinational setting. The procedures laid down in 58 SE agreements combine up to four steps and foresee the intervention of different actors with different roles.

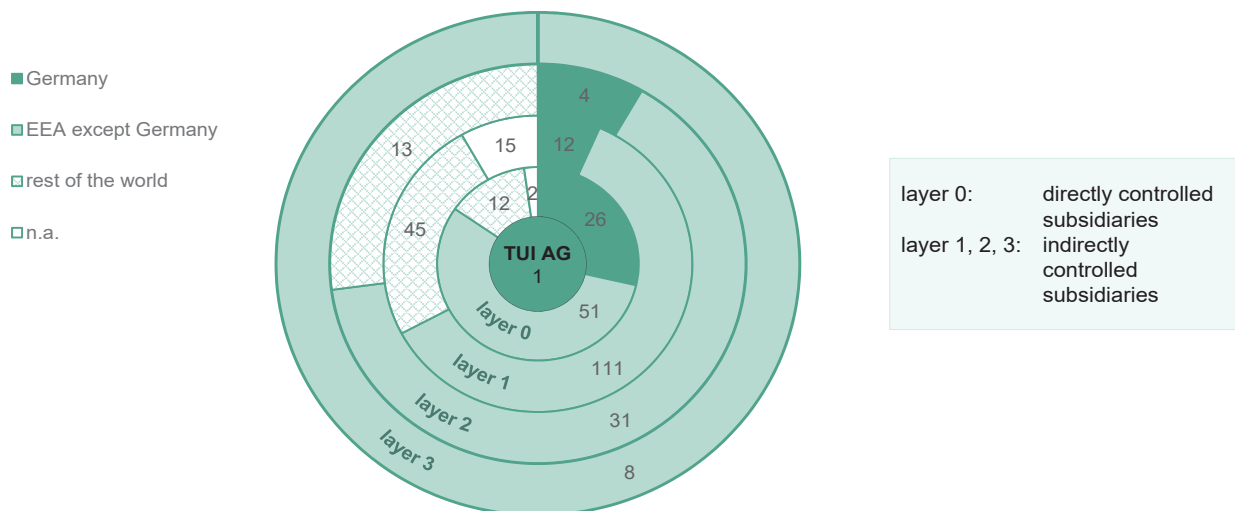
As shown in Figure 5.15a, the appointment procedures consist of one, two, three, or even four steps. 20 agreements simplify the procedure entirely, by making a single actor, usually the SE-WC, solely responsible for BLER appointments. But most cases foresee a more complex procedure and design a balance between the roles of different actors to strengthen the legitimacy of this collective cross-national mandate. Figure 5.15b illustrates these 'two-step', 'three-step' and 'four-step' arrangements with corresponding green, grey and red arrows. For instance, 16 SE agreements define a 'two-step' process, in which the SE-WC nominates BLER members who are then formally appointed at the general meeting of shareholders (GMS).

Overall, while the role of national representatives is crucial in a quarter of all cases, it is the SE-WC which ultimately has the decisive role in the multi-level process of BLER seat allocation and final appointment in two thirds of all cases. Yet the procedures exhibit great diversity and organisational complexity. The involvement of several actors and articulation of different levels of representation reflects an attempt to secure the legitimacy of the members appointed. A decentralised procedure ensures that national constituencies (trade unions or representative bodies in the company) can retain control over the process. Nevertheless, the legitimacy chain is in most cases relatively short, the task being directly delegated to the SE-WC; the principles of efficiency and delegated legitimation thus prevail.



## Board-level employee representation

Figure 5.16 Companies of the TUI Group, by layer of control and country of HQ (number of subsidiaries)



Source: Based on CapitalIQ, 2018, TUI AG (XTRA:TUI1) Corporate tree information, as of 18 January 2018.

## Territoriality and BLER rights

In the light of the Commission's vigorous company mobility strategy, nationally-bound workers' participation rights risk cracking under the principle of territoriality applied to MNCs. While capital benefits from freedom of movement and the freedom to do business across the EU, workers are not equally entitled to such pan-European collective and individual labour rights.

This mismatch is illustrated in Case C-566/15 *Erzberger*, in which the European Court of Justice rendered its judgment assessing whether workers from foreign subsidiaries controlled by a German MNC were discriminated against when excluded from the elections to the Supervisory Board of the German parent company. Was this exclusion compliant with EU law principles of equal treatment and free movement of workers? The CJEU declared full compliance: in the absence of EU-level coordinated or harmonised rules on workers' codetermination rights, Member States are free to apply their national models, which may in effect exclude workers in foreign subsidiaries from exercising participation rights vis-à-vis the parent company.

The German Co-determination Act of 1976 entitles workers in public limited corporate groups to elect (and be elected as) representatives in the parent corporate governance structure. If the group has more than 2,000 employees, workers from all controlled subsidiaries can elect half of the members of the parent supervisory board. Academics and German courts have discussed at length whether and how this should apply to MNCs headquartered in Germany (Pütz and Sick 2015). Most German case law reserves representative rights to the workforce in Germany, thus making the territoriality principle of international private law prevail.

Here, for the first time, the CJEU ratified this national case law, by interpreting current EU free movement and equal treatment rules in a restrictive manner. But the question remains whether the relationship between a parent company and the workers in its subsidiaries really differs depending on the geographic location of the latter. Workers of controlled subsidiaries may well be equally affected by group policies and strategic decisions, irrespective of the jurisdiction in which their company is located (Lafuente Hernández and Rasnača, forthcoming). Restricting voting rights to the workforce employed in the home country may seem disproportionate.

The concentric circles in Figure 5.16 represent the TUI group corporate

organisation. The TUI group consists of 332 companies, represented here by layers of control and location (based on data of Capital IQ 2018). The controlling company, TUI AG, is visualised as the core inside several distinct layers of subsidiaries. Subsidiaries represented in Layer 0 are directly controlled by TUI AG (i.e. TUI AG owns at least 50% of their shares), while those represented in layers 1, 2 and 3 are indirectly controlled by TUI AG via different links of the control chain. Control is here only based on capital share ownership (i.e. shareholder pacts or extraordinary voting rights are not considered).

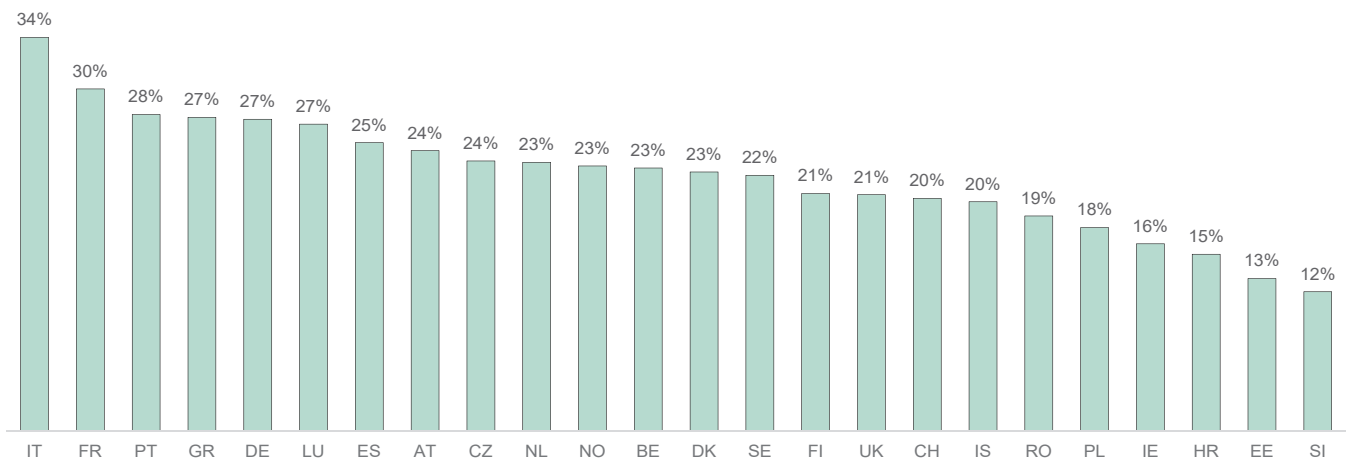
According to German law, workers in any of these companies would have the right to participate in parent supervisory board elections if they were legally based in Germany. Thus, according to the interpretation of the territoriality principle confirmed by the CJEU, only workers from 43 companies are *de facto* entitled to such participation rights, regardless of which layer of corporate control they are in, while 288 fall out of the scope entirely.

If this may be so according to a restrictive interpretation of current EU law, the European Commission could use its legislative competence under the TFEU to support pan-European participation rights in MNCs.



## Company mobility

Figure 5.18 Average effective corporate tax rates, by country (2014-2016)



Source: Vitols (2018a).

## Letterbox firms undermine cohesion in Europe

The Panama Papers, LuxLeaks and the Paradise Papers demonstrate how widespread the use of letterbox companies to avoid taxation is (European Parliament 2017). These are companies registered in countries in which they have no 'real' activities, frequently just a letterbox. The taxing of corporate profits is determined in large part by the laws and practices of the country in which the company is registered, rather than the country where its main activities are located. Owners can take advantage of the large variation in national tax rates by creating letterbox companies registered in countries with lower tax rates than the countries in which their 'real' activity takes place.

An ETUI analysis of 1,860 large European listed companies illustrates the large differences in effective tax rates (ETRs) across European companies (see Figure 5.18). The ETR is measured as the ratio of paid corporate income taxes to before-tax profits (Gebhart 2017). A three-year period (2014-2016) was analysed, since annual tax rates can vary drastically due to the influence of

one-time tax deferrals or deductions. For this analysis, the 'home country' was defined as the country in which the administrative centre of the company was located, rather than its registered seat. Only countries which are home to more than five companies in the sample are shown in the figure above.

The first striking fact is that the highest ETR (Italy with 34%) is almost three times higher than the lowest ETR (Slovenia with 12%). Generally, the countries with the lowest ETRs (under 20%) are located in eastern Europe. However, Ireland is also in this category. Interestingly, three countries hit particularly hard by the crisis (Italy, Portugal and Greece) also have among the highest ETRs.

The analysis also looked at factors other than home country which influenced ETRs, including whether the main company itself (rather than just a subsidiary) was a letterbox company, what industry the company was in, and whether workers were represented on the company board. Letterbox companies, most of which are registered in tax havens such as Jersey, the Isle of Man, and Bermuda, had on average an ETR five percentage points lower. Companies with workers on the board had a slightly higher ETR (up to one percentage point higher, depending on the regression model used).

A recent ETUC study shows clearly how letterbox companies are routinely

used on a widespread basis to not only avoid paying taxes, but also to source 'cheap labour' across borders (ETUC 2017b). Decisions by the European Court of Justice expanding the 'freedom of establishment' have encouraged an explosion in the founding of letterbox companies, now estimated at 500,000 in Europe (LSE Enterprise 2017). In the interests of cohesion, measures in company, labour and taxation law need to be undertaken to reduce the use of letterbox companies.

## Conclusions

- The chances that the much-vaunted promises of the European Pillar of Social Rights (EPSR) will be fulfilled remain rather slim. Taken together, its non-binding, soft-law character, the lack of legislative initiatives to underpin it, and its still untested link to the European Semester and the Social Scoreboard do not bode well for meaningful and long-lasting developments.
- Notwithstanding these handicaps, if the EPSR were to be backed by a strong political commitment evidenced by a concrete action plan, it could serve to generate a productive consensus around specific principles, which could in turn provide the basis for a legally binding, if fragmented framework. Furthermore, it may serve as a shield against further deregulation and provide an influential reference for future rulings of the European Court of Justice.
- With respect to workers' rights, the EPSR adds little: it reaffirms the already existing rights; the introduction of new rights is strictly limited and/or lacks robust means to enforce them.
- The assessment of the Commission's Regulatory Fitness and Performance (REFIT) programme concludes that though the process may be fundamentally flawed due to its exclusively cost-benefit analysis approach, it has fostered more upwards convergence and unity across the EU's social *acquis* than one would have expected.
- In patient anticipation of the Commission's long-awaited evaluation of the 2009 Recast EWC Directive, an examination of a wide range of research findings on the need for improvement and clarification finds that these are closely reflected in and illustrated by the conclusions drawn by trade unions and EWC members.
- In addition to the by now familiar catalogue of demands for the improvement of the EWCs' legal framework, we shed new light on a significant east-west divide in practice, identify fundamental gaps in the renegotiation clauses of EWC agreements in force, which limit the ability of EWCs to try to improve their own functioning independent of the legal framework, and point to the persistent practical and legal issues which hinder the establishment of new EWCs.
- Exploring relationships between various measures of employee voice in different data sets, we find some interesting links: in the data from the European Working Conditions survey, we find a positive relationship between forms of employee voice and both employee enthusiasm and more sustainable work. We also find that the ETUI's Employee Participation Index (EPI) correlates strongly with the Gini coefficient as regards the measure of inequality.
- A multinational comparison of women on boards shows that despite some variation across countries, a significant gender inequality gap persists across the EU. The stock-taking of policies to address this gap shows a wide range of approaches: there are almost as many Member States with no regulations as those who have introduced hard public regulation, and there is a wide range of softer public and private regulation in between these two poles.
- An analysis of the provisions in agreements about workers' involvement in SEs yields an impressive array of company-specific solutions to the key challenge of the allocation of mandates across countries and the design of nomination, election and/or appointment procedures.
- Comparing the CJEU's ruling in the Erzberger case with a novel way of mapping groups of companies illustrates the inherent mismatch between today's multinational corporate structures and territorial models of governance.
- In anticipation of the Commission's announced company mobility package, we explore some possible links between cross-border company mobility, workers' rights and national taxation regimes. The initial conclusions suggest that great care must be taken to retain a circumspect view of the potential knock-on effects of cross-border company mobility.