



# ACCESS TO JUSTICE FOR EWCS

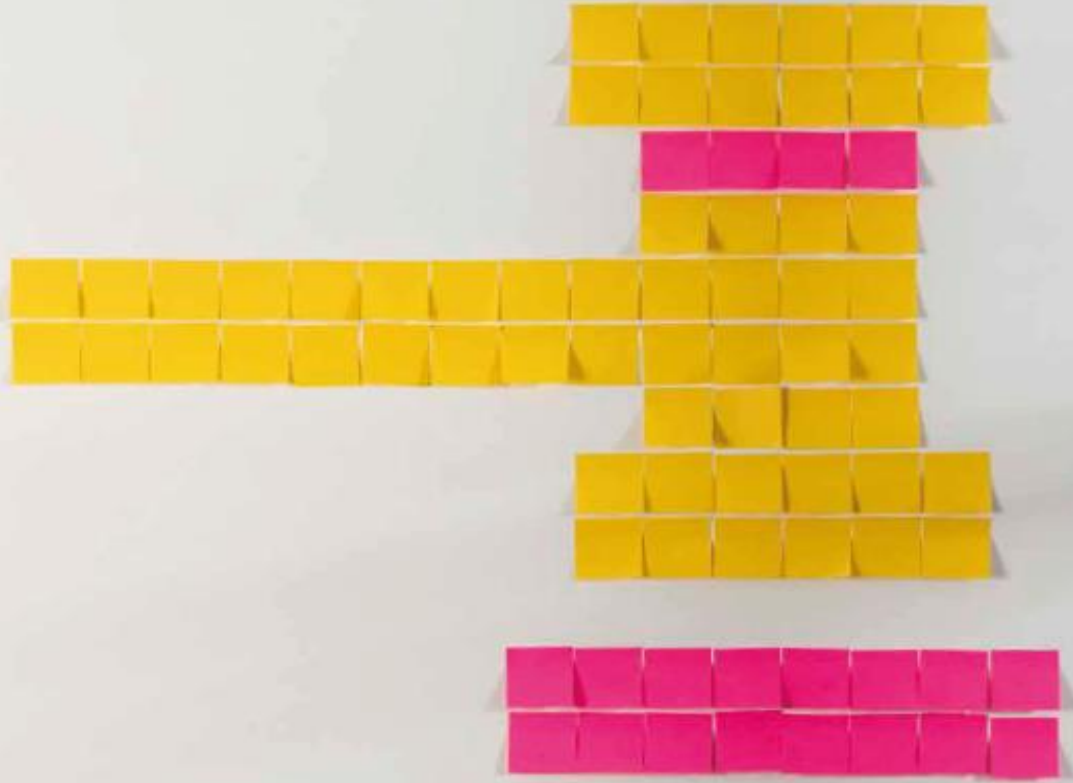
Cyprian Szyszka, ETUI

**etui.**

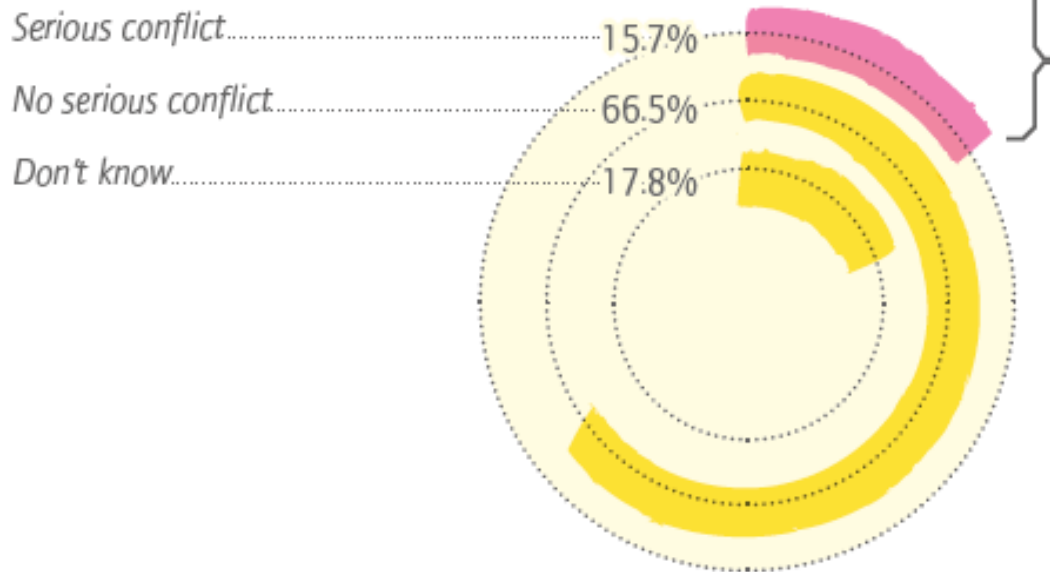


# TO GO TO COURT OR NOT TO GO?

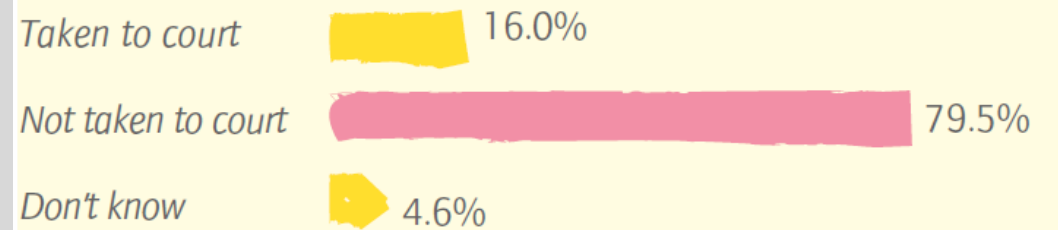
Question asked by many EWCs in conflict



**Enforcement.**



### Did they go to court?



serious conflict' -> not so many have this

### Conflict

- EWC handles a serious conflict with management

### Assessment and alternatives


- Other solutions to solve a conflict, feasibility assessment

### Court action

- Decision, lawyer support, preparations, effects of legal action

# Procedure of deciding the litigation

We are here



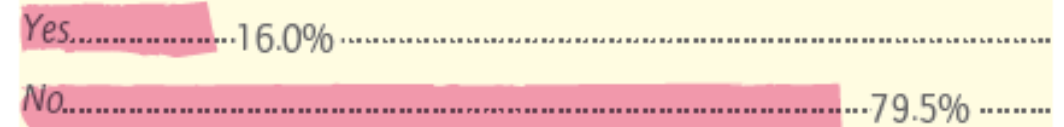
Assess the seriousness of the conflict and lack of other ways to solve it (whole EWC involved), get the know,edge

Decide on litigation by voting in whole EWC

Preparations in EWC, looking for a lawyer, decision on to go with a lawyer or without

Preparing the case, courtroom proceedings and evaluation of effectiveness

## Taken court action?



# Interesting facts

How was it handled? \_\_\_\_\_

## By referring to legal sources...

Referred to the agreement for support



Referred to legislation for support



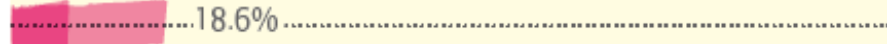
## ... or by asking the trade union for help...

We asked a trade union for help



## ... but not so much by mediation

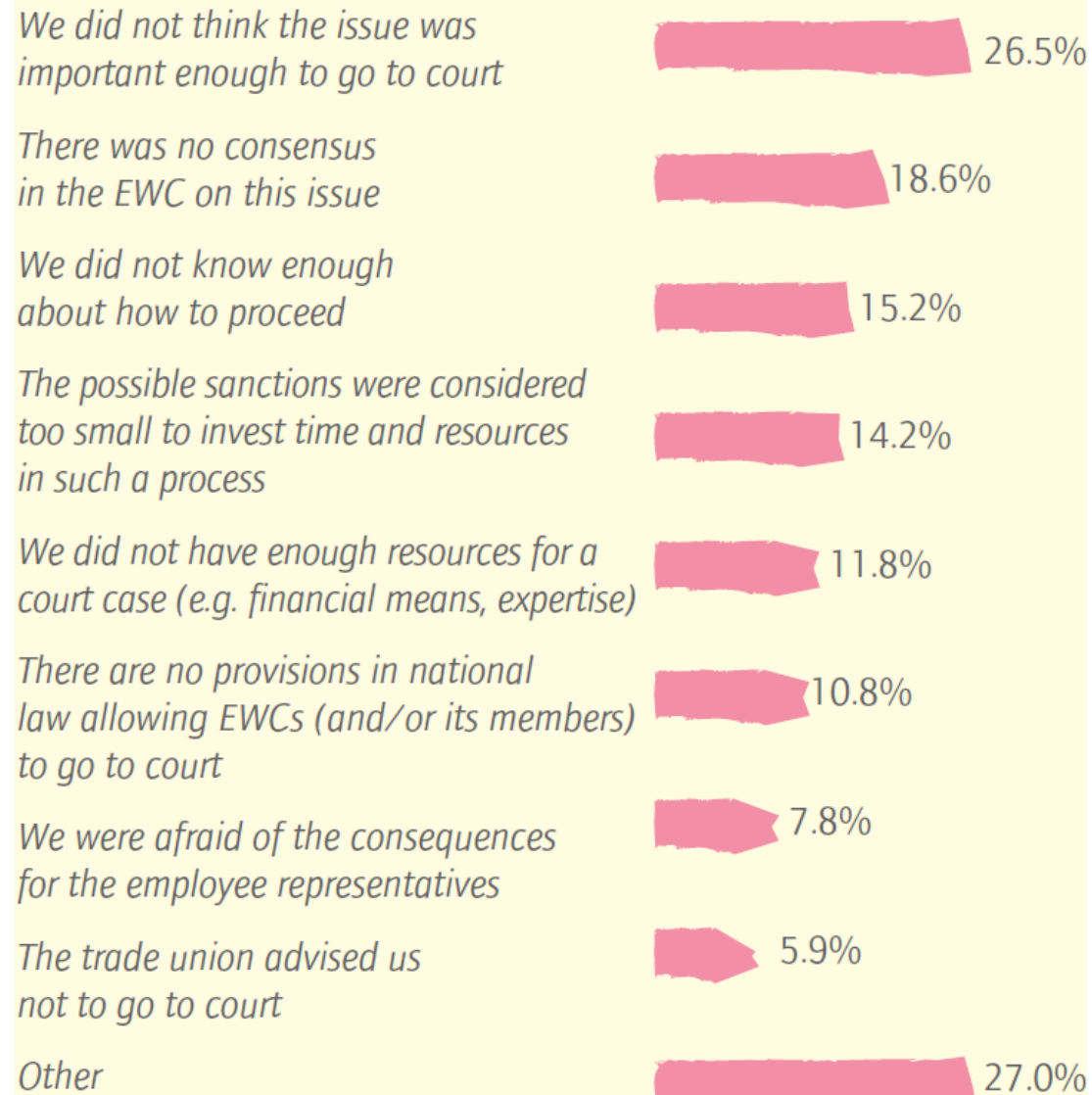
Used a mediator to resolve the dispute



 Most of the time     Always

- If there is a serious conflict:
  - Most settle this internally by referring to the agreement (escalation procedure) or legislation
  - EWC agreements are used to solve the conflict more often in SEWCS
  - Only very little EWC members say they go to court
  - Article 13 go much less often to court
  - EWC members in French and US companies go to court more often
  - Only half ask the trade union for support
  - Almost none refer to a mediator

## Why not?



# Choice of the majority: not going to court

Various reasons for not going to court! => mostly because it was not important enough

- 27% says 'other reasons' (?)
  - it's not something you do in that country
  - the issue was solved in another way.
- Article 13 say much more often 'there's no provision in the national law' (law blaming)
- Office holders think there are more conflicts (responsibility)
- EWC members in US headquartered companies say there is more conflict (culture?)
- Union member refer much more to agreement and legislation to solve the conflict (better educated / qualified))

# Legal situation by countries

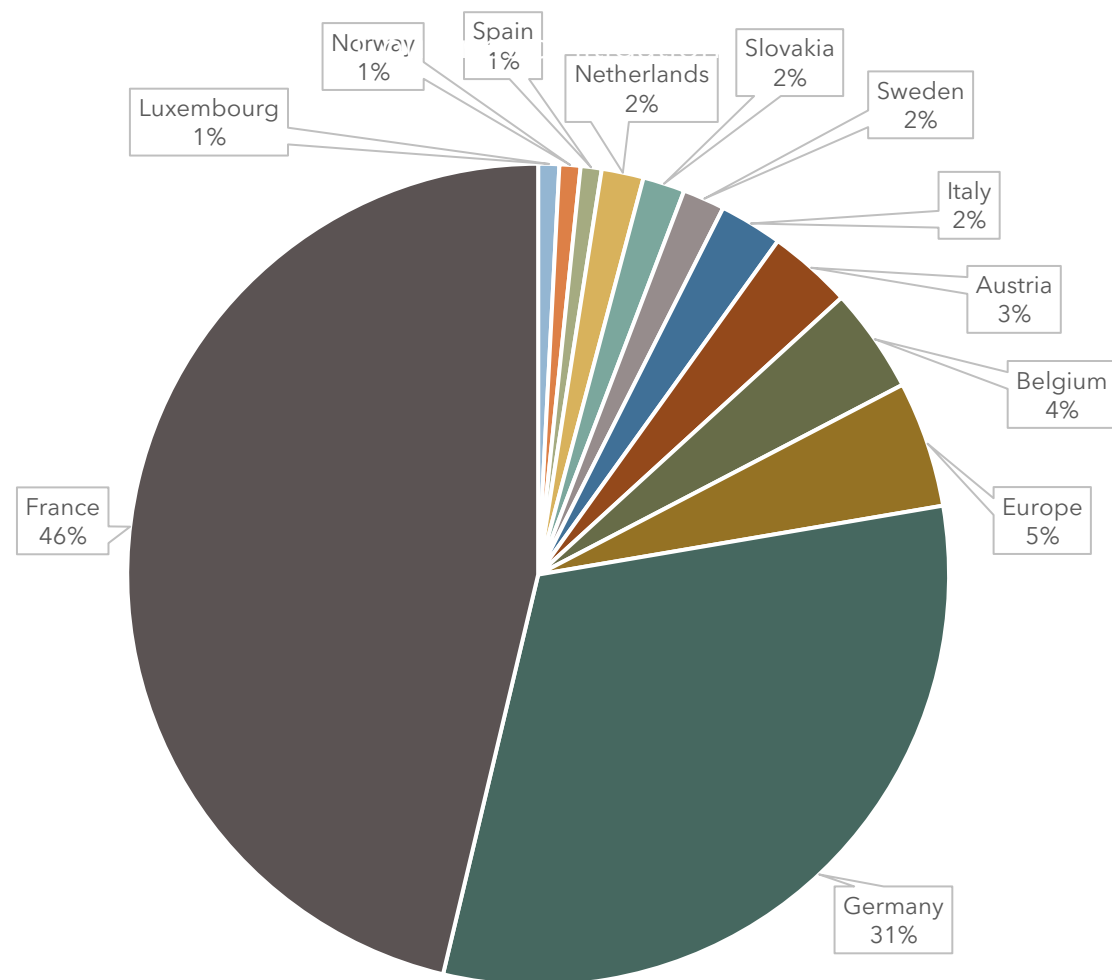
- Are administrative or judicial conflict solving procedures available? For which set of rights?
- Capacity to act in court
- How to start a court case and timeline of a court case
- Costs (court fees + lawyer fees)
- Sanctions (including presence of injunctions / court orders)
- Out of court settlements
- Additional resources for EWCs





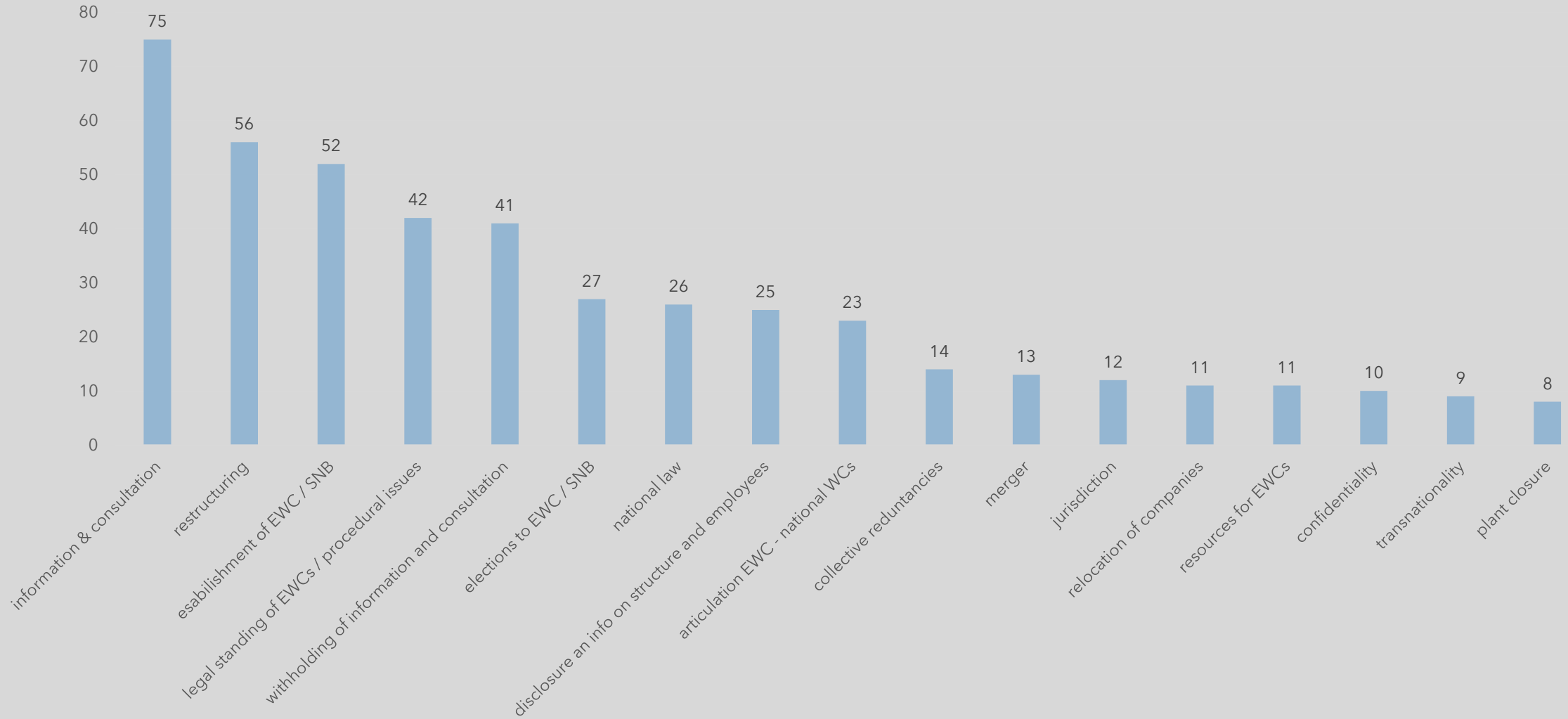
# Litigation facts

- EWC database 147 court cases
- 75 companies
- 12 countries
- 50 more in preparation
- Not a complete list! => there is more litigation linked to the national TU organisations



Adecco	Chubb Insurance Company of Europe	Global One Communications	Lucent Technologies	Sanofi
ADS Anker	Collins Aerospace	Goodyear	Manpower	SAP
Alstom	Dana Corporation	Group 4 Securicor	Marks And Spencer	Schneider Electric
Altadis	Dell Computer Corp.	Groupon	Mayr-Melnhof	SNCF
Amcor	Dematic	Gruppo Sofidel	Novo Nordisk	Steria Group
Avaya	DXC Technology	Hamilton	Oracle	TNS
AXA	easyJet Airline Company Limited	Hewlett Packard Enterprise	Otis	Tractebel - Suez Lyonnaise Des Eaux
Beiersdorf	Electricité De France	HP	Panasonic	Transdev
Bofrost	Emerson	HSBC Holdings - Midland Bank	Peninsular & Oriental Steam Navigation	Valora
Bouygues	Enersys	HTC Holding	Premier Farnell	Veolia Transdev
British Airways	ENGIE	IBM	Princes Group	Verizon Business
British Council	Exxon Mobil	Impress Metal Packaging	ProSiebenSat1. Group	Vesuvius
British Polythene Industries	Facilicom	Jungheinrich	Renault	Visteon
Cegelec	Fiat Chrysler Automobiles	Kuehne & Nagel	Rieter	Walgreens Boots Alliance
Cemex	Forbo	Lactalis	SAFRAN Group	Zalando

# EWC litigation topics



Assessing seriousness of a dispute: objective and subjective criteria

What do we want to achieve? Goals, effectiveness, alternatives

Cooperation with the relevant trade unions

Comprehensive strategy

Cost-benefit analysis: financial, time, material, relationship with management

SWOT analysis & scenarios

EWC eligibility (legal status) + relevant jurisdiction + competent court

Getting the entire EWC on board / voting

Agreeing the steps in the litigation process

Hiring a lawyer / do it by yourself

Preparing evidence

Contacts with management during and post-case

Input from interviews with EWC members & experts

Input from interviews & other advice

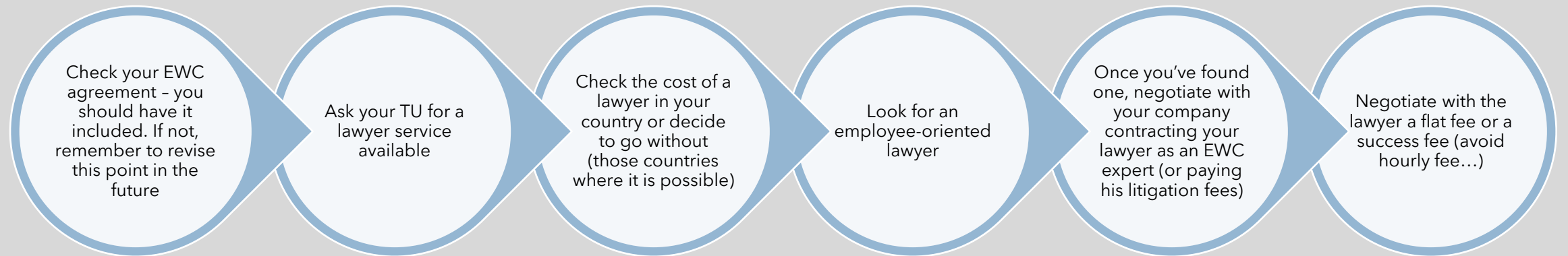
Full step-by-step pathway of the procedure

**Internal EWC preparation**

**Court action and post-litigation**

# Money issue. How to finance the case

General note: all MS transpositions contain just a general clause on management's responsibility to provide the means necessary for EWC operation. **Is legal expense a necessary mean? - the burden of proof is on EWCs**



# Financing legal expenses / agreement examples

- Article 19.6: The management shall bear all the costs of the arbitration committee which are incurred and those of court proceedings **Krieger Handel SE**, *installation agreement of 2017*
- The central management shall assume the costs incurred for the proceedings before the board of arbitrations and the courts, the EWC may be represented by a lawyer in proceedings to settle disputes before the courts or the board of arbitration (Art. 19.5 and 5) **Manpower EWC**, *installation agreement of 2017*
- EWC Representation: The Chairperson has the right to commission a lawyer or any other person acting in such a capacity to represent the interests of the EWC both in court and out of court **Fraunethal Keramik**, *Rules of Procedure 2008*
- Cost for litigation paid by the company regardless of the outcome **AssaAbloy EWC**, *renegotiated agreement of 2006*
- The company will cover costs of MEDIATION services; if this does not resolve the conflict the company will pay a max of 7000 Euro of judicial fees at court for professional legal advice at EAT or CAC (Art. 10) **Legrand Group European Council**, *2016 amendment to original agreement*

# Financing legal expenses / agreement examples

- The Central Management shall bear the costs of all necessary financial and material resources of the EWC, the EA and the working groups. These shall include, in particular, (...) the costs of any necessary mediation and any court and lawyer fees. **Yazaki Europe Limited EWC**, *installation agreement 2018*
- The Central Management shall assume the costs incurred for the proceedings before the board of arbitration and the courts **Abertis Group EWC**, *installation agreement 2012*
- art 6. (viii) The members of the Forum shall have such legal rights, and recourse to dispute resolution machinery and such courts of relevant jurisdiction, as are necessary to vindicate their duties, rights and entitlements under this Forum agreement **Zimmer Biomet European Works Council**, *installation agreement of 2019*;
- The SE Works Council may not be ordered to pay the costs of such [court] proceedings. Article 261 and following of the Dutch 'Wetboek van Rechtsvordering' shall apply. (Art. 15.2) **AEB SE Works Council**, *installation agreement of 2018*)

# EWC legal status: can go to court?

- Legal personality: 3 countries (Austria, France, Spain)
- Legal capacity: 13 countries (Bulgaria, Croatia, Czechia, Germany, Greece, Hungary, Netherlands, Portugal, Romania, Slovakia, Slovenia, Sweden, UK)

- Limited access: 6 countries (Belgium - only individual members and TUs; Ireland - only individual reps; Italy - only with TUs; Lithuania; Luxembourg - only individual reps)
- No access: 6 countries (Cyprus, Denmark - no for EWC, but SNB can, Estonia, Finland, Latvia, Malta)



# No lawyer needed?

- 17 countries possible to present the case by yourself
  - Austria, Germany, Portugal - lawyer not required in local courts, cases up to 5000EUR
  - Denmark, Finland, Poland, Slovakia, Sweden - lawyer not required in civil courts, but usually there is one
  - France, Slovenia - lawyer not required in district court (1<sup>st</sup> instance), but generally useful
  - Greece - not required in district courts and before the sigle-bench courts, also to prevent an immanent danger
  - Hungary - generally possible to go without, lawyer needed sometimes
  - Ireland, Italy, Romania - sometimes needed, sometimes not
  - Netherlands - lawyer not needed in civil court, but needed in Enterprise Chamber of Amsterdam
  - UK - possible to go without lawyer, yet lawyer advisable
- 9 countries where lawyer is most certainly needed to file a case
  - Belgium, Bulgaria, Croatia, Cyprus, Czechia, Estonia, Latvia, Lithuania,, Luxembourg, Malta, Spain

*Better sanctions and enforcement are on the top of the wish list of EWC members*

# SANCTIONS

Most important tool of EWC enforcement

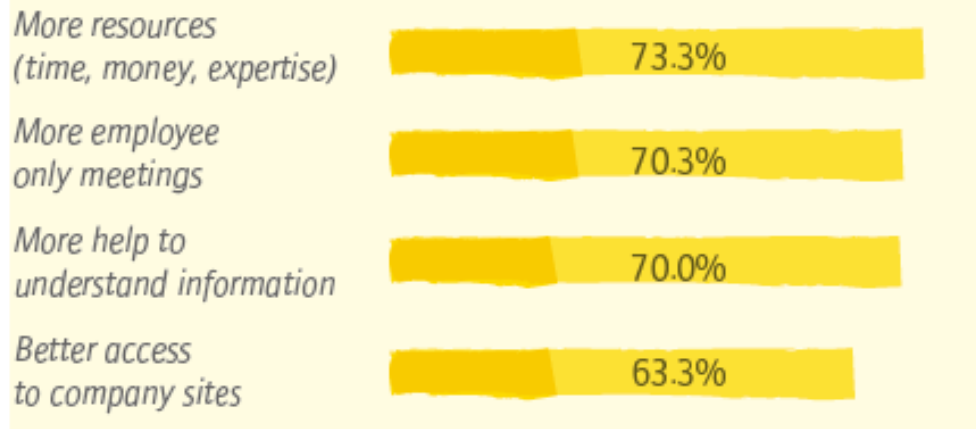
## More effective enforcement and sanctions



## Information quality and scope



## Resources and expertise



## Meetings



# When the times get tough

- Almost everybody asked what should be changed in the Directive say two things:
- Prohibition to implement a measure before consultation
- Sanctions for non-compliance
  
- as very **few go to court**, sanctions have mostly a **preventive** value in order not to have to go to court, so they should be significantly high

1. Member States shall lay down rules on penalties applicable to infringements of the information and consultation requirements under this Directive or under agreements concluded pursuant thereto. The penalties shall be effective, proportionate and dissuasive.



2. The penalties referred to in paragraph 1 shall include:

(a) financial penalties that are proportionate to the nature, gravity and duration of the undertaking's infringement;

(b) orders excluding the undertaking from an entitlement to some or all public benefits, aids or subsidies, including EU funds managed by the relevant Member States, for a period of up to three years;

(c) orders excluding the undertaking from procurement within the meaning of Directive 2014/24/EU of the European Parliament and of the Council<sup>1a</sup>, for a period of up to three years.

## Article 11a - Penalties

3. The financial penalties referred to in paragraph 2, point (a), shall amount to a maximum of at least EUR 10 000 000 or 2 % of the undertaking's total annual worldwide turnover in the preceding business year, whichever is higher.

4. In the case of intentional infringements, Member States shall provide for a maximum financial penalty of at least EUR 20 000 000 or 4 % of the undertaking's total worldwide annual turnover in the preceding business year, whichever is higher.

## Article 11a - Penalties



# EWFC COURT CASES

Case studies

# Task

- You will be organised in small groups. Each group will receive a summary of a court case on EWC/SE WC practice. First, read the document individually and then discuss the case in your group. Consider the following questions:
  - **What was the nature of the conflict?**
  - **Who are the parties involved?**
  - **What judgment was passed? Is it favourable to workers? Why?**
  - **Have you experienced a similar situation in your company?**
  - **How can this ruling help you to resolve any conflicts in your EWC/SE WC?**
- 
- Among the members of your working group, appoint someone who will lead the discussions and make sure that all opinions can be taken into consideration as well as a spokesperson who will report back to the plenary session. The report should contain a short summary of the case and reflect the lessons that your group has drawn from it.



# CHALLENGES OF USING LITIGATION AS A TOOL

...to solve conflicts in EWC practice **DEBATE**



# Possible improvements?

Consequences of losing

Decision making - internal procedure

Finding a support / right lawyer

Upgrading your agreement (legal budget)

Designing escalation procedure

Relationship with management after

# Designing dispute resolution procedure

In the general dispute resolution clause usually you get three stages: => internal process including consultation with management / mediation / court (referring to the cooperative / compromising / challenging logic). If your country legal system foresees using arbitration bodies in the labour disputes, you may include proper Arbitration Chamber before the court stage or instead

## Internal stage (choose a structure fitting you the best or invent yours)

- By SC (consulting with the management)
- By the joint 'Dispute resolution Committee' (or whatever name you find proper)
- By the individual SE WC rep responsible for complaints and escalations

## Mediation / conciliation

- Internal, performed by the joint committee
- Internal, performed by the BLER
- External, by the agreed certified mediator (no possibility for the management to choose the conciliator unilaterally, eg. company lawyer!)
- External, by the European trade union confederation (they have mediators on board)

## Arbitration / litigation

- Arbitration if foreseen by the reference law practices
- Litigation by the courts indicated in the Agreement

# Designing dispute resolution procedure

- For the stage 1 the most common solution is to perform DR by the Select Committee itself, but you may consider establishing a joint commission (eg. 2 management reps+ 2 SE WC reps + 1 Board rep) to deal with complaints / escalations (and check the validity of the elections in countries by the way). This committee can be versatile, eg. It can be an internal mediating body too. When opting for a 'joint dispute resolution committee' remember to decide the chairmanship: SE WC or HR will lead it?
- You can consider adding the dispute resolution procedure concerning confidentiality issues, namely what to do when there's no clarity over the confidentiality measures imposed or the practices of EWC members with handling confidential information. It may stand as a separate escalation path or be a part of duties of aforementioned bodies; same goes with the election challenging procedure
- Remember pointing on the correct court and a base language version of the agreement (authentic text) for the possible litigation processes, as well as rules on the translation of the rulings (you have it)
- You may include a general reference to a 'good faith', 'reasonable efforts' or 'amicable settlement' in resolving the disputes, sometimes it is taken into consideration by the tribunals
- You may include the possibility of intervention at any stage of the parties' respective affiliating organisations, such as business confederations (employer side) or trade union confederations (SE WC side). This may help to gain the external opinion and the visibility to the possible dispute
- Remember to end the first phase (internal) with the dissatisfaction letters or discrepancy report (that will help making things faster afterwards)
- You may want to set the deadlines for the stages 1 and 2: a month each would make disputes fast enough



# THANKS FOR ATTENTION

For more sources, look at ETUI publications: Can anybody hear us?, EWCs: contested and still in the making and  
Court cases ETUI database [www.ewcdb.eu/court-cases](http://www.ewcdb.eu/court-cases)