

The WHY, WHAT and HOW of review of EWCs

or „Placebos don't cure!”

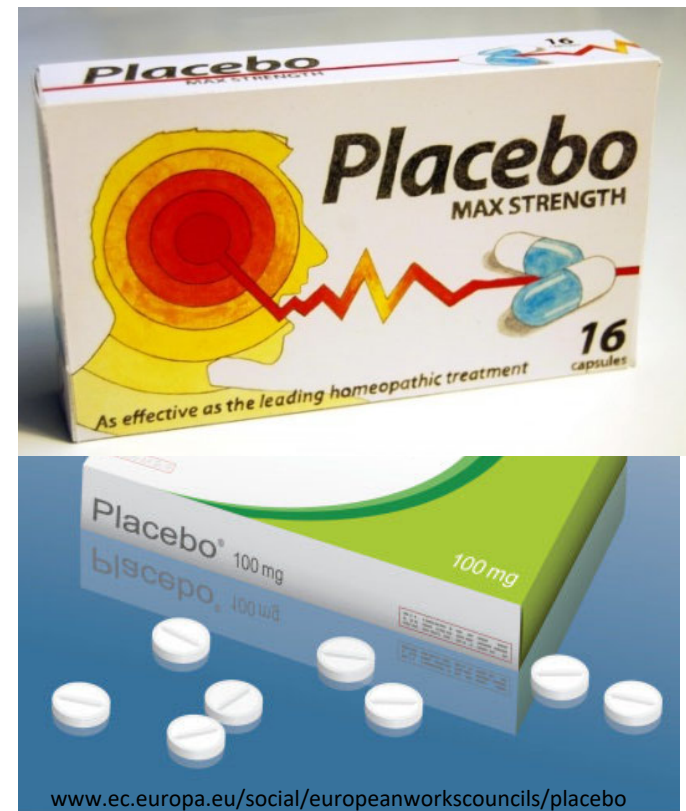
rjagodzinski@etui.org

European Trade Union Institute

Acknowledgements:

Stan De Spiegelaere,
prof. Jeremy Waddington
prof. Filip Dorssemont

Konferencja NSZZ Solidarność
Gdańsk, 11 Maja 2021

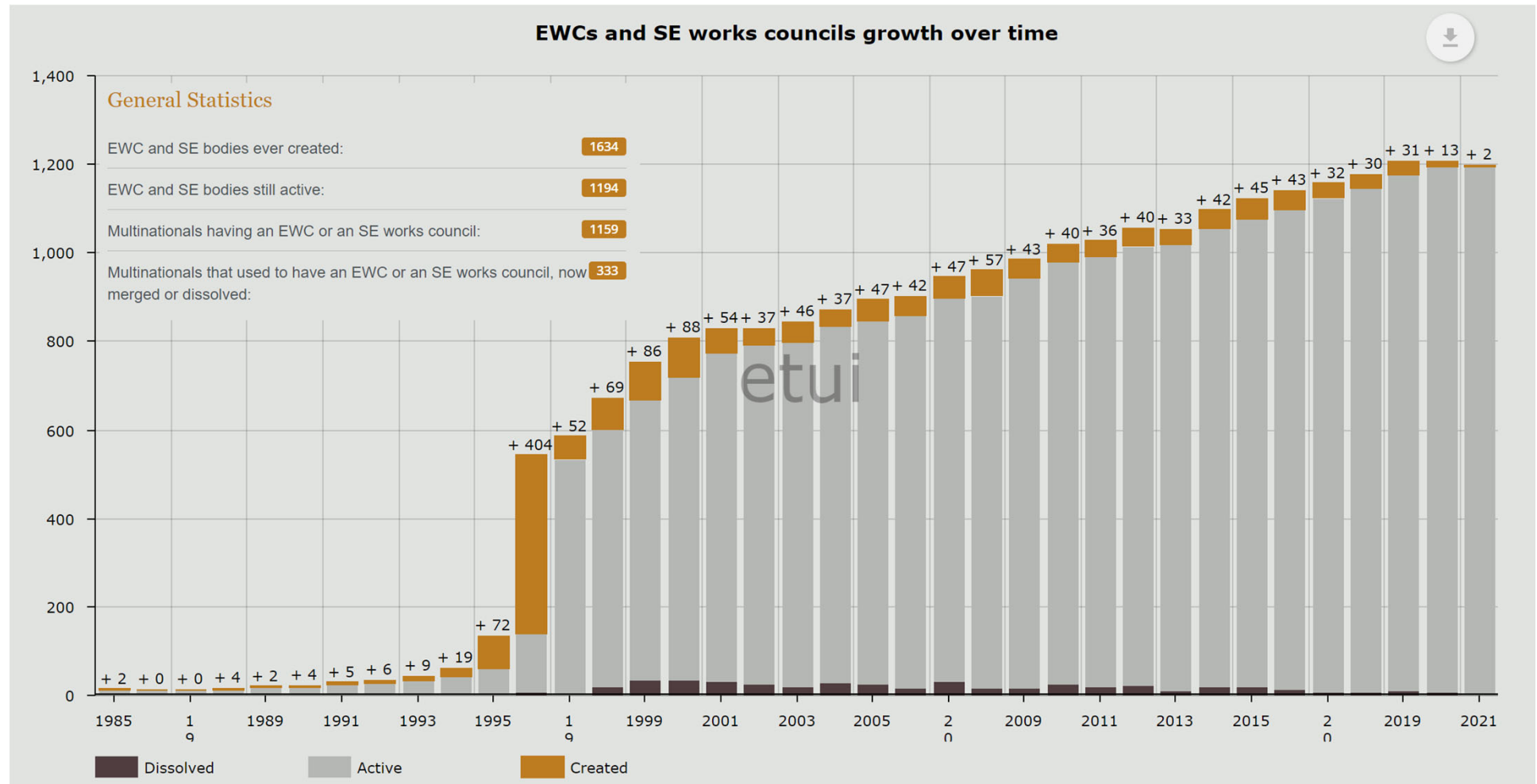


etui.

Context

1. EWC Directive 94/45/EC reviewed in 2008 → replaced with EWC Recast Directive 2009/38/EC
2. EWC Recast entry into force: 06/06/2011
3. By 05/06/2016 ‘
*the **Commission shall report** to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive, **making appropriate proposals where necessary.***’
4. On 14/05/2018 the European Commission issued
 - Report on the implementation of Directive 2009/39
 - Evaluation Staff Working Document

How many EWCs?



Agenda

1. The **WHY**: research & survey evidence
2. The **WHAT**: Analysis of the Implementation Report
3. The **HOW**:
 1. Analysis of the past review/recast procedure: lessons learnt
 2. Considerations for future

the

WHY

Commission's Implementation Report (before 2018)

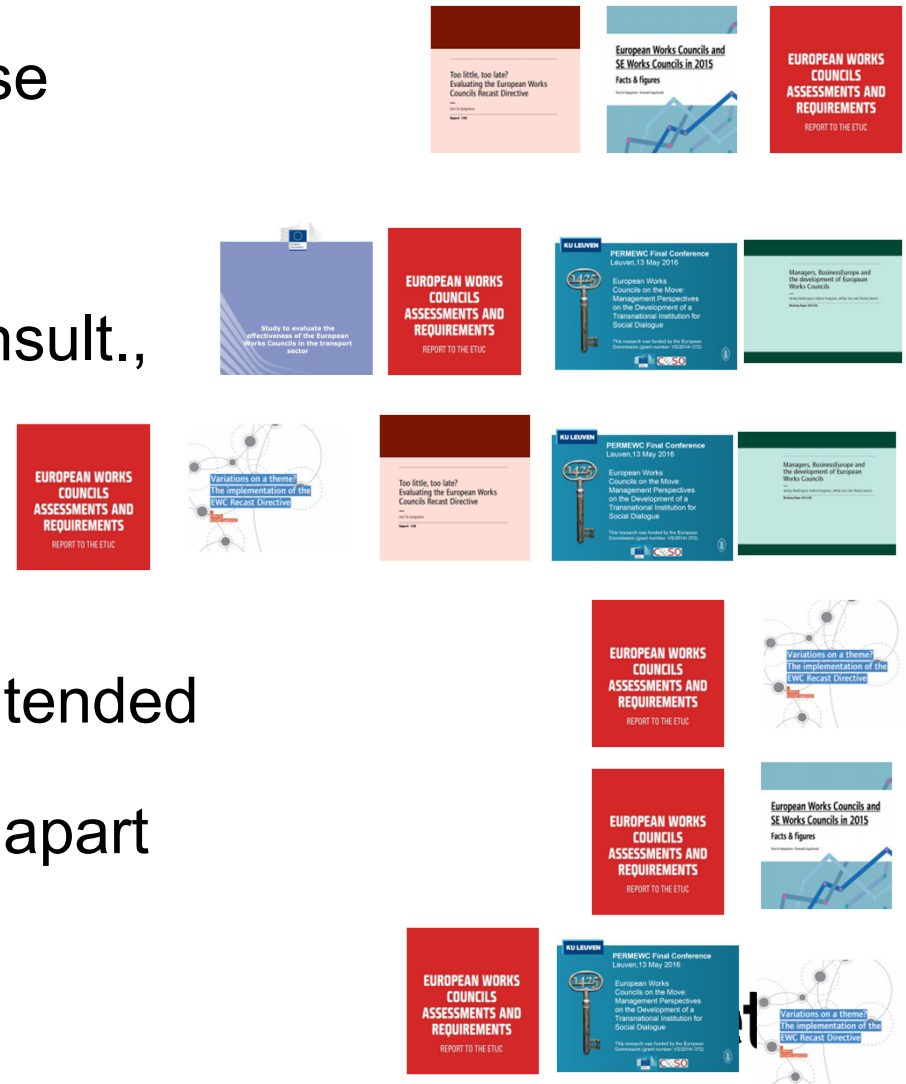
1. Unprecedented amount of relevant research: various methods and angles + **converging conclusions**



etui.

Overview of evaluation studies: findings (before 2018)

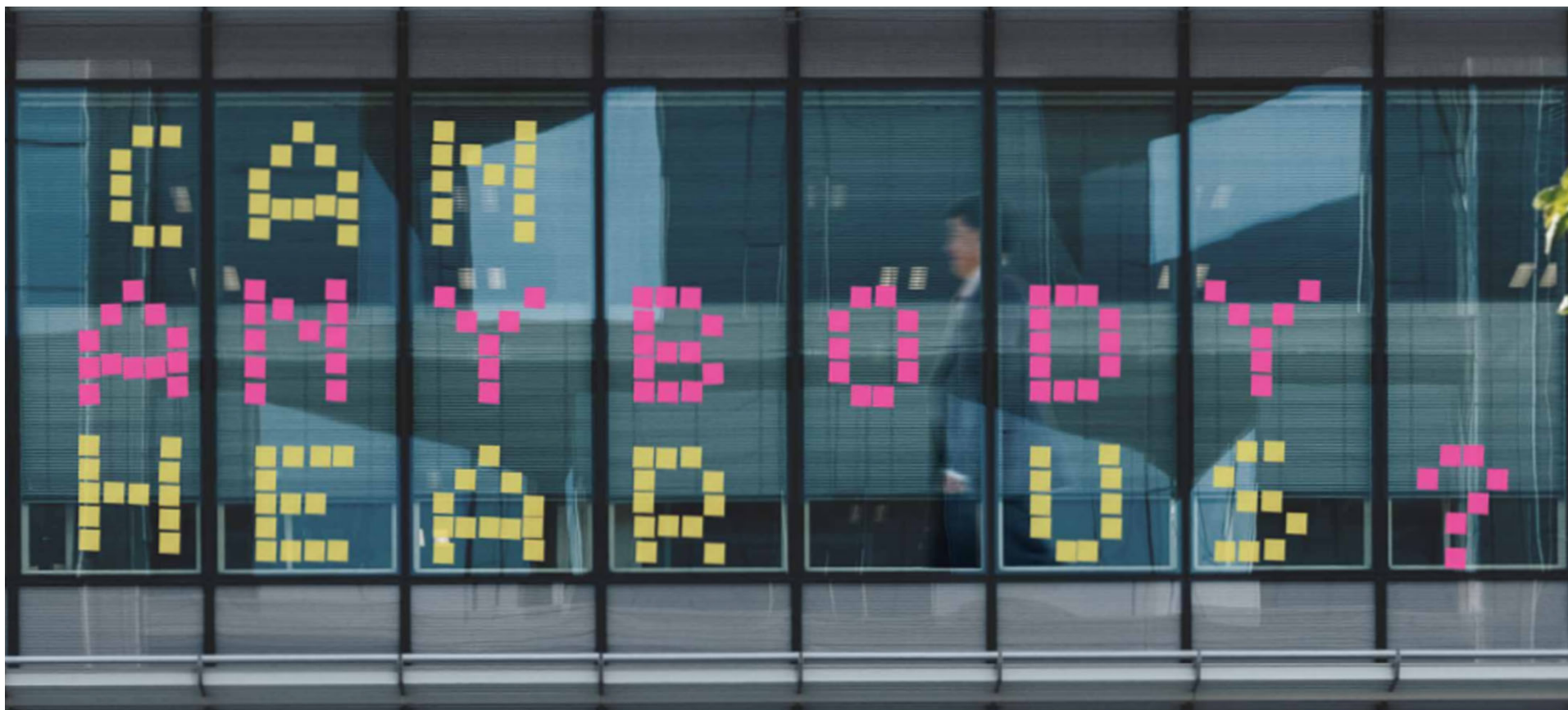
- Directive is still not fit for purpose
- EWCs unable to play their role (timing of I&C, meaningless consult., restructuring)
- Recast directive had little / no impact (2 little, 2 late)
- Directive not implemented as intended
- EWCs growing more and more apart
- Problems with enforcement



Relevant research on EWC functioning before 2018

Unprecedented amount of relevant research: various methods and angles + **converging conclusions**

**etui.**



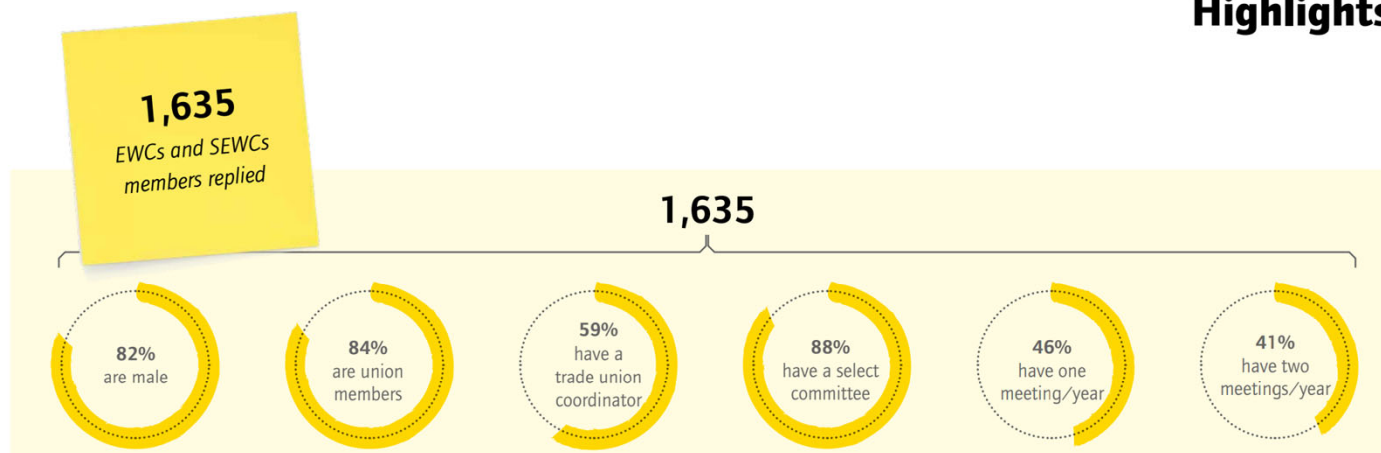
Can anybody hear us?

An overview of the 2018 survey of EWC and SEWC representatives
by Stan De Spiegelaere & Romuald Jagodziński

etui.

2018 EWC Survey

Highlights.



Information & consultation

- Only 22% consulted before the final decision

Restructuring

- 91% are engaged with restructuring projects
- Less than 13% had a timely extraordinary meeting

Communication

- 67% always try to align positions between countries

Management

- Able: 67% say decision-makers are present
- But not willing: only 39% say management tries to find solutions

Training

- 38% have received no training

Conflicts

- 16% had experienced a serious conflict
- Few cases went to court

Art. 13, Art. 6 and SEWCs

- Few differences in practice
- Legal base different

Trade union coordinator

- Where a trade union coordinator is present, the EWC's internal organisation is better.

Changes over time

- More meetings per year
- Little improvement

Demands for the future

- Enforcement: 83% want a prohibition of decisions taken without prior consultation

etui.

Number of meetings

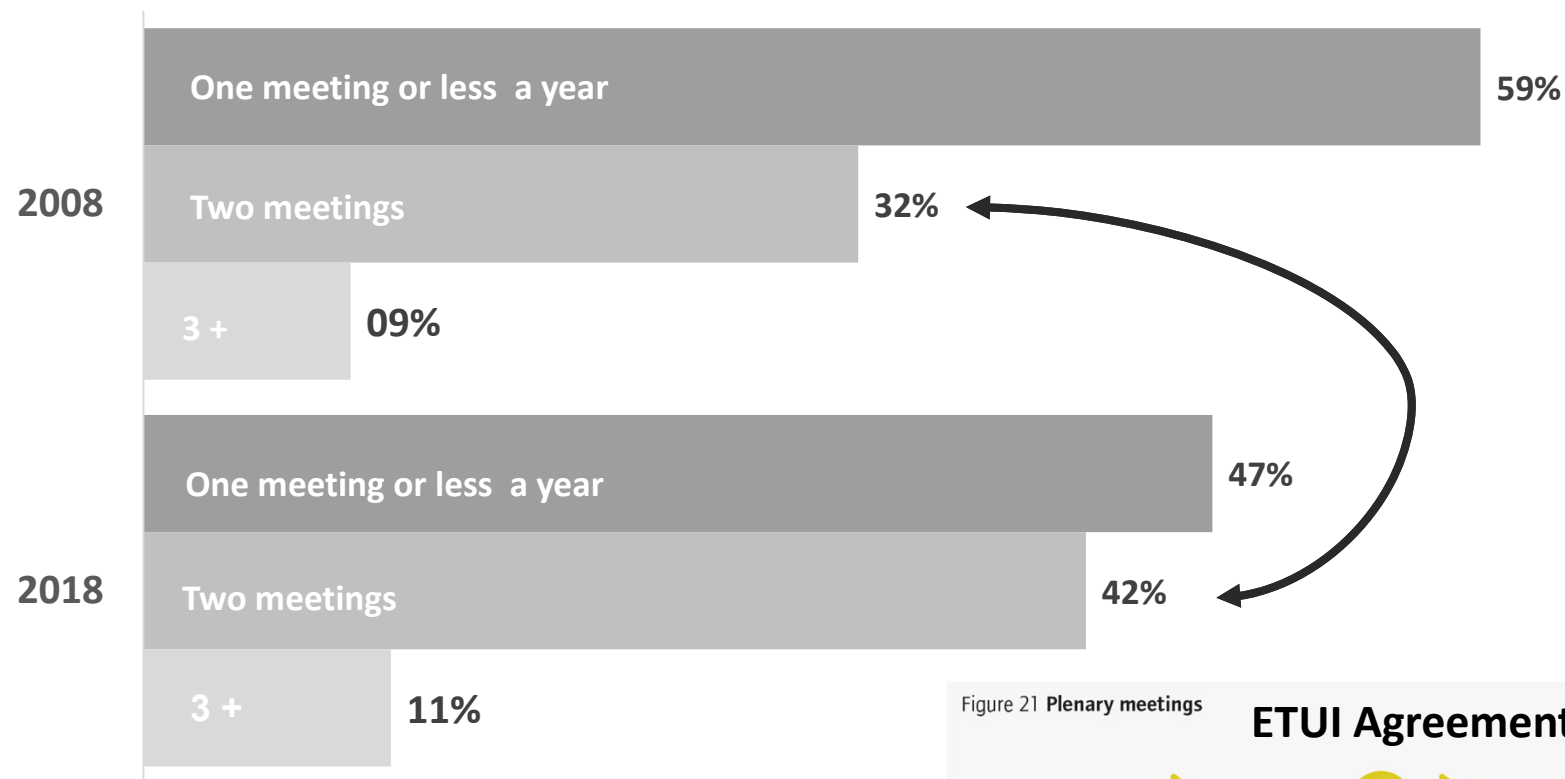


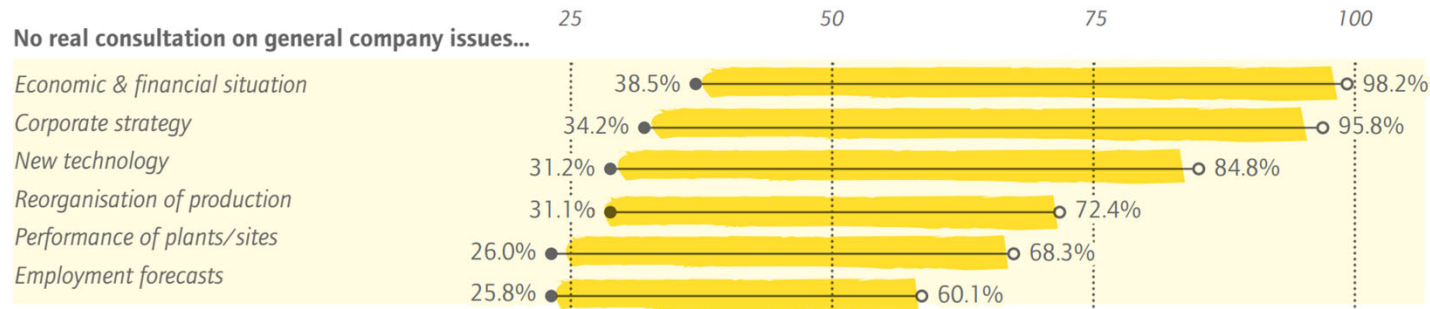
Figure 21 Plenary meetings

ETUI Agreements' analysis

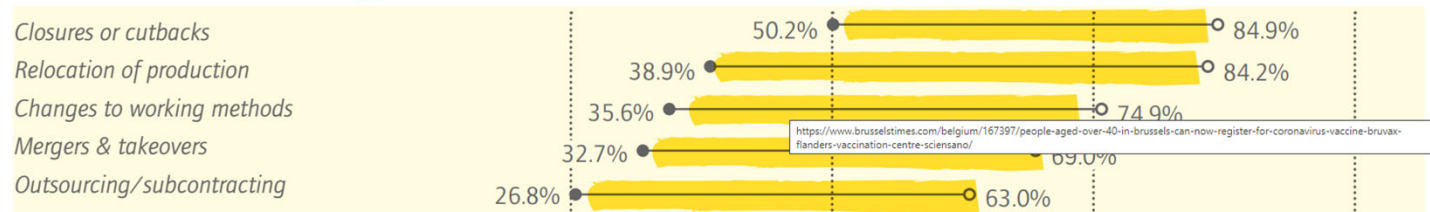


Information and consultation. Agenda and quality

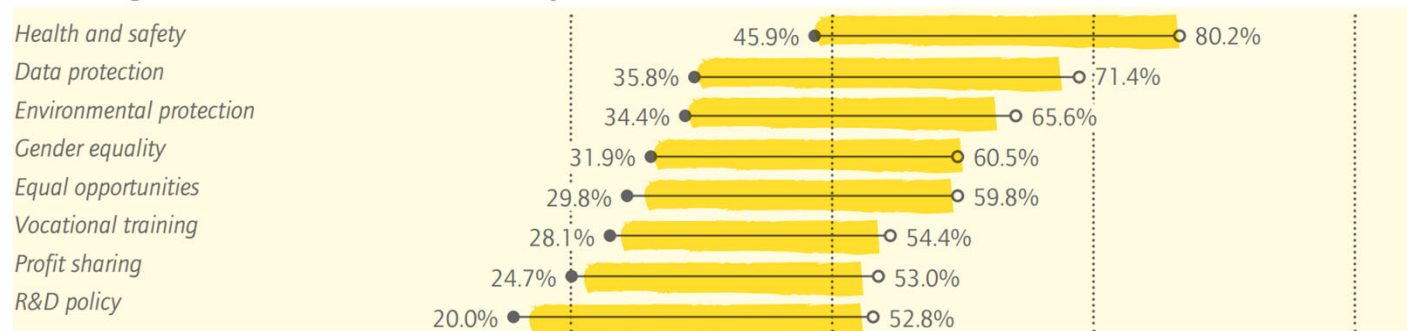
% EWC members who considered there was 'useful information and consultation' on each issue that had been raised



A bit more mixed for restructuring...



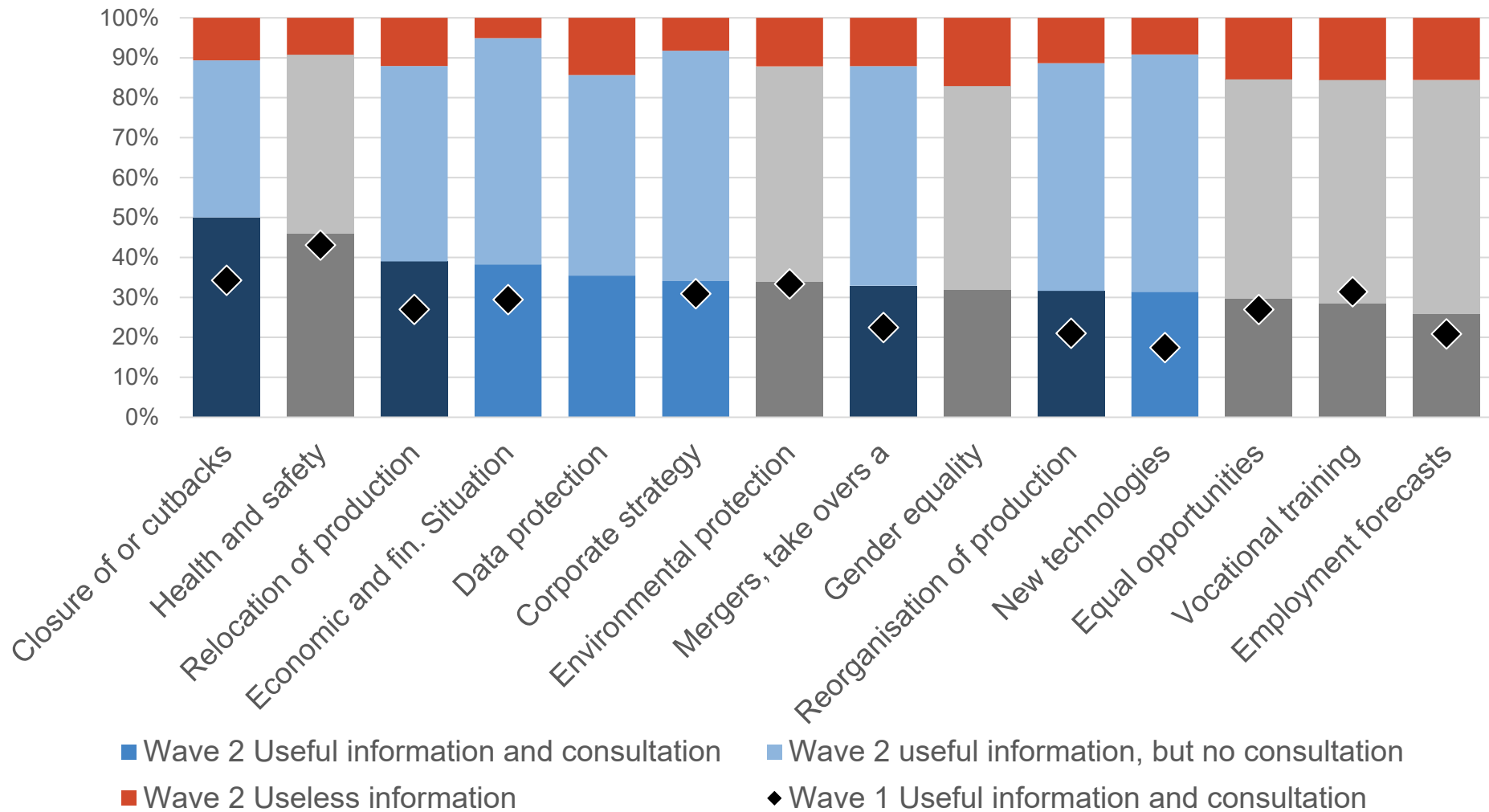
Extended agenda: consultation for health and safety...



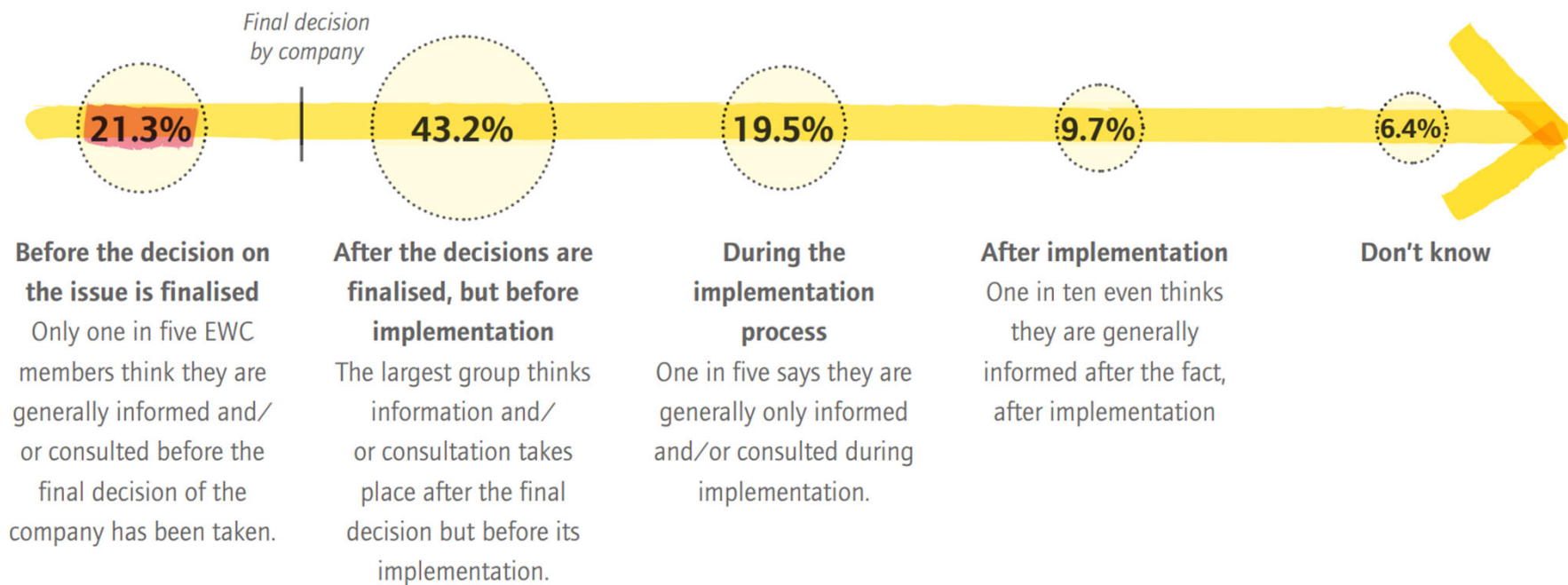
○ Topics raised in the last three years, % EWC reps

● % EWC members who considered there was 'useful information and consultation'

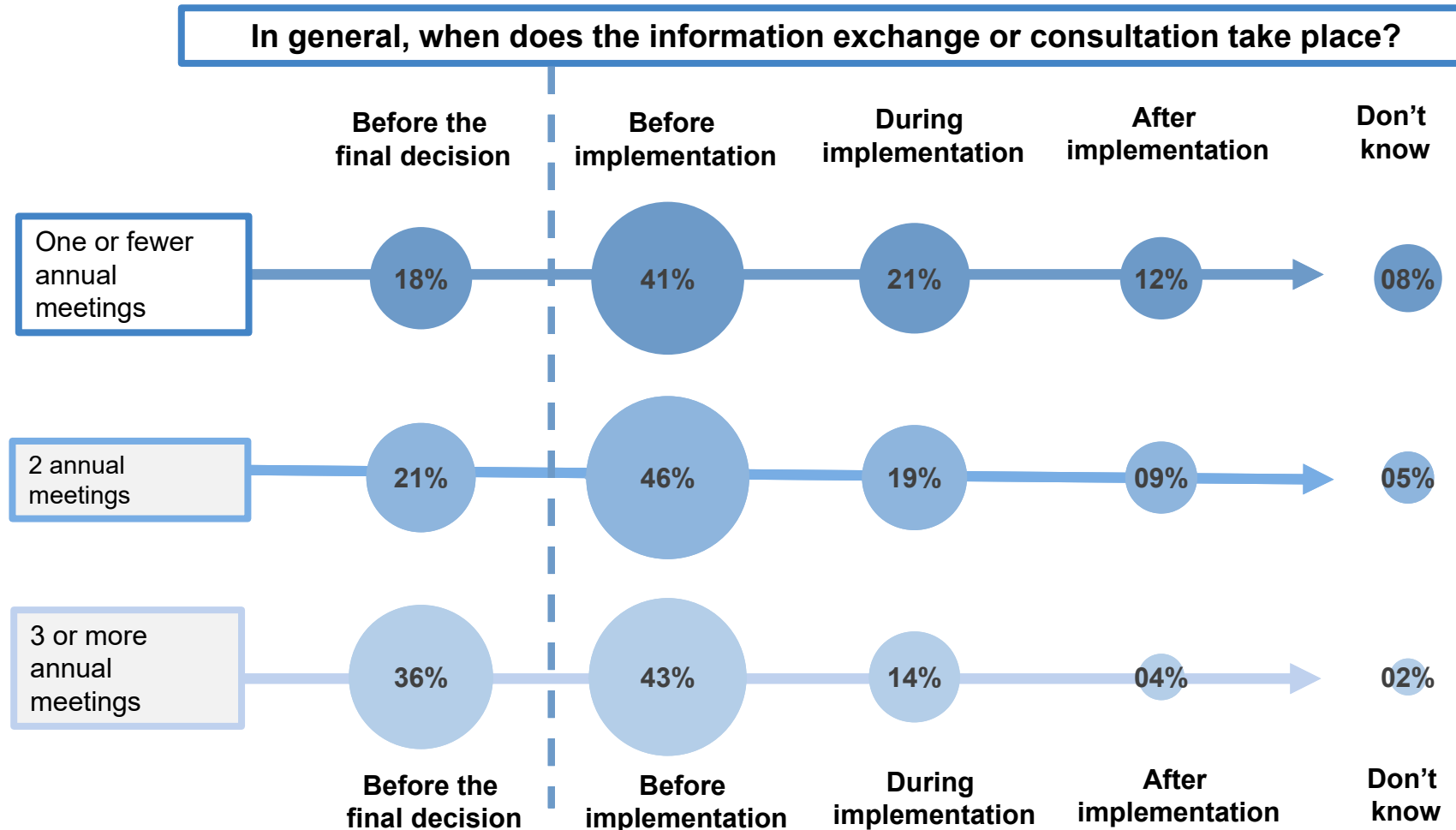
Quality of I&C on those topics raised



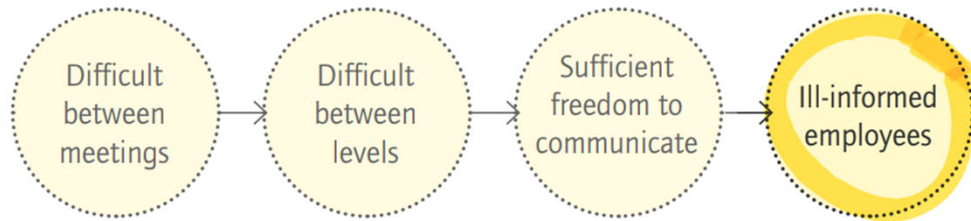
Timing of information



Timing of information and consultation



Communication. Employees

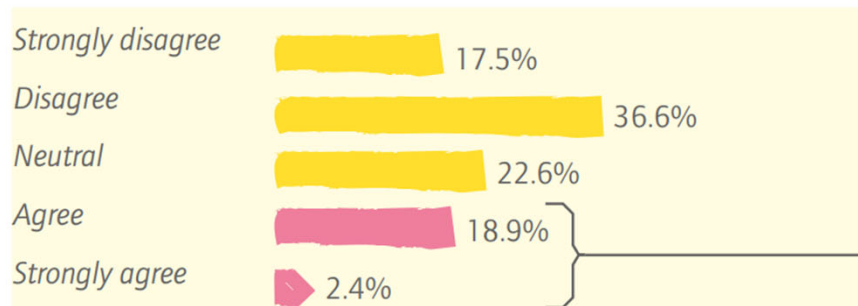


<https://www.brusselstimes.com/belgium/167397/people-aged-over-40-in-brussels-can-now-register-for-coronavirus-vaccine-bruvax-flanders-vaccination-centre-sciensano/>

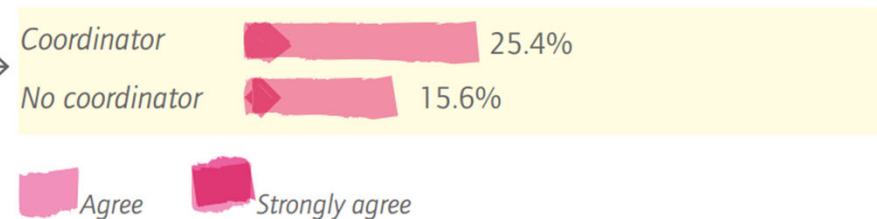
Employees not well informed about EWC _____

Well-informed? Better with a coordinator _____

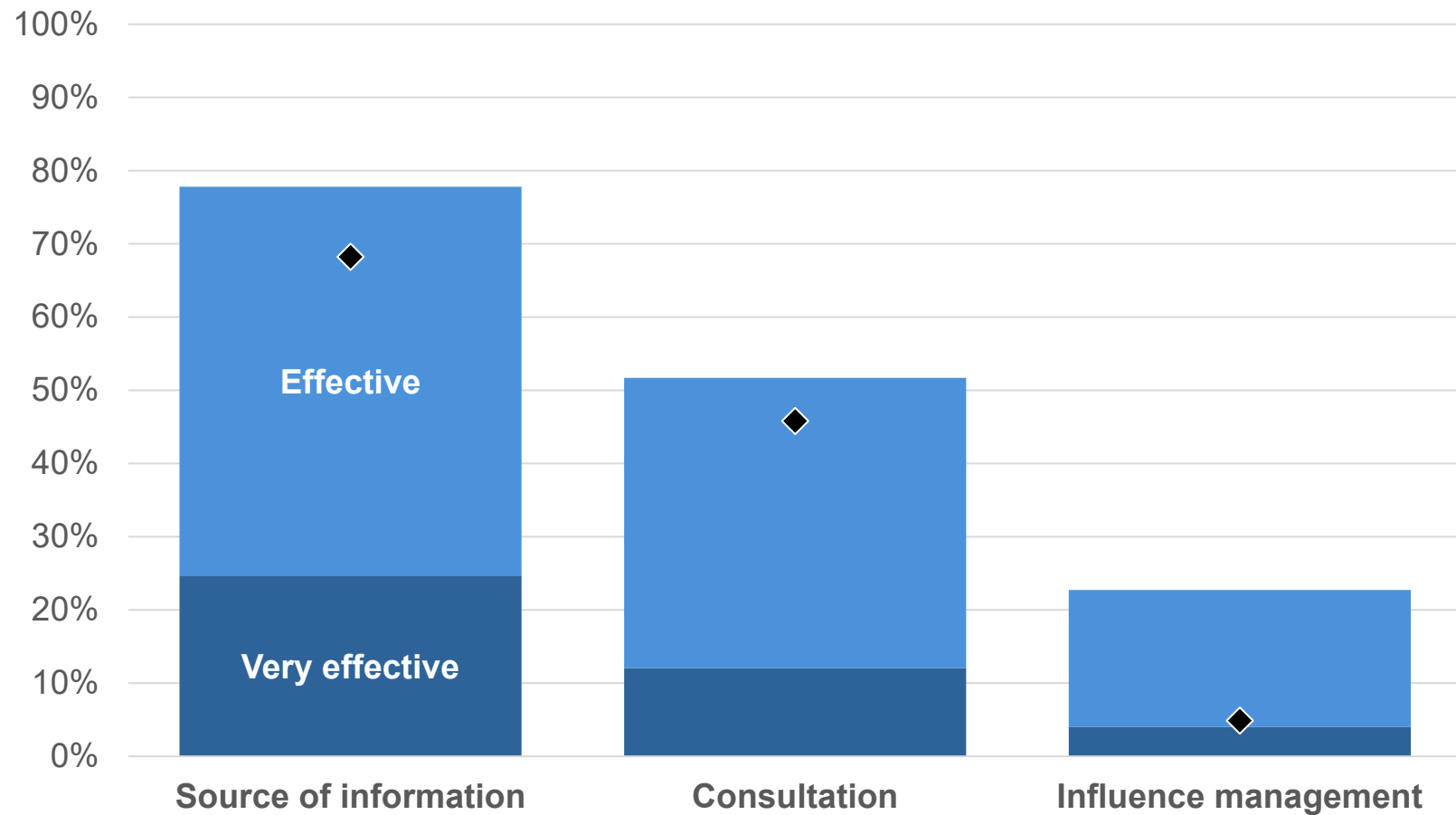
I think the employees in my company are well informed about what we do in the EWC



Are employees well-informed?



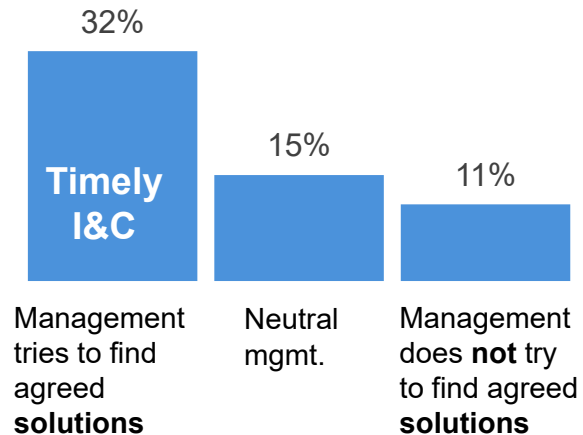
EWC Plenary meeting effectiveness



The power of the management

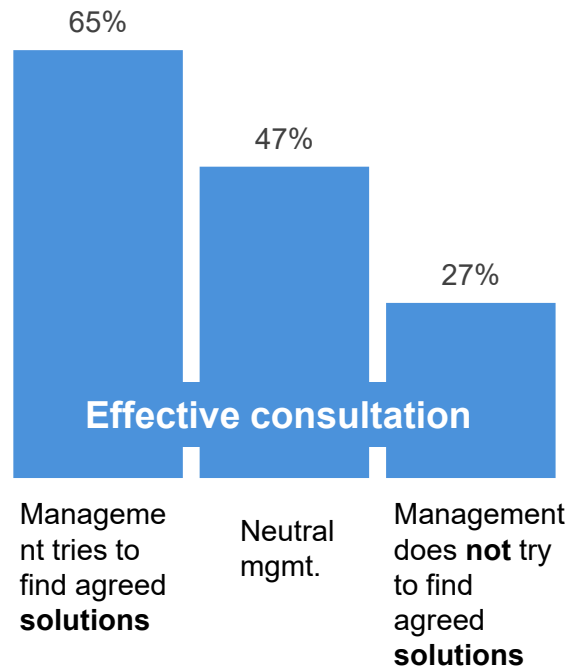
If the mgmt wants to... there is **early involvement** of the EWC

% EWC representatives that think they are informed **before** a final decision is taken



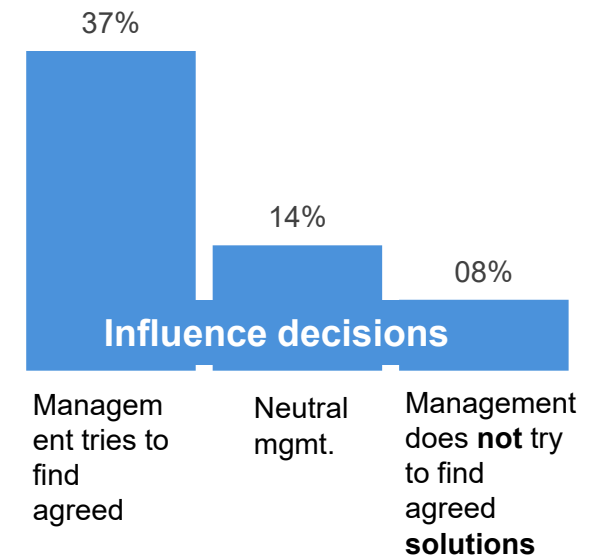
If the mgmt wants to... the EWC is really **consulted**

% EWC representatives that the EWC meetings are effective for **consultation**



If the mgmt wants to... the EWC can **influence** decisions

% EWC representatives that the EWC meetings are effective for **influencing management decisions**



etui.

When the times get tough

Serious conflicts

Serious conflict
16%

16% of the EWC representatives had a serious dispute with the management over the EWC functioning in the last three years.

The core question: what cure for what disease?

Healing the EWCs:

- 1) **Diagnosis:**
diseases/symptoms & root causes
- 2) **Prescription/medicine:**
Commission's proposal
- 3) **Evaluation:** does medicine address the disease & causes?



etui.

the

WHAT

Criteria for evaluating the review

1. **Purpose** of the Recast Directive (Preamble and body):

*‘ The purpose of this Directive is **to improve the right to information and to consultation** of employees in Community-scale undertakings and Community-scale groups of undertakings.’ (Art. 1, Recital 7)*

+ fundamental right (CFREU, Art. 27)

BUT: the fundamental nature of the right to I&C has **NOT been a catalyst** for empowering the judiciary of the MS to disapply provisions contrary to the EU directives implementing this right (*Association de Médiation sociale*, C-176/12).

+ **step down from 94/45/EC:**

„to examine whether the workforce size thresholds were appropriate” NOT present in 2009/38/EC

etui.

Commission's criteria for evaluating the review (2)

2. Criteria (directive)

- Effectiveness
- Increasing the proportion [number] of EWC's established
- Continuity of the functioning of existing agreement
- Solving practical problems
- Remedying the lack of legal certainty
- Improving the linking between various EU instruments on I&C



etui.

Proper review: two (parallel) routes

- **Review of the implementation + enforcement (of proper implementation)** (monitoring and securing compliance and sanctioning non-compliance);
- **Review of the directive's provisions** and identification of **loopholes and problems** → a **revision** of the directive.



etui.

Analysis of the Commission's Implementation Report

- I. **Problems identified**, proposed **solutions adequate**;
- II. **Problems identified**, proposed **solutions inadequate**;
- III. **Problems identified** for which **no solutions** proposed;
- IV. **Issues mentioned** in the Report but **not problematised**
- V. **Problems ignored**, but needing a solution

etui.

Problems identified, proposed solutions adequate



etui.

Problems identified, proposed **solutions inadequate**

- The sluggish **increase in EWCs population** [proportion]
- Lacks of awareness, voluntarism, IR traditions, lack of enforcement, scepticism of managers
- **sanctions** not meeting the criteria of being ‘*proportionate, effective and dissuasive*’

*‘The evidence of the operation of the redress and sanction system indicates that it **does not fully meet the objectives of the availability of ‘appropriate measures’** to be pursued where the obligations relating to an EWC are not met.’ (Implementation Report SWD 2018)*



*‘**continue to support** Member States’ work to improve implementation of the Directive’s provisions, and will **facilitate exchanges** between Member States, notably on the design of ‘effective, proportionate and dissuasive’*

Problems identified for which **no solutions** proposed

- **Lack of financing** means for litigation by EWCs
- The situation of **article 13** EWCs
- The flawed **definition of ‘controlling undertaking’**
- Unclear definition/concept of **transnationality**
- The **timing and content** of information & information
- Limited **influence** on company decision making
- **Articulation** between the levels of I&C – priority/sequence of information & consultation processes
- Abuse of **confidentiality** clauses
- Right to request external **expertise**
- **Enforcement** of obligations
- **Access to courts**: lack of legal status of EWCs and means
- The **role of trade unions** and local works councils.



- Handbook
- More financing for EWCs

etui.

Issues mentioned in the Report, but **not problematised**

- **Coherence** with other EU instruments on workers' information and consultation
- Unclearity regarding the **resources for reporting back**
- The **flawed transpositions** of the Directive in national law
- **Training** (content mainly national or English training)
- **TCA's** and EWCs
- **Subsidiary requirements** (lacking procedures to apply)

Problems ignored, but needing a solution

Not exhaustive:

- Information on **eligible companies**
- **Calculation methods** of employees and definition of employees (temporary agency workers, etc.)
- **Regime shopping**
- **Renegotiation** of old agreements
- **New areas** of EWC competence
- **Cost of training** explicitly to be borne by companies
- **Protection** against victimisation of workers setting up EWCs
- Explicit **sanctions**
- **Meetings without management** before and after (not only SNB) **etui.**

What priorities for future?



etui.

What should be changed?

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

More effective enforcement and sanctions



Information quality and scope



Resources and expertise



Meetings



Agree Strongly agree

etui.



the

HOW

Procedural history: lessons learnt

1.1 First review of implementation of Directive 94/45/EC:

- Overdue (2000 vs. 1999) and unrivalled
- Despite numerous faults found did not lead to any *'making appropriate proposals where necessary'*

1.2 consultation with the Social Partners - ambiguity

- First stage opened in 2004
- Second stage (claimed): 2005 (March) Claimed/rivalled (procedural)
- Second stage: reopened 2008

Procedural history: lessons learnt



See www.worker-participation.eu/

2. Political actors of change

- ETUC: Numerous demands, position, letters – (half)unsuccessful
- BusinessEurope: limit legislation / damage control, against – (half)successful
- EESC: opinions and positions (2003, 2006, 2009) - unsuccessful/not decisive
- European Parliament: resolutions of 2006 and 2007 – not decisive
- European Commission:
 - Implementation Report 2000:
 - no proposal for change/revision + no infringement procedure
 - Review (recast) of the Directive 2009/38/EC - initiated only at the impulse (2007) from the forthcoming French Presidency of the Council (2008)
 - Evolution: 1990s (for) – 2010s (against)
 - Implementation Report 2018: no proposal for change/revision + no infringement procedure (so far)

Conclusions:

1. Commission's capacity to initiate change **limited**
2. the **source of political initiative and change**: most probably external (not the Commission)

The core question: what cure for what disease?

Healing the EWCs:

- 1) **Diagnosis:** diseases/symptoms & root causes
- 2) **Prescription/medicine**
 - creating and sharing a **practical handbook** for practitioners;
 - **funding** for social partners to support the implementation and effectiveness of EWCs;
 - **ensuring the full transposition** of key provisions of the Recast Directive in MS
- 3) **Evaluation:** does medicine address the disease & causes?



etui.

Considerations for future

- Many improvements easily available: move recitals to body (transnationality, articulation, sanctions)
- Review without consultation with social partners?
- Enforcement directive?
- Who will give impulse? MS, EP...?

Summary & conclusions



Adequate solutions?



etui.



Thank you for attention
Questions & comments welcome

rjagodzinski@etui.org
filip.dorssemont@uclouvain.be

etui.