European Works Councils knocking on the door of justice

A study on implementation of sanctions in national transpositions of directives 94/45/EC and recast directive 2009/38/EC

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Paper’s structure

The paper starts by presenting in Part I the contextual background, rationale for the research and its origin.

In Chapter I the study analyses available sources of law defining sanctions for breach of EWC laws. This part starts with a short overview of the existing research on the topic and then goes on to looking at specific, most relevant sources of European laws and auxiliary sources discussing EWC sanctions in their chronological order.

In Chapter II firstly, provisions of the original 1994 EWC directive (94/45/EC) are presented followed by official recommendations for their implementation in national transpositions (European Commission 1995). Secondly, in order to highlight the contrast between the (non-binding) recommendations made under auspices of the European Commission and the findings of the report on the application of the EWC directive 94/45/EC (European Commission 2000) follow. The paper then goes on to look at recommendations and findings of the Impact Assessment study (European Commission 2008) undertaken in the preparation for adoption of the recast directive 2009/38/EC. Subsequently, provisions regarding sanctions in the recast directive 2009/38/EC are discussed. They are followed by reference to Recommendations of the Expert Group Report 2010 (European Commission 2010) to present the reader with officially adopted guidelines and ideas on how the primary sources of law (directives) should be implemented.

In Chapter III empirical findings on specific sanctions available in national law of the EU Member States are presented. Firstly, changes to national enforcement regimes as a result of the EWC recast directive 2009/38/EC are discussed. Secondly, a classification by type of violation of EWC laws is presented. Thirdly, general trends with regard to sanctions in the Member States are discussed; they are followed by specific focus on financial penalties and the discussion of their levels in view of general requirements of severity, proportionality and dissuasive character of sanctions. Finally, the question whether there is a link between severity of national enforcement systems and regime shopping is considered.

Chapter IV contains an analysis of the meaning of the three criteria the EWC recast directive 2009/38/EC setting quality requirements for sanctions on the national level (effective, proportional and dissuasive sanctions). Various elements of theories of enforcement, European Commission’s recommendations with regard to e.g. financial market regulation, and jurisprudence of the European Court of Justice are called upon to provide substantial input and guidance for evaluation of national sanctions in view of the recast directive’s requirements.

In the final Chapter V some policy relevant issues are discussed. These include i) considerations on the ultimate sanction of invalidity of managerial decisions implemented without respect for information and consultation obligations towards EWCs; ii) considerations on the question whether the problem of implementation of sanctions is an isolated, EWC-specific problem; and iii) whether there is scope and legal competence on part of the European Commission to intervene in the field of sanctions to be implemented in the EU member states.

Chapter 1: Background information

1.1. Introduction

In 2009, fifteen years after its adoption the original European Works Councils (EWC) Directive 94/45/EC underwent a review resulting in recasting the directive as 2009/38/EC. It took the European Commission a decade to launch the reform procedure of the directive as stipulated by its art. 15 requiring such a ‘review’ to be completed by 1999; a decade of repeated demands from the European Trade Union Confederation and individual trade unions, the
European Parliament, the European Economic and Social Committee, experts and even individual EWCs ([Jagodziński 2009 #2]).

The recast directive 2009/38/EC, among many improvements, for the first time made reference and imposed requirements on the Member States with regards to provision of sanctions for breaches of EWC law. The criteria for the quality of sanctions set in the Preamble to the recast directive that the Member States are obliged to ensure in transpositions are effectiveness, proportionality and dissuasive character. This amendment held a big promise for all EWCs forced to seek legal redress. Similarly, EWCs not (yet) involved in legal conflicts with their management bore expectations with regard to stricter and more dissuasive sanctions that were presumed to give worker representatives more leverage in both overall, and in conflictual situations.

Against the expectations the uptake of this new requirement of the directive by the Member States has been very limited and many of them retained enforcement regulations that were arguably substandard already under the ‘old’ directive 94/45/EC.

This approach in the Member States seems at odds with the new requirements of the EWC recast directive and the general principles of EU law. According to the European Court of Justice enforcement provisions are not a technical, but substantial matter ensuring the effectiveness of directives.

Since in the implementation report of directive 94/45/EC (European Commission 2000) the issue of enforcement was largely neglected and because according to informal information the European Commission plans to launch an implementation study on the transposition of the 2009/38/EC directive it is important to reemphasise the necessity to include enforcement frameworks, and specifically sanctions, in any evaluation of quality of transposition. Since workers and management bargain ‘in the shadow of the law’ it is important to ensure that this shadow is in shape guaranteeing a level playing field for them. If the EU really wishes to maintain EWCs as an important actor of European industrial relations it has to become more critical and decisive in evaluating the levels, the types and availability of sanctions, and possibly require the Member States to bring their enforcement frameworks to the standard of the directive.

**1.2. Contextual setting**

It seems that the relevance of the research on court judgements in European Works Councils (EWC) related litigation has been gradually acquiring significance in terms of daily practice of those bodies over the past decade. European branch level trade union organisations, the European Trade Union Federations (ETUFs), are more and more often addressed with enquiries from EWCs concerning information about possible measures that can be applied against international companies that do not respect their obligations in the area of information and consultation. Consequently, they take measures to support the coordinated EWCs and employee representatives in litigious cases (e.g. EMF 2006; EPSU 2008). The increase in number of such inquiries reflects and confirms the disturbing reality reported in 2005 in a study by Waddington (Waddington 2005 and 2010; Jagodzinski/Kluge/Waddington 2008: 22-25): in some areas in which EWCs do have a competence formally guaranteed by law the basic information and consultation rights are notoriously violated and ignored. It is perplexing that EWCs in 69% of cases are not provided with useful information allowing for a meaningful consultation in economic questions and matters related to financial situation of a company (Waddington 2005). Equally alarming results were found with regard to a big group of matters linked to restructuring (closures or cutbacks: 71,8%; mergers, take-overs or acquisitions: 83,3%; transfers, relocation of production: 79,5%; ibid.) which according to the European Commission (European Commission 2002 and 2005) is an area where EWCs have an ‘essential role’ to play.

High number of instances of EWC initiated litigation is rooted, however, not only in the lack of information and consultation or their poor quality, but also in their timing. Empirical evidence is again delivered here by Waddington’s study (Waddington 2005 and 2010). EWCs often report, employee representatives learn about implemented managements’ decisions
from press (information in 25.7% and consultation in 20.5%), or once they are already carried out (only in 24.2% information was given before a decision was finalised; consultation in 19.9%).

It is difficult to quantify the potential for further litigation cases involving EWC rights to information and consultation, however, confirming Waddington’s study results the ETUFs are reportedly confronted with questions concerning possible lawsuits on a regular basis. Many of violations and infractions of EWCs rights are settled amicably between the parties and do not make it to court rooms. A certain number of them, however, do not make it to court rooms due to lacking information about the different national rules of governing access to courts. In case of conflicts that end up in courts the practice has shown that the sanctions imposed by national courts differ significantly across the Member States. This puts in question the very idea of adopting European standards for information and consultation and, respectively, for their enforcement.

The latter question is of particular importance in view of the forthcoming evaluation of implementation measures unofficially announced by the European Commission to be executed in 2015, with results expected in 2016. Since the criteria for sanctions included in the EWC recast directive represent a new obligation for the Member States this study aims at informing the European Commission about possible omissions and deficiencies in national systems concerning the fulfilment of the directive’s requirements.

1.3. Research background and rationale for the analysis

The analysis of EWCs access to courts originates from a study on EWC related litigation presented in the second part of the book ‘The recast of the European Works Councils directive’ (Blanke and Dorssemont 2010) analysing the available jurisprudence, both on the EU (European Court of Justice) and national court levels, referring directly and indirectly to EWCs (see part 2 of Dorssemont and Blanke 2010). As has been argued over the years and, especially, during 2008 in the debate on the recast of the EWC directive, the rights and competences of these bodies at the moment of adoption of the directive 94/45/EC (1994) were defined imprecisely and, in fact, insufficiently to ensure the necessary legal certainty of their existence and functioning (Jagodzinski et al 2008; European Parliament 2007; Altmeyer 2003). Taking this finding as a point of departure in 2008 the author launched the above mentioned study analysing available case law relating to EWCs (later in cooperation with F. Dorssemont and T. Blanke) and invited national experts to work on the topic (Blanke and Dorssemont 2010). The hypothesis of the study was that weak and vague directive is likely to result in numerous and consequential litigation. By this token, analysis of court judgements (both by European Court of Justice and national courts) was expected to provide important clarifications in regard to EWCs’ operation.

The analysis of laws regulating EWCs access to courts was initially designed to serve a twofold purpose: firstly, to provide a background for the analysis of EWC related jurisprudence and, secondly, to help explore the question, whether, against the background of poor quality of information and consultation in EWCs (Waddington 2010) the number of existing EWC court cases could have been limited by insufficient legal regulation guaranteeing EWCs access to courts.

The latter question was especially pertinent as the EWC related jurisprudence was concentrated only in specific countries (Germany, France, the UK) and not proportionally spread across the EU countries. In course of the study on case law it became evident that legal institutions and frameworks in the area of access to courts vary significantly across the Member States. Sanctions, as part of the general concept of enforcement of the EWC directives, represent probably the most striking example of diversity in implementation across the EU.

At the same time, the question whether national legislation, despite all the justified differences between countries, ensures that EWCs have proper facilities of access to courts in all the Member States was identified as a highly under-researched area. Hence the current
paper (and the broader study of access to justice) aims at extending beyond the frames of a background fact-finding of a merely subsidiary nature.

The relevance of the study seems to extend also beyond the specific area of EWC research. Due to the fact that worker rights in information and consultation on national level often seem to be guaranteed by similar or identical enforcement measures¹ analysis of punitive systems with regard to EWCs can be useful for a better understanding of the general system of penalties for breach of information and consultation rights. The extent to which drawing more general conclusions beyond enforcement of EWC rights will obviously vary across the Member States and it is beyond the scope of this analysis to determine it, yet the present report might represent a contribution to such broader research.

1.4. Sanctions as part of general concept of access to justice

The below paper is based on a broader study by the author (Jagodzinski 2014, forthcoming) dealing with various aspects of access of European Works Councils to justice. Due to the extent of the study only its part dealing with sanctions has been selected as presenting the outcome of legal proceedings (litigation) considered the most palpable result of any court case. However, it should not be forgotten that sanctions should not be considered in separation from the entirety of the legal system and national industrial relations and are strongly conditioned by the former.

As advocated by the author in the more comprehensive study of implementation of EWC enforcement provisions, sanctions represent only one of several parts of the broader concept of EWCs’ access to justice. The latter is argued to consist, generally, of:

a) Access to judicature and capacity to act in courts;
b) Costs of legal proceedings;
c) Competence of courts;
d) Category of breach and possible sanctions.

¹ Many national measures do not refer specifically or exclusively to breaches of EWC obligations and rights, but rather consider wrongdoings in this area as a general category of breaches against worker rights and/or information and consultation rights. An example here is Estonia where the CSIEA (the Community-scale Involvement of Employees Act (CSIEA), which transposes into Estonian law Directives 94/45/EEC, 2001/86/EC, and 2003/72/EC, as well as the cross-border mergers directive (2005/56/EC; harmonised with the national law implementing EU Directive 2002/14/EC into the Employee Trustee Act) among else provides liability for violation of prohibition on international informing and consulting and involvement of employees (§ 85), and for violation of obligation of annual informing and consulting and informing and consulting under exceptional circumstances (§ 87). In event of such violations the extent of liability is the same as with the violation of the rules of the general framework of informing and consulting . Source: http://www.juridicainternational.eu/public/pdf/ji_2008_2_25.pdf
Chapter 2: EWC sanctions in legal and auxiliary sources

2.1. Existing research

After approximately two decades of existence of European-wide employee representation assemblies and over ten years of binding force of the Directive 94/45/EC on European Works Councils (EWCs) these bodies represent a well described and investigated element of European industrial relations. Research has been conducted on both the theoretical level (e.g. McGlynn 1995; Schulten 1996; Streeck 1997; Traub-Merz 2001) and the echelon of empirical studies dealing with various aspects of EWC functioning (case studies: e.g. Marginson & Hall et al. 2004; analysis of EWC agreements: Bonneton & Carley et al. 1996, Marginson & Carley 2000; research on quality of information and consultation in EWCs: Waddington 2010; typology of EWCs: Lecher et al. 2001, Kotthoff 2006; EWCs as a vessel of emerging transnational bargaining: Da Costa & Rehfeldt 2007; Schömann 2008; EWCs and EU enlargement: Kerckhofs 2003; Voss 2006, etc.).

At the same time, legal analysis of case law as well as of related instruments of enforcement of EWC rights in Europe is a clearly underdeveloped area of research (see also similar evaluation in European Parliament 2007: 2). A dominating approach in the literature has been an analysis of the role and positioning of EWCs in the European labour law (e.g. Blanpain / Engels 2001; especially Chapter 21; Krimphove 2001; Barnard 2000; Schiek 1997; Thüsing 2008), a general legal overview of provisions of the directive 94/45/EC (Rigaux & Dorssumont 1999), or commentaries of national transposition acts (Blanken 2001; Skupien 2008; Confederation des Syndicats Chretiens 1997; Schnelle 1999; Müller 1997). Interesting and more in the scope of the present project lies the analysis of the relationship of the principle of subsidiarity and the extent of margin of leeway conferred to the national legislator on the one hand, and the community universal character of standards introduced by the directive 94/45 (Bachner 1998). Nonetheless, only individual academics have turned the attention to the increasing role of case law and litigation in the further development and harmonization of European law on workplace codetermination (Blanken 1999: 366). Some further authors (Clauwert et al 2003 generally on social rights; Köstler / Büggel 2003 on Societas Europaea and company law) took the challenge of comparing, or at least juxtaposing, information and consultation rights enshrined in different EU instruments in the area of social rights. In those publications EWCs have always been mentioned and incidentally referred to, but never made a separate subject of analysis.

Few exceptions to the general overlooking of enforcement issues with regard to workers’ information and consultation rights at large, and EWCs specifically exist. Firstly, a practice oriented study for the European Metalworkers Federation (EMF) in 2002 (Büggel 2002). The study looks at some legal aspects of the operation of EWCs (and of national works councils) such as legal/moral personality, right to negotiate collective agreements, right to conclude other contracts (being in fact a derivative of legal personality or its functional, limited variant), resources (budget) for EWCs and EWCs opportunities to participate in litigation before courts. While the work by Büggel was a helpful resource and a point of departure for the present chapter (also for Annex 1). Nonetheless, it came short of an analysis of the data put together and a more in-depth investigation concerning the effects of application of certain solutions by the Member States, or of the lack of particular arrangements for operation of EWCs.

Secondly, a Eurofund study on implementation of the ‘Impact of the information and consultation directive on industrial relations’ (Eurofund 2009) focusing on the implementation of the 2002/14/EC directive on works councils included several enforcement issues, such as identity of employee representatives as well as an item ‘enforcement procedures and sanctions’. The importance of such a systemic study cannot be overstated as it included a collection of national reports on the implementation of the 2002/14/EC directive serving as a basis for a comparative overview and some important policy relevant conclusions. While useful for providing some information on national systems of information and consultation it did not, however, cover (at least explicitly) the transposition of the EWC
directive and EWC specific enforcement issues. Admittedly, in some countries some procedures for enforcement of information and consultation rights of workers are similar irrespective of whether only the local and national or transnational levels are concerned; in many countries, however, these procedures are different and/or enforcement issues are specific to one of them. Finally, the consideration of enforcement issues was not the study’s main focus and thus, understandably, was not exhaustive.

The Eurofund (2009) study was shortly preceded by another publication commissioned by the European Parliament in 2006 on the 'Impact and Assessment of EU Directives in the field of “Information & Consultation”' (European Parliament 2007). This analysis comprised the classical information and consultation trio, i.e. implementation of directives 2002/14/EC, 94/45/EC on EWCs and 98/59/EC on collective redundancies and was much more focused on their transposition on national level from the point of view of enforcement. It identified some crucial shortcomings, took account of varying social partners’ views on the necessity of revision of these legal acts and formulated relevant policy recommendations. Useful and timely relevant as the study might have been it seems not to have had a limited, if any, impact on the outcome of the recast of the EWC directive.

A third group of topic related and relevant analyses is formed by literature consisting of more general legal studies on the issue of requirements for national implementation in regard to procedures and sanctions (Malmberg 2003) analysing rules developed by the European Court of Justice (ECJ) regarding the limits to autonomy of Member States in the process of implementation of EU directives. Malmberg (Malmberg 2003; Malmberg et al 2003; Malmberg 2004) looked specifically at domestic rules on procedures and sanctions stipulated in the EU labour law directives and analysed them against the principle of effective enforcement. These very instructive studies referred to EC labour law in general, however, they did not scrutinise legislation on information and consultation of employees. Similarly, of general relevance for the analysis of effectiveness of implementation measures were works by Kilpatrick (Kilpatrick et al. 2000) and Craufurd Smith (Craufurd Smith 1999). Both, but especially Kilpatrick et al., explore the complex relations and often controversial dialogues between courts, national and supranational, on remedies, among others, under the Convention on Human Rights and the Social Charter. In the latter context conclusions from the 4th Annual Symposium Report of the European Union Agency for Fundamental Rights are of particular relevance (FRA 2013). Firstly, the FRA pointed to the essential link between law and its implementation by stating:

‘When discussing links between the rule of law, justice and fundamental rights, the working group first had to examine the different dimensions of the rule of law. Participants agreed that the rule of law has a formal and a substantial dimension. They highlighted that it should not be considered as a narrower concept since the existence of law in itself is never sufficient and law cannot be abstracted from its implementation.’ (FRA 2013:7).

The working group ‘also underlined the importance of citizens’ trust and confidence in the processes and discussed in this context (...) law enforcement procedures, and the capacity of judicial systems to provide effective justice.’ (ibid.). As further space for action it indicated, among others, conducting studies measuring ‘the capacity of the judicial systems in terms of their functionality and the ability to produce results’ (ibid.). These conclusions of the FRA working group confirm the importance of the matters covered by the below study and its main idea of analysing national enforcement and judicial systems’ functionality and the ability to produce results’ with regard to EWC rights. Even though the below analysis does not look at the outcomes of litigation, yet it pursues the logic of assessing the implementations’ ability to produce palpable outcomes, i.e. factual possibility to defend EWC rights in court. In this sense it fits well into the FRA’s plea ‘that any potential rule of law assessment should not only look

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2 One of the study’s official goals was to respond ‘to the request to review the scope of the legislation and its impact (...) and the extent to which the social partners are satisfied with the present legislative arrangements. It provides a background to proposals to review the operation of the European Works Council directive, and to consolidate information and consultation legislation’ (European Parliament 2007: 1).

3 This goal was pursued in the original study Blanke and Dorssemont (eds.) (2010) from which the below analysis originates.
at available laws and institutions (structures) or policies (procedures) but also, and especially, the situation on the ground (outcome)’ (ibid. 9).

The above author’s own literature review seems to corroborate Müller’s and Hoffman’s (Müller and Hoffmann 2001) earlier diagnosis of a research gap on EWC enforcement issues. The research that we find underdeveloped, or, in fact, missing, is directly linked to the EWC relevant case law: it is an analysis of the institutional background providing for enforcement of the EWC legislation, or in other words means, procedures and outcomes (sanctions) of EWCs’ access to courts. The identification of this gap is a spin-off from and draws upon the author’s earlier comprehensive analysis of the case law of the domestic courts, co-led with prof. F. Dorssemont and finalised in 2010 in a form of an edited volume (Blanke and Dorssemont 2010). The publication was devoted to taking stock of multifaceted developments in EWCs at an important point in time between adoption of the EWC recast directive and its entry into force. The latter publication as well as a regularly updated database of litigation related documents available at ETUI’s website www.ewcdb.eu provide the much needed insight into legal questions driving the operation of EWCs and clarify contentious issues of interpretation of the directive 94/45/EC.

In fact we are convinced that research on both aspects, i.e. on material litigation and institutional enforcement frameworks, are indeed two sides of the same coin, i.e. of EWCs capacity to seek conflict resolution in courts. While analysis of case law and jurisprudence focuses on the outcomes of litigation, the present study aims at deepening the understanding if solutions in the field of implementation of measures necessary for EWCs to be able to approach courts and defend their rights as well as analysing their compatibility with the present standards of the EWC directive(s).

2.2. Sanctions in various sources

Differences among the EU member states are not limited only to the access to courts sensu stricto (see above sections on material competence of courts in various countries), but occur also once a dispute has been brought before the court. The following chapter does not investigate procedural differences between the EU member states, but focuses on the question of sanctions.

Sanctions (in all their forms) being the outcome of pursuit of justice have consistently been in the spotlight of discussions on judicial matters related to EWCs. They have represented a bone of contention between the employers and trade unions in the process of recasting the EWC directive (more on this issue in Jagodzinski 2009). The European Commission in an attempt to satisfy both parties included criteria for sanctions that need to be effective, proportionate and dissuasive (Recital 36) to satisfy the unions’ and researcher community demands (e.g. Dorssemont & Meussen 1999: 383), yet included there requirements only in the Preamble of the directive 2009/38/EC which constitutes a non-binding part of the legislation.

Despite the elevated interest in sanctions, especially in context of the political debate on the recast directive 2009/38/EC the available literature on the subject has not investigated this problem in a structured, comparative manner (apart from limited information contained in a comparative table ‘EWC’s – their legal/moral personality and related implications’ (Büggel 2002). The limited literature on the subject matter emphasised in a more normative way the need for effective, dissuasive and proportionate sanctions has (e.g. Dorssemont & Meussen 1999: 383)arguing that penalties were considered the necessary element to guarantee that employees’ representatives could claim rights in EWC agreements, the latter being specific arrangements sui generis falling outside of the normal collective bargaining and thus not covered by other legislation.

4 A major contribution on this topic is Blanke and Dorsssemont (2010), where a systematic analysis of EWC case law is presented.
“(…) it is essential to take all the possible steps to guarantee that workers, workers’ representatives, trade unions and the EWC have access to justice to demand the respect of these agreements sui generis.” (ibidem).

Taking the Dorssemont’s and Meussen’s conclusion and Bueggel’s practice oriented comparison as points of departure the present chapter undertakes to provide an overview of sanctions applied across the EU member states in order to provide factual input for evaluation of their compatibility with the requirements set by the recast directive 2009/38/EC in terms of effectiveness, proportionality and dissuasive character.

Provisions of directive 94/45 concerning category of breach and possible sanctions

The EWC directive refers to sanctions only in a general way. Firstly, such reference is made already in the preamble (28th recital) by stating that ‘(…) the Member States must take appropriate measures in the event of failure to comply with the obligations laid down in this Directive (…)’.


In relation to possible sanctions for breach against the rights defined in the EWC directive and the explanation of art. 11.3 for the purpose of transposition by the MS the same recommendations of the WP apply as those expressed in regard to the competent courts (see above point 2.1.5 b); see also: European Commission 1995: 172). In particular, the WP by referring to principles laid down by the European Court of Justice (ECJ) emphasized the necessity 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);
- (...);
- last, (...) the sanctions must be effective, proportionate and dissuasive.’ (ibidem).

These two criteria set out by the WP aimed at advising the Member States to apply genuinely effective sanctions that would have a truly deterrent effect on any potential perpetrator. Clearly and rightly the link between the effectiveness of legal remedies in general and sanctions is made, as they are an interdependent system whose full efficacy can be reached only if both the elements are complementary.

Findings of the Implementation Report (European Commission 2000) concerning category of breach of EWC laws and possible sanctions

Even though the directive 94/45/EC aimed at creating common standards for operation of the transnational representation of employees and uniform rights to information and consultation, they have been enforced differently according to individual national standards, industrial relations traditions and understanding (despite the advice on common standards

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5 In 25th recital a reference to sanctions is made also to similar level of protection to be guaranteed to employee representatives sitting on EWCs as that available to employee representatives on national level. This aspect of operation and institutional guarantees granted to EWCs is, however, beyond the scope of this chapter and is, thus, not analysed here.
provided by the European Commission in form of Recommendations of the Working Party). As far as inspection of the transposition measures in this area is concerned the European Commission in the Implementation Report (European Commission 2000) dealt with this issue only briefly and limited itself to taking note of existence of various solutions. Firstly, a reference to the Italian transposition was made as insufficient in respect to sanctions (European Commission 2000: 3). Secondly, only sanctions for breach of confidentiality of information (ibidem: point 3.9.3) were investigated. The report registered a strong variety in the character and type of sanctions applicable in case of breach of the obligation not to disseminate information classified as confidential. It highlighted that as a rule penal sanctions apply in the vast majority of the Member States. Interestingly, the Commission did not make any reference to the difference visible already at that time in terms of more severe sanctions applied for breach of confidentiality (for perpetrations committed by employee representatives) as compared to infringements of the right to transmit information and pursue consultation (linked to actions of management).

Concerning penalties for violating information and consultation rights the Implementation Report enlisted (in a descriptive and non-exhaustive manner) selected examples of solutions applied in some Member States. Secondly, regarding the question of punishment for breach of obligations of the directive it classified the sanctions into two major groups:

a) ‘penalties for infringement of collective agreements’ (DK, SE), and
b) ‘general procedures under employment law’.

The implementation report recorded also differences in relation to types of fines applied by Member States. Interestingly, it noted that ‘Not all countries specify how these penalties are to be applied in the case of infringement of obligations entered into under an earlier agreement, and so it may be assumed that they also apply in this case, except in Denmark and Sweden, where agreements already in force are not covered by the system of penalties’. The ascertainment of this shortcoming was, however, not followed by any kind of actions aiming at remedying the flaw in transpositions. The European Commission rendered itself satisfied with the above statement (a mere supposition of universal coverage of sanctions) and did not consider any corrective measures or recommendations for the Member States to guarantee more explicit enforcement of art. 13 agreements. Similarly, no statement was made concerning the possible effects of such a lack of penalties on respecting the right to information and consultation. Finally, the question of proportionality and dissuasive character of sanctions, despite being recommended by the Working Party ‘Information and Consultation’ (1995) as universal criteria or requirements concerning the quality of sanctions have not been considered in the Implementation Report of 2000.

Impact assessment study of 2008 (SEC/2008/2166 final)

The European Commission’s preparatory study on possible impact of the recast directive on EWCs with regard to sanctions made reference to European Parliament’s Resolution A5-0282/2001 (Report W. Menrad) calling on the Commission to submit a proposal for a revised directive in which ‘precise definitions’ of, among other, sanctions would be adopted (European Commission 2008: 9).

Another reference to sanctions is made when the study presents results of a survey completed within the remits of ‘A Preparatory Study for an Impact Assessment of the European Works Council Directive’ (European Commission 2007) concerning ‘Additional costs in some EWCs’ where ‘Labour Disputes’ are reported to have occurred in 16% of surveyed companies with EWCs. In these companies such disputes are reported to have consumed €0-500 000 Euro, however, the costs arose not due to sanctions, but due to additional meetings and expert fees (European Commission 2008: 15). The costs of labour disputes are also used as an argument against no-action by the Commission (i.e. a refusal to go through with a review and reform of the directive 94/45/EC)6

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6 ‘Growing costs of labour disputes (at present affecting every sixth company, with costs ranging from €10 000 to €500 000 per company) and legal fees due to legal uncertainties (at present included in overall
When discussing drivers of problems identified with regard to the EWC directive the Impact Assessment Study excludes 'shortcomings in enforcement' and sanctions as an origin. The foundation of this conviction and the dismissal of any problem with sanctions is again solely the self-proclaimed comprehensiveness of the Implementation Report of the European Commission of 2000 (being the very same institution ordering the Impact Assessment Study). The dismissal of the view that sanctions have represented one of the origins of problems with the application of the directive 94/45/EC is upheld even though the evolution of the legal framework at EU level, leading to the lack of clear and coherent legal rules: no interplay between different instruments, different sets of definitions, different outcomes of court cases' was enumerated among the causes (European Commission 2008: 16). The explicit exclusion of sanctions from the list of problems in application of the directive is even more puzzling in light of the point made by the Impact Assessment Study concerning the lack of effectiveness of transnational information and consultation rights. The Study finds that 'lack of effectiveness of transnational information and consultation rights has two main aspects:

- EWCs are not sufficiently informed and consulted, in particular as half of the EWCs are not consulted before a restructuring decision is made public;
- Workers are not in a position to exert their rights, as no EWC has been established in their company although it falls within the scope of the Directive.' (ibid. 17).

Despite admitting the above the Study falls short of making a link between the insufficient information and consultation of workers as well as them being 'not in a position to exert their rights' and the effectiveness of judicial and administrative procedures and dissuasive character of sanctions. Neither is this link made when the study goes (immediately) on to referring to data from the J. Waddington’s (Waddington 2010) survey on the (poor) quality of information and consultation and infringements of information and consultation rights in some high profile restructuring cases (European Commission 2008: 17).

The Study continues to show its inconsistency on the point of sanctions when in the Section IV ('Policy Options') it puts up 'clarification of sanctions' as one of the main measured to pursue the objective to 'remedy the shortcomings in the information and consultation of EWCs' (ibid. 30). In more concrete terms the Study’s recommendation is to:

- ‘improve compliance by making clear to company actors the existence of sanctions in the event of violations of information and consultation rights and to address legal uncertainties regarding the capacity of the European Works Council to represent workers’ interests and regarding the information needed to open negotiations to set up a new EWC, (...) the proposal here is to:
  - reiterate the general principle according to which, in the event of infringements, sanctions must be effective, proportionate and dissuasive (...)’ (ibid. 37).

This lacks of consistency between recognising the role of sanctions and the refusal to address them continues also when the Study concludes that 'measures proposed for the protection of rights are in general likely to improve legal certainty, with the related benefits, and the effectiveness of these rights' and that 'clarification on sanctions (...) is likely to make clearer to company actors the existence of sanctions in the event of violations of information and consultation rights, and therefore increase compliance' (European Commission 2008: 46). It also admits that some 'operational objectives (...) need to be achieved in order to ensure the effectiveness of employees’ information and consultation rights' and lists among them the legal costs or varying from €1500 to €66 000 a year for specific fees, particularly important in merger cases).

7 ‘Problems are not primarily caused by shortcomings in enforcement. The Commission has verified that the Directive is properly implemented by Member States and has carried out in-depth studies to that end. The results indicate that all Member States have adopted national implementing measures that are close to the text of the Directive and put in place sanctions in the event of infringements. As a general rule, the competent national authorities, including courts, have taken measures to ensure the correct and effective application of the national transposing rules and to ensure that companies meet their obligation’, European Commission 2008: 16.
objective ‘to clarify sanctions in case of non-compliance’ (European Commission 2008: 27 – 28). However further on the Study concedes that ‘this would not necessarily require adding anything to the present Directive, as the need for Member States to provide for appropriate, dissuasive and proportionate sanctions is already a general principle in Community law.’ (ibid. 46)

The coherent refusal of putting up sanctions as an area for major overhaul in any revision of the EWC directive is striking, as is the justification of its origin. The Study recognises that ‘trade union and EWC contributions as well as Parliament resolutions have insisted on the need for sanctions, given the numerous breaches of the right of workers to be informed and consulted at transnational level’ yet it confronts these demands by democratic and direct stakeholders’ representatives with two contributors’ views: ‘however, AmCham EU18 considers that sanctions are already provided for and CEEP that they should remain national’ (ibid.46). Only then does the Study go on to explaining that ‘in addition, a further reinforcement or more detailed prescription of sanctions would not be in conformity with the subsidiarity principle, as the responsibility for establishing appropriate, dissuasive and proportionate sanctions lies, as a general principle, with the Member States.’. It seems that in this spirit the Study arrives to the recommendation for any Commission’s action to be adapted to take into account the interests of various stakeholders, yet specifies that ‘particularly the content of the subsidiary requirements, the protection clauses (including sanctions) and the definition of the transnational scope have been reviewed in order to minimize the concerns that employers may have about the effects of the new rules (…)’ (ibid. 62)9.

Recast Directive 2009/38/EC

Following the Impact Assessment Study’s (European Commission 2008) recommendations the only modification concerning sanctions introduced by the recast directive 2009/38/EC was the addition of two Recitals 35 and 36 stipulating:

‘(35) The Member States must take appropriate measures in the event of failure to comply with the obligations laid down in this Directive.

(36) In accordance with the general principles of Community law, administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations arising from this Directive.’

The obvious shortcoming of such a solution is that in the vast majority of Member States directives’ preambles are considered non-binding parts of legislation and are not considered as parts to be mandatorily transposed into national law. It seems that this might be one of explanations for few modifications of provisions concerning sanctions in the Member States10 (see also further sections).

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8 American Chamber of Commerce to the European Union.
9 Reiterated again in a final overview table weighing various legislative options on page 80. The other stakeholders’ insistence on clarifying sanctions was not granted equal visibility.
10 For instance the Greek trade union OBES involved in the transposition of the directive as a social partner proposed to include the following passage into the implementation act: ‘In the case the central management does not provide the members of the EWC or the members of the selective committee the necessary information to fulfill the obligation for information and the preparation of potential consultation, or it provides wrong or incomplete information or refuses the obligation to conduct consultation, the EWC legally represented or the members of the selective committee have the right to appeal before the First Instance Court of the central administration office and request through an application is discussed at the time of interim measures, to be provided with the information required on specific transnational issues and ask that the implementation of any decisions of the central management, concerning these transnational matters are suspended until the central management fulfills properly its obligation to consultation. The above application for interim measures is discussed in priority within fifteen (15) days. The central management has the burden of proving that it has properly fulfilled its obligation to information and consultation. In the case the central management
The recast directive’s requirements concerning sanctions should be read in conjunction with art. 11.2 of the recast directive that obliges the Member States to ‘provide for appropriate measures in the event of failure to comply with this directive’.


When providing an overview of provisions of the Recast Directive 2009/38/EC the Expert Report reiterates the recitals 35 and 36 of the recast directive by restating that appropriate measures in the event of failure to comply with the obligations laid down in the Directive must be ensured. It also explains that ‘in accordance with the general principles of Community law, administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations arising from the Directive’ (European Commission 2010a: 9). In this way the requirement of ensuring effectiveness, proportionality and deterrence (dissuasive character) of the entirety of provisions guaranteeing access to justice is clearly reiterated, communicated and accepted by all Member States sitting on the Group of Experts.

Further on the Expert Report deals with specific questions concerning implementation of provisions on sanctions. Firstly, the question of executability of sanctions for non-compliance with the requirement to inform the European Social Partners (ESP) about the composition of the SNB and of the start of the negotiations. The executability of sanctions is considered in relation to three possible options (ibid. 30). It is remarked by the Expert Group that in any case applicability of sanctions to employee representatives for not informing the ESP is questionable since they:

- They do not have the global picture of SNB’s composition before the first meeting;
- They are not responsible for organising the first meeting;
- It would be difficult to provide for sanctions towards individual employees’ representatives in case of non-compliance.

The Expert Group concluded on the matter that ‘an information obligation upon employees’ representatives towards European social partners or European trade unions could only be effective after the first meeting of the SNB. Giving the responsibility to inform to the SNB would however lead to delayed information and raises the question of the sanctions to be provided.’

Secondly, in the later part of the Report when discussing specificities of transposition the Expert Group highlights the necessity to devote special attention when implementing (among others) Recitals 35 and 36 dealing with judicial procedures and sanctions and recommends that they ‘should particularly be considered, given the clarifications they provide to the aim of the articles or their importance in the adoption process.’ (ibid. 60).

Finally, the Expert Group report devotes a specific section (Section 19) to the question of compliance with the recast directive. When discussing the origin and objective of provisions on compliance it recalls the European Commission’s earlier statements on the application of provisions concerning sanctions in the transposition of directive 94/45/EC. In this sense it takes note of, among others, the following points from the Impact Assessment Study (European Commission 2008):

- Clarification on sanctions as a requirement as an operational objective to ensure the effectiveness of workers’ rights to information and consultation;

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*infringes the requirement for an appropriate consultation and proceeds to the implementation of decisions relating to transnational matters, such decisions are subject to be void and cannot be enforced against employees for modification or termination of individual contracts of employment. Similarly, those decisions do not constitute a legitimate reason for terminating collective bargaining agreements*. The Greek government refused to include it in the law arguing reportedly there was no sufficient justification for such a modification either in the directive (non-binding character of the preamble) or in the national Law 4052/12.
- Providing more awareness on ‘the existence of the sanctions’ to the actors in order to improve compliance¹¹.

Considering the significant variety of severity of sanctions applied in the Member States and the factual jurisprudence rarely imposing the maximum penalties the latter recommendation of providing more awareness on their existence seems as a rather liberal or even lax approach to ensuring more ‘clarification on sanctions’ and ensuring the effectiveness of workers’ rights. This approach of the European Commission leading the works of the Expert Group was, nevertheless, consistently applied and manifested itself in the response to the central question on whether the existing sanctions have to be changed. The reply of the Expert Group made of national specialists was ambiguous: ‘Not necessarily, but they may have to be updated with new obligations (such as principles, information of social partners of new negotiations, training) and checked by Member States in order to ensure they are “effective, dissuasive and proportionate in relation to the seriousness of the offence” (ibid. 65). In other words the responsibility to evaluate whether the sanctions in place fulfil the criteria of effectiveness, dissuasiveness and proportionality was delegated to the Member States. Such an approach is consistent with European Commission’s policy in all areas and other directives and therefore criticism-proof. However, the European Commission continues to bear responsibility for ascertaining that the transposition laws on national level meet the requirements of the directive and that the achievement of directive’s goal is genuinely ensured (Commission’s role as the ‘Guardian of the Treaties’¹²).

¹¹ ‘As regards the clarification on sanctions, it is likely to make clearer to company actors the existence of sanctions in the event of violations of information and consultation rights, and therefore increase compliance. However, this would not necessarily require adding anything to the present Directive, as the need for Member States to provide for appropriate, dissuasive and proportionate sanctions is already a general principle in Community law’; and: ‘Clarifications regarding the protection of rights: In order to improve compliance by making clear to company actors the existence of sanctions in the event of violations of information and consultation rights and to address legal uncertainties regarding the capacity of the European Works Council to represent workers’ interests’ (ibid.).

¹² As stipulated by Art. 211 of the Treaty Establishing the European Community and Art. 258 of the Treaty on the Functioning of the European Union.
Chapter 3: Sanctions in national law

The following chapter aims at presenting results of a review of national legislation from the point of view of available sanctions. It starts by looking at various categorisations of breaches of EWC laws as a starting point for differentiation of sanctions. In this sense it points towards the existence of a close link between the category of infringement of law (e.g. penal, civil, administrative) and possible sanctions foreseen in national law. Further on the chapter looks at various sanctions in national law and proposes their categorisation. Subsequently, special attention is devoted to financial sanctions and their levels in view of the requirements of the directive as to effectiveness, proportionality and dissuasive character. Finally, the question of regime shopping incentivised by (relative) laxness in enforcements of EWC laws of some national regimes is considered.

3.1. Overview of solutions applied by Member States concerning category of breach of EWC laws and possible sanctions

There are several reasons for undertaking a review of national solutions and proposing a categorisation of legal qualification of breaches of EWC rights:

- Insufficient thoroughness of the Implementation Report of 2000 (European Commission 2000);
- The post-2000 Implementation Report enlargement of the EU by 12 New Member States;
- New provisions in the 2009 recast of the directive on EWCs (Directive 2009/38/EC);
- Due to the absence of relevant penal provisions in the EWC directive 94/45/EC and their laxness on national level (e.g. the German debate13) they have been one of the most intensively debated aspect of the revision/recast of the original EWC directive 94/45 (see e.g. Jagodzinski 2009).

Such categorisation of legal qualification of breaches of EWC regulations is also a preparatory step for and complements a review of sanctions themselves (see second part of the chapter).

Finally, it must be noted that currently no overview of such type exists and, therefore, it is meant as a contribution to the debate on the quality of the implementation of the recast directive 2009/38/EC.

3.2. Changes to national regulations on sanctions following the recast directive 2009/38/EC

The demand to introduce effective sanctions in all of the Member States (together with other claims by the trade unions) has been strongly opposed by the European representation of employers (BusinessEurope, CEEP; Jagodzinski 2009). The employers’ resistance to introducing any (binding) supplementary precision, requirements or standards concerning the institution of penalties was coupled with the European Commission’s consistent institutional reservations concerning the limits of directives’ degree of invasiveness into national legal orders (ibid.). A compromise solution taking into account trade unions and other institutional actors’ (European Parliament, European Economic and Social Committee; for details see Jagodzinski 2009) insistence on introduction of more binding punitive regulations resulted in a compromise reflected by inclusion of requirements of proportionality, dissuasive character and effectiveness of sanction into the Preamble of the directive (recital no. 36) rather than in the universally binding body thereof.

13 German Trade Union Deutscher Gewerkschaftsbund as well as IG Metall via the SPD fraction in Bundestag argued that the existing sanction of 30 000 DM was not sufficiently dissuasive for multinational corporations (Antrag der SPD-Fraktion, BT-Drs. 17/5184, http://www.infopoint-europa.de/images/Beitraege/antrag%20spd%20drss.17_5184.pdf.)
Nonetheless, recital 36 is a progress in comparison to directive 94/45 and provides a supplementary explanation and specification of art. 11.2 of the recast directive that obliges the Member States to ‘provide for appropriate measures in the event of failure to comply with this directive’. It remains to be seen to what extent the obligations stemming from the Preamble of directive 2009/38/EC will be taken into account in the process of evaluation of the transposition to be undertaken by the European Commission. Two groups of potential infringements are thinkable. Firstly, a relatively straightforward case of countries where sanctions are not indicated in the transposition acts, either directly or by reference to other external acts, which represents violation of art. 11.2 of the recast directive 2009/38/EC. In this case it seems that profound examination should be conducted with regard to CZ, EE, HU, LV, NL and SK (and possibly also Lithuania), where based on the EWC transposition act implementing directive 2009/38/EC it was not possible to conclude what are the potential consequences of violations of EWC rights or to trace references to external acts regulating punitive measures for such violations. It is of course possible that those sanctions can be ascertained by reference to other acts (e.g. labour code), even though not mentioned by the given EWC transposition, nonetheless, such solutions may fall short of meeting the criterion of transparency of law and legal security in its application.

Secondly, another group of cases of potential infringement of transposition obligations comprises those national transpositions that despite including regulations on sanctions do not provide them in quality corresponding to the requirements of the directive 2009/38/EC (i.e. its Recital 36 in conjunction with art. 11.2). To the end of identification of such possible instances of insufficient quality transpositions previous and following sections in this chapter attempt to provide tools for this evaluation.

### 3.3. Classification of violations of EWC laws

Since the recast directive did not introduce any major changes to directive 94/45/EC with regard to sanctions or in many Member States the provisions concerning sanctions remain unaltered (only in Austria, Bulgaria, Denmark, Estonia, Hungary, Lithuania, Latvia, Portugal, Slovakia, Slovenia and the UK some change to provisions regulating access to justice, including sanctions, was introduced; see also the overview table in Annex 1). A vast majority of national transposition acts does not include provisions on sanctions, but makes reference to other acts of national law. A result of those references to other existing acts of law is a significant degree of variation of solutions across the EU. An implication of the diverse legislative approaches is a practical difficulty for the stakeholders to obtain an overview and evaluate the possible litigation’s outcomes, especially in context of the transnational composition and character of EWC work.

In the first place it needs to be pointed out that none of the EWC directives specifies the type or gives indication as to the branch of law in which sanctions are to be defined. Analysis of the nature of references from the national acts implementing the EWC directive(s) to external acts undertaken in frames of the current study reveals an array of solutions in place. First and foremost, sanctions threatening perpetrators for violation of EWC rights and duties depend primarily on the category of breach specified in the EWC transposition act. Therefore, to provide a full insight into the landscape of punitive measures applied in the EU it seems worthwhile to examine how are the violations of EWC laws classified. A review of references from the EWC implementation acts to external laws resulted in the following classification:

a) Countries where the category of infringement of the respective EWC acts is considered an administrative / labour law offence (AT, CY, IE, IT, DE, UK, Lithuania, LU, MT, ES, SK; Bulgaria, CZ);
b) Countries where the category of infringement of the respective EWC acts is considered a **criminal offence** (FR, PL, DE*, Estonia* 22, Belgium* 23);

c) Countries where the category of infringement of the respective EWC acts is classified as **other forms of breach, infringement, violation of rights, etc.** (PT – infringement of rights 24; FI – “violation of the co-operation obligation of a group of undertakings”; GR – infringement of obligations; IT - infringement; LT – violation of law; RO – contravention; BG: non-observance of labour legislation 25 and violation of provisions of the labour legislation 26);

d) Countries where the category of infringement of the respective EWC acts is classified as a **violation of collective agreements** (Sweden 27, DK);

e) Countries where the category of infringement of the respective EWC acts is **not specified** in the EWC transposition act (NL, NO, SL,CZ* 28, HU, LT* 29, EE30).

### Table 2. Category of breach of EWC rights violations

<table>
<thead>
<tr>
<th>Country</th>
<th>Administrative or labour law offence</th>
<th>Criminal offence</th>
<th>Other term used without further definition</th>
<th>Violation of collective agreements</th>
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27 Distinction between criminal and administrative offences is made. Violations of information and consultation stipulated by art. 13 agreements are not considered offences.
29 Under the 1997 Act transposing directive 94/45/EC a differentiation between serious and very serious administrative offences is made (art. 32 and 33). This distinction is confirmed in Real Decreto Legislativo 5/2000, 4 agosto, Ley sobre Infracciones y Sanciones en el Orden Social (Legal Decree 5/2004th August, Law on Infractions and Sanctions on the Social Order) Section I, Subsection II art. 9.
30 Art. 416 para. 6 ‘The ascertainment of violations, the issuance, appeal and execution of penalty decrees shall follow the procedure established by the Administrative Violations and Sanctions Act, save insofar as another procedure is established by this Code.’
31 Breaches of EWC regulations may be considered ‘Breaches of the legislation and administrative offences’ under the Labour Inspection Act of 3 May 2005.
32 Not stipulated directly in the EWC transposition act, but by reference to Employment Contracts Act and Employee Trustee Act of 2006. Offences against the EWC law are monitored and prosecuted by the Labour Inspectorate which, however, in this case applies the Penal Code and/or the Code of Misdemeanour Procedure (Art. 26 Employee Trustee Act).
33 Since in Belgium the EWC Directive is applied by means of a social partners (collective) agreement the sanctions foreseen for employers who violate collective bargaining agreements that are rendered generally binding are stipulated in acts: The Parliamentary Act of 5 December 1968 with respect to Collective Bargaining Agreements and Joint Committees, Official Gazette, 15 January 1969, subsequently often amended.
34 Under transposition of directive 94/45/EC. In the act No. 171 of 3 September 2009 classification was changed into ‘serious administrative offence’ (art. 5.4; 8.3; 7.10; 9.5; 14.5; 15.8; 22.8) or ‘very serious administrative offence (art. 9.5; 10.4; 15.8; 16.3; 17.5; 18.5; 20.6; 22.8; 24.4) or ‘minor administrative offence (art. 11.4).
35 The right to alert the General Labour Inspectorate Executive Agency for a non-observance of the labour legislation. (Art. 130b, Paragraph 6: Upon failure on the part of the employer to fulfil the obligation thereof under Paragraph (1), or where the employer fails to hold the consultations under Paragraph (4), the trade union organisations’ representatives and the factory and office workers’ representatives under Article 7 (2) or the factory and office workers shall have the right to alert the General Labour Inspectorate Executive Agency of a non-observance of labour legislation.)
37 In Sweden any party that wishes to claim remedy according to the EWC law is obliged to demand negotiations within four months of his becoming aware of the circumstances to which the claim relates and not later than two years after the occurrence of such circumstances (Footnote 06 to art. 41 of the Swedish ACT N° 359 OF 9 MAY 1996).
38 Breaches of EWC regulations may be considered ‘Breaches of the legislation and administrative offences’ under the Labour Inspection Act of 3 May 2005.
39 Under the act of 22/06/2011 transposing directive 2009/38/EC no classification of infringement of EWC right is indicated.
40 Not stipulated directly in the EWC transposition act, but by reference to Employment Contracts Act and Employee Trustee Act of 2006.
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<tr>
<th>Country</th>
<th>Violation of the cooperation obligation of a group of undertakings</th>
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<th>Violation of law</th>
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Source: own compilation.

Since there is a direct link between the category of violation of law and the sanctions it seems clear that this element constitutes an important component of the concept of EWCs' access to justice. Furthermore, organising solutions applied across the Member States into the above classification gives rise to a couple of reflections.

1) Firstly, it should be pointed out that classification of national implementation acts based only on the legal term used to describe the type of violation of EWC law may be sometimes misleading and may not reveal the type of sanctions applicable to the given infringements. It is not uncommon that a violations classified as administrative offence against labour law (being part of civil law) is sanctioned according to criminal code and

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31 Based on Article 5 of the Parliamentary Act of 5 December 1968 (with respect to Collective Bargaining Agreements and Joint Committees, Official Gazette, 15 January 1969, subsequently amended) which foresees criminal sanctions for employers violating provisions of collective bargaining agreements (transposition of the EWC directives in Belgium are executed via collective bargaining agreements).

32 In the current project classification was done on the basis of statutory terms used in individual implementation acts. A further analysis of the nature of sanctions may represent an interesting potential research project, but due to its complexity remains outside of the scope of the present examination.
procedure (e.g. Poland: administrative offence and petty offences code). Therefore the above classification should be used for indicative purposes only, and shall not be automatically considered a final listing of corresponding sanctions. Despite that the classification of types of EWC law violations seems useful because it shows that already at the preliminary stage of determining the infringement there are significant differences between the Member States. The fact that the same violations are often classified significantly differently by national legislation (e.g. a crime vs. an administrative misdemeanour) produces (or multiplies) discrepancies in the implementation of the Directive’s obligation for the national legislator to provide for effective sanctions (e.g. penal vs. administrative sanctions). As a result a legitimate question about the equality of rights of employee representatives sitting on the very same EWC and coherence in application of the EU law can be posed. In fact it is a question that represents an ingredient of a bigger debate on EWCs as vessels of Europeanisation of industrial relations in Europe (Waddington 2010) dealing with the question of balance between national versatility originating in country specific industrial relations and the need of common standards for common EU originating institutions. The thread of this discussion looking at effective an instrument the directives are is central to the issue. On the one hand it must be recognised that specific labour relations and traditions deserve recognition and protection. On the other hand, however, an excessive versatility of legal solutions in place has the potential of confusing all the actors involved. EWCs and their members confronted with the challenge of transnationality often struggle with the question whether it is worthwhile to start a court case in a representative’s home country where the maximum sanction is a relatively low fine for the company, or whether it would not be more effective to try to launch it in another Member State where sanctions can be more severe and the entire logistical effort or launching litigation more worthwhile. Such EWCs, under the circumstances of significant legal diversity of solutions and limited resources, thus grapple with the ways to find common denominator to workers’ representation and face problems with finding an internal common standard for their operation.

2) Secondly, with all its constraints, the above classification reveals several countries, where the category of infringement is not specified in the EWC implementation act. Such an approach adopted in national transposition measures may generate legal confusion and lack of transparency. Furthermore, in light of EWC directive’s obligations to provide for (effective) procedures and sanctions as well as in context of the recommendations of the Working Party of 1995 and the Expert Group of 2010, in cases where no sanctions are specified directly in the implementing act (or no references to other acts made) justified serious doubts regarding the fulfilment of the Member States’ obligation to introduce effective and efficient legal remedies can be raised.

3) Thirdly, the fact that none of the EWC directives offers guidance as to the preferred type of sanctions for EWC law violations seems to be one of the reasons for the significant latitude of the national legislators and the wide variety of solutions applied. It is an open question whether such guidance should be offered by the EWC directive in future, yet it needs be mentioned that it is not uncommon in the EU legislative practice (e.g. directive 2008/99/EC; see also next section in this chapter).

3.4. Observations concerning general trends in sanctions applicable for violations of EWC rights (including the current post-recast directive regulations)

At the end of the tiresome and demanding trial through court(s) lies the court’s decision, which, in more straightforward sense, means sanctions for one of the parties. In this sense
sanctions can be considered the crowning of litigation and thus the last aspect of legal analysis of institutional safeguards for access to justice. Even though in the vast majority of discussions the question of sanctions has attracted the most attention the punishment for violations of EWC laws is not an alone-standing feature. As attempted in the current chapter, the type of sanctions applicable is dependent upon the classification of the violation and represents a corollary of the choice of part of national law that governs EWC violations (e.g. labour law, criminal law, civil law, etc.; see earlier chapters). Consequently, sanctions are not hovering in a vacuum, but are far more dependent variables. The choice of sanctions is left to the Member States who are in no way limited by the EWC directive or guided by the Expert Group instructions in their choice. The only ultimate requirement is that sanctions be ‘effective, proportionate and dissuasive’ and that national procedures ensure an effective exercise of rights stemming from the directive (\textit{effet utile}). An inherent consequence of such an open approach to regulating sanctions and enforcement of EWC rights (and, generally, of the choice of directive) is a significant variety of solutions applied by the Member States. On the one hand, such an approach provides for the necessary respect and room for various national industrial relations and traditions. On the other hand, however, it might result in an array of significantly varying solutions that, in the end, are not comparable and incompatible with each other. An implication of such a situation would obviously be ambiguous legal situation, legal inequality and injustice with regard to a different ‘valuing’ of workers’ rights across the Member States. If this were the case it would be a flagrant contradiction of the main reason for adopting EWC legislation on the EU level, i.e. the goal of providing for common European rights and standards across the countries and multinational companies.

To the end of evaluating whether EWC rights are safeguarded by comparable and coherent sanctions that correspond to the recast directive’s 2009/38/EC standards the review of solutions was undertaken in the previous section of the paper. Below some specific conclusions were drawn:

\textbf{a) Injunctions and summary proceedings as an important safeguard of EWC rights to information and consultation}

Occurrence of the right to issue injunctions or conduct summary proceedings by courts is an important factor differentiating national implementation acts. These two institutions of law are not sanctions – they are provisional remedies to ensure either a preservation of the subject matters in their existing condition or safeguarding of plaintiff’s rights. Injunctions are essentially court orders by which an addressee is required to perform, or is restrained from performing, a particular act and are a measure to prevent further damage that would otherwise happen if the violation persisted. Summary proceedings are a procedure or a simplified mode of trial allowing a case to be held before a judge without the usual full hearing and thus accelerated in comparison to a regular trial. Summary proceedings greatly enhance access to justice (Jacobs 2004: 40) and courts’ effectiveness especially when time is of the essence (e.g. Bocken / de Bondt 2001: 110).

Providing for a shortened procedure summary proceedings in EWC matters allow obtaining a court decision within time ranging from hours (in exceptional circumstances where urgency can be proved, as is the case in France) to approximately 14-15 days (e.g. Italy, Hungary). In some countries summary proceedings are accompanied by a possibility to issue immediate court’s or monitoring institutions’ (e.g. in Bulgaria\textsuperscript{34}) orders obliging the perpetrator (i.e. in case of EWCs the management not respecting rights to information and consultation) to stop actions representing the subject infringement, or undertake certain actions to rectify the violation. As some prominent EWC litigation cases, such as the Gaz de France – Suez merger or the Renault-Vilvoorde, have shown the legal institution of summary proceedings and/or court orders (injunctions) touches upon the very core of meaningful guarantees for employee rights to information and consultation and safeguards the fundamental workers’ right to be involved (i.e. consulted) into the decision making process before final decisions are taken and measures implemented.

\textsuperscript{34} Art. 404 of the Labour Code.
It seems important to point out that injunctions even if available in a legal system do not automatically promise swift summary proceedings or do not result in immediate actions. A point in case here is the Lithuanian transposition law 35 providing legal remedy against management’s refusal to provide information or in case of a dispute over the correctness of the information provided in form of employee representatives’ right to apply to court within 30 days (Art. 12). The court would subsequently try the case, but no mention is made of the time in which such a ruling should be issued. In case of a ruling that ‘refusal to provide information is unjustified or incorrect information has been provided, the central management or any other level of management in question shall be obligated to provide correct information within a reasonable period of time’ (Art. 11 and 12). As a result, even if injunction is issued to provide information the period in which the management should remedy its failure remains unspecified (‘reasonable time’). Consequently, it might diminish the impact of injunction as a remedy aiming at halting a violation or preventing damage.

It seems logical and in line with the EWC directive’s 2009/38/EC requirements that if infringement of the rights to a timely information and genuine consultation are to be effectively safeguarded courts (or other institutions such as e.g. Labour Inspectorates) in each EU Member State should have the competence to stop a violation from causing further harm to the sufferer (i.e. workers) It should be pointed out that other sanctions’ effectiveness and the capacity to dissuade potential perpetrators is significantly limited if only relatively small administrative fines (see below section 3.4.8.4) or financial penalties are the only consequence multinational companies with often multi-million turnovers need to count with.

Summary proceedings and court orders (suspensive injunctions) as a legal means represent an important safeguard of parties’ interests and address the serious shortcoming of any other sanction – its delay. The European Commission endorses introducing this instrument as an obligatory, minimum standard in the approximation of sanctions for violations of national transpositions of EU financial market regulations (European Commission 2010b: 12). It is highlighted that it can be an effective countermeasure and deterrent especially against crimes committed repetitively.36 Sanctions, be it of financial or criminal nature, take time to be decided and executed and despite their retributive character cannot perform the function of instant safeguarding of workers’ rights, as they can hardly remedy the implications of a managerial decision taken with violation of EWC rights.37 By contrast, the possibility to stop a company from implementing projects or decisions taken without consultation with workers grants the latter a chance to be heard before the decision is executed and damage done. It represents also a means of safeguarding the respect for law at large as it excludes the possibility of cynical violations of law with the aim to buy oneself out of legal consequences. Finally, one should keep in mind that in many of the EU member states injunctions are a means in industrial relations used also by employers in industrial disputes (e.g. to compel a trade union to desist from organizing an industrial or strike action; see e.g. Gall 2006; Emir 2012: 663). When such injunctions are available to only one of the social partners (i.e. employers; or alternatively against only one of the social partners), as is the case in the UK (see e.g Regulation 19D of the Statutory Instrument 1088), and are explicitly denied to the worker representatives (i.e. EWCs) in cases of infringement of their key right to information and consultation, it represents a consequential imbalance in industrial relations. This imbalance was taken notice in the UK by the House of Common whose members when discussing operations of private equity firms concluded that injunctions issued in summary proceedings are an effective means of enforcement of

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35 LAW AMENDING THE LAW OF THE REPUBLIC OF LITHUANIA ON EUROPEAN WORKS COUNCILS 22 June 2011, No XI-1507
36 ‘For example, cease and desist orders and court or administrative injunctions may be useful if there is a risk of certain types of violation being continued or repeated.’ (European Commission 2010b: 12).
37 Employee representatives’ involvement in meaningful information and consultation usually cannot be reinstated post-factum. However such examples are known, e.g the Gaz de France – Suez merger case that ended up in nullifying the merger; see Dorssenomt and Blanke 2010.
a company management’s/owners obligation to inform and consult the worker representatives before any decision involving e.g. a highly levered take-over and thus should be available to workers and trade unions (House of Commons 2007: 243).

Analysis of national implementation acts of the EWC directive reveals that the effective measure of court injunctions is provided as a safeguard of EWC rights only by few national legal orders (BE, BG, EE, FI, FR, ES, LT and IE) and has been applied in court practice so far only in France (Brihi 2010). Sometimes injunctions are available only with regard to specific circumstances as is the case Cyprus, where such court orders are applicable to situations in which the management (unlawfully) classified information as confidential (art. 17(2)b of the Law 106(Ι)/2011, No 4289, 29.7.2011). Alternatively, in some countries there exist sufficient premises allowing to infer the courts authority to issue injunctions in EWC cases based on the courts’ analogous capacity with regard to other instances of information and consultation; an example are The Netherlands where the Commercial Chamber (Ondernemingskamer) is competent to issue injunctions in case of breach of national level information and consultation procedures stipulated in the Works Councils Act (European Commission 1998: 26).38

In the rest of the countries covered by the EWC legislation such an institution of law is not available in case of breach of EWC regulations. Unfortunately, an attempt to introduce such a possibility to the Greek implementation law following the recast directive 2009/38/EC ended without success.39 Consequently, applications by EWCs aiming at putting managerial decisions, sometimes deliberately taken with infringement of EWC rights, at halt are handled by courts in a normal course which usually finds its end several months after an unlawful decision has been taken, implemented and has negatively impacted the workers who remained uninformed and unconsulted.40 Such situations lead to a further complication of the legal situation and make post factum claims for compensation by employee representatives (e.g. after a major restructuring including redundancies has been completed) almost purposeless and irrelevant. They also raise questions on imbalance in importance, value and protection of interests safeguarded by the judicial system: if, for instance, in case of environmental corporate crimes41 injunctions can be issued, why should not

38 The Commission’s report on implementation of the Directives 75/129 and 92/65 on collective redundancies argues: ‘Non-fulfilment of the consultation requirement laid down in Article 25(1)(a) of the Works Councils Act is not specifically penalised by the Act itself. If, however, the works council has expressed an opinion which the employer has disregarded, Article 26(1) of the Act authorises it to challenge the employer’s decision before the Ondernemingskamer (Commercial Chamber). The Chamber may, for example, enjoin the employer to refrain from implementing his proposed decision (Article 26(5)(b)). The employer may not violate such an injunction (Article 26(6)).’

39 In frames of consultative dialogue between the Greek Ministry of Labour and the trade unions OBES had proposed that the following two paragraphs would be included in the respective article of the transposition law, which have, however, been omitted in the final text of Law 4052/12: ‘In the case the central management does not provide the members of the EWC or the members of the selective committee the necessary information to fulfill the obligation for information and the preparation of potential consultation, or it provides wrong or incomplete information or refuses the obligation to conduct consultation, the EWC legally represented or the members of the selective committee have the right to appeal before the First Instance Court of the central administration office and request through an application is discussed at the time of interim measures, to be provided with the information required on specific transnational issues and ask that the implementation of any decisions of the central management, concerning these transnational matters are suspended until the central management fulfils properly its obligation to consultation. The above application for interim measures is discussed in priority within fifteen (15) days. The central management has the burden of proving that it has properly fulfilled its obligation to information and consultation. In the case the central management infringes the requirement for an appropriate consultation and proceeds to the implementation of decisions relating to transnational matters, such decisions are subject to be void and can not be enforced against employees for modification or termination of individual contracts of employment. Similarly, those decisions do not constitute a legitimate reason for terminating collective bargaining agreements’.

40 Apart from Hungary, where the court is obliged to issue a ruling within 15 days from the application by an EWC.

41 The term is used in the sense of definitions used by in the work of Shrager and Short (1977) on organizational crime and developed by Box (1983: 20-22) describing it as ‘illegal acts of omission or
this be an option with regard to fundamental workers’ rights to information and consultation?

In context of the above considerations the question of availability of summary procedures and possibility to issue injunctions in national legislation seems to be one of the decisive issues determining concordance with art. 11.3 and 11.4 of the directive 94/45/EC and 11.2 and 11.3 of directive 2009/38/EC. These articles do not limit the Member States obligation to providing sanctions; the European legislator imposed the requirement of ensuring ‘that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced’. Without a doubt injunctions fall into that category of administrative or judicial procedures and contribute the enforcement of obligations of the EWC directive(s). More importantly still, they are often the only measure capable of ensuring that the right to information and consultation before decisions are taken is effectively observed. Therefore it seems reasonable for the European Commission to consider verifying national implementation acts of Directive 2009/38/EC against the existence of such or equivalent measures and ensuring that remedies with effect similar to injunctions are provided for in every Member State.

The scope of the present analysis did not allow to undertake a profound EU-wide study of the use of suspensive injunctions in labour law, yet, it represents a relevant and interesting area for further research. It seems not unfounded to seek parallels with the execution of environmental law in the EU, where in many EU countries, in order to prevent damage to environment resulting from illegal corporate actions, suspensive injunctions are issued or the very fact of launching administrative or court proceedings triggers a suspension of any corporate actions in question (for an overview see Epstein 2011: 86 ff.).

b) Sanctions imposed by labour inspectorate

In some countries sanctions can be imposed (also) by national Labour Inspection. Typically, powers of inspection, sanctions and administrative procedures are regulated by general labour laws, supplemented in some cases by separate provisions in occupational safety and health legislation. This is the case e.g. in Italy42, where the regulation concerning the scope of competence of inspectors contains the main provisions on inspection sanctions. This is also the case for other European countries such as the Czech Republic and Hungary. (Vega and Robert 2013).

c) No sanctions

Italy represents a particular case since, by agreement of the social partners, there are principally no sanctions for infringement of EWC laws (stipulated in the collective agreement) and the only remotely relevant provision stipulates ‘where an infringement has been ascertained, the possibility of fulfilling the obligations should be provided for’ (Point B.1 of the Joint Opinion attached to the 1996 social agreement43). Only failing that, a fine should be imposed (supposedly by the very

commission of an individual or group of individuals in a legitimate formal organization, in accordance with the goals of that organization, which have a serious physical or economic impact on employees, consumers ... the general public and other organizations’ (Tombs 1995: 132).

42 The labour inspectors’ scope of competency is regulated by the Legislative Decree No. 124 of 23 April 2004. Labour Inspection in Italy is also supported by The Tripartite Committee for the Support of Labour Inspection which was established at the beginning of 1980s with a view to assisting the labour inspectorates. At the national level, the most representative social parties (e.g. CGIL, CISL, UIL, Confindustria, Confcommercio) are informed and consulted regularly on the various labour inspection policies and programmes. For more information see ILO online resource at: http://www.ilo.org/labadmin/info/WCMS_126019/lang--en/index.htm

conciliation committee within the Ministry of Labour and Social Security). The amount of fine is, however, not specified. Such situation does not seem unusual in Italy and has been reported already in the past in regard to implementation of directives 75/129 and 92/65 on collective redundancies. A European Commission’s report on the implementation of these directives suggested that legal sanctions ‘can only be derived from the relevant court rulings and general labour law regulations’ (European Commission 1998: 5).

Similarly in Lithuania, the law amending the previous EWC implementation act does not stipulate any sanctions for violation of the laws.

Also in Denmark the transposition of the Recast Directive does not define the sanctions. It merely stipulates that violation of certain provisions ‘shall be punishable by a fine’. It has not been possible, however, to establish what amounts of those fines were applicable in case of breach of the law. No indication is provided by the previous act transposing the directive 94/45/EC into Danish law (ACT N° 371 OF 22 MAY 1996), either.

In Hungary the acts implementing the EWC directives (of 2003 and amendment of 2011) stipulate fines for breaches of EWC regulations, yet set no concrete amounts. Reportedly, neither are the amounts of fines set by the Hungarian Labour Code.

d) In some countries financial penalties (fines) are accompanied by possibility of applying penal sanctions of imprisonment.

e) Severity of sanctions as a factor in effectiveness, proportionality and dissuasive character of sanctions

Severity of sanctions (resulting from the combined effect of effectiveness, proportionality and dissuasive potential) for violations of EWC law is one of the key criteria in assessment of compatibility of national legislation with the directive (Recital 36 of Directive 2009/38/EC). In this way the individual features of sanctions determine the overall severity of sanctions. On the other hand, the individual features of the sanctions (i.e. effectiveness, proportionality and dissuasive potential) are themselves dependant variables. For instance, as discussed above, the type of sanctions applicable to infringements of EWC regulations is a derivative of classification of violations to a specific branch of law. By this token, the fact whether infringements of EWC laws are regarded as violations of civil, administrative or criminal law determines strongly the severity of sanctions. The latter may also be influenced by the legislative technique adopted in implementation of the EWC directive. In various countries sanctions are mentioned either directly in the act transposing the EWC directive (see e.g. Table 3, also Spain, Slovakia) or by reference to external national acts governing infringements, sanctions and procedural matters linked to workers representation issues. As indicated, the majority of EU Member States classify violations of EWC regulations as administrative or labour law offences endangered with a fine (DK*, ES, IT, LT, MT, NO, PT, RO, SE SL, UK).

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44 The report (European Commission 1998) specifies further that based on legal literature and case law, violation of the employer’s obligation to inform and consult the company union delegations (rappresentanze sindacali aziendali) is seen by some as anti-union conduct (comportamento antisindacale) within the meaning of Article 28 of the Statuto dei lavoratori [Statute of Workers’ Rights] of 1970 and hence as subject to the penalty laid down therein (see also Borelli 2011: 5).
45 LAW AMENDING THE LAW OF THE REPUBLIC OF LITHUANIA ON EUROPEAN WORKS COUNCILS 22 June 2011, No XI-1507
46 "Any infringements of § 9, § 10 subpara. (1), § 11 subpara. (1), § 16, § 17a, § 20, § 23, § 24 subparas (1), (2) and (4) and § 28 shall be punishable by a fine." (Art. 31 of the Act No 281 of 6 April 2011 Amending the European Works Councils Act.
47 Simon (2007): ‘Trade unions also have workplace information and consultation rights. (…) As noted above, in practice, unions have had to rely on the courts to enforce these rights, but the Labour Code does not cite any possibility of a sanction.’
48 Provisions of Law 8/1988 of 7 April on infringements and penalties in the field of industrial relations.
49 See point 2 above.
or, alternatively, with a financial punishment combined with incarceration (CY, DE, FR, EL, IE, LU and PL). The latter set of sanctions, on top of the financial responsibility by the company includes an element of personal criminal responsibility which automatically seems more severe thus may be argued to be more dissuasive.

The issue, however, is a contentious one. Numerous research argues that in the context of corporate violations of law financial penalties are the preferred option since based on the economic calculus they are simply cheaper than incarceration that incurs costs (Faure 2010: 266; Polinsky and Shavell 1979, Polinsky and Shavell 1991).

3.5. Financial penalties for corporate violations of EWC laws in the EU Member States

When implementing the recast directive 2009/38/EC (but also in case of the previous directive 94/45/EC) national authorities chose financial penalties as the most common sanction for corporate EWC rights infringements. It is hardly possible to trace back discussions about the rationale of such choice in individual Member States but in general the issue itself is contentious (see below in this chapter). Admittedly, one can suppose that the fundamental belief that financial penalties that are aimed to deprive enterprises of part of their revenue and thus hit them at the very core of their operation and raison d’etre was the main ground for this policy option.

The question that comes up upfront is whether financial penalties threatening for breaches of EWC laws are sufficiently severe to meet the requirements of the EWC recast directive 2009/38/EC (mainly Recital 36). The concept of severity of sanctions (being the collective result of their effectiveness, proportionality and dissuasive potential) with regard to financial penalties depends heavily on their proportionality. As argued by legal research the latter determinant is dependent upon the company’s financial capacity to pay the fine (Faure 2010: 264) and thus should arguably be set on the basis of a relationship (ratio) to revenues multinational companies generate each year. Should the ratio be too low the criterion of proportionality and dissuasive character (Recital 36, 2009/38/EC) could not be deemed fulfilled.

Despite the above considerations in none of the Member States are the financial penalties set proportionately in relation to the corporate perpetrator’s financial capacity and magnitude. In all the countries providing for financial penalties the fines are fixed. Their height varies significantly across the countries and can be as low as equivalent of approximately 4 EUR in PL (lower limit for an offence) or 290 EUR in (Lithuania). Even if the maximum levels of fines are considered (it is uncertain whether courts adjudicate maximum statutory punishment in standard cases) they do not seem to be ‘proportionate in the relationship to the seriousness of the offence’ (Recital 36, 2009/38/EC) where the maximum severity of such fine is e.g. 1100 EUR PL or 15 000 EUR (DE).

<table>
<thead>
<tr>
<th>Country</th>
<th>Transposition of directive 94/45/EC</th>
<th>Transposition of directive 2009/38/EC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>none</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Up to EUR 2,180 may be imposed⁵⁰</td>
<td></td>
</tr>
<tr>
<td></td>
<td>none</td>
<td></td>
</tr>
<tr>
<td></td>
<td>20 000 EUR or 40 000 in case of repetitive infringements</td>
<td></td>
</tr>
</tbody>
</table>

⁵⁰ In case of the employer’s violation of duty to inform the EWC about transnational matters that have a considerable effect on the interests of the workforce (Article 207 (1) of the Labour Constitution Act).
<table>
<thead>
<tr>
<th>Country</th>
<th>Previous Fine</th>
<th>Current Fine</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bulgaria</td>
<td>15 000 BGN</td>
<td>15 000 BGN</td>
<td>As previously</td>
</tr>
<tr>
<td></td>
<td>(aprox. 765 EUR)</td>
<td>(aprox. 7650 EUR)</td>
<td></td>
</tr>
<tr>
<td>Czech Republic</td>
<td>fine of 200,000 CZK</td>
<td>fine of 200,000 CZK</td>
<td>No change (?)</td>
</tr>
<tr>
<td>Estonia</td>
<td>none</td>
<td>Up to 50 000 kroons</td>
<td>none</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Up to an equivalent of 800 EUR (200 Units) for individuals; up to 3200 EUR in case of legal persons</td>
</tr>
<tr>
<td>Estonia</td>
<td>50 000 kroons</td>
<td>none</td>
<td>Equivalent of 800 EUR if committed by private person; Equivalent of 3200 EUR if committed by legal person</td>
</tr>
<tr>
<td></td>
<td>(aprox. 3195 EUR)</td>
<td></td>
<td>In confidentiality cases up to 383 EUR</td>
</tr>
<tr>
<td>France</td>
<td>FRF 25,000</td>
<td>3750 euros or in case of repeated infringement 7500 EUR</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>30 000 DM</td>
<td>As previously</td>
<td>As previously</td>
</tr>
<tr>
<td>Greece</td>
<td>10 000 000 DR</td>
<td>50 000 EUR</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(equivalent to aprox. 29 300 EUR)</td>
<td></td>
<td></td>
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</tbody>
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52 The 5000 BGN is a limit in case of violations of rights on collective redundancies. For a repeated violation additional fines and penalty payments may be imposed.
53 Based on Eurofund (2009).
54 If infringement committed by a legal person (Art. 7 of the Employee Trustee Act of 2006
55 According to §47(1) of the Penal Code, a fine unit is the base amount of a fine and is equal to 4 euros.
56 According to §47(1) of the Penal Code, a fine unit is the base amount of a fine and is equal to 4 euros.
57 Act amending the TKS § 851 provides for the liability on violation of confidentiality obligation.
58 Article 4 of the French implementing legislation (directive 94/45/EC). When an offence is repeated, both the custodial sentence and also the fine can be doubled.
60 For infringement of information duties (withholding information, misinformation, incorrect information).
61 Fine up 50.000 according to the articles 23 and 24 of the Law 3996/2011. The law 3996/2011 has extensive regulation on fines and other penalties in various cases.
<table>
<thead>
<tr>
<th>Country</th>
<th>Fines</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ireland</td>
<td>200 EUR/day $^{62}$</td>
<td>1500 EUR (summary proceedings) or 10 000 EUR on conviction on indictment + 1000 EUR/day $^{63}$</td>
</tr>
<tr>
<td>Italy</td>
<td>1033 EUR (for breach of confidentiality); 5165 EUR for other $^{64}$</td>
<td>6198 EUR (breach of confidentiality); 30 988 EUR for other $^{65}$</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Aprox. 290 EUR</td>
<td>As previously</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>2 501 francs (aprox. 62 EUR); may be doubled $^{66}$</td>
<td>150 000 francs (aprox. 3718 EUR); may be doubled $^{67}$</td>
</tr>
<tr>
<td>Malta</td>
<td>a) Depending on type of breach: not less than 10 liri (aprox. 23 EUR) and not more than 50 liri (aprox. 116 EUR) for each for every employee of the Community-scale undertaking or Community-scale group of undertakings b) Not less than 500 Liri (aprox. 1164 EUR)</td>
<td>1164 EUR</td>
</tr>
<tr>
<td>Poland</td>
<td>16 PLN (aprox. 4 EUR)</td>
<td>As previously</td>
</tr>
<tr>
<td>Portugal</td>
<td>Depends on the volume of business $^{68}$: 1) For smallest companies in case of serious infringements: from 630 EUR to in case of 4400 PLN (aprox.1100 EUR)</td>
<td>Depends on the volume of business: 1) For smallest companies in case of serious infringements: up to 1260 EUR in case of</td>
</tr>
</tbody>
</table>

$^{62}$ Per each day of continued conviction (Section 19 of the Irish transposition Act of 10/07/1996.  
$^{63}$ Per each day of continued conviction (Section 19 of the Irish transposition Act of 10/07/1996.  
$^{64}$ If the orders made by the Ministry of Labour and Social Affairs under the Conciliation Procedure are not complied with within 30 days (Büggel 2002).  
$^{65}$ If the orders made by the Ministry of Labour and Social Affairs under the Conciliation Procedure are not complied with within 30 days (ibid.).  
$^{66}$ In case of repeated infringement within a period of 4 years (Art. 62 of the transposition act).  
$^{67}$ In case of repeated infringement within a period of 4 years (Art. 62 of the transposition act).  
$^{68}$ No final transposition yet, fines based on a bill of modifications to the labour code (Titre III du Livre IV du Code du Travail). Fines may be doubled in case of repeated violations.  
negligence; from 1260 EUR in case of fraud.
2) For biggest companies: from 1575 EUR in case of negligence; from 5250 EUR case of fraud

1) In case of very serious infringements: a) 2100-4200 EUR for smallest companies in negligence (4025-9450 EUR in case of fraud); b) 9450-31500 EUR for biggest companies in case of negligence and 31 500 in case of fraud

<table>
<thead>
<tr>
<th>Country</th>
<th>Penalty for Smallest Companies In Negligence</th>
<th>Penalty for Biggest Companies In Negligence</th>
<th>Penalty For Fraud</th>
</tr>
</thead>
<tbody>
<tr>
<td>Romania</td>
<td>2,000 RON (approx. 446 EUR)</td>
<td>4,000 RON (approx. 893 EUR)</td>
<td>As previously</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Up to 1,000,000 SKK</td>
<td>Up to 1,000,000 SKK</td>
<td>As previously</td>
</tr>
<tr>
<td>Slovenia</td>
<td>None</td>
<td>1,000,000 Tollars (approx. 4,173 EUR) for legal persons, or 80,000 Tollars (334 EUR) to individuals</td>
<td>20,000 EUR for a legal person; 2000 EUR for an individual</td>
</tr>
<tr>
<td>Spain</td>
<td>626 EUR to 1.250 EUR</td>
<td>100,006 EUR to 187,515 EUR</td>
<td>As previously</td>
</tr>
<tr>
<td>UK</td>
<td>75,000 GBP (approx. 94,500 EUR)</td>
<td>100,000 GBP (approx. 126,000 EUR)</td>
<td>As previously</td>
</tr>
</tbody>
</table>

Source: own compilation.

Note: Record was taken only of financial penalties and not of criminal sanctions (e.g. imprisonment) that in some cases can be imposed in parallel.

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Based on Eurofund (2009)

Art. 32 and 33 of the LAW OF 10 APRIL 1997 as specified further by Real Decreto Legislativo 5/2000, 4 agosto, Ley sobre Infracciones y Sanciones en el Orden Social (Legal Decree 5/2000 4th August, Law on Infractions and Sanctions on the Social Order) Section I, Subsection II art. 9 (as amended by the Ley 40/2006 of 14/12/2006), available at: [http://noticias.juridicas.com/base_datos/Laboral/rdleg5-2000.html#4](http://noticias.juridicas.com/base_datos/Laboral/rdleg5-2000.html#4); category of fine: serious infringements in minimum to maximum extent. Before the amendment by the act 40/2006 Büggel (2002) indicated the fines t orange from EUR 3,005 and EUR 90,151 (ESP 500,001 and ESP 15,000,000). At the moment of adoption of the transposition of the directive 94/45/EC the relevant provisions regulating sanctions were those of Law 8/1988 of 7 April on infringements and penalties in the field of industrial relations.

Category of breach: most serious infringements in their maximum extent (ibid.).

Part V, Article 22 of the implementing legislation (TICER 1999).
3.6. Severity, proportionality and dissuasiveness of financial penalties and corporate turnover

Admittedly, it is difficult to value how much a sanction should amount to in order to be proportionate, yet in specific cases even the highest maximum fine available in all the countries (100 000 GBP in the UK) might not fulfil this criterion when companies revenues are considered. Therefore a legitimate question arises whether putting a limit on financial penalties for corporate crime is a means to achieve sufficiently severe sanctions, or if it is not rather an obstacle to this end? It should be emphasised that both predetermined-limited and not predetermined ‘unlimited’ type of financial penalties were applied in EWC related jurisprudence. One spectacular example of the latter type was ruled in case of the Renault Vilvoorde lawsuit in which the Belgian court on 20 March 1998 sentenced Louis Schweitzer, the managing director and chair of Renault, to pay BEF 10 million for failing to comply with Belgian laws and collective agreements at the time of the 1997 closure of Renault’s Belgian headquarters at Vilvoorde (Krzeslo 1998).

The question of proportionality of fines poses an additional problem of determining the point of reference for their proportionality: should they be proportional to company revenues or turnover (or any similar criterion linked to corporate wealth), as often argued by trade unions and workers’ representatives; or, alternatively, should they be proportional to other penalties stipulated in the national legal systems and, commensurate with that is considered reasonable in relation to the given country’s costs of living at large. Both approaches are not without a reason. The first one postulating proportionality with companies revenues is based on the argument that a sanction of a couple of thousand euros is not really a burden for large multinational enterprises (according to the EU nomenclature all companies qualifying for an EWC do not meet the criteria of SMEs) whose turnover and income amounts often to millions of Euro. The issue is well known to and recognised as a challenge by the European Commission with regard to EU directives concerning financial market regulation:

‘To ensure that a fine has a sufficiently deterrent effect on a rational market operator, the possibility that an infringement will remain undetected must be offset by imposing fines which are significantly higher than the potential benefit deriving from a breach of the financial services legislation. In the financial sector, where a large number of potential offenders are cross-border financial institutions with very considerable turnovers, sanctions of a few thousand euros cannot be considered sufficiently dissuasive.’ (European Commission 2010b: 7). In the same Communication the Commission points out as one of the problems that ‘[c]ertain factors, such as the benefit resulting from the violation (if calculable) as well as the financial strength (...) of the author of a violation, are not always taken into account, while they would help ensuring effectiveness, proportionality and dissuasiveness of the sanctions actually applied’ (ibid. 8).

At the same time it needs to be noted that doctrine and relevant tests of proportionality (of penalties) do exist and allow factoring in companies’ turnover when setting sanctions, mostly of financial nature. This approach is most developed in EU competition law where the amount of fines relates not only to the seriousness of the infringement and its consequences for the market, but also takes into account the turnover of the companies involved, the period of time the infringement has lasted and any other aggravating consequences (de Moor–van Vugt 2012: 37)\(^\text{74}\). All in all there is a limit for fines imposed on corporate perpetrators distorting competition of

\(^{74}\) See for an example Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02, T-136/02 en T-139/02, Bolloré SA e.a. [2007] ECR II-947, cons. 480-484, and Case C-386/10P Chalkor.
10% of the group global annual turnover\textsuperscript{75} for particularly damaging behavior. Another example of the understanding of the need to set financial penalties with the turnover (and profit from violating the law) considerations is the European Commission’s Communication on reinforcing sanctioning regimes in the financial services sector listing corporate turnover of perpetrators as one of ‘appropriate criteria’ to include in applying sanctions:

The effectiveness, proportionality and dissuasiveness of sanctions depend also on the factors, including aggravating or mitigating circumstances, taken into account by the competent authorities when deciding the sanctions to be applied to the author of a specific violation. This holds particularly true for determining the actual amount of fines, where national legislation usually provides for a range of minimum and maximum amounts.

These factors should be framed in such a way as to allow competent authorities to adapt type and level of sanctions imposed to the nature and the impact of the violation as well as to the personal conditions of the offenders, which would help ensuring optimal proportionality and dissuasiveness of the sanctions actually imposed.

In the Commission’s view, in addition to the seriousness of the violation which is already foreseen in almost all national legislations, the factors to be taken into account should include at least:

- the financial benefits for the author of the infringement derived from the violation (if calculable), in order to better reflect the impact of the violation and discourage further violations.

- The financial strength of the author of the violation, as indicated by elements such as the annual turnover of a financial institution or the annual income of a person responsible for the violation, which would help in ensuring that sanctions are sufficiently dissuasive even for large financial institutions. (...)’ (European Commission 2010b: 13)

Against these abstract guidelines one can ask a question what is, in concrete terms, the amount of financial penalties imposed on multinational companies operating on European internal market that meets the requirement of proportionality (in relation to turnover) and dissuasive potential. Instances of what amount of sanctions by the European Union interprets is perceived by the public and the business world as ‘dissuasive sanctions’ (for multinational companies considered large) can be gathered, for example, from analysis of press releases on the topic:

- € 462 million, Hofmann-La Roche, 2001\textsuperscript{76}
- € 497 million, Microsoft, 2004\textsuperscript{77}
- € 280 million, Microsoft, 2006\textsuperscript{78}
- € 899 million, Microsoft, 2008\textsuperscript{79}
- € 85.8 million, Knauf, 2008\textsuperscript{80}

The above penalties were obviously imposed with consideration of other factors such as damage to general public in consequence of distortions of free competition and acquisition of market dominant positions and thus their scale is bigger than that of violations of law against worker rights. Nevertheless the above figures set a point of reference for what is perceived as dissuasive sanctions with regard to multi-million transnational enterprises and groups.

\textsuperscript{75} Art. 23(2) of Regulation (EC) No 1/2003).
\textsuperscript{76} Source: www.spiegel.de/wirtschaft/0,1518,292146,00.html
\textsuperscript{77} www.sueddeutsche.de/wirtschaft/774/341617/text/
\textsuperscript{78} www.spiegel.de/wirtschaft/0,1518,426368,00.html
\textsuperscript{79} Source : www.taz.de/1/zukunft/wirtschaft/artikel/1/900-millionen-euro-strafe-fuer-microsoft/?src=SZ&cHash=073fab7d36
\textsuperscript{80} Source: www.eu-info.de/eugh/knauf/
In consequence of lack financial penalties’ proportionality to their revenues in the area of information and consultation those penalties are not dissuasive not only for tycoons of the financial market, but for multinational enterprises at large; without a doubt it is a universal issue. The problem with this argument is, however, that it would require from the legislation to set a very wide range of possible fines for violations of EWC law (a system that could resemble penalties for violations laws on company concentrations, distortions of free market competition and abuses of market dominant position) and/or necessitate judges’ broad discretionary powers. The European Commission has discerned the problem in the field of financial market regulation by finding that

‘In the banking sector, only 17 Member States take into account the financial strengths of a financial institution when determining the level of a fine imposed on it. Only 5 Member States take into account that factor in the application of fines for violations of the UCITS Directive. However, any penalty imposed needs to have an equivalent effect on all financial services undertakings: a fine of a small level, while being clearly dissuasive for certain smaller financial institutions, will have only a very limited dissuasive effect for large financial institutions’ (ibid. 8).

On the other hand, the alternative approach while proportional to other fines and a given country’s economic reality seems to disregard the aspect of companies’ financial power which combined with too low a level of fines might result in enterprises being able to afford to violate information and consultation rights and thus growing disrespectful of EWC laws.

The mentioned lower limits (see Table 3) seem absolutely out of proportion if one takes into account the turnover and income of international companies where EWCs are installed. Multinational companies more and more often generate income comparable or exceeding a budget of a middle-sized EU Member States and can thus be not in the least bothered by such small fines. Probably if those fines would be due to be paid for each day of delay of consultations caused by management the severity effectiveness of this sanction would be probably much higher and sufficiently dissuasive. Alternatively, as some scholars have been arguing (Dorssemont / Rigaux 1999: 378) companies benefiting from state or EU subvention schemes should be deprived thereof and forced to refund them if they are found in breach of European legislation on information and consultation. Otherwise enterprises are welcome to take and implement decisions without information and consultation with employees and count in possible one-time fine of several hundreds or thousands of EURO, if this shall be the price for a unilateral and arbitral management. The latter seems to be a commonplace in some Member States. For instance in Lithuania the absence of adequate penalties on employers for failure to observe information and consultation procedures, properly or at all is reportedly ‘a serious practical problem’ (Blažienė 2009) as employers not observing their duty to inform and consult employees’ representatives may be fined from LTL 500 to 5,000 (approx. EUR 145-1450). As these fines are not large ‘it may be easier and more beneficial for employers to pay the fines and continue non-performance of their duties, because there are no special regulations obliging employers to meet their information and consultation obligations after payment of a fine’ (ibid). Therefore Blažienė concludes that ‘it can be argued that information and consultation procedures are inadequately implemented in practice in Lithuania’. An even more gruesome conclusion confirming the present study’s considerations on ‘cynical’ employers applying the strict cost-benefit logic is Blažienė’s observation that ‘it is arguably more attractive for employers to violate knowingly the legislation and pay fines instead of performing their duty to inform and consult’. It suffices to refer the reader to Table 3 above to find out that the levels of penalties for breach of EWC information and consultation rights are not exceptionally low in Lithuania and that there are countries with even lower levels thereof.

Concerning the maximum levels of financial penalties, on the other hand, even in countries that are considered to have set them high (e.g. the UK, Germany, Austria) they are perceived as insufficiently dissuasive and proportionate. In context of the recent court case of EWC Visteon the EWC Chairman involved in the proceedings
called the maximum fine of 15 000 EUR ‘ridiculous’ (PlanetLabor 2012). It is not an isolated view supported with regard to some Member States also by the European Commission that with regard to sanctioning regimes in the financial market services found financial penalties substantially higher than those provided for with regard to breaches of EWC information and consultation laws to be insufficient (European Commission 2010b: 6).81

One needs to bear in mind, too, that fixing a prior upper limit for compensation may preclude the availability of an effective and proportionate remedy. (European Court of Justice, C-271/91 Marshall paragraph 30, 32).

The fact that remedies must be effective, proportionate and dissuasive is not disputed and is firmly established by the relevant Directives and case-law. At the same time, there does not seem to be a tangible understanding as to what type and level of sanctions would fulfil these criteria as evidenced by the considerable discrepancies in the sanctions awarded in the cases selected above. In the ECJ von Colson case, the Court of Justice held that although there is no requirement for a specific form of sanction for unlawful discrimination, the sanction must be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect [...]. It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.’

In view of the above demonstrated shortcomings in terms of effectiveness, proportionality and dissuasive power of national financial penalties for breach of EWC laws in some cases it remains to be seen whether the European Commission will deal with this problem with decisiveness comparable to that shown in its communication on strengthening sanctioning regimes in the financial services sector (European Commission 2010b). In the latter document the Commission recognises its own twofold obligation to act when the Member States fail to apply proper sanctions:

a) by means of ‘considering proposals to introduce provisions requiring Member States to ensure that competent authorities, when determining the sanction to be imposed for a violation of financial services legislation, take into account, as a minimum, certain common key criteria’ (European Commission 2010b: 14);

b) by deriving the competence to set legal frameworks: ‘the Commission believes that EU can take action to improve the legal framework in which competent authorities operate, and particularly to ensure that all national authorities have the necessary key powers and investigatory tools, they cooperate and coordinate their action appropriately.’ (ibid.: 15).

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81 ‘Important divergences exist as to the minimum and maximum level of pecuniary sanctions provided for in national legislation and sometimes the maximum level is so low that the sanctions are unlikely to be sufficiently dissuasive. For example in the banking sector the maximum amount of fines provided for in case of a violation is unlimited or variable in 6 member States, more than 1 million euros in 9 Member States, less than 150 000 euros in 7 Member States’. In the securities sector among the 18 Member States providing for administrative fines for violations of the prohibition of insider dealing, 4 Member States provide for maximum fines of 200 000 euros or less, while only 12 Member States provide for fines of 1 million euros or higher. In the case of violations of the minimum conditions for authorisation of investment firms, 17 Member States provide for maximum fines of less than 1 million and in 6 of them the maximum amount is 100 000 euros or less. In the insurance sector, fines are unlimited or can reach 1 million euros or more in 10 Member States, they are between 100 000 and 1 million euros in 7 Member States, and less than 100 000 euros in 6 Member States. Violations of financial services legislation can lead to gains of several million euros, in excess of the maximum levels of fines provided for in some Member States. A fine that is lower than the gains that can be expected from the violation is unlikely to have much of a deterrent effect.’
3.7. Regime shopping – is there evidence for opportunistic quest for laxer laws?

With regard to the significant extent of variation it is often pointed out that lower sanctions in some countries (next to other forms of laxity in legal regimes) can give rise to ‘regime shopping’. It is not a problem limited to or specific for the labour law or the social field, but discerned by the European Commission to be present also in other areas: ‘(...) divergences in sanctioning regimes may create distortions of competition in the Internal Market. If sanctions applied in different Member States for similar infringements are considerably different, financial institutions could be tempted to engage in regulatory arbitrage when deciding on their place of establishment or the location of branches in order to benefit from the least stringent sanctioning regimes’ (European Commission 2010b: 9).

Also in research on EWCs it is argued, that significant discrepancies can lead to a quest for laxer legal order, which is referred to as ‘regime shopping’ (Pries 2008: 168; Kristensen & Zeitlin 2005: 270). In these debates it is suggested that EWC-hostile companies when forced to establish such a body for transnational information and consultation could search for the most lenient national regime (Dorssemont and Rigaux 1999: 378).

Finding a statistical proof to verify this hypothesis is challenging. Comparison of the number of multinational companies with EWCs headquartered in individual EU Member States and of the number of cases of application of a given national law (Figure 1) provides some insight, yet is inconclusive in this regard.

In total based on the data from EWCdb.eu we conclude there are 57 cases of EWCs based on a different law than the law of their host company’s headquarters (at this stage only EFTA-based multinational companies were taken into account; for non-EFTA multinationals see below). Out of 15 countries hosting such EWCs it seems that a clearly higher number of cases is concentrated only in France and Ireland, and even that not by a significant margin (if one adopts the simple arithmetical rounded-up average of 4 cases per country), and only two further countries (Belgium and the Netherlands) exceeding the average of 4 cases. Out of those four countries Ireland has probably the most lenient law on EWCs offering, but the bare minimum. The remaining three countries have relatively developed industrial relations offering protection for workers; the latter is confirmed by occurrence of instances of worker-friendly jurisprudence in litigation involving EWCs (especially in France and Belgium). At the same time country notorious for its minimum standard regulations on EWCs i.e. the United Kingdom hosts only three EWCs from foreign headquartered companies. Consequently, the hypothesis about regime shopping whose origin is the alleged pursuit of more lenient (employer friendly) legislation seems to hold, if at all, only with regard Ireland. Concerning the latter country jumping to any easy conclusions might simply be unfounded as other factors could be at play. Thus it would require further research into the topic to allow making clear inferences.

Figure 1 Number of EFTA-based multinational companies with EWCs effective that have chosen applicable EWC law from an EEA country different than the country of HQ of the multinational
Regime shopping seems to occur in the most straightforward way in case of EFTA and EU based companies choosing different EEA (Switzerland does not have an EWC transposition act) member country law for their EWC (as described above). However, another dimension to consider are cases of non-European (i.e. non-EFTA) companies establishing EWCs and thus forced to pick a specific EEA country’s law as the legal order for their EWC. Figure 2 presents data for non-European companies selecting EEA law for their EWCs. In total there have been 217 such cases. The most frequently chosen target legislation (by a significant margin) was that of the UK and Germany ex aequo as well as Belgium and France. Interestingly the British transposition law considered to be more employer than worker friendly (as far as information and consultation rights are concerned) was chosen as frequently as the German law founded firmly upon the foundation of Mitbestimmung, i.e. extensive participatory rights for workers and favourable provisions on information and consultation and traditions, and thus by many considered one of the models in Europe. Moreover, both Belgian and French legislation that safeguard workers’ rights relatively well too were chosen more frequently than the reportedly more employer-friendly EWC legislation of Ireland. Interestingly too, the Belgian, French, German and Irish legislation that has been chosen the most frequently by companies from outside of the EU provide for either full legal personality (FR, DE), or capacity to act in courts (IE), or an explicit entitlement to start legal proceedings (BE); even in case of the UK the Statutory Instrument 1088 transposing the directive in Article 21A provides now for improved access to courts for clearly defined ‘relevant applicants’.

Finally, there has been no specific concentration of companies from one non-EEA country choosing EU member state’s legislation for their EWCs; the approximately even distribution across all the EU countries is another point in case against the alleged regime shopping. All in all it can be concluded that with regard to EWCs regime shopping has not occurred on a mass, statistically significant scale. This is not to say that in particular cases consideration on more lenient legal order have been made by
management of multinational companies, yet such statements are beyond the numerical proof that the ETUI database of EWCs can deliver.

Figure 2 EWC bodies effective that have chosen applicable law from a country different from headquarters of the multinational company (non-EEA-based multinationals only)

An explanation to the above depicted choices of foreign legislation lies most probably in the fact that in a vast majority of cases multinational enterprises from outside of the EU choose Germany, France, Belgium, Luxembourg and Ireland as their European headquarters based on e.g. favourable tax regulations, infrastructure, availability of staff, etc. (see: Holt et al. 2006) rather than according to the most lenient or incomplete regulations on transnational information and consultation of employees that in terms of priority rank are not on par with the former precisely calculable costs.
Chapter 4: Parameters for evaluation of sanctions compatibility with the requirements of the EWC recast directive 2009/38/EC

Irrespective of the type of sanction, i.e. whether these are financial penalties, incarceration or other set of punitive measures is the preferred solution in a given country their evaluation is a complex and multifaceted issue. The following sections represents an attempt to discuss various parameters of sanctions relevant for the requirements set in the recast EWC directive 2009/38/EC. At the first glance the directive in Recitals 35, 36 and and Art. 11 impose collectively only three criteria that need to be met: effectiveness, proportionality and dissuasive character. Simple as these three parameters may seem, they represent complex questions. The complexity of debate on the sanctions' parameters is directly reflected in the intricacies of policy choices. To better understand and evaluate the EWC sanctions the following section introduces the necessary elements of legal studies and research.

4.1. Definition of a sanction in EU law

Interestingly, ‘it seems that Union law does not prefer the term “sanctions” as an umbrella term for labelling the state’s response to unlawful behaviour’ (de Moor- van Vugt 2012: 12). The observation of Moor- van Vugt that terms such as ‘penalty’ and ‘measure’ in EU legislation are more common than ‘sanction’ seems confirmed in case of the EWC recast directive 2009/38/EC where in Art. 11.2 reference is made to ‘measures’ and ‘adequate administrative and judicial procedures’. The term ‘sanction’ is used only in the Preamble’s recital 36 (and recital 34 but in a different context) along with ‘procedures’.

As Moor- van Vugt finds (ibid.) the ‘distinction between a penalty and a measure is meaningful’ since the former has a punitive nature, while the latter a reparatory one. A catalogue of means considered to be measures confirming its clear reparatory character can be found in Regulation 2988/95 (Article 4):
- withdrawal of the wrongly obtained advantage
  - payment/repayment of amounts due or wrongly received);
  - total or partial loss of the security provided in support of the request for an advantage granted.

Penalties, on the other hand, threaten for ‘intentional irregularities or those caused by negligence’ (Art. 5). A catalogue of penalties is provided by Article 5 of the said Regulation and comprises:

   a) ‘payment of an administrative fine;
   b) payment of an amount greater than the amounts wrongly received or evaded, plus interest where appropriate; this additional sum shall be determined in accordance with a percentage to be set in the specific rules, and may not exceed the level strictly necessary to constitute a deterrent;
   c) total or partial removal of an advantage granted by Community rules, even if the operator wrongly benefited from only a part of that advantage;
   d) exclusion from, or withdrawal of, the advantage for a period subsequent to that of the irregularity;

Recital 36: ‘In accordance with the general principles of Community law, administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations arising from this Directive’.

Art. 4 para 4 of the Regulation 2988/95 emphasises that ‘The measures provided for in this Article shall not be regarded as penalties.’
The above considerations and provisions introduce an element of confusion into interpretation of the EWC recast directive 2009/38/EC which inconsistently uses the term 'sanction' in its Preamble as opposed to 'measure' in the body in art. 11 para. 2. When a formalistic interpretation is applied and only Art. 11. Para 2 is taken into account one could argue that as a result of the use of the term 'measures’ in accordance with Art. 4 of the Regulation 2988/95 only ‘withdrawal of the wrongly obtained advantage’ (i.e. fines or repayment of amounts due) should be implemented on national measures as legal consequences of wrongful acts or irregularities in informing and consulting EWCs. This idea seems, however, indefensible in view of the telogical interpretation of the Directive 2009/38/EC which must include the Preamble and the term 'sanctions' used therein. Furthermore, even if one would have accepted the formalistic interpretation of the provision of art. 11 para 2 of Directive 2009/38/EC the Member States would still be free and obliged to impose sanctions in response to breaches of Community law, even if the Treaty or secondary legislation does not provide for an explicit legal basis for them to do so based on the fundamental Treaty principle of loyal cooperation laid down in Article 4 para 3 TFEU (de Moor- van Vugt 2012: 7 ff.). This legal principle is the first and foremost basis and obligation for the Member States to put an adequate sanctions system into place (ibid.).

In conclusion of the above considerations it may be stated that directive 2009/38/EC provides for a sufficient basis for the Member States to introduce a wide variety of measures both from the catalogue of art. 4 and 5 of the Regulation 2988/95. At the same time, it needs to be borne in mind that on the basis of the European Court’s of Justice ruling in the so called Greek Maize case Member States have freedom of choice of legal means (be that civil, penal or criminal) they wish to apply to infringements of Community law, provided that those means are effective, proportionate and deterrent.

4.2. The doctrine of ‘effective, proportionate and dissuasive sanction’ in EU law

Accepting the existence of differing views in the practical and scholarly debate on the choice of the best doctrine it the central question with regard to corporate violations of EWC laws is to determine the method by which companies can best be held responsible. This question has been raised neither by the legislator (the European Commission) nor by the members of the Expert Group debating on the implementation of the recast directive 2009/38/EC. The subject matter was approached from a more pragmatic and less constraining perspective, namely by means of providing only the criteria of Recital 36.

Despite the fact that these criteria are mentioned in the Preamble they are not explained further in any way either in the EWC directive or in the report of the Expert Group. The lack of specification what do these criteria imply might be the source of further problems with evaluation of the sanctions in, at least, a twofold way. Firstly, because the Member States on which the obligation to abide by the criteria was imposed are not necessarily clear on what effective, proportionate and dissuasive sanctions are. The latter might be simply because similar criteria are not in use in national law and/or because they might have a different meaning with regard to multinational companies infringing transnational social rights like those of EWCs. Secondly, lack of clear explanation of the criteria of Recital 36 can have an impact on the European Commission itself when it performs its standard evaluation of

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implementation of directives (vide explanations concerning the superficiality of the Implementation Report of 2000 on the EWC directive 94/45/EC in the present study).

For the above reasons, before one goes to reviewing the available penalties for EWC laws violations and their compatibility with Recital 36 it seems worthwhile to seek and provide explanation of the each of the elements of the doctrine of effective, proportionate and dissuasive sanctions. As a brief general introduction into the specific characteristics of each of the later features of sanction’s reference to ECJ jurisprudence on the central importance of enforcement provisions and sanctions will be made.

4.3. European Court of Justice: sanctions as an inherent ingredient of EU directives

With regard to determining the importance of proper transposition of sanctions as inherent parts of EU directives at least three judgements seem of relevance: cases ‘Colson’ 85, ‘Harz’ 86 and ‘Coote’ 87. In the Colson case the ECJ decided in favour of the claimant who was an individual employee laying a claim against insufficient implementation with regard to the ‘necessary measures’ (sufficient sanctions) to be provided by the Member State to secure the rights stemming from the directive. In this case the ECJ declared that, even if the ‘substantive’ part of the Directive had been implemented, the absence of adequate remedies for protection against discrimination effected in the transposition not being sufficient to ensure that the Directive was fully effective ‘[a]lthough the third paragraph of article 189 of the treaty leaves member states free to choose the ways and means of ensuring that the directive is implemented, that freedom does not affect the obligation, imposed on all the member states to which the directive is addressed, to adopt, within the framework of their national legal systems, all the measures necessary to ensure that the Directive is fully effective, in accordance with the objective which it pursues.’ (Summary of the cases Colson, C-14/83 and Harz C-79/83) 88. It should be emphasised that the Court insists that the nature of obligation of the Member States to provide effective measures to apply the directive is unconditional, i.e. not subject to national competence.

The ECJ specified moreover the requirements of efficiency and proportionality of the penalty by ruling that even though

‘the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the member states free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a member state chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connexion with the application’ (ibid.).

In the Coote v. Granada Hospitality Ltd case the Court found that lack of effective means of pursuing a ‘judicial process’ has the potential of jeopardising implementation of the goals pursued by the directive to be implemented:

‘The principle of effective judicial control laid down in Article 6, a principle which underlies the constitutional traditions common to the Member States and which is also enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, would be deprived of an essential part of its effectiveness if the protection which

88 See also Judgment of the Court (Fourth Chamber) of 8 March 2001. - Commission of the European Communities v French Republic,. Case C-97/00. European Court reports 2001 Page I-02053
it provides did not cover measures which an employer might take as a reaction to legal proceedings brought by an employee with the aim of enforcing compliance with the principle of equal treatment. Fear of such measures, where no legal remedy is available against them, might deter workers who considered themselves the victims of discrimination from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the Directive. (Point 2 of the Summary, case C-185/97).

The ECJ needed also to deal with the crucial debate on delimitation of competences between the European Community and the traditional national Member State competence to determine sanctions. In the Harz case it accepted that the competence to set sanctions remains with the Member States, yet at the same time specified that this freedom is subject to the ultimate obligation of effectiveness:

‘Although directive no 76/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the member states free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a member state chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connexion with the application.’ (Summary, Case C-79/83).

Gradually the ECJ extended the scope of its jurisprudence by requiring adequate national remedies to be available for the violation of rights conferred by EC law even in the absence of any specific ‘remedies provisions’ in the Directive concerned (Malmberg 2003: 3). Finally, in the ruling in the Johnston case, the ECJ made reference to the legal order of Council of Europe and declared that the principle of effective judicial protection ‘underlies the constitutional traditions common to the Member States and is laid down in articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which must be taken into consideration in Community law’. (point 18 of the ruling).

4.3.1. Effectiveness

The dictionary definition of the term ‘effectiveness’ is explains that it is the capability of producing a desired result or the degree to which something is successful in producing a desired result. In more specific terms of directives effectiveness could be defined as ‘particular goals set by the policy maker on the one hand (the effects) and the (legal and policy) instruments used by the policy maker on the other hand’ (Faure 2010: 259). In line with this approach in order to assess the effectiveness one needs to look at the goals set by the EWC directive and compare it with the policy instruments (in case of the subject matter, on sanctions. The first and foremost goal of the directive is ‘to improve the right to information and to consultation of employees in Community-scale undertakings’ (Art. 1) and ‘ensuring the effectiveness of employees’ transnational information and consultation rights, (...) enabling the continuous functioning of existing agreements, resolving the problems encountered in the practical application of Directive 94/45/EC and remedying the lack of legal certainty resulting from some of its provisions or the absence of certain provisions, and ensuring that community legislative instruments on information and consultation of employees are better linked’ (Recital 7). Furthermore there is more
precision about the information and consultation – it should be done in a ‘timely fashion’ (Recital 14, 22 and 23) and with ensuring good quality of content. All in all, in brief, the directive is about ensuring workers’ access (via their representatives) to information and consultation on transnational decisions and developments.

Inherently, any test of effectiveness of improved access to information and consultation is interlinked and must include the dissuasive effect of sanctions that threaten potential perpetrators for obstructing the achievement of this goal. The latter is valid since after all, a penalty will most certainly be effective in ensuring improved information and consultation if/when it has the ability to dissuade potential offenders from violating the law (ibid.). At the same time effectiveness of the sanctions is interlinked with their proportionality, which can be described as a ‘relationship between the seriousness of the offence and the size and type of the penalty ‘ (ibid.).

Measuring effectiveness of sanctions represents a significant challenge. In view of lack of any quantitative computation fit for this purpose several approaches are thinkable. Firstly, one could follow the idea suggested by the European Commission to look at the level of application of sanctions (problematic to measure in itself): ‘some evidence can be derived from input factors, such as the resources dedicated by a country to application of sanctions, or output factors such as the number and level of sanctions applied. For example the number of sanctions applied in different Member States (...). Some Member States have not applied any sanction for more than two years’ (European Commission 2010b: 8). The Commission rightly points out to the possible reason of ‘absence of infringements’, yet at the same time it points out that ‘it could be due, in part to violations not being detected’ (ibid.). It is all the more suspicious that some Member States with comparable financial sector have applied sanctions to a considerably varying degree (ibid.). The situation resembles the one in the field of EWC information and consultation where in some Member States there have been no court cases at all, while in others worker representatives sought court resolution on several occasions. It seems that this has to do not only with resources devoted to enforcement by the national authorities, but more with the overall facility of access to courts, resources and legal certainty that EWCs enjoy to a varying degree in different Member States.

Secondly, a benchmark in approximating the effectiveness of sanctions can be established by means of relationship of this function to proportionality and dissuasive character of punitive measures. Since none of the EWC directives ever included a clear statement on the fact that decisions taken without meaningful and proper involvement (information and consultation) of the workers are null and avoid an inference can be drawn that the legislator laid emphasis on prevention or general deterrence rather than punishment. Consequently, evaluating the deterrence potential of sanctions for EWC law violations can be recognised as the crucial factor in determining the effectiveness thereof. In other words, testing whether penal measures foreseen for violations of EWC obligations can ex ante put potential violators off of deliberately taking actions and decisions without respecting the worker representatives’ prerogatives to being informed and consulted can be adopted as an indirect test for the effectiveness of punitive measures.

Due to the specific nature of workers’ rights to information and consultation one could, however, go further in describing which characteristics of sanctions are also necessary for them to be effective. Similarly to postulates voiced with regard to functions of e.g. environmental law (ibid.) it is justified to argue that punishing the perpetrator does not represent a sufficient remedy, as the harm done to the collective of workers persists even if a company is ordered to pay a financial penalty. Taking this into account one could argue that with regard to information and consultation laws the function of restoring the original order (‘restitutio in integrum’) should be taken into consideration when designing sanctions that meet the requirements of Recital 36
of the 2009/38/EC 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 to repeat the process with the proper inclusion of information and consultation procedures are a good though relatively isolated cases.

4.3.2. Dissuasive character/potential of sanctions

Dissuasive potential of sanction is a function originating from the theory of deterrence. The theory’s main argument is that the prospect of punishment should be sufficient to prevent future instances of the offense (see Nagin, 1998, for a review). The deterrence considerations have been present in the European law doctrine since the 1980s when the ‘well-known equal treatment cases of Von Colson and Kamann v Land of North Rhine Westphalia
 Case 14/83 [1984] ECR 1891 and Dorit Hart v Deutsch Tradax GmbH
 Case 79/83 [1984] ECR 1921 hosted the elaboration of the rule that national sanctions must provide a real deterrent effect against breach of Community law’ (Ward 1995: 209).

The deterrence theory is generally grounded in the assumption that the potential criminal, like other citizens, is a rational actor (Carlsmith et al. 2002) that 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 into 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 a swift decision making in e.g. a merger case. If the sanction for the violation of law is insignificant/inferior to the benefit of keeping the information about e.g. a merger obscure from the public including the workers such a multinational company is prone to being tempted into ignoring the information and consultation obligation. In other words, if the sanction is not significant enough it does not represent a sufficient deterrent and thus some companies might consider ‘buying the violation’ if it is threatened only by an insignificantly low financial penalty (see also section 3.5 on Financial penalties for corporate violations). The European Commission is well aware of this threat (at least in some areas of legislation) as it gave testimony in the Communication ‘Reinforcing sanctioning regimes in the financial services sector’ (European Commission 2010b: 7) by stipulating that ‘Violations of financial services legislation can lead to gains of several million euros, in excess of the maximum levels of fines provided for in some Member States. A fine that is lower than the gains that can be expected from the violation is unlikely to have much of a deterrent effect (...)’ To ensure that a fine has a sufficiently deterrent effect on a rational market operator, the possibility that an infringement will remain undetected must be offset by imposing fines which are significantly higher than the potential benefit deriving from a breach (...). The Commission’s stance on dissuasive character of sanctions and its relationship to the benefit derived from breaking the law was reiterated in the statement that the benefit derived from a violation should be taken into account when providing for sanctions and that ‘a fine that is not considerably higher than the benefit that may be gained from a violation will have only a limited deterrent effect’ (ibid. 8). The severity of sanctions as an important factor in determining the dissuasive potential of punitive measures is therefore to be considered as a relative quality defined in relationship to the possible perceived reward and risk of being detected and prosecuted: ‘Indeed, when sanctions applied across the Union are not sufficiently strict or their level is particularly low even for the most serious infringements, there is a high risk that they will not have a sufficiently dissuasive effect, as the perceived reward from the illegal behaviour will far outweigh the real risk.’ (European Commission 2010b: 9). All in all, it is clear that the European Commission supports the view that the level of fines is a crucial factor determining

92 Case 14/83 [1984] ECR 1891.
the national authorities’ capacity to meet the standards of providing for effective, proportionate and dissuasive fines94.

As Faure (2010: 260) points out consideration of the deterrent potential of a sanction should not be made in isolation from other factors such as the probability that the violator gets apprehended and that the case will be prosecuted (in case of EWC rights that the worker representatives will bring a case to court and launch litigation). He also notes that ‘since the probability of a sanction being imposed is usually less than 100% the expected cost (probability multiplied with the sanction) is usually substantially lower than the sanction which is ex post actually imposed’ (ibid.). This allows concluding that in order to be assessed as effective and dissuasive ‘sanctions should be of such type and magnitude that the expected costs are higher than expected benefits to perpetrator’ (ibid.). A policy relevant guideline is thus a logical consequence of the latter finding: penalties to be imposed are strongly linked to benefits that a violation might bring to the perpetrator; they are, however, also linked to the harm they can represent to society or community: the larger the damage to the community/affected group or stakeholders and the larger the potential benefit to the offender the higher the expected sanction will have to be to act as a deterrent and dissuade from committing the crime (compare Faure 2010: 260). Finally, taking into account the main assumption that any perpetrator is rational and acts according to the cost-benefit analysis, an optimal sanction (in terms of its deterrent function) must include also the probability of being apprehended, the probability of being brought to court (and/or prosecuted if such a possibility is foreseen) and convicted.

Statistics on the probability of companies being brought to court and convicted for EWC laws violations are not available. Nonetheless, the number of known EWC court cases in all the EU27 countries throughout the almost 17 years since the entry into force of the EWC directive 94/45/EC is relatively moderate and amounts to approximately 50-60 cases altogether (for details see Dorssemont and Blanke 2010, Part A). The moderate number of litigation cases seems to result, among other, from the fact that that workers representatives (either individually or as EWC) often lack the resources and information to start the proceedings. At the same time multinational companies have incomparably more means at disposal, which compares a certain imbalance of which all parties are perfectly aware. Since in many countries companies’ potential responsibility for violations is limited only to financial penalties (for an overview see next section and Annex 1) it is possible that the cost-benefit analysis being fundamental for the worker representatives’ decision to launch a lawsuit is concluded with a simple ‘it’s not worth the hassle’. In this way the perception of inevitability of sanctions (an important factor in the general deterrence function; Kaczmarek 2006: 450) for violations of information and consultation laws is seriously tainted. Consequently, the dissuasive potential of the system of punitive measures is significantly weakened. As argued by various research another ingredient of the deterrence function if also making it known to the general public (Nalewajko 2009: 253; Braithwaite 1989), a factor more important for companies in some businesses than in others (e.g. in the environmental business the deterrent function of being stigmatised in the general public was found to be an important driver for respecting law, see Earnhart 2004: 62-63; similarly in financial industry, compare Karpoff and Lott 1993).

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94 European Commission (2010b: 12) clearly recognises the reasonable market operator theorem by Becker (1962 and 1968) and Carlsmith (Carlsmith et al. 2002) and thus recommends (with regard to financial market regulations, but also easily applicable to other fields of EU policy) that ‘In view of the large gains that could be obtained from violations of financial services legislation, the level of fines provided for by national law should be sufficiently high to allow national authorities to impose effective, proportionate and dissuasive fines. In order to dissuade a rational market operator from breaching the law, the possibility that a violation would remain undetected should be offset by a fine that could reasonably be considered to exceed the potential financial benefits that could be gained from a violation, even where those benefits are not capable not capable of calculation. This would be on the assumption that a rational market operator would take into account the likelihood of detection in deciding whether to commit an offence, and that not all infringements would be actually detected.’
Finally, it needs to be reminded that sanctions of the same level imposed on both natural and legal persons are unlikely to be sufficiently dissuasive for the latter.

A general conclusion from the above considerations might be that the deterrent function of sanctions is a complex variable comprising aspects such as severity, inevitability of the punitive measures, the latter dependent upon EWCs’ resources to access courts and pursue lawsuits, as well as courts factual jurisprudence that adjudicates sufficiently severe, rather than too lenient sanctions. If the potenatial sanctions are not sufficiently deterrent the risk is that enforcement of information and consultation rights will be undermined and the fundamental worker right to information and consultation trivialised\(^\text{95}\) (compare Faure 2010: 262). It is not a theoretical, but a real threat: in the environmental law execution it was found that when the sanctions (fines) are too low a ‘perverse learning effect’ occurs (Faure 2010: 263). This learning effect’s mechanism is that companies that violate the law once and experience that sanctions are not severe enough are inclined to commit crimes again, knowing for a fact with the benefit of hindsight that the punitive measures are lower than could have been initially expected. Of course in terms of policy recommendations the approach must be differentiated as not all violations of law are committed intentionally and involve lack of information rather than bad will. Admittedly, this might be the case with some cases of company measures and/or decisions with a social impact on workers where the implications are not clearly manifested, indirect or complex and thus the extent and timing of information and consultation processes blurred. As Faure (ibid.) argues (with regard to environmental law) such a differentiated approach could involve different measures for the calculated crime by the Becker-type perpetrators against whom deterrence could be the primary weapon, and a separate set of sanctions for companies violating the law because of the mere lack of information. Faure argues that such an approach can be effective, yet it might occur problematic in view of the fundamental legal principle ignorantia iuris nocet that does not allow shunning off responsibility due to being ignorant about a law’s existence.

4.3.3. Proportionality

Proportionality of sanctions can be defined as a relationship between the infringement and/or its aspects (such as type, severity, harm/damage, wilfulness, etc.) and the type and magnitude of punitive measures. As such proportionality is one of general principles of Union law (de Moor- van Vugt 2012: 35; Tridimas 2006) and as a rule anchored in the foundations of the EU, i.e. in Art. 13 para 2 TEU it is a leading criterion for EU and Member States actions it is under review of the ECJ. In reviewing proportionality various degrees of strictness are applied to different policy areas, with most intensive tests administered when fundamental rights are at stake (de Moor- van Vugt 2012: 36; case 44/79 Hauer [1979] ECR 3727)\(^\text{96}\)

Faure (2010: 264 ff.) argues that there are two major approaches to applying proportionality to violations of law:
1) An economy based approach according to which severity of sanctions can be determined on the basis of economic analysis of the perpetrator’s capacity to pay the fine. In other words, the bigger the financial ability of the perpetrating

\(^{95}\) Of course the question of compliance with regulations and incentives for non-compliance is a very complex one and its thorough examination is beyond the scope of this paper. In this context, it seems worthwhile to point towards a phenomenon of a relatively high compliance with norms not withstanding low expected sanctions known as the Harrington paradox (more on the issue: Faure 2010: 262; Harrington 1988 as well as Harrington and Harford 1991). The latter is modified by the companies’ experience and subjective evaluation of the probability and severity of the sanction (see Faure 2010: 263 and Rousseau 2008).

\(^{96}\) At the same time it needs to be noted that doctrine of proportionality (of penalties) is most developed in competition law
company the higher the fine. Such an approach seems to satisfy the popular feeling of justice, yet it also suffers from the disadvantage of disconnecting the sanction from the factual harm done by the violation. Therefore it is argued that the so called ‘marginal deterrence’ needs to be taken into account too. The doctrine of marginal deterrence argues that if relatively minor violations would be endangered with major penalties such a system would provide incentives for the potential perpetrators to drop all restraints and go directly all the way to committing more/most serious crimes.

2) An approach based on differentiation between the nature and type of infringement and corresponding penalties. Within this approach 4 basic models developed with regard to environmental law (proposal by Faure 2010 and Faure and Visser 1995) are thinkable as relevant for the violation of information and consultation laws:

a. Model I ‘abstract endangerment’ focused on penalising the very fact of breach of legal norms/regulations irrespective of the fact whether actual harm or threat of harm occurred;

b. Model II ‘focused on both the breach of legal regulations and the proof that the illegal activity caused harm or threat of harm (presumed or actual);

c. Model III focused on punishing ‘concrete harm crimes with administrative predicate’ and requiring proof of actual harm;

d. Model IV focusing predominantly on the harm to stakeholders (workers and worker representatives) regardless of the violation of underlaying regulations.

Adopting the latter approach which divides sanctions according to the nature and type of violations and putting it in context of the actual (or potential) harm caused by the infringements seems to allow an extensive degree of proportionality. In this sense it also allows to punish violations according to the importance of interests at stake (either administrative or factual harm). Moreover, such type of ranking is capable of including the element of the mental state of perpetrators and an according differentiation between violations committed negligently or wilfully (ibid.).

Multifaceted as it may be, the system of proportionality testing at the same time presents itself as the most complex and, sometimes, awkward to use, too.

4.4. Sanctions and their characteristics according to the European Commission

When trying to determine what is meant by the European legislator (the Commission) by ‘effective, proportionate and dissuasive sanctions’ one should not simply accept that the EWC directives do not provide any specification in this regard, but seek for guidelines in other acts and official documents that might provide useful hints about the content of these criteria. The following section looks at such guidelines firstly in European institutions’ official documents and, subsequently, in jurisprudence of the European Court of Justice.

Firstly, in pursuit of relevant sources it seems worthwhile to refer to the European Commission’s Communication (2010) 716 on ‘Reinforcing sanctioning regimes in the financial services sector’ (European Commission 2010b). Admittedly, this communication even remotely does not refer to sanctions for breach of information and consultation rules. However, it is being quoted here to demonstrate that the European Commission is not consistent in its denial of providing more detail concerning the meaning of ‘effective, proportionate and dissuasive’ sanctions and claims a mandate to intervene in the field of consistency and efficiency of national systems of enforcement of EU directives. Because it would be difficult to argue that the protection of rights and interests of stakeholders in financial markets is more important than safeguarding fundamental rights (such as the right to information and consultation) it seems that explaining the European Commission’s
approach (below) and applying the same guidelines to the area of protection of rights of workers is in this case justified.

The Communication (2010b) 716 provides valuable instructions on its involvement into scrutinising the enforcements systems of financial market regulation that are of general applicability. Firstly, by means of reference to an earlier report on financial supervision it recognises that ‘supervision cannot be effective with weak, highly variant sanctioning regimes. It is essential that within the EU and elsewhere, all supervisors are able to deploy sanctioning regimes that are sufficiently convergent, strict, resulting in deterrence’ (par. 201; European Commission 2010b: 2). The important element of the Commission’s view in this regard is that excessive divergence can be detrimental as well as the insistence on ‘sufficient’ convergence of the national punitive systems. This approach and statements on the degree of heterogeneity of implementation seem to be at stark odds with the European Commission’s views in the Implementation Report on European Works Councils from 2000 (European Commission 2000). It seems indeed the case that the European Commission’s position in this view evolved, or at least differs among various fields of legislation. An interesting point in case is the European Commission’s approach to financial markets regulation (European Commission 2010b). The Commission indicates there that the ‘financial crisis has put into doubt whether financial market rules are always respected and applied as they should be across the Union’ and that ‘[l]ack of enforcement of EU rules in one Member State may have significant implications for the stability and functioning of the financial system in another Member State’ (ibid. 2); while the correctness of these statements cannot be argued with it occurs as a relevant question why has the European Commission been less reactive with regards to similar signals coming from the field of social legislation field (Eurofund 2009; European Parliament 2007; reports from ETUC and EESC indicating shortcomings in the field of enforcements, see Jagodziński 2009)? The European Commission should be praised for the decisive declarations in the communication stipulating that

- ‘Ensuring proper application of EU rules is first and foremost the task of national authorities (…) but national authorities need to act in a coordinated and integrated way’ (ibid.);
- ‘Efficient and sufficiently convergent sanctioning regimes are the necessary corollary to the new supervisory system’ (ibid.);
- ‘(…) a proper enforcement of EU legislation requires that all national authorities have at their disposal appropriate sanctioning powers’ (ibid. 3);
- ‘the existing legal framework, Member states enjoy considerable autonomy in terms of choice and application of national sanctions. However, this autonomy should be balanced with the need for effective and consistent application of European law’ (ibid. 5);
- ‘In general, competent authorities will only be able to impose a sanction that is optimal in terms of effectiveness, proportionality and dissuasiveness, if they have a wide range of different sanctioning powers’ (ibid. 6);
- ‘Some competent authorities cannot address administrative sanctions to both natural and legal persons’ (ibid. 8);
- ‘(…) divergences in sanctioning regimes may create distortions of competition in the Internal Market. If sanctions applied in different Member States for similar infringements are considerably different, financial institutions could be tempted to engage in regulatory arbitrage when deciding on their place of establishment or the location of branches in order to benefit from the least stringent sanctioning regimes’ (ibid. 9);
- ‘In the Commission’s view, for violations of each key provision of an EU legislative act, compliance with which is essential for the practical effectiveness of the act and therefore for the well-functioning of financial markets, a core set of administrative sanctions should be provided in all Member States. Such sanctions should be of a nature so as to allow the competent authorities to impose, in each specific case, a sanction that is likely to be optimal in terms of effectiveness, proportionality, and dissuasiveness.’ (ibid. 11);

• ‘Sanctioning regimes will better prevent other potential offenders from future violations, if those are aware that the sanctions provided for by law are actively applied and enforced and there is a real risk that violations will be detected and sanctioned by the authorities.’ (ibid. 12)

The pursuit of these goals, quite rightly, deemed a sufficient reason ‘to conduct a stocktaking exercise of the coherence, equivalence and actual use of sanctioning powers in the Member States, in order to help determining whether sanctioning regimes are sufficiently equivalent’ (ibid.). The European Commission also bases its mandate to pursue the agenda of ‘strengthening sanctioning regimes’ and promoting ‘convergence of sanctions across the range of supervisory activities’ (ibid.) on ‘studies carried out by the Committees of Supervisors [that] cover the sanctions applied by the Member States for violations of national rules transposing some of the most important EU directives applicable in the banking, insurance and securities sectors’ (ibid.). One cannot help but notice that similar goals and mandate that would justify a need for similar exercise exists in the field of information and consultation rights (including those of EWCs).

The said Communication includes also an explanation of the key term ‘effective, proportionate and dissuasive’: ‘(...) sanctions can be considered effective when they are capable of ensuring compliance with EU law, proportionate when they adequately reflect the gravity of the violation and do not go beyond what is necessary for the objectives pursued, and dissuasive when they are sufficiently serious to deter the authors of violations from repeating the same offence, and other potential offenders from committing such violations.

Whether sanctions meet these requirements, depends on a number of factors, such as the nature and level of the sanctions provided for by law, the institutional and procedural settings governing their application, the effective detection of infringements and the actual application’ (ibid. 4).

A similar understanding of qualitative requirements concerning sanctions was expressed by the EESC in its Opinion 2001(553) where it stipulated:

‘3.2 Sanctions can be considered effective when they are capable of ensuring compliance with EU law, proportionate when they adequately reflect the gravity of the offence and do not go beyond what is necessary for the objectives pursued, and dissuasive when they are sufficiently serious to deter the authors of violations from repeating the same offence, and put off other potential offenders.’ (page 3).

These qualitative criteria of sanctions determine, however, also minimum standard and demarcation lines between implementation autonomy and minimum requirements for the Member States in terms of implementation:

‘3.3 Under the existing legal framework, Member States enjoy considerable autonomy in terms of choice and application of national sanctions. However, this autonomy should be balanced with the need for effective and consistent application of European law.’ (ibid.).

This understanding of the relationship of implementation autonomy and respecting some non-negotiable minimum standards concerning sanctions is also shared by the European Parliament (2007). When providing comments on collective redundancies directives within the context of impact assessment of EU directives in the field of information and consultation the Parliament pointed out that:

‘Even though the directive leaves sanctions to the discretion of the Member States, the European Court of Justice has ruled that certain sanctions are inadequate and must be tangible for the employer, i.e. have a certain level of severity, and national governments have been obliged to modify their arrangements, including in Germany and the United Kingdom.’ (European Parliament 2007: 11).

It seems that the European Commission is aware of these requirements and intends to apply them in the ‘Fitness check’ on the information and consultation framework Directive
The three directives were subject recently to a ‘fit for purpose’ test on behalf of the European Commission (Deloitte, 2012) which comprised analysis of the following aspects:
- relevance – the extent to which the content of the Directives addresses ‘the needs of employers and employees in the EU social market economy’;
- effectiveness – the extent to which the above needs are met in practice by the Directives;
- efficiency – the extent to which the needs are met in the most cost-effective way;
- coherence – the extent to which the needs are met in a comprehensive and compatible way.

Inclusion of the two criteria (effectiveness and coherence) relevant in view of the present study deserves praise. The final evaluation was presented by the European Commission in 2013 (European Commission 2013). It concludes that the directives are ‘broadly fit for purpose’ in terms of promoting a minimum level of information and consultation (I&C) throughout the EU/EEA, yet identifies specific problems with enforcement of these directives based on application of effectiveness considerations.

It is also important to note that the Commission considers sanctions as a term sensu largo (at least in this Communication) and ‘refers to “sanctions” as a broad notion covering the whole spectrum of actions applied after a violation is committed, and intended to prevent the offender as well as the general public from committing further infringements’ (ibid.). In this sense it supports and confirms the approach of the present study that considers e.g. a court declaration of invalidity (or in other words the arguably ‘natural’ consequence of null and void) of managerial decisions taken in violation of information and consultation rights as part of the national enforcement systems (see section 5.2). In this sense the Commission is ready to go to great lengths to protect financial markets from abuse and is not shy of proposing very severe sanctions with regard for non-observance or respective regulation: it points out that ‘in 6 Member States there is no possibility to withdraw the authorisation in case of violations of the market Abuse Directive’ and that ‘15 Member States do not provide for the disqualification/dismissal of the management and/or supervisory body in cases involving market manipulation’; it finds out that ‘[t]hose powers may be useful to effectively sanctions violations, and therefore prevent market abuse’ (ibid. 7). Such resolution in ensuring proper enforcement of EU directives and the decisiveness and level of specificity given to the Member States are most welcome, yet in stark contrast to preservative statements of representatives of DG Employment on the limitations of the European Commission’s authority to shape national sanctions in regard to the EWC directive 2009/38/EC (Jagodziński 2009).

Moreover, the European Commission’s review of the sanctioning regimes in the field of financial market regulation allowed it to find ‘divergences across Member States’ that ‘may stem from many factors including differences in the national legal systems of the Member States, constitutional requirements, the functioning of national administrations and the role of courts (administrative or criminal)’ (ibid.) – all being factors very similar to those found in course of the review of enforcement of information and consultation rights of EWCs conducted in the present study. Again, the European Commission showed a much welcome firmness and resolution by questioning whether the enforcement of financial regulation is fit for purpose, i.e. ‘whether sanctions are fully effective, proportionate and dissuasive’, whether the fact that existence of divergences as to the level of enforcement plays any role, and whether it can be accepted that in ‘some Member States no sanctions were applied for more than two years’ (ibid.).

Furthermore the Communication identifies a number of weaknesses in national sanctioning regimes of financial regulation that resemble problems identified in the present study of enforcement of EWC rights (ibid. 6 ff):
1) Lack of important types of sanctioning powers for certain violations;
2) Varying types of sanctions for the same type of infringement;
3) Significant variations in the levels of administrative pecuniary sanctions (fines) and in some of the Member States sanctions being too low. (for further details see section 3.5 in the present paper);
4) In the said communication the European Commission indicates also the
On these premises one could expect and demand that the same approach of the European Commission be applied to social legislation and the information and consultation rules. There seems to be no apparent reason to treat legislation on workers’ information and consultation differently and, thus, if the EU employs a decisive stance concerning enforcement of financial regulation it should be comparably bold in other areas, too. The latter is especially valid for EWCs which are an EU originating institution not known on national level before. This view is shared by authors of a study on ‘Impact Assessment of EU Directives in the field of “Information & Consultation”’ commissioned by the European Parliament (2007) who find that ‘[p]olitical pressures for improved governance are strong in relation to legislation in a number of policy areas at EU level – notably in relation to the internal market – but the arguments are not commonly heard in relation to social legislation, least of all labour law, despite general concerns expressed by the social partners about implementation on some Member States’ (ibid. : 6). The report points out also that the European Commission has been ‘less active in addressing enforcement procedures and sanctions’ than in pursuing simple infringement procedures.

4.5. Conclusions

In view of the above considerations the evaluation of the Member States obligations to transpose and comply with Recitals 35 and 36 (effective, proportionate and dissuasive sanctions) gains a new dimension. As a result the evaluation of the national implementation of those obligations should be respectively extended beyond the formal minima in order to consider the requirements, and criteria that sanctions need to meet in order to perform their designed functions. Trivial as it may sound the desired effect or objective of sanctions is punishment for violation of law. An effective sanction should thus provide for a punishment that is not only objectively effective and proportionate (the latter being subject to subjective evaluation), but also one that is perceived as such, i.e. is deterrent. All these elements together create a complex, interdependent and mutually influencing system; collectively they determine the sanction’s severity that needs to be high enough to be deemed a sufficient retribution for an offence.

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98The Member States must take appropriate measures in the event of failure to comply with the the obligations laid down in the Directive
Irrespective of the fact whether this policy recommendation will find its way into the next legislative amendment of the EWC directive or whether the European Commission will not go beyond a mere implementation report on the transposition of directive 2009/38/EC several dilemmas need to be addressed.

Firstly, the choice between financial penalties or incarceration of perpetrators. It needs to be pointed out that incarceration can be applied only to individuals acting as organs or representatives of companies. Financial penalties can be applied to corporate entities, i.e. legal persons. Also, importantly, when optimal dissuasion can be achieved equally through fines and prison sanctions (see above in this chapter) it is the financial penalties that are the preferred choice since they are less costly to execute than prison sanctions (Faure 2010: 266; Polinsky and Shavell 1979). On basis of the economic calculations many economists argue therefore against prison sanctions and why many have qualified financial penalties as the ideal sanction for corporate crimes (Faure 2010: 266). Arguably, however, the deterrent potential of financial penalties is lower for individuals in key decisional positions as their personal actions and decisions in case of conviction are warranted with impersonal (i.e. not their own) property, but that of a company; therefore, it is argued that incarceration due to its severity increases the deterrent potential of sanctions and fulfils the function of dissuasion better than financial penalties (Comey 2009). In legal theory, there is one more argument raised against financial penalties: in cases where the fines are extremely high they might exceed the company’s economic capacity to pay and cause insolvency; however, with regard to EWC legislation on national level this argument does not apply as according to the comparison of the amount of maximum fines potentially payable in individual Member States they are of a relatively small size compared to multinational companies’ revenues and profit. This could of course change if the legislators took into account considerations on the optimal penalty level according to which when determining financial sanctions' levels one needs to consider the deterrence potential and outweigh the low detection rate (see above in this chapter; also Faure 2010: 267). As long as this is not the case it is possible to argue that some mix of financial and prison sanctions be in place. Such systems can add substantially to expected costs for the perpetrator and thus are positively correlated with the deterrence potential of the sanction system at large (ibid. 268).

Secondly, it is pointed out that monetary sanctions can in principle have both an administrative and criminal character (Faure 2010: 267). Faure points out, however, that imposition of fines via an administrative procedure is less costly than via criminal proceedings (ibid.), since in the former the ‘threshold of proof’ is (usually) lower. Finally, there is an additional advantage to financial sanctions as they can be imposed by administrative authorities (in case of EWCs these are for instance labour inspectorates) according to a relatively simple procedure with relatively low procedural requirements concerning the ‘threshold of proof’. Not only are such proceedings cheaper and thus compatible with the economic calculus (amount of fine vs. costs of execution and imposition; Ogus 2009), but they are also (usually) quicker than full litigation at courts.

Thirdly, evidence from national EWC related litigation should be taken into consideration when discussing the effective design of a penalty system. As the ETUI project on EWC related case law coordinated by the author has shown (see Part A in Blanke and Dorssennmont 2010) the severity of financial sanctions seems to be of a relatively greater importance than the prison sanctions. This is due to the fact that the penalty of incarceration was not imposed in any of the known lawsuits in which a company was convicted and found guilty of breach of information and consultation measures. It seems possible that because of the severity and personal acuteness of incarceration this sanction (where available) has been so far not applied. In consequence, however, the main burden of deterrence is placed on the financial penalties. This mechanism does not seem to have been taken into account by many national legislators when implementing the EWC recast directive 2009/38/EC as the level of fines was increased only in the UK and Austria.

Finally, it is argued that dual administrative-criminal type systems of sanctions might be the most effective solution as due to the higher costs of criminal procedures state authorities
might be less inclined to prosecute information and consultation infringements (considered as minor compared to other breaches of workers’ rights); in such cases the possibility to penalise violations of EWC laws is offered via the less stringent administrative sanctions branch (compare Faure 2010: 268).

5.1. **Personal or corporate liability for violations of EWC law?**

The discussion on severity and legal responsibility for corporate wrongdoings has considered the question of who should be legally responsible for violations of law – an individual executive employee of company or the company as a legal person itself (see Clarkson 1998). On the one hand, one seems inclined to make a company responsible for corporate violations of law (see Sullivan 1996) but ultimately it is the individual within the company who is the culpable agent deserving punishment (Clarkson 1998). Further, Clarkson (ibid) argues that in utilitarian terms it is often raised that it is ‘the individuals within the company who are most amenable to deterrence in that fear of prosecution and loss of employment and income will prompt such persons into greater care and vigilance’. To substantiate his claims he refers to an example of court case before the British Kite and Others⁹⁹ in which while the company was fined £60,000, Peter Kite (the owner) was sentenced to three years’ imprisonment – presumably a greater deterrent to other persons running similar types of businesses (activity centres) or performing similar functions. The argument goes that if it is an individual that has caused the harm, it is that person who should bear responsibility and be subject to sanctions.

On the other hand, however, there are arguments in favour of corporate legal responsibility for wrongdoings. In many cases it is the company itself, through its policies or practices, that has done wrong and thus prosecution and punishment should be directed at the real wrongdoer (Clarkson 1998). Furthermore, in many cases there are problems with identifying a concrete individual who is responsible for violations of law as it might be a conjunction of the practices of several individuals, all acting in compliance with a company’s procedures. Moreover, it should not be forgotten that in multinational companies complex structures with blurred responsibility distributed at many different layers within the corporate hierarchy are a commonplace making it difficult, if not impossible, to determine where the true fault lies (ibid.). Finally, it should not be forgotten either that ‘one of the main objects of corporate criminal liability is to ensure that companies improve their work practices’. Consequently legal responsibility of companies, rather than individuals, can provide the necessary impetus to enterprises to improve their practices. In this sense, in cases where a successful prosecution would be aimed against an individual, rather than a company there would be little incentive for the latter to remedy their practices and simply cheaper to employ another ‘vice-president responsible for going to jail’ (Coffee 1981).

An argument against corporate responsibility is that with larger companies financial punishment is, in essence, punishment of shareholders, creditors, and employees who might be made redundant and the public who will have to meet the cost of increased prices (Clarkson 1996: 562). The latter argument seems to apply, however, only to the highest, most severe fines imposed on multinational companies and thus does not seem relevant in the discussion about corporate violations of EWC laws. In case of EWCs it seems that one can also safely refute the argument that big multinational companies suffer damage to their reputation that impacts on their consumer perception and/or share value. The latter, yet again, according to some scholars serves as an argument in arguing that it is thus the individual sanctions that can serve any useful purpose (Khanna 1996: 1500).

In practice, however, no case of incarceration of an individual for violation of EWC laws has been documented (at least none was found in frames of the earlier ETUI project on EWC related case law; see Blanke and Dorssemont 2010). Consequently, in reality no empirical evidence seems to exist that would support or verify the hypothesis that existence of

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personally applicable penal sanctions, due to their (perceived) increased severity, ensures a specific national laws’ compliance with the requirement of Recital 36 of the EWC recast directive. As a result, it should be pointed out that severity of sanctions is not necessarily automatically synonymous or equivalent to the criteria for sanctions stipulated in art. 11.3 and 11.4 of the Directive 94/45/EC and in the Preamble of directive 2009/38/EC (Recital 36). Penal sanctions for individuals seem to be burdened with one additional, generally known flaw: they make an individual personally responsible for actions of a company he/she works for and represents. Nonetheless, on the other hand, EWC members are also individually responsible for breaches of confidentiality or other violations they might commit while serving on the EWC. In this sense personal responsibility of members of company management is in a way justified and represents a balance to the type of sanctions threatening worker representatives. Admittedly, however, since EWCs, despite their collective character do not have legal personality but in few Member States predominance of personal sanctions on part of worker representatives seems justified. Nevertheless, since in case of EWCs relationships are established between collective parties (in some cases both of them can be legal persons) it seems plausible (though not without reservations100) that the efforts of ensuring dissuasive, proportionate and effective sanctions should be focused on making those collective parties responsible for any violations of law, at least as far as the core of the EWC rights and obligations is concerned. Hence in line with Clarkson’s arguments (including criticism of the ‘identification doctrine’, Clarkson 1998) it seems plausible to argue that in case of violations of EWC laws by the company it should principally be the company who bears responsibility and is held liable (at least in addition to personal liability). In this sense probably the most relevant to corporate violations of EWC laws would be the proposed corporate mens rea doctrine (ibid.) treating the company as a person to whom actions and responsibilities can be assigned. Contrary to the above raised argument that companies can act only through actions of their managers or employees the corporate mens rae doctrine accepts the fiction of ascribing a quasi-personal responsibility to by nature impersonal subjects such as companies. The justification for making such a link lies in the fact that these companies, by means of using legal fiction, are also considered legal persons and thus can be held liable as persons. This doctrine seems to be applied in all the Member States imposing financial penalties in case of EWC law violations.

It seems that given the above advantages and disadvantages of both approaches (i.e. individual or corporate liability) an optimal solution would be a system applying both types of legal responsibility. This would also be in line with the European Commission’s own policy recommendations for the field of financial markets regulation in which it finds that

‘sanctions should be imposed on the individuals responsible for a violation and/or on the financial institution to the benefit of which those individuals are acting when committing a breach. Sanctioning the individuals responsible for a violation may be more appropriate where a violation is exclusively their responsibility. On the other hand, where that individual is part of a financial institution, fining the financial institution is frequently appropriate if the person responsible acted to the benefit of a financial institution. It could also encourage financial institutions to take the organisational measures and provide the staff training necessary to prevent violations.’ (European Commission 2010b: 13).

5.2. Can illegal actions produce lawful effects?
Declaration of nullity and invalidity of managerial decisions taken with violation of EWC laws

So far the analysis of sanctions for violations of EWC laws was pursued solely from the point of view of effectiveness, proportionality and dissuasive potential of fines. However, as is

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100 In fact researchers dealing with corporate misconduct claim that crimes can only be committed by human, moral agents (see Sullivan 1995; Clarkson 1996) and that a company, since it is not a living organism, as a collective cannot do or refrain from doing something on its own. One might wish to attribute their wrongdoing to a company (see Sullivan 1996) but ultimately it is the individual within the company who is the culpable agent deserving punishment (Clarkson 1998).
argued in literature multiple functions of penalties can be distinguished, among other: a) deterrence/dissuasion (preventive function); b) retribution (retributive function); c) restoration of harm caused (restorative or reparative function).

While the focus so far has been on the preventive and retributive functions of sanctions for violations against EWC laws the retributive aspect of punitive measures deserves some deliberation too.

The debatable effectiveness and dissuasive potential of the currently available (financial) penalties in many of the Member States (see e.g. national reports to the Eurofund 2009 study) seems alone to be a sufficient reason to consider other possibilities of handling violations of EWC laws. It is argued that one of the most severe consequence of breaches of law on workers’ information and consultation can be the acknowledgement by court that an illegal decision cannot produce legal results. In other words, the court by declaring actions and decisions unlawful, as a consequence, nullify the measures implemented by management without respecting the procedures of information and consultation as well as any of their legal consequences (Dorssemont / Rigaux 1999: 378). In fact none of the implementation laws transposing the EWC directives has ever made such possibility of declaratory nullity and voidity of decisions taken in breach of law available; neither did any transposing legislation on EWCs provide for an automatic constitutive recognition of decisions taken in breach of EWC legislation as null and void. Nevertheless, there is precedence and evidence in national jurisprudence concerning such situations.

Firstly, such a declaration (restorative means) was applied in the Gaz de France – SUEZ merger case (see Brihi 2010), where a merger of the two companies taken by the management without respecting employee rights to be consulted was initially put on hold by the French court via an injunction on and finally declared null and void on the basis of a principle that violation of those employee rights results in decisions being unlawful. Similarly, in the (in)famous court case known as Renault-Vilvoorde (1997) the French and Belgian courts eventually declared the closure of the Vilvoorde plant unlawful and null and void (for more details see: Clauwaert et al. 2006).

Based on the results of research on hitherto jurisprudence it is difficult to ascertain if such declarations of decisions being null and void are available elsewhere than in France. Research on court capacity to declare managerial decisions taken in breach of information and consultation provisions null and void reveals that such possibility exists and has been applied in practice with regard to violations of workers’ rights on national level. A non-exhaustive list of countries and provisions where the declaration of null and void occurs comprises:

a) Spain (Fanning 2012) and the Netherlands;
b) in Croatia where court declarations of null and void are explicitly available in the Labour Code with regard to national level of information and consultation rights: Art. 149 (Duty to consult before rendering a decision) stipulates that ‘(12) A decisions rendered by the employer in violation of the provisions of this Act governing consultations with the works council is null and void’. However, this provision of the Labour Code does not seem to refer directly to EWCs that are governed by a separate section (Art. 164 ff) and thus it might appear problematic to apply it per analogiam;
c) A similar situation exists in Germany, where works councils have co-determination rights and, by means of an application for an injunction can stop the employer from implementing any decisions taken without their agreement; in case the employer is in breach of its mandatory co-determination obligations, any measures taken are null and void (Fannigan 2012). The same rights do not seem to apply (at least directly) to decisions taken in breach of EWC’s right to information and consultation (different from co-determination). The importance of availability of such a court authority was highlighted in 2011 by Hanna Schelz from the German Federal Ministry of Labour in Bonn who pointed out that an early involvement of EWCs in decision making processes was important; she also expressed the view that the possibility of penalties after the violation has taken place was not as useful for the EWC as a pre-emptive use of legal possibilities (EBR Newsletter 2/2011). In her statement Ms. Schelz obviously could not declare whether such suspensive injunctions would be used by judges, yet she did not exclude that one day they would find their way into practice (ibid.).
d) In the Czech Labour Code it is recommended to the court to take into account, even without a motion the nullity of ‘a legal act (…) that contradicts or circumvents the law and that concurrently does not comply with the fundamental principles of labour relations (…)’ (Section 19 (d)). At the same time a reservation is made that ‘where the law only requires a prior consultation of a certain legal act with the competent agency, the legal act shall not become null and void where it has not been consulted’, which seems to limit the possibility of applying it to EWCs.

e) Italy, where a ruling by the Corte di cassazione on collective redundancy procedures under Article 4 of Statute No 223/1991, which lays down the employer’s obligations to inform and consult the regional employment office and the rappresentanze sindicali aziendali, states that dismissals based on Article 4 are null and void if the statutory procedure, including information and consultation with workers’ representatives, has not been followed (Judgment No 6759 of 26 July 1996) (European Commission 1998: 6).

f) Reportedly, with regard to the implementation of the collective redundancies directive in some Member States (Belgium, Greece, Spain, Italy, Hungary, Luxembourg, the Netherlands, Austria) the intended dismissal of workers may be set aside (declared null and void) by local courts if the legal conditions (the period of notice and the quality of the information provided) have not been respected (European Parliament 2007: 12);

g) Even though there are no specific provisions neither in the Directives 2002/14/EC, nor Directive on collective redundancies 98/59/EC and Directive 2001/23/EC on transfers of undertakings concerning the sanction of nullity in the I&C ‘Fitness Check’ final report (European Commission 2013) the Commission advanced a proposal:

h) ‘In other countries sanctions seem particularly effective. It is possible, for example, judicially to declare as null or void any employers’ decisions which are taken without prior I&C’ (ibid. 37). Overall, it has been concluded or endorsed by the European Commission (or by the European Parliament) that ‘the effective protection of employees’ rights through the nullity of employers’ decisions taken in breach of the I&C requirements (enforcement)’ constitutes part of the response to the above identified shortcomings, yet such proposals were not upheld by the European Council (European Commission 2013: 37) and are unlikely to be translated into binding rules capable of remedying the situation.

Secondly, the limitations of the most classical functions of sanctions (i.e. of the dissuasive and retributory function) were discerned by the British government in course of preparation for the transposition of directive 94/45/EC. In the ‘EWC Consultation Document’ (BERR 1999) it was stated that in order to meet the requirement that the enforcement arrangements to be applied by the Member States are ‘effective, proportionate and dissuasive’ (ibidem: 36) the EAT (Employment Appeal Tribunal) ‘may make an order requiring the management to remedy a failure to fulfil its obligations under the terms of an EWC agreement’ (ibidem: 37-38). At the same time, however, the BERR showed an incoherent approach as it specified that such an order may not have the effect of suspending overturning company transactions which management has already entered into.’ (ibidem). The latter suggests thus that the EAT was considered to have indeed the power to issue injunctions, yet they could not touch on the core of the EWC rights to information and consultation, or to require companies to suspend decisions in clear breach of EWC rights and to order restorative means.

It seems that the European Commission already in the past planned on forcing the principle of fraudulent agreements in the area of workers’ information and consultation being null and void, but lacked the necessary political force to encode it in a binding form due to resistance from the ultimate instance of the European Council (see e.g. European Commission 2013: 37). With regard to the collective redundancies directive the European Commission’s original proposal had been to allow proposed redundancies to be declared ‘null and void’ if the requirements of the directive were not met. However this was not accepted, even though most of the then Member States already had such provisions in place (European Parliament 2007: 10)
Due to the fact that neither the EWC directives\textsuperscript{101} nor, consequently, the national implementation acts are clear on the legal effectiveness of decisions taken in breach of information and consultation rights guidelines on the issue should be sought in higher universal EU law principles. The source of such principles are the decisions of EU courts that interpret the EU law. A relevant common rule was provided in the case ‘Comite Central d’Entreprise de la Societe Generale des Grandes Sources vs. Commission’\textsuperscript{102} decided by the European Court of First Instance that clearly and expressly stipulated that the non-respect of an information and consultation procedure vis-à-vis workers’ representatives by the Commission according to the concentration-regulation\textsuperscript{103} are to be considered null and annulled (Dorssemont / Rigaux 1999: 378). It seems eligible to hold the position that the same principle shall \textit{per analogiam} apply to managerial decisions taken with violation of information and consultation procedures provided for by the EWC law (ibidem). This view seems well founded, as it would be difficult to argue that the same right to information and consultation in a case of collective dismissal deserves different protection depending on whether it affects the national or European workforce. The latter case would incite questions about discrimination of parts of workforce in multinational companies and would be impossible to defend in view of the universal character of fundamental rights (as per European Charter of Fundamental Rights); moreover, it would, understandably, undermine the \textit{effet utile} principle of European directives on information and consultation with EWCs.

5.3. Problematic sanctions in EWC transposition – an isolated issue in EU directives?

In view of the above demonstrated record of arguably significantly varying solutions applied by EU Member States in implementation of the EWC directive(s) an important question arises whether the difficulties occur only with regard to this specific legislation or are they more common in (or even a systemic feature of) the broader field of EU social legislation at large. The state of play in the area of sanctions for violations of EWC rights and obligations are, surprisingly, not specific to the EWC directive, and resemble obstacles encountered in implementation of other EU directives in the social and labour law area. A couple of examples to substantiate this finding are provided below.

Firstly, similarly as in the wake of the recast directive 2009/38/EC Schoemann and Guedes (2012: 50-53) found that in case of implementation of directive 2008/104/EC on Temporary Agency Work
- penalties vary widely across the Member States with some of the Member States not implementing any (major) changes to the existing system of penalties, considering it sufficient and appropriate and other reinforcing the already existing sanctions;
- there has been preference for financial penalties instead of criminal sanctions, with the former varying considerably across the Member States;
- the question of effectiveness, proportionality and deterring potential of sanctions has been an issue in some Member States (Greece, Germany, Portugal, Malta, Latvia).

Similarly to the present assessment of the implementation EWC directive the Schoemann’s and Guedes’s report ends with a critical evaluation of the transposition measures of the Temporary Work Directive revealing worrying trends witnessed in various member states, in which, for example, the transposition measures are unsatisfactory or non-existent, or where Member States have adopted a minimal interpretation of the provisions of the Directive (ibid. 9).

\textsuperscript{101} Directive 2009/38/EC only in the Preamble, Recital 16 insists that the member states provide for dissuasive, proportionate and effective sanctions. At the same time, the European Commission has explained on numerous occasions that it is a common practice not to stipulate specific sanctions in directive and that they are part of national transpositions.

\textsuperscript{102} European Court of First Instance 27/04/1995 T-96/92 (Comite central d’entreprise de la Societe generale des Grandes Sources vs. Commission, Jur., 1995, II-1213, no. 465.

\textsuperscript{103} Regulation No 2367/90.
Secondly, evidence on problems with implementation of enforcement measures is provided by a Eurofund study on the implementation of the 2002/14/EC directive (Donaghey et al. 2013) exploring recent experiences in the practice of information and consultation at national level (builds on the findings of the European Industrial Relations Observatory (EIRO) 2011 report entitled Information and consultation practice across Europe five years after the EU Directive). The study finds that ‘A key justification deployed by the Commission (from its November 1997 second-stage social partner consultation document onwards) was that an EU initiative to define a ‘general and consistent’ framework for I&C at European level was necessary to overcome a series of shortcomings in national and EU law. (...) For the Commission, the key national shortcomings included the facts that [among others] (...) sanctions for breaches of employees’ I&C rights were often weak (ibid. 6). In the same document problems with enforcement measures are reiterated and positions of social partners applying the legislation are explained:

‘In the transposition process, there was debate over enforcement issues in several Member States. In Austria and Germany, workers’ representatives hoped unsuccessfully that the Directive’s implementation (which the Austrian and German governments believed required no change to national legislation) might be an occasion for strengthening, respectively, sanctions on employers failing to comply with I&C legislation and the legal rights of works councils to enforce I&C. Greek unions saw the administrative sanctions used for infringements of I&C requirements as being ineffective, as did UK unions, which sought a legislative provision that would enable the effect of decisions made without proper I&C to be nullified.

From the other side of the debate, Italian employers’ representatives opposed the implementing legislation’s imposition of administrative sanctions on non-compliant employers, arguing that this would discourage some employers from opening a serious dialogue with unions on the rights arising from the Directive. Spanish employers complained of a lack of applicable penalties if employee representatives fail to observe confidentiality. UK employers had reservations about the identity of the statutory body chosen to adjudicate complaints under the implementing legislation, seeing it as too ‘union friendly’ (ibid. 33).

Also, lack of the sanction of annullment (declaration of nullity and voidity of managerial decisions taken unlawfully) was identified as a factor decreasing the efficacy of the legislation in question (ibid. 57). Furthermore, recurrence to the principle of subsidiarity by some EU Member States has been condemned as a form of legal escapism and source of a ‘wide variety’ of sanctions (ibid.).

In view of the above findings it comes as little surprise that the European Parliament itself concluded the report by stating that ineffective enforcement regulations were the core reason for diminishing the impact of information and consultation legislation:

‘From the scant evidence available, the legislation has not brought about a significant upturn in the quantity and quality of I&C bodies. While the Commission had sought to create a system where significant decisions taken without consultation could be annulled, the lack of meaningful sanctions in the legislation (...) have affected the overall efficacy of the legislation. (ibid. 2).

Thirdly, in the same report the European Parliament by pointing out with regard to the implementation of the Collective Redundancies (Council Directive 98/59/EC) reaffirmed its position that excessive recurrence to the principle of subsidiarity leads to inordinate diversity in enforcement measures, puts workers and employers in different countries into different legal situations and confronts them with various consequences of similar breaches of the same EU law:

‘In some Member States – Belgium, Greece, Spain, Italy, Hungary, Luxembourg, the Netherlands, Austria – the intended dismissal of workers may be set aside (declared null and void) by local courts if the legal conditions – notably concerning the period of notice, but also the quality of the information provided – have not been respected. In other Member States – the Czech Republic, Denmark, Estonia, Cyprus, Latvia, Lithuania, Slovenia, Malta
and Poland, as well as Bulgaria and Romania – on the other hand, financial penalties appear very limited, and infrequently applied. In Finland and Slovakia, the potential size of fines appear to be significant, but they are infrequently used. In the United Kingdom, on the other hand, many cases pass through the courts or other procedures. Ireland has recently strengthened its legal sanctions, and Portugal describes failures as ‘serious administrative offences’ that can justify significant fines.’ (ibid. 12).

The European Parliament’s report also pointed out that ‘The collective dismissals directive, and the related transfers of undertakings directive, have a volume of case law, which has covered, in particular, the need to increase the severity of sanctions to deal with case of non-compliance.’ (ibid. 56).

It is perplexing that the experience of implementation of the older directives on worker involvement (on e.g. collective redundancies and European Works Councils) did not suffice to avoid similar problems in transposition of the directive 2002/14/EC. As the European Parliament’s said document (2007: 14) reports the only amendment concerning the enforcement system that was adopted was a new ‘recital’ stating that ‘more stringent, dissuasive penalties and specific judicial procedures should be applicable in the case of decisions taken (a ‘replacement’ for the proposed amendment to the main body of the Directive that had been lost in the vote), This question has been handled similarly in the EWC recast directive despite the European Parliament’s (European Parliament 2007), earlier findings on problems with implementation of the 2002/14/EC Directive. As is rightly noted by the European Parliament’s report social partners views on that have been also split between the trade unions endorsing tougher sanctions and employers opposing them, despite factual evidence on violations and non-compliance resulting from excessively lenient enforcement systems in some of the Member States (ibid. 30).

Fifthly, considerations on effectiveness of enforcement systems were undertaken by the European Commission within the ‘Fitness check’ on the information and consultation framework Directive 2002/14/EC, Directive on collective redundancies 98/59/EC and Directive 2001/23/EC on transfers of undertakings. The final evaluation was presented by the European Commission in 2013 (European Commission 2013). It concludes that the directives are ‘broadly fit for purpose’ in terms of promoting a minimum level of information and consultation (I&C) throughout the EU/EEA, yet identifies specific problems with enforcement of these directives as there are ‘few judicial cases and court decisions’ and ‘in cases of non-compliance, low-level sanctions are occasionally imposed.’ (ibid. 22). Admittedly, the ‘situation varies from one Member State to another’ and also ‘across the three Directives’ (e.g. extremely few I&C-related jurisprudence on Directive 2001/23/EC) which amounts to the conclusion that ‘[i]t seems that there are (…) shortcomings relating to the enforcement of the national transposing legislation, which mainly falls within the competence of the national authorities.’ (ibid. 37). A common explanation proposed by the European Commission concerning the low number of enforcement measures in countries where there appear to be shortcomings regarding compliance comprises: ‘lack of necessary means and enforcement instruments; low priority given to enforcement of I&C requirements; and perceived length and costs of judicial proceedings.’ (European Commission 2013: 22). On top of that

‘[a]nother explanation is the perceived insignificance of sanctions.(…) Some Member States provide for administrative fines with minimum or maximum amounts which allegedly are not high.’ (ibid.).

Another finding of the ‘Fitness check’ evaluation is that ‘the potential of the I&C Directives has not yet been fully exploited due to shortcomings with regard to their effectiveness in practice’ among which ‘the effective enforcement of these rights in the event of non-compliance’ are listed (European Commission 2013: 38).

The above evidence raises questions concerning fulfilment of requirement of quality transposition of information and consultation directives ensuring effective worker rights. It is to be welcomed in context of enforcement the European Commission made the public
confession to its Treaty role as the Guardian of the Treaties and recognises the obligation and their limits confined to the Member States:

‘In the event of non-compliance in specific cases, the social partners may exercise their collective right and seek redress before the national enforcement authorities. The Member States have to ensure compliance with the EU Directives, attainment of their objectives and prevention of abuse, including circumvention of their requirements. Issues related to enforcement and sanctions have to be assessed and reviewed as appropriate at national level. While the Member States are allowed to make use of the Directives’ flexibility, they are in fact responsible for guaranteeing the effective application of EU law in practice.’ (European Commission 2013: 39).

What seems of absolutely crucial importance, however, is how the European Commission is going to apply this correct understanding in its actions towards the Member States not observing the above principles and whether it is going to act firmly where necessary against the Member States and with relation to the European Council.

Overall, it has been concluded or endorsed by the European Commission (and/or by the European Parliament) that ‘the effective protection of employees’ rights through the nullity of employers’ decisions taken in breach of the I&C requirements (enforcement)’ constitutes part of the response to the above identified shortcomings, yet such proposals were not upheld by the European Council (European Commission 2013: 37) and are unlikely to be translated into binding rules capable of remedying the situation.

The European Commission in its final conclusions insists that ‘(...) the low number of complaints and the limited data regarding their follow-up make it difficult to assess if sanctions are effective, proportionate and dissuasive in practice’, yet this inference seems too conservative and not enough inquisitive. The latter is due to the fact that (too) little attention seems to have been paid to the causes of infrequent litigation cases that might result exactly from the lack of feasibility of access to worker representatives. The latter hypothesis advanced in the present study also with regard to EWC (see Chapter 1) obviously requires further exploration in order to confirm the causal relationship between institutions of access to courts and frequency of litigation, yet seems a feasible explanation of the scarce number of information and consultation lawsuits.

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As has been demonstrated problems with implementation of EU directives in the area of enforcement at large and sanctions more specifically are not an isolated issue specific to EWCs, but a more common issue in the field of EU social legislation. As the European Parliament found (2007: 57) the variation in legislation ‘is is not just an issue of the quality of the procedures or structures, but of culture.’. It is difficult not to consent to the European Parliament’s general conclusion that ‘Research into the practical implementation of EU social legislation in the different Member States, and concern about the quality of EU governance in general, suggests that there is a need to put much more emphasis on implementation and enforcement policy once the EC is assured that the legislation has been effectively transposed.’ (ibid.)

5.4. Policy conclusions: is there scope for EU authorities intervention in the field of sanctions?

Given the above evidence on significant divergence of sanctions and enforcement regimes across the EU and the validity of European Parliament’s appeal for more emphasis on implementation and enforcement policy (European Parliament 2007: 57) it seems useful to
deal with the question whether there is legal scope for EU authorities to intervene more decisively into how sanctions are determined and enforced on national level.

### 5.4.1. Community’s general competence in the field of criminal law and policy

Before responding to this question with specific regard to workers’ information and consultation rights one needs to respond to the whether the Community has any general competence to set legal framework for criminal legislation at all? It is a broader debate which scope goes beyond the limit of this paper, yet a basic analysis of the Treaties provides a response to this query in affirmative. As defined in the Treaty on the Functioning of the EU (TFEU), the EU has three specific competences for criminal law and policy:

a) Setting minimum rules on specified types of crimes (so called Euro Crimes) based on Article 83(1)

b) Criminal law for the enforcement of EU policies based on Article 83(2), which provides for the EU’s competence to adopt common minimum rules on the definition of criminal offences and sanctions if they are essential for ensuring the effectiveness of a harmonised EU policy. On this basis the European Commission proposed on 20 September 2011 EU-wide rules to ensure minimum criminal sanctions for insider dealing and market manipulations (as criminal sanctions against market abuse);

c) Protection of EU public money based on Articles 310(6), 325, 85 and 86.

In view of the above competences the Commission in 2012 set up an expert group on EU criminal policy, composed of twenty high-level legal experts, academics and practitioners. The group was created following the Commission’s Communication published in September 2011 ‘Towards an EU criminal policy - Ensuring the effective implementation of EU policies through criminal law’ and its main task is to advise the European Commission and contribute to improvement of quality of EU legislation in the field of criminal law, in the light of the new rules of the Lisbon Treaty and the Charter of Fundamental Rights.

This paper’s focus is not on the general debate over the EU competence in criminal law and policy, but on more concrete examples of EU interventionism in this field that can be relevant for the discussion on the European Commission’s competence to ensure proper transposition of enforcement provisions in the EWC recast directive 2009/38/EC. Admittedly, so far crimes specified by the Art. 83(1) TFEU (terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption and counterfeiting of means of payment, computer crime and organised crime) are outside of the labour law related crimes. Even though Art. 83 TFEU does not cover labour law crimes, it covers protection against crimes against the EU Fundamental Rights (e.g. Art. 1, Art. 3, Art. 5); especially Art. 5 on ‘Prohibition of slavery and forced labour’ puts slavery and servitude that are common features of ‘trafficking in human beings and sexual exploitation of women and children’ (a crime defined by Art. 83(1) of TFEU) next to prohibition of compulsory or forced labour providing for a possible link to labour related crimes in general.

Evidence on such interventionism and guidance from the EU authorities (mainly European Commission) in the field of financial market regulation is discussed in the present report (see sections 4.4 and 5.4.3), but there is further content substantiating the European Parliament’s appeal for more emphasis on implementation and enforcement policy (European Parliament 2007: 57) that will be discussed below. The following section firstly provides an evaluation of the possibility and examples of EU legislative intervention into national enforcement and sanction regimes to demonstrate (against the European Commission’s statements with regard to the recast of the EWC directive 2009/38/EC) that the Commission does have and is competent to exercise a mandate in the field of punitive measures; subsequently, it goes on to discussing legal anchorage of such interventionism by means of referring to EU institutions’

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105 Ex Article 31 TEU. For more information please refer to http://ec.europa.eu/justice/criminal/criminal-law-policy/
5.4.2. **Assessment of possibility to undertake examples of EU interventionism into national enforcement and sanction regimes**

Attempts to provide enforcement measures to ensure proper application of EU law are not a new development and have been made gradually with increasing intensity as the Community competence in law-making expanded (see de Moor-van Vugt 2012). It is beyond the scope of this publication to present this evolution yet some examples will be used to show that the EU by means of the European Commission has developed a competence in the field of sanctions and enforcement measures and gradually claimed part of competence in this field from the Member States.

One of pieces of evidence substantiating this claim was the Council Regulation (EC, Euratom) 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ L 312). In this regulation the Council in order to defend the Union’s budgetary interests stepped forth to determine administrative measures and penalties by means of setting nature and scope of infringements as well as sanctions: ‘Community law shall determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility.’ (Article 1.3). In further articles it set periods within which punitive proceedings should be concluded as well as the levels of fines (Articles 4 and 5). With regard to administrative measures and Community competence to determine them it must be mentioned that the EU penalties have priority over national punitive measured if the former preceded the latter in time: the ECJ ruled that a Member State cannot lay down its own national penalties in case penalties of that type are already set out in detail in a Community Regulation (Case C-45/05 Maatschap Schonewille-Prins [2007] ECR I-3997; de Moor-van Vugt 2012: 9).

Further, it is useful to consider the European Commission’s own opinion that more EU level interventionism to ensure convergence of enforcement regimes is a worthwhile policy objective to pursue (European Commission 2010b: 10). As was argued above (see section 3.4.7.3.), Admittedly, again this opinion refers to the financial market regulation, but since workers’ rights to information and consultation have a treaty status of Fundamental Rights there seems to be no viable reason to apply any kind of grading to them; consequently, they should be treated equally and given the similar problems confronted in the area of labour legislation the financial market recommendations can be readily applied in the former. The similarity between the two areas lies also in the fact that as much as the ‘Commission considers these objectives [in the financial market regulation, RJ] can be better achieved through EU action rather than by different national initiatives, which would not be sufficient to achieve sufficient convergence’ (ibid.), the same applies to the EWC legislation and its enforcement: EWCs are an EU originating institution and a ‘foreign body’ in the vast majority of EU member states (apart from France and Germany, where comite de groupe or Konzernbetriebsrat or Gesambtbetriebsrat respectively had existed) and therefore the expected degree of European-wide convergence is higher and better justified than in case of other regulations. Therefore a similar suggestion as in the financial markets regulation proposal of introducing ‘a minimum common standard (…) set at European level on the key issues of sanctioning regimes’ begs consideration with regard to European Works Councils legislation and its application.

Based on the argument of subsidiarity and a claimed anchorage in the TFEU the European Commission’s recommendations for regulation of financial markets (European Commission 2010b) go as far as to propose concrete solutions and sanctions. When discussing ‘Appropriate types of administrative sanctions for the violation of key provisions’ in the framework of proposed approximation of laws the report mentions enforcement measures such as ‘For example, cease and desist orders and court or administrative injunctions’
[which] may be useful if there is a risk of certain types of violation being continued or repeated' or a rather severe and far reaching 'Withdrawal of authorisations [which] may be appropriate in case of recurrent violation of key provisions of the EU legislative acts' as well as 'Replacement of the managers of a financial institution' as 'a sanction to be applied in the case of serious wrongdoings in the management' (ibid 12). Indication is made also with regard to the height of administrative fines which 'in view of the large gains that could be obtained from violations of financial services legislation' should be 'sufficiently high to allow national authorities to impose effective, proportionate, and dissuasive fines' (ibid.). Admittedly, violations of information and consultation obligations in the EWC legislation may not provide comparably large gains as violations of financial market rules, yet still they might offer multinational companies considerable savings in time and money and incentivise to ignore the law (as was the case in e.g. the GDF-Suez merger case in France). The latter is not an unprecedented theoretical possibility: because in many Member States the full scope of sanctions for breach of information and consultation rights is not used the knowledge of the fact incentivises further breaches to an even greater extent. It is a common mechanism identified also in the area of financial market regulation breaches against which the European Commission considered 'whether there is a need to establish, for each category of administrative fines, minimum levels which Member States would need to respect when laying down the range of the fines foreseen in national legislations' (European Commission 2010b). Given the similarity of challenges posed by national jurisprudence in both areas consideration on introduction of similar measures in the area of EWC legislation could prove a useful stimulus for ensuring more coherent application of rights to transnational information and consultation.

On top of increasing severity of (financial) sanctions advocated by the European Commission (2010b) there is a further proposal with regard to financial markets that could be occur useful and effective with regard to breaches of information and consultation regulations. Namely, the European Commission sees as an important preventive but also punitive measure publication of public warnings and publication of sanctions for specific breaches of law (European Commission 2010b: 7). At the moment none of the Member States foresees any such measure for breaches of information and consultation rights of workers. Introduction of such a requirement could be an additional, yet potent complement to classical sanctions as it affect the multinational companies’ corporate image and could have an impact on corporate social responsibility profile of the perpetrators. If such measures are considered to be feasible to be introduced by the European Commission in the internal market field there seems to be no obstacle to refrain from applying them to often the very same companies for breaches of law in the social/labour field.

5.4.3. Legal anchorage of EU interventionism into enforcement and sanction regimes of the Member States

The question whether the EU has any competence to prescribe concrete sanctions or specify to the Member States the method of realisation of the obligation to provide for punitive measures that are 'effective, proportionate and dissuasive' is a multifaceted one. As institutional conflicts between the Council and the European Commission resolved by the jurisprudence of the European Court of Justice demonstrate (see below) it seems to be also a debate in development, not yet decisively concluded.

The European Commission on interventionism into national enforcement regimes in financial market regulation

The first aspect to consider is compatibility of any such EU far-going interventionism into national sovereignty with principle of subsidiarity as one of the foundations of the EU. To this question the view of the European Commission is that if [these objectives] specified in the Communication on reinforcing sanctioning regimes in the field of financial market regulation,
RJ cannot be sufficiently achieved by the Member States alone: in the absence of a common EU framework, national initiatives cannot ensure consistency in the reinforcement of sanctioning regimes. EU action seems therefore necessary to achieve sufficient convergence’ (European Commission 2010b: 11).

Further legal anchorage points beyond the principle of subsidiarity were named in the above mentioned European Commission’s Communication on financial market regulation (2010b) that can are relevant for the debate on potential similar interventionism in the field of workers’ information and consultation rights. Of course it is not possible to apply to EWCs per analogiam the same provisions of the European Treaties that the European Commission recalled when pointing towards legal basis for intervention in the financial market regulation (Art. 114 TFEU). Practically in all EU Member States EWC matters belong formally to labour law being itself a branch of civil law (in many countries enforcement of EWC rights is pursued according to civil law procedural codes and by civil courts). Given this fact it is conceivable to anchor a possible EU legal intervention in form of introduction of common sanctions (or standards therefor) by means of referring to article 81 TFEU on Judicial Cooperation in Civil Matters stipulating, among others, that such cooperation should ‘include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83’. Alternatively, in countries where breaches of EWC laws are classified as criminal offences and regulated by criminal law Art. 83 para. 2 could be a viable option 106. Article 83 TFEU also provides a legal basis for the establishment of minimum rules concerning the definition of criminal offences and sanctions, when the approximation of criminal laws proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures (European Commission 2010b: 11, Cf. 23).

Furthermore, Art. 151 TFEU enumerates among its goals the objective of providing ‘proper social protection’. To the end of realisation of the former goal the Union shall support and complement the activities of the Member States in, among others, the field of information and consultation rights of workers, and thus, may adopt ‘by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States’ (paragraph 2). Arguably, these are provisions sufficient for the European Commission’s intervention in form of minimum enforcement standards in the field of European Works Councils.

Position of the European Economic and Social Committee on interventionism into enforcement regimes in financial market regulation

The above EU level intervention of the European Commission into national enforcement and sanction regimes in the financial sector (see above) was not a self-proclaimed assumption of competences, but an initiative welcome by the European Economic and Social Committee (2011); a reaction of high significance as the EESC represents opinions from the social partners (labour and business) along with other stakeholders:

‘The EESC welcomes the creation of a supranational system of sanctions that are truly effective, dissuasive and proportionate. It supports the approach taken by the Commission communication to provide common criteria that Member States should meet as a minimum requirement when establishing administrative sanctions for the infringement of financial services legislation.’ (EESC 2011: 4. General Comments)

There are several points of legal anchorage of such an intervention as well as arguments in favour thereof called in by the EESC. Firstly, The EESC agrees with the Commission’s extensive approach on referring to ‘sanctions’ as a broad notion which encompasses various measures (such as tax-related administrative measures, restoration of legality, confiscation, the disqualification of managers, withdrawing privileges (such as the withdrawal of licences),

106 ‘If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned (…).’
pecuniary sanctions, fines which act as a deterrent, and other similar measures). Some of those sanctions are indeed far reaching especially that they punish companies at the core of their economic activity (e.g. withdrawal of licences) aiming at ultimate severity. Again, if such extensive sanctions are allowed (i.e. deemed lawful and compatible with the principle of subsidiarity\footnote{See point 4.2 of the EESC Opinion on the matter: ‘The Communication is clearly in line with the subsidiarity principle. (…)’}) and welcome by the EESC it would be difficult to deny similarly favourable assessment of the European Commission’s intervention into enforcement systems in the area of European Works Council regulations. Secondly, the latter holds true as in its core the European legislation (directives) in both areas (i.e. of financial market regulation and EWCs) impose similar obligations on the Member States with regard to ensuring their applicability and enforcement: ‘[t]he document [i.e. the European Commission 2010b, RJ] underlines the fact that the national authorities have primary responsibility to ensure that a coordinated, integrated approach is taken to consistently applying both the existing legal framework and the future framework of sanctions for violations in the financial services sector. (EESC 2011, point 4.2.2). Importantly, the EESC finds that when such regimes either ‘have serious weaknesses or shortcomings which mean they cannot be harmonised, or they operate using completely different criteria’ (which was demonstrated above to be valid also with regard to European Works Councils) a ‘supranational action is justified by the need to ensure convergence of national sanctioning regimes (administrative or criminal)’ (ibid., point 4.2.3). Thirdly, the latter point is reinforced also by the fact that the EESC holds the view that established legal principles in one area can be applied to other areas, as is the case with the ‘already applied successfully’ rule ‘polluter pays’ that once established in the environmental law area is endorsed to be applied in the financial market regulation enforcement (ibid. point 4.2.4). By the same token there seems to exist no obstacle to apply the same principle to the area of information and consultation laws and their enforcement. Fourthly, the EESC deems a general competence of the EU lawmaker to intervene based on the mandate that ‘under the Charter of Fundamental Rights, all EU institutions are responsible for ensuring a high level of protection for users of financial services’ (ibid. point 4.7.6). Again, a parallel to protection of information and consultation rights can be drawn here, as these rights (should) enjoy a similar protection under the Charter of Fundamental Rights. Fifthly, in another Communication on the Area of freedom, security and justice serving the citizen (EESC 2009) the EESC showing its support for the Stockholm’s agenda (aiming at establishment of a European area for freedom, security and justice) expressed the view that ‘although the European system for protecting fundamental rights is well advanced, these rights are not fully upheld throughout the EU, particularly when it comes to implementing and applying Community law at national, regional and local level’ (EESC 2009, point 3.3), which serves as sufficient ground to support the method proposed by the Commission to secure the success of the Stockholm programme including ‘narrowing the gap between the rules approved at European level and their implementation at national level, and developing practical measures’ (EESC 2009, point 3.8). Furthermore, the EESC urged the Commission on yet another occasion to ensure proper coherence of sanctions and enforcement regimes in various Member States emphasising that it is a necessity in view of limited law-making powers of the EU (the lack of EU laws) and a countermeasure against ‘sanctions dumping’:

The EESC strongly urges the Commission to monitor the effectiveness of the sanctions that the Member States are to determine. There are numerous differences between national bodies of legislation concerning how seriously financial infringements or offences are viewed, stemming from the different economic and legal cultures of the individual countries. Since it is not possible to issue European laws, with accompanying penalties, in the administrative or criminal fields, the Commission must strive to make not only the rules, but also the sanctions, as uniform as possible. There is a real danger of shifting from regulatory to sanctions dumping, with the same laws but very different sanctions, leading operators to choose to work from the place where the risk is least. Work to coordinate common efforts is key to making regulation effective and efficient.’ (EESC 2013, point 3.12)

Parallels between the discussed areas of financial market regulation and EWCs go even further as the EESC Opinion mentions the necessity of pulling down confidentiality limitations and barriers linked to reporting in the financial market regulation field (EESC 2011, point 4.2.7). Admittedly business secrets and confidentiality are mentioned in context of
whistleblowing, yet limiting exchange of information between EWC members and curbing its usage based on the clause of confidentiality has been reported as an issue also in information and consultation practice.

All in all one can summarise that the EESC has supported the idea of interventionism into the field of sanctions and enforcement on several occasions in order to ‘help to ensure that the objective is achieved: creating a sanctioning regime which acts as a deterrent and is based on the principles of effectiveness and proportionality.’ (EESC 2011, point 4.6.1). When referring to the European Commission’s Opinion concerning financial market regulation the EESC went as far as to stipulate that the EU intervention into national regimes should not be just some intervention, but a directive that ‘should contain very detailed provisions in order to meet the general interest objectives being pursued’ (ibid.). Given the numerous parallels and general applicability of the above quoted statements of both the European Commission with regard to its assumed mandate to intervene in the financial market regulation enforcement and sanctions as well as of the European Economic and Social Committee supporting the Commission’s mandate and necessity to intervene into national implementation of enforcement regimes one can validly conclude that the EU has the mandate to set punitive measures for infringements of EU law. The latter conclusion is of big significance in view of statements of the European Commissions’ officers concerning the alleged lack of authority of the EU and common practice in European law-making of not prescribing any sanctions whatsoever made on repeated occasions both in course of negotiations over the recast EWC directive 2009/38/EC as well as subsequently to its adoption.

**Jurisprudence of European Court of Justice and related institutional debates**

The third EU official institution that became involved in the subject discussion and has the ultimate competence to determine the meaning of and interpretation of EU law is the European Court of Justice. With the development and expansion of EU law and appropriation of community competences in new areas the need for effective enforcement of that law grew ever bigger and became one of central issues. It has already been mentioned earlier in the present chapter that the ECJ substantially contributed to expanding the Community competence in the area of administrative sanctions when it stipulated that with regard to administrative measures and Community competence to determine them the EU penalties have priority over national punitive measured if the former preceded the latter in time; in other words, the ECJ ruled that a Member State cannot lay down its own national penalties in case penalties of that type are already set out in detail in a Community Regulation (Case C-45/05 Maatschap Schonewille-Prins [2007] ECR I-3997; de Moor- van Vugt 2012: 9).

From the very beginning of this expansion of the Community and appropriation of competence to set (criminal) sanctions the debate was about the protection of state sovereignty in the criminal law area and some Member States sought to actively define their traditional sole competence in this field. In the case C-240/90 Germany v. Commission the Court found that the EC has the power to determine what is necessary to attain the objectives of the common agricultural policy and that measures aiming at harmonising the system of sanctions form part of that competence. In this way determining enforcement measures and sanctions (both of punitive and reparatory nature) was a means to the goal of the policy. On this occasion the Court, despite an invitation made by the German government to take position on the Community’s power in the ‘penal sphere’ (Cons. 24), refrained from giving a clear view on the power to prescribe to Member States the imposition of punitive administrative sanctions, which, however, takes nothing away from the generally shared view that the EC has full power to prescribe them in its legislation (de Moor- van Vugt 2012: 10; confirmed by further jurisprudence of the court in environmental matters, see below).

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108 For further information on background and evolution of EU administrative law see Moor-van Vugt (2012).
In one of further fundamental rulings C-326/88 Hansen & Son [1990] the Court stipulated that, as a general rule (especially if no specific sanctions were provided for by the EU law), Member States are free to choose the way in which they wish to react: by means of civil, penal or administrative law, but they need to respect one superior principle that the sanctions must be effective, proportionate and deterrent (C-326/88 Hansen & Son [1990]: Summary).

“Where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.” (Summary of the ruling).

The issue of EU legal mandate for interventionism in form of specifying the type and level was brought to the ECJ at least on two occasions (cases C-176/03 and C-440/05).

Court case C-176/03 concerned the Framework Decision 2003/80 on the protection of the environment through criminal law. The Commission had adopted a proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law based on Article 175 of the EC Treaty. However, the Council refused to adopt it because it claimed that the Community could not prescribe criminal penalties and instead adopted its Framework Decision. The Commission claimed that the Framework Directive fell within the proper scope of the European Community's powers on the environment.

While the case deals with environmental protection the judgement contains several points of general applicability and provides clarification on the EU interventionism in the area of sanctions. Firstly, in para. 41 the ECJ sets the precondition for the said interventionism by means of stating that because ‘protection of the environment constitutes one of the essential objectives of the Community (...) the Community has as its task to promote ‘a high level of protection and improvement of the quality of the environment’ and, to that end, Article 3(1)(l) EC provides for the establishment of a ‘policy in the sphere of the environment’. Since the requirements of environmental protection must be integrated across Community policies and activities (Art. 6 EC) the environmental protection objective has a ‘fundamental nature’ (para. 42) and thus a horizontal extension across all policies and activities of the Community. Further the ECJ finds that despite the fact that ‘as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence’ the ‘[a]rticle 2 establishes a list of particularly serious environmental offences, in respect of which the Member States must impose criminal penalties’ (para. 47). However, this ‘does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.’ (para. 48). According to ECJ the former principle is not limited by restrictions in the ECT (in this case Article 135 EC and 280(4) EC) reserving the Member States ‘the application of

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110 The case concerned harmonization of certain social legislation relating to road transport (Regulation No 543/69 of the Council of 25 March 1969).

111 See also point 17 of the Ruling: ‘Furthermore, it should be borne in mind that, according to the consistent case-law of the Court, as confirmed by its judgment in Case 68/88 Commission v Greece [1989] ECR 2965, where a Community regulation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the EEC Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.’
national criminal law and the administration of justice’ since ‘[i]t is not possible to infer from those provisions that, for the purposes of the implementation of environmental policy, any harmonisation of criminal law, even as limited as that resulting from the framework decision, must be ruled out even where it is necessary in order to ensure the effectiveness of Community law.’ (para. 52).

The above ruling of the ECJ provided for significant excitement as well as criticism in the legal community and was soon referred to as a judgement establishing that the European Community and not just the European Union could prescribe criminal punishments in a Community directive or even in other legislative measures. The judgment was the ruling in which the ECJ has expressly stated that the Community has the power require member States to adopt criminal legislation. The gravity of the judgement (arguably not only for environmental law) generated reactions both from the European Commission as well as from the European Parliament. Firstly, the European Commission produced a Communication to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (COM (2005) 583 final/2) (European Commission 2005). In this document the Commission highlights an important fact, namely that

‘[t]he scope of the Community competence to make decisions in criminal matters may be inferred from the nature of the criminal law measures and thus [t]he is on which the Community legislature may provide for measures of criminal law is the necessity to ensure that Community rules and regulations are complied with.’ (European Commission 2005: point 1.2.9)

The Commission also points towards the fact that the judgement has general implications beyond the area of environmental policy: ‘[i]n this case, the Community policy concerned is environmental protection. However the judgment lays down principles going far beyond the case in question. The same arguments can be applied in their entirety to the other common policies and to the four freedoms (freedom of movement of persons, goods, services and capital).’ (European Commission 2005: point 1.2.6). As the British House of Lords in its Report on ‘The Criminal Law Competence of the European Community’ (House of Lords 2006) remarks ‘[w]e ourselves note the fact that the Court [European Court of Justice] did not expressly limit its judgement, that it described the environmental protection as “one of the essential objectives of the Community”’ (ibid. para 39). In the Commission’s view the ECJ adopts a functional approach, i.e. makes no distinction between the nature of the criminal law measures and thus ‘[t]he is on which the Community legislature may provide for measures of criminal law is the necessity to ensure that Community rules and regulations are complied with.’ (European Commission 2005: point 1.2.9).

The Commission understands, however, that at the same time: ‘Community action in criminal matters may be based only on implicit powers associated with a specific legal basis. Hence, appropriate measures of criminal law can be adopted on a Community basis only at sectoral level and only on condition that there is a clear need to combat serious shortcomings in the implementation of the Community’s objectives and to provide for criminal law measures to ensure the full effectiveness of a Community policy or the proper functioning of a freedom.’ (ibid. point 1.2.7). There is also a specific ‘test of necessity’ (ibid. point 1.2.9) to be applied on a case by case basis that should constitute a basis

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113 See also point 1.2.8 of the Communication: ‘The point of view of subject matter, in addition to environmental protection the Court’s reasoning can therefore be applied to all Community policies and freedoms which involve binding legislation with which criminal penalties should be associated in order to ensure their effectiveness.

114 This view was also (partially) supported by the European Parliament that stated that ‘there appear to be no grounds for an automatic presumption on favour of a broad interpretation of the judgement’ (European Parliament 2006), yet by implication the Parliament corroborated the view that Community competence in criminal law is not limited to environmental protection (House of Lords 2006: para 43).
for the application of criminal law measures to ensure effectiveness of Community law. When passed positively the ‘test of necessity’ shall open up the possibility to introduce measures (according to needs) including ‘the actual principle of resorting to criminal penalties, the definition of the offence – that is, the constituent element of the offence – and, where appropriate to the nature and level of the criminal penalties applicable, or other aspects relating to criminal law’ (ibid.). This view of the European Commission was also endorsed by the European Parliament which found that ‘Community law in the form of directives can only lay down minimum rules for criminal penalties to be applied by the Member States (...) in certain cases it is appropriate to further define the action taken by Member States by expressly specifying (a) the type of conduct that should constitute a criminal offence, and/or (b) the type of penalty that should be applied, and/or (c) other measures relating to criminal law which are applicable in the relevant context’ (European Parliament 2006: para 16).

This catalogue of measures allows admittedly for a far going interventionism into national enforcement systems and therefore any resort to criminal law is allowed only if two specific conditions are met: necessity and consistency. For considerations on the matter of the present section the condition of necessity bears substantial information on the Commission’s interventionism:

‘Any use of measures of criminal law must be justified by the need to make the Community policy in question effective. In principle, responsibility for the proper application of Community law lies with the Member States. In some cases, however, it is necessary to direct the action of the Member States by specifying explicitly (i) the type of behaviour which constitutes a criminal offence and/or (ii) the type of penalties to be applied and/or (iii) other criminal-law measures appropriate to the area concerned. Checks must be carried out to establish necessity and the observance of the principles of subsidiarity and proportionality at each of these stages’ (point 2.2.12; own emphasis added).

The above points were in essence confirmed in the second ECJ judgement (C-440/05) on the question of Community competence to determine sanctions and enforcement measures; at the same time, however, the Court took a step back on its previous ruling in C-176/03. The case C-440/05 involved a dispute again concerning the field of environmental protection, notably the Council Framework Decision 2005/667/JHA. By means of the Framework Decision the Council meant ‘to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution’; a goal whose achievement was to be ensured via introducing the obligation for Member States to provide for effective, dissuasive and proportionate criminal penalties for persons, natural or legal, who have committed, aided, abetted or incited one of the offences referred to in the Community directive.115 The debate over the mandate to determine sanctions took place in context of the broader question of competition between competences enshrined to the EU under the Treaty on European Union (as argued by the Council) and the EC Treaty (the first and the third pillar) launched in the case C-176/03)116. The ECJ found (as it did previously in Case C-176/03) that ‘although it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence, the fact remains that when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, the Community legislature may require the Member States to introduce such penalties in order to ensure that the rules which it lays down in the field of environmental protection are fully effective.’ (European Court of Justice 2007).

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116 Considering that the framework decision had not been adopted on the correct legal basis, the Commission (supported by the European Parliament) brought an action before the Court of Justice arguing that the aim and content of the framework decision come within the European Community’s sphere of competence rather than the EU Treaty.
There is, however, a crucial limitation to this principle delivered in the judgement of the Court C-440/05) narrowing down the Commission's scope of intervention to checking and ensuring that the nationally set sanctions meet the criteria of 'effective, proportionate and dissuasive' measures: '[b]y contrast, and contrary to the submission of the Commission, the determination of the type and level of the criminal penalties to be applied does not fall within the Community’s sphere of competence' (point 70 of the judgement) 117.

117 See also Press Release No 76/70 of the ECJ (European Court of Justice 2007) explaining that '[b]y contrast, the Court finds that the determination of the type and level of the criminal penalties to be applied does not fall within the Community’s sphere of competence.'
6. Conclusions

The present paper aimed at fulfilling at highlighting the importance of ensuring proper quality of national provisions transposing the EWC directives 94/45/EC and 2009/38/EC in the area of access enforcement. As was argued, this quality should be guaranteed in respect of the general spirit of the directive and its effectiveness for workers’ rights to information and consultation. In this sense the paper aimed to emphasise the need of analyzing national solutions in enforcement in a comprehensive manner. It also aimed to show the importance of comparative research in this area that reveals important and often excessive differences between the EU Member States.

These objectives originated in the observation of a common neglect represented by scarce attention paid to questions of enforcement, both in EWC research as well as in formal institutional analyses of the quality of transposition of EWC directives by the European Commission. This set of goal seems to be even more important since, as was demonstrated among other by reference to the jurisprudence of the European Court of Justice, enforcement is a guarantee of effective application of directives.

The paper, by means of critical evaluation of the European Commission’s past activities in ensuring proper implementation of enforcement provisions in the EWC directive 94/45/EC (European Commission 2000) showed shortcomings of the Commission’s 2000 implementation report in the area of sanctions. This evaluation combined with analysis of further sources discussing sanctions and confronted with solutions on national level was mean as a contribution to inform the forthcoming transposition report on the recast EWC directive 2009/38/EC. By means of review of EU institutions’ legal sources (European Commission, European Parliament, European Court of Justice, European Economic and Social Committee) the present paper demonstrated that ‘effective, proportionate and dissuasive’ sanctions are not an abstract notion, but that there are specific requirements developed by the research and ECJ jurisprudence that define the substance of these notions.

In the part reviewing and analysing sanctions at national level the paper revealed substantial variation in classification, types and levels thereof. While intra-European diversity in approach to sanctions it is recognised as a reflection of the richness of European industrial relations systems and various traditions the paper reveals cases where too much diversity affects the coherence of a European system of worker rights to transnational information and consultation.

With the above consideration in mind, based on the analysis of sanctions three general conclusions can be formed:

1. Injunctions and summary proceedings are an important safeguard of EWC rights to information and consultation. They amount to the most effective and dissuasive punishment for multinational companies if coupled with the sanction of rendering a decision null and void. On this the study argues that such option is the most straightforward guarantee of penal measures’ effectiveness; it is also probably the most honouring the value of respect for law considering the fact that illegal actions (such as managerial decisions violating information and consultation requirements) should not produce lawful effects.

2. Some countries (Italy, Lithuania, Denmark) do not determine sanctions in their implementation which raises the question to investigate and follow up by the European Commission whether they properly transposed the directive’s 2009/38/EC requirement in this regard.

3. The three qualitative determinants of sanctions used in the recast directive 2009/38/EC are closely interrelated and should be evaluated in close relationship to one another. If this optics is missing sanctions at national level are prone to failing in performing their functions.

4. Analysis of effectiveness, proportionality and dissuasiveness of sanctions should be complemented with considering their severity. Severity (defined as overall harshness, strictness or toughness as perceived by the perpetrator) can be understood both as a
general hybrid characteristics resulting from a combined effect of the three features in question as well as can be considered a fourth implicit determinant having influence on effectiveness, proportionality and dissuasiveness. In the latter sense, severity of sanctions is an important factor having impact on effectiveness, proportionality and dissuasive character of sanctions.

5. The most commonly used type of sanctions seem to be financial penalties. Their overview across the Member States is presented leading to the conclusion that they are excessive beyond any rational justification and range from blatantly small to more significant in some Member States. As the paper argued and demonstrated, in case of many national systems, in view of explanations on the theory and doctrine on effectiveness, proportionality and dissuasive character of sanctions, these financial penalties cannot be considered as fulfilling the qualitative criteria set by the EWC recast directive 2009/38/EC.

Worth noting in this context, only in two Member States (Austria, UK) have maximum penalty levels been increased following the implementation of directive 2009/38/EC.

In view of problems with determining levels of financial penalties that would meet the requirements of the EWC directive(s) the study suggests considering the possibility of introducing penalties related to companies’ turnover, which has precedence in other areas of EU law (e.g. sanctions on distortion of common market).

Due to the above mentioned discrepancies between the levels of sanctions across the EU in practical and political debates differing severity of enforcement and sanctioning regimes was suggested as a potential driver for multinational companies practicing regime shopping in search of most lenient legal orders. Making reference to EWCs database of ETUI the study refutes this argument showing that no statistically meaningful scale of the phenomenon can be demonstrated.

Lastly it is demonstrated by reference to implementation of other legal instruments (EU directives) on worker rights that the shortcomings identified with regard to EWC are not an isolated issue, but more of a systemic weakness of legislation in this area. The ultimate punishment: null and void

A central part of the debate on sanctions in the EWC recast directive 2009/38/EC has been the role of the European Commission in enforcing proper implementation at national level. It was not an intention of this paper (and specifically of Chapter 5) to prove or demonstrate beyond doubt that the European Commission has the competence to prescribe common Community sanctions for infringements of transposition of the EWC directive 2009/38/EC. Rather, the goal was much more to point towards precedence in the European Commission’s (as confirmed by the European Court of Justice) interventionism into the national prerogatives of setting enforcement and punitive measures when applying community legislation; furthermore, the objective was to show the political and institutional debate over judicial evolution of the (binding) interpretation of the meaning of Member States obligation to provide ‘effective, proportionate and dissuasive sanctions’ along with the Commission’s responsibility to ensure that national measures meet these criteria. This general obligation is confirmed also in Art. 83 para 2 TFEU that codifies the earlier ECJ rulings and states that: ‘If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. (…)’.

These developments and evolution of the Community competence should not be ignored in any evaluation of the Member States’ fulfilment of obligation to transpose the directive correctly and meeting all the requirements linked to ensuring its proper enforcement; nor should they be left out of debate when scrutinising the European Commission’s role in verifying that the Member States have thoroughly done so. With regard to the latter the study argues that only a specific policy-mix combining financial penalties, possibility of criminal sanctions (such as incarceration) and, most importantly, the sanction of nullity and invalidity
of decisions violating law fully satisfies the requirement of providing effective sanctions as
required by the recast directive 2009/38/EC.

Lastly it is demonstrated by reference to implementation of other legal instruments (EU
directives) on worker rights that the shortcomings identified with regard to EWC are not an
isolated issue, but more of a systemic weakness of legislation in this area. It should be
emphasised that worker rights to information and consultation being granted now a status of
Fundamental Rights protected by the EU Treaties should not be protected and enforced with
less decisiveness and commitment than other values, even such important as environment or
proper functioning of financial markets. Infringements of all these rights have effects for
significant numbers of people, in case of EWCS also counted in thousands or millions of
employees of multinational companies. With the announced accession of the Union to the
European Convention on Human Rights (Art. 6 para 2 TEU) a whole new dimension of
possibilities opens up (de Moor- van Vugt 2012: 11-12) allowing for an even more extensive
Union interventionism to protect these human rights.