August 2017 | 04

German corporate codetermination withstands ECJ scrutiny

Employment law – in brief ...

Since the Berlin Higher Regional Court had referred the question to the European Court of Justice (ECJ) in October 2015 of whether it was compatible with EU law regulations that only the workers employed in Germany are eligible to participate in the election of the workers' representatives on the supervisory board, the legal sector has been eagerly looking to Luxembourg and awaiting an answer from the ECJ.

The answer is now available and is likely to allow the legal sector to breathe a sigh of relief. On 18 July 2017, the ECJ ruled that restricting the right to vote and the right to stand as a candidate for the workers' representatives on the supervisory board to workers employed in establishments in Germany did not violate EU law (Case Erzberger v. TUI AG – C-566/15).

1. Decision of the ECJ

a) Underlying facts of the matter

The claimant Mr Erzberger is a shareholder of TUI AG. He asserted in the main proceedings that the supervisory board of TUI AG was not properly constituted. Mr Erzberger considered the fact that the German provisions on worker codetermination limit the right to vote and stand as a candidate for the workers' representatives on the supervisory board to workers employed in establishments in Germany to be a violation of the prohibition of discrimination on grounds of nationality under EU law (Article 18 of the TFEU) and of the free movement of workers guaranteed under EU law (Article 45 of the TFEU).

It is true that case law and the prevailing opinion in legal commentary have assumed so far that workers employed outside Germany do not participate in the election of workers' representatives on the supervisory board. This limitation was justified by the so-called "principle of territoriality" according to which German corporate codetermination cannot extend to the territory of other states.

Whereas the Berlin Regional Court had still denied a violation of EU law standards in the first instance, the Higher Regional Court considered such a violation conceivable and thus referred this question to the ECJ for a ruling.

b) Content of the ECJ judgement

Giving only a brief explanation of the grounds for its decision, the ECJ denies that this violates EU law.

A violation of the general prohibition of discrimination on grounds of nationality does not exist for the sole reason that in such employment law scenarios, only the more special and thus overriding guarantee of free movement of workers is relevant.

When reviewing any possible impediment to the free movement of workers by the German codetermination laws, the ECJ forms two groups of workers and denies an impediment of the free movement of workers in each case.

Regarding the workers who have never worked in Germany, but always in another EU state and thus have never exercised their freedom to move within the

Union and who do not intend to do so either, there is no cross-border element from the outset. In order for fundamental freedoms under EU law to apply, however, a cross-border element is always necessary. National situations are generally not covered by the fundamental freedoms under EU law, so an infringement of the free movement of workers is ruled out with regard to these workers.

It is true that a cross-border element exists with regard to the workers who have first worked in Germany and then assumed a position in another EU state ("transfer to another EU state"). An impediment to the free movement of workers, however, does not exist. EU law cannot guarantee towards a worker that moving to another member state will be "neutral" in terms of social security. Therefore, the guarantee of free movement of workers does not give workers the right to rely, in the host member state, on the conditions of employment that they would have enjoyed in the member state of origin under the national legislation of the latter state. Germany is therefore not prevented from limiting the scope of application of the codetermination laws with regard to the right to vote and stand as a candidate to the workers employed in establishments in Germany.

2. The decision's practical implications

The decision of the ECJ is to be welcomed. It would be difficult to understand why the free movement of workers should be impeded only because workers employed in EU states other than Germany may not participate in the elections of members to the supervisory board in Germany. It is hard to imagine that "dropping out" of codetermination can prevent employees from transferring from a position in Germany to a position in another EU state.

a) No EU-wide new elections of supervisory board members required

By way of its decision, the ECJ made an important clarification. Workers employed in EU states other than Germany (irrespective of their nationality) do not participate in elections of workers' representatives on the supervisory board. Companies employing workers in EU states other than Germany are thus not obligated to conduct EU-wide (new) elections of the workers' representatives on their supervisory board. The constitution of the supervisory board will remain unchanged until the next regular election. Only the workers employed in establishments in Germany must be involved – as before – also in the next regular election of workers' representatives.

b) Transferability to thresholds under codetermination law possibly required

It has not yet been finally clarified, however, whether the decision of the ECJ can be transferred also to the thresholds under codetermination law. In this respect, the question arises whether workers employed outside Germany must be counted or not when determining the correct codetermination statute. For example, parity codetermination is not applicable until 2,000 workers are regularly employed (§ 1 (1) No. 2 of the German Codetermination Act (*MitbestG*)). As of a number of 500 regular employees, one third of the supervisory board members must be workers' representatives (§ 1 (1) of the German One-Third Participation Act (*DrittelbG*)).

The Higher Regional Court of Frankfurt/Main suspended proceedings concerning Deutsche Börse AG dealing with the application of the correct codetermination statute until the decision of the ECJ (decision of 17 June 2016 – 21 W 91/15). In view of the judgement of the ECJ, it is probably to be expected that the Higher Regional Court of Frankfurt/Main will repeal the decision to the contrary that was rendered in the previous instance and will rule that, in general, the workers employed in Germany must be taken as a basis when calculating whether the relevant thresholds under codetermination law are reached. Even if there will be no final certainty until after the court decision, it is not to be feared that companies that currently employ just under 2,000 regular employees in Germany, in particular, will be subject to parity codetermination "all of a sudden" because the workers employed in other EU states must also be additionally taken into account. Notwithstanding this good news, it may be reasonable for companies that come within a whisker of the numbers of workers relevant under codetermination law also within Germany to consider whether the applicability of (parity) codetermination could be avoided by internal reorganisation within the group. We would be pleased to assist you in such considerations.

Yours sincerely

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