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REPORT

No. 17 · Co-Determination Report

ACID TEST ECJ - UNDERMINE OR STRENGTHEN CO-DETERMINATION?

The ECJ examines conformity of German co-determination under European law.

Reference to the European Court of Justice: Attack on the European social model?
On the order of reference of the Superior Court of Justice Berlin dated October 16, 2015 with regard to the question as to whether the co-determination of employees is a violation of European law.

AT A GLANCE:

- Based on a question submitted by a German court of law, the ECJ has to decide whether the existing laws on employee participation in company bodies, respectively their application, are compatible with European law.
- Depending on the decision reached by the ECJ there is a threat of considerable upheavals within the national systems of industrial relationships in all Member States. Consequently, the proceedings have substantial significance extending far beyond Germany's borders.
- The governments of the EU Member States can participate in the proceedings before the ECJ with their own opinions.
- The national federations of trade unions should examine whether, with regard to the points of view stated, it is meaningful to campaign to their own national governments for the submission of an individual position statement.

MF MITBESTIMMUNGS-FÖRDERUNG

INHALTSVERZEICHNIS

I. CONTENT OF THE PROCEEDINGS

With its decision dated October 16, 2015, within the scope of a so-called preliminary ruling procedure, the Superior Court of Justice Berlin presented the European Court of Justice (ECJ) the question whether the German Co-Determination Act violates European law.[1] In concrete terms, the issue is that those employees working in foreign EU Member States neither have an active nor a passive right to vote at supervisory board elections. Contrary to those inner-German employees, they can neither vote to elect members to the supervisory board nor stand for election to the supervisory board themselves. TUI AG, the underlying case of these proceedings, has some 10,000 employees working in Germany and about 40,000 employees who are employed in other EU Member States. The Superior Court of Justice Berlin (corresponds to the Higher Regional Court in other German federal states) considers it "possible" that this can be seen as a violation against the prohibition of discrimination under European law based on nationality (Art. 18 of the Treaty on the Functioning of the European Union (TFEU)) and against the freedom of movement for workers (Art. 45 TFEU). This question is also controversial in juristic literature. However, the prevailing opinion in jurisdiction and literature[2] speaks against a violation of European law. The order of reference was instituted in a so-called status procedure to examine the composition of the supervisory board (Section 98 German Stock Corporation Act (AktG)). In the previous instance, the Regional Court Berlin (LG Berlin) still convincingly rejected a violation of European law (102 O 65/14 German Stock Corporation Act).[3] A decision by the ECJ is expected by early 2017. Until that time, the co-determination on a supervisory board is not affected.

II. MOTIVATION FOR THE PROCEEDINGS

These proceedings are part of analogous ongoing legal disputes concerning various companies (Deutsche Börse, Hornbach, BayWa). For the most part these are identical applicants (shareholders, in particular a professor of labour law close to the employers and a single shareholder) whose objective – in our opinion politically motivated – is to achieve an inapplicability of the German Co-Determination Act based on the alleged infringement of European law. Their demand is that the supervisory board should be composed of shareholder representatives only.

Even in the proceedings at hand, it can be assumed that the concrete company is of no interest to the Applicant. Rather, the Applicant's intention is to weaken employee participation in Europe and in Germany. The democratic legitimization of national employee representations in Europe is to be called into question. In so doing, the entire system of national industrial relations is on trial before the EJC. Up until now, the German courts – Regional Court Landau[4], Higher Regional Court Zweibrücken[5], Regional Court Frankfurt[6], and Regional Court Berlin[7], Regional Court Munich I[8]– have, however, not granted the applications of the aforementioned individuals, and have considered the German co-determination laws as compliant with European law. This is contrast to the Superior Court of Justice Berlin that presented the question to the EJC.

1 Pending at the ECJ under the File Reference -566/15 (Erzberger).
2 Please also particularly refer to Krause, AG 2012, page 485 (appendix attached).
3 Regional Court Berlin dated June 1, 2015 - 102 O 65/14 German Stock Corporation Act (appendix attached).
4 Regional Court Landau (Palatinate) dated September 18 2013 – HK O 27/13, HK O 27/13 = ZIP [Journal of Commercial Law] 2013, page 2107.
5 Higher Regional Court Zweibrücken dated February 20, 2014 - 3 W 150/13 = ZIP 2014, page 1224.
6 Regional Court Frankfurt dated February 02, 2015 3-16 O 1/14, 3/16 O 1/14 = ZIP 2015, page 634. Regional court Frankfurt (Case: Deutsche Börse) does not see a violation of European law but interprets this as compliant with European law. Refer here to: Krause ZIP 2015, p. 634 et seq.
7 Regional Court Berlin dated June 1, 2015 - 102 O 65/14 German Stock Corporation Act (appendix attached).
8 Regional Court Munich I dated August 27, 2015 – HK O 20285/14, HK O 20285/14 = ZIP 2015, page 1929.

III. THE QUESTION REFERRED TO THE EJC IS

Is it compatible with Art. 18 TFEU (prohibition of discrimination) and Art. 45 TFEU (freedom of movement for workers) that a Member State grants the active and passive right to elect employee representatives to the supervisory board of a company only to those employees working in inner-German companies or in domestic group companies?

This question consequently affects the practice of corporate co-determination irrespective of the amount of the holding. This decision would most likely also affect other EU Member States and their legislation on employee participation in company bodies as, for example, France, Austria, Sweden, and the Netherlands. So far, not a single Member State provides for an automatic participation of workers abroad in elections for national employee representations. The co-determination of employees on a supervisory board and/or administrative board is thus not a German peculiarity but is so far spread that it could be considered a central component of the European social model.[9]

IV. ARGUMENTS OF THOSE OPPOSING CO-DETERMINATION

- The employees' freedom of movement is affected as employees would be deterred from moving abroad due to the threatened loss of their active and passive right to vote representatives to the supervisory board or a possible membership in a supervisory board.
- Employees working for the group would, for reasons of nationality, be (indirectly) discriminated against as these employees are not entitled to either the active or the passive right to vote in elections of representatives to the supervisory board and would therefore not be sufficiently represented despite the fact that the supervisory board is responsible for the group as a whole worldwide.

V. WHY THE CO-DETERMINATION IS COMPATIBLE WITH EUROPEAN LAW

Prevailing opinion[10] and jurisdiction convincingly argue against the assumption of a violation of European law in terms of the co-determination laws. This is in particular based on the following considerations (cf. Regional Court Berlin and Krause, AG [Journal of Stock corporation, Corporate, and Financial markets law] 2012 - both attached):

- The legislator does not have a regulatory competence to include employees working abroad (principle of territoriality). It cannot issue regulations on voting rights in other EU Member States. In this respect, the legislator can consequently also not violate the prohibition of discrimination outside his sphere of competence. Transnational matters can only be regulated at EU level. The prohibition of discrimination under European law also does not have the function to change structural decisions under labour law in terms of a negative integration; structural decisions are allowed to be, and actually are different, in the relevant Member States.
- The professional move to another Member State within Europe is a decision that brings along many different kinds of considerable changes. The assumption that the loss of an inclusion in the voting process of supervisory board elections could prevent a job change within the group is obviously absurd. The possible restriction is far too abstract and indirect. In addition, the reason for the loss of eligibility is not merely crossing borders, but the end of the affiliation with the company. Were this argument of restriction of the employees' freedom of movement to take hold, the national provisions for the protection against dismissal could also violate European law. This too would be lost in the event of a transnational job change.[11]
- Moreover, in the absence of a harmonization of the co-determination laws in the European Union, only the Member States themselves are responsible for regulating conflicts between employers and employees within their own country. Corporate co-determination must not be seen in isolation but rather in association with in-house co-determination, collective bargaining law and the right to strike. Also, nobody deliberates as to whether, for example, the employees working in a subsidiary of a French company situated in Germany could possibly call on the French right to strike.
- The prohibition of discrimination in Art. 18 TFEU states that no EU citizen may be placed in a less favourable position based on his/her citizenship than a national. This kind of discrimination is not present as every person in the establishment has an active and passive right to vote irrespective of his/her nationality.

9 Refer here to: Conchon, "Workers' Voice in Corporate Governance: A European perspective" which can be called up in English, French and German http://www.etui.org/Publications2/Reports/Workers-voice-in-corporate-governance.-A-European-perspective

10 Comprehensively on this subject Krause, AG [Journal of Stock corporation, Corporate, and Financial markets law] 2012, page 485, printed in the appendix; Wißmann in: WWKK, German co-determination law-commentary, 4th edition 2011, preliminary margin note 3b; Seyboth in: European Sustainable Company: A stakeholder approach, Vol. II, S. 151, 161 et seq. Kort, NJW [New Legal Weekly Journal] - Editorial, 47/2015.

11 Refer in this regard also to: ECJ dated January 27, 2000 - C-190/98, NZA [New Journal of Industrial Law] 2000, page 413.

VI. EMPLOYEE PARTICIPATION UNDER EUROPEAN LAW

European treaties also include a competence base in primary law for employee participation in company bodies. This means that the co-determination is recognised in terms of European law as a protective objective in the area of social policy (Art. 151, Art. 153 paragraph 1 et seq. TFEU). The notion behind European treaties is to support and supplement Member States in their endeavours to ensure employee representation which remains a part of national competence. The demand of the European Trade Union Confederation for European minimum standards when it comes to employee participation for European regulations, coupled with the protection of national participation rights, takes up this model (refer here to: Ein neuer Rahmen für mehr Demokratie bei der Arbeit, Entschließung des EGB-Exekutivausschusses am 21-22. October 2014 [A new framework for more democracy at the workplace; Resolution by the European Trade Union Confederation Executive Committee October 21-22, 2014[12]). Furthermore, the individual Member States' employee participation in company bodies in general and the co-determination in particular are, by way of the directives on the European Company (Societas Europaea, SE), the European Cooperative Society (SCE) and the transnational amalgamation, which refer to national regulations, are also integrated into European secondary law – obviously without questioning the compatibility with European law. The fact that the European legislator issues its own resolutions for the SE shows that it does accept national regulations as such.

VII. POSSIBLE DECISION BY THE ECJ

A decision by the ECJ is expected by early 2017. Despite the good arguments against a violation of European law, it us currently uncertain as to how the ECJ will decide. The worst case scenario would be if the ECJ decided on an inapplicability of the co-determination laws for companies with transnational operations as this could result in employee participation in company bodies falling away altogether.

VIII. POSSIBLE CONSEQUENCES FOR EMPLOYEES IN GERMANY AND EUROPE

A negative decision would have serious consequences for corporate co-determination as well as for employee participation in Europe overall and therefore for the entire structure of industrial relations in Germany and Europe.

A negative decision by the ECJ would be a step backwards on the path to a social and democratic Europe. The co-determination laws are geared to protect the employees. It would contradict this protection if, as a consequence, such co-determination would remain completely inapplicable; this is substantiated by Art. 151 TFEU. By claiming discrimination of employees' interests, it would also not make sense to reach a conclusion whereby the co-determination of all employees would, from then on, be suspended. In any case, even if the ECJ could reach a ("European-law-compatible") interpretation of the laws that foreign workforces are included in the legal election processes, it would be completely unclear as to how such processes could be incorporated in practice. This then raises legal and real obstacles which are almost insurmountable.[13]

The effects described in no way relate to Germany alone. 18 of the 28 EU Member States also have types of employee participation in company bodies.[14] Not one of these regulations includes a binding inclusion of workforces in other EU Member States (territoriality). The work and social relationships of these countries would then face exactly the same problems as Germany. The consequence would be that the legitimization of national employee representations would also be questioned there. It can be expected that these Member States too will soon demand the abolishment of employee participation in company bodies or the introduction of a negotiation model at national level based on the model of the Societas Europaea. Ultimately, considerable sections of the European social order are awaiting a decision by the EJC.

12 Resolution by the European Trade Union Confederation Executive Committee October 21-22, 2014 can be called up under: https://www.etuc.org/documents/towards-new-framework-more-democracy-work-etuc-resolution#.VmAyw01dFjq.

13 Refer here to: Wißmann, Öffnung der deutschen Unternehmensmitbestimmung nach Europa? [Opening up German corporate co-determination for Europe?] in FS Wank, 2014, page 695 et seq.

14 Refer here to: Conchon, "Workers' Voice in Corporate Governance: A European perspective", page 13 et seq. which can be called up in English, French and German under http://www.etui.org/Publications2/Reports/Workers-voice-in-corporate-governance.-A-European-perspective.

IX. ROLE OF THE NATIONAL GOVERNMENTS AND TRADE UNIONS

In order to assure an effective and uniform application of Union law, and to prevent divergent interpretations, the Court of Justice's decision in a preliminary ruling procedure is de facto binding on other national courts and governments dealing with the same problem. The decision of the EJC will therefore develop relevance not only beyond the individual case described in the order of reference but also beyond German jurisdiction. Accordingly, the proceedings before the EJC provide that, besides the parties of the initial dispute, i.e. relating to domestic proceedings, the EU Commission and all EU Member States, among others, will be able to state their opinion in the proceedings (Art. 96 Rules of Procedure of the ECJ). Hereby, the opinion must be made within two months after service by the EJC (Art. 23 of the ECJ Statute). The opinion statements by the parties to the proceedings form the basis for drawing up the final applications and the decision.

The government of the Member State making the submission will regularly provide a written comment. In this case, however, even other Member States with employee participation in company bodies should also deliver an opinion. Since, as depicted, the EJC's decision could also affect the interests of other Member States (besides those of Germany). Alongside Germany, 18 of the 28 EU Member States have forms of employee participation in their company bodies. For the most part, these would also be affected by a negative judgement by the EJC. The national federations of trade unions should therefore entertain the idea of contacting their governments so as to take an individual stand for their own country's position.

A negative decision by the EJC could have considerable effects on the national and European social model, the relevant economies as well as the corporate governance of co-determined companies.[15] After all, no automatism actually exists to achieve a negotiation solution, such as in the SE, as strived for by co-determination critical circles. The negotiation solution in no way solves the legal and practical problems. It would therefore be up to the parliaments, as legislators, to react to the decision of the EJC. National parliaments, but also the EU Parliament, are required to critically accompany the proceedings.

15 Refer here to: Aline Conchon, "Workers' Voice in Corporate Governance: A European perspective", page 13 et seq. which portrays that the European economies distinguish themselves by a co-determination of their employees in corporate governance; this can be called up in English, French and German under: http://www.etui.org/Publications2/Reports/Workers-voice-in-corporate-governance.-A-European-perspective

APPENDICES:

Krause, AG 2012 (translated)
Regional Court Berlin (translated)

LINKS

Links:
Seyboth, Worker participation as an element of the democratic principle in Europe – A critique of the codetermination-relevant aspects of the Reflection Group report: https://www.etui.org/Publications2/Books/European-company-law-and-the-Sustainable-Company-a-stakeholder-approach.-Vol.-II

Malmberg, Sjödin, Bruun, EU company law and employee involvement – some perspectives on future developments (EN): https://www.etui.org/Publications2/Books/European-company-law-and-the-Sustainable-Company-a-stakeholder-approach.-Vol.-II

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THE SIGNIFICANCE OF UNION LAW FOR CORPORATE CO-DETERMINATION

For some time now, the view has been expressed that the non-inclusion of foreign personnel in German corporate co-determination violates Union anti-discrimination law, as well as representing an inadmissible restriction of employees' freedom of movement. The article views this as an overextension of European law. The structure of collective labour relations in transnational companies should be regulated at Union level via secondary legislation, not by way of individual Member States' infringements of other Member States' continued authority on the established rule of collective employment law in their own territories.

I. An outline of the new discussion on co-determination

German corporate co-determination has been a major focus of the specialist community for a number of years now. Since the disputes on the constitutionality of the German Co-Determination Act[1] (MitbestG) with the decision of the German Federal Constitutional Court (BVerfG) from 1979[2] were settled[3] and a general pacification ("hibernation")[4] of this economic and socio-political minefield was achieved,[5] a new debate concerning the fundamental right to, and form of, corporate co-determination of employees once again gained momentum.[6] Whereas following a first peak towards the middle of the last decade[7], it could be presumed that the interest in corporate co-determination in the face of the clear intentions of German politics only to accept this issue in the case that a consensus could be reached with the social partners (which was evidently not possible)[8], would gradually begin to wane, new developments show that the discussion has started to pick up speed once again. From research circles[9] as well as from the political arena[10], concrete proposals have been made for the development of corporate co-determination.

The critics of the current German system of corporate co-determination base their arguments on

* The author wishes to thank Prof. Dr. Hellmut Wißmann, President of BAG a.D., for his advice on this subject.

1 See Badura/Rittner/Rüthers, Mitbestimmungsgesetz 1976 und Grundgesetz ("Kölner Gutachten"), 1977; Kübler/Schmidt/Simitis, Mitbestimmung als gesetzgebungspolitische Aufgabe ("Frankfurter Gutachten"), 1978.

2 BVerfG [German Federal Constitutional Court] from 1.3.1979 – 1 BvR 532/77, 1 BvR 533/77, 1 BvR 419/78, 1 BvL 21/78, BVerfGE [law reports of the German Federal Constitutional Court] 50, 290.

3 See Ulmer in Ulmer/Habersack/Henssler, Mitbestimmungsrecht, 2nd Ed. 2006, introduction point 67; Wißmann in Wlotzke/Wißmann/ Koberski/Kleinsorge, Mitbestimmungsrecht, 4th Ed. 2011, preface para. 46.

4 As portrayed by Henssler, RdA [Labour Law] 2005, 330.

5 Cf. Bertelsmann Stiftung/Hans-Böckler-Stiftung (Eds.), Mitbestimmung und neue Unternehmenskulturen – Bilanz und Perspektiven, 1998; Ulmer in Ulmer/Habersack/Henssler, Mitbestimmungsrecht, 2nd Ed. 2006, introduction point 66; Wißmann in Wlotzke/Wißmann/Koberski/Kleinsorge, Mitbestimmungsrecht, 4th Ed. 2011, preface point 58; Analysen der Rechtsprechungsentwicklung bis zum Jahr 2000 in Henssler in the commemorative publication for the 50th anniversary of the Federal Supreme Court (BGH), vol. II, 2000, P. 387 et seq. and Oetker, ZGR [Journal of Business and Corporate Law] 2000, 19 et seq.

6 In hindsight, the trigger appears to have been the article by Ulmer, ZHR [Periodical for Overall Commercial and Business Law] 166 (2002), 271 et seq. On the precursors, see Hopt in commemorative publication for Everling, vol. I, 1995, P. 475 (476 et seq.); Kübler in commemorative publication Döser, 1999, P. 237 (240 et seq.); Raiser in commemorative publication Kübler, 1997, P. 477 (487 et seq.).

7 BDA/BDI (Eds.), Mitbestimmung modernisieren, Bericht der Kommission Mitbestimmung (2004); Rieble, Zukunft der Unternehmensmitbestimmung, with articles by Rieble, Rebhahn, Thüsing and Neubürger; Henssler, RdA 2005, 330 et seq.; Oetker, RdA 2005, 338 et seq.; Kommission zur Modernisierung der deutschen Unternehmensmitbestimmung ("Biedenkopf II"), 2006; Raiser, Unternehmensmitbestimmung vor dem Hintergrund europarechtlicher Entwicklungen, Gutachten zum 66. DJT (2006); Stiftung Gesellschaft für Rechtspolitik/Institut für Rechtspolitik an der Universität Trier (Ed.), Mitbestimmung im Unternehmen, Bitburger Gespräche – almanac 2006/I, 2006 with articles by Dieterich, di Fabio, Franz, Gentz, Henssler, Hexel, Junker, Köstler, Löwisch, Rieble and Weiss.

8 Ref. the coalition treaty between CDU, CSU and SPD from 11.11.2005, P. 31 ("will take up the – mutually agreed – results of the commission"/"werden die – einvernehmlich erzielten – Ergebnisse der Kommission aufgreifen"); available online at http://www.cdu.de/doc/pdf/05_11_11_Koalitionsvertrag.pdf.

9 Working group "corporate co-determination" ("Unternehmerische Mitbestimmung") (comprising Bachmann, Baums, Habersack, Henssler, Lutter, Oetker, Ulmer), Entwurf einer Regelung zur Mitbestimmungsvereinbarung sowie zur Größe des mitbestimmten Aufsichtsrats, ZIP [Journal of Commercial Law] 2009, 885 et seq., see also the statements by Hommelhoff, Teichmann, Kraushaar and Hellwig/Behme, ZIP 2009, 1785 et seq., as well as the supplement to ZIP 48/2009 with articles by Habersack, Hanau, Jacobs, Teichmann and Veil. For a fundamental reorientation by way of a replacement of supervisory board co-determination with a so-called consultative council, see the "Berliner Netzwerk Corporate Governance" (comprising of Kirchner, Säcker, Schwalbach, Schwark, v. Werder, Windbichler), AG 2004, 200 et seq.; for details in this respect, see Kirchner, AG 2004, 197 et seq.

10 See the proposal of the SPD (Antrag der Fraktion der SPD), BT-Drucks. 17/2122 from 16.6.2010. In contrast, the proposal made by DIE LINKE party only addresses the specific challenge of the treatment of foreign companies with headquarters in Germany, BT-Drucks. 17/ 1413 from 21.4.2010. In general support: Sick, GmbHR 2011, 1196 et seq. Predominantly critical commentary from Merkt, ZIP 2011, 1237 et seq., and Schockenhoff, AG 2012, 185 et seq.

two main aspects:[11] on the one hand, supervisory board co-determination cannot (or rather, can no longer)[12] do justice to the drastically increased requirements for efficient and professional corporate governance[13]. On the other hand, the lacking consideration of the German provisions on the internationalisation of the economy and in particular on the developments at European level have been reprimanded.[14] Since there is no doubt about the fact that even the highest level of pressure for reform alone would not lead to the suspension of current co-determination legislation, the vast majority of the newest statements has an avowedly right-leaning political focus, arguing in favour of changes to the legislative framework. The plausibility of the criticism of co-determination thus depends to a large extent on non-legal (economic and sociological) insights and considerations. However, neither model theory[15] nor the many empirical investigations into the influence of corporate co-determination of employees on productivity, profitability and capital market valuation of the affected companies[16] give a consensus of results which could form the basis for change in co-determination law.

Directly legal ground is broken, however, by a question which has been gaining support for some time now: does the current form of German corporate co-determination collide with Union law? Ever more voices express the view that the German corporate co-determination provisions violate Union law in those companies and/or groups which employ workers in other European countries,[17] such as is the case not only in a few large firms, but which now also occurs in the mid-sized sector too. The consequences of this approach are considerably more serious than a simple demand on German legislators to react de lege ferenda with an adjustment of the normative guidelines to the corporate governance movement and the internationalisation of the economy. On the basis of the primacy of ap-

11 Alongside this, the conflicting interests of corporate co-determination and private retirement provisions are increasingly being brought to the foreground; cf. M. Roth, ZGR [Journal of Business and Corporate Law] 2011, 516 (552 et seq.); see also M. Roth, European Business Organization Law Review 11 (2010), 51 et seq.

12 Adams, ZIP 2006, 1561 (1562 et seq.); Loritz, ZfA [Journal of Labour Law] 2009, 477 (498 et seq.); Peltzer in commemorative publication Schwark, 2009, P. 707 (709 et seq.); von Rosen in commemorative publication Schwark, 2009, P. 789 (797 et seq.); Säcker in commemorative publication Richardi, 2007, P. 711 (719 et seq.); Säcker, AG 2008, 17 (20 et seq.); Ulmer in Ulmer/Habersack/Henssler, Mitbestimmungsrecht, 2nd Ed. 2006, introduction point 70 et seq.; v. Werder, AG 2004, 166 (170 et seq.).

13 Even if opinions differ on the term's exact definition, the central concept is the function of a company's executive organs, their interaction with one another and the regulation of their conduct in terms of institutional provisions as well as by way of market forces. In this respect, see Baums, Bericht der Regierungskommission Corporate Governance, 2001, P. 6. Even more vague is the European Commission, which appears to want to link corporate governance to corporate social responsibility; cf. Grünbuch Europäischer Corporate Governance-Rahmen from 5.4.2011, KOM (2011) 164 finally, P. 2, available online at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0164:FIN:DE:PDF. On the various aspects of corporate governance, see further Behrens in commemorative publication Drobnig, 1998, P. 491 et seq.; Leyens, JZ [Lawyer's Newspaper] 2007, 1061 et seq.

14 Henssler, RdA 2005, 330 et seq.; Schwark, AG 2004, 173 et seq.; Ulmer in Ulmer/Habersack/Henssler, Mitbestimmungsrecht, 2nd Ed. 2006, introduction point 72 et seq.

15 As such, property rights theory and participation theory oppose one another; see for example Eger/Nutzinger/Weise in Ott/Schäfer, Ökonomische Analyse des Unternehmensrechts, 1993, P. 78 (92 et seq.); Furubotn, Journal of Business 61 (1988), 165 et seq.; Jensen/Meckling, Journal of Business 52 (1979), 469 et seq.; Kreutz, NZA [New Journal of Industrial Law] 2001, 472 et seq.; Thannisch, AuR [Work and Law (Journal)] 2006, 81 et seq.; also G. Roth, ZGR 2005, 348 (360 et seq.).

16 Cf. Baums/Frick in Blair/Roe (Eds.), Employees and Corporate Governance, 1999, P. 206 et seq.; Benelli/Loderer/Lys, Journal of Business 60 (1987), 553 et seq.; Bernig/Frick, Der Aufsichtsrat 2011, 157 et seq.; Fauver/Fuerst, Journal of Financial Economics 82 (2006), 673 et seq.; FitzRoy/Kraft, British Journal of Industrial Relations 43 (2005), 233 et seq.; Frick, Kölner Zeitschrift für Soziologie und Sozialpsychologie, Sonderheft 45 (2005), 418 et seq.; Gorton/Schmid, Journal of the European Economic Association 2 (2004), 863 et seq.; Gurdon/Rai, Journal of Economics and Business 42 (1990), 289 et seq.; Kraft/Ugarkovic, Jahrbücher für Nationalökonomie und Statistik 226 (2006), P. 588 et seq.; Renaud, Labour 21 (2007), 689 et seq.; Schmid/Seger, Zeitschrift für Betriebswirtschaft 68 (1998), 453 et seq.; Vitols, Ökonomische Auswirkungen der paritätischen Mitbestimmung: Eine ökonometrische Analyse, 2006; evaluation of the various studies can be found inter alia in Höpner, Unternehmensmitbestimmung unter Beschuss: Die Mitbestimmungsdebatte im Licht der sozialwissenschaftlichen Forschung, MPIfG Discussion Paper 04/8 (2004); Jirjahn, Sozialer Fortschritt 55 (2006), 215 (221 et seq.); Jirjahn, Ökonomische Wirkungen der Mitbestimmung in Deutschland: Ein Update, 2010, P. 39 et seq.; Sadowski/Junkes/Lindenthal, ZGR 2001, 110 (122 et seq.); on the effect on innovative capacity Kraft/Stank, Schmollers Jahrbuch 124 (2004), P. 421 et seq.; Kraft/Stank/Dewenter, Cambridge Journal of Economics 35 (2011), 145 et seq.; on the effect on employment dynamics Werner/Zimmermann, Industrielle Beziehungen 12 (2005), 339 et seq.; on the results of a company survey Stettes, AG 2007, 611 et seq.; monograph by Hörisch, Unternehmensmitbestimmung im nationalen und internationalen Vergleich, 2009.

17 In detail Hellwig/Behme, AG 2009, 261 (264 et seq.); monograph by Latzel, Gleichheit in der Unternehmensmitbestimmung, 2010, margin number 60 et seq., 330 et seq.; 703 et seq., 735 et seq.; also Habersack, AG 2007, 641 (648 et seq.); Habersack, AG 2009, 1 (12); Habersack, supplement to ZIP 48/2009, 1 (3 et seq.); Hellwig/Behme, ZIP 2009, 1791 (1793); Hellwig/Behme, ZIP 2010, 871 et seq.; Rieble/Latzel, EuZA [European Journal of Labour Law] 2011, 145 (149 et seq.); to this end also Henssler, RdA 2005, 330 (331); Heuschmid, Mitentscheidung durch Arbeitnehmer – ein europäisches Grundrecht?, 2009, P. 241 et seq.; Raiser/Veil, MitbestG und DrittelbG, 5th Ed. 2009, Section 5 MitbestG margin number 29.

plication of Union law,[18] which has been acknowledged now for several decades, it is now de lege lata assumed that with the exception of societies registered as SEs (Societas Europaea) or a transnational merger of previous companies, the regulations on the co-determination of employees on the Supervisory Boards of German companies with workers in other Member States of the European Union, are no longer valid for use on the occasion of re-elections until new legal provisions have been introduced. In this case, only shareholder representatives would in future be appointed to the supervisory boards,[19] or the employee representatives would be excluded from involvement of any kind, at least concerning transnational matters.[20]

As the protagonists of this view openly admit, the practical effects of their advancement are devastating[21], giving reason enough to consider the viability of this approach more closely. All the more so, considering that this no longer remains a purely German controversy, the issue is now receiving attention at European level too. In its conclusive report, the so-called "Reflection Group on the Future of EU Company Law", a group of distinguished experts formed on the initiative of the European Commission, voiced its criticism of the current form of German corporate co-determination in transnationally active companies and groups, going so far as to suggest instituting infringement proceedings against Germany.[22] The considerations of this group of experts were not yet integrated into the Commission's Green Paper on a European corporate governance framework, which was published simultaneously.[23]Additionally, although the Commission discussed the considerations of the "Reflection Group" at a conference on corporate co-determination in May 2011 in Brussels,[24] it did not deal with the topic as part of its consultation procedure begun in February 2012 on the future of European corporate law[25]. There can, however, be no doubt about the fact that questions about the failure to comply with Union law relate to a central aspect of German corporate co-determination.

II. Starting point: non-inclusion of workers employed abroad in supervisory board elections

The starting point of the theory of German co-determination legislation violating Union law[26] is the scope of voting rights with regards to the employee representatives on the supervisory board. As such, the jurisdiction[27] and prevailing literature[28] assumes to a large extent that only those employees have active and passive voting rights who are employed in companies in Germany. This opinion is supported by the exact wording of the German Co-Determination Act, its methodology, and not least by the intention of the original legislator who explicitly states in the supplementary material that participation rights shall only be conceded to employees in such companies' business operations in Germany which also exceed the necessary threshold number.[29] These include such employees who despite actually working abroad, can be counted as employees of an inner-German company due to the "transmission" of their work activities.[30] However, those employees working as permanent local employees in dependent branch offices or legally independent subsidiaries of German companies abroad remain excluded from this group. The voices in the literature calling for active and passive electoral rights for the employees of

18 See ECJ from 15.7.1964 – C-6/64, [1964], 1251 – Costa/ENEL; from 22.11.2005 – C-144/04, [2005], I-9981 – Mangold – margin number 77; from 19.1.2010 – C-555/07, [2010], I-365 – Kücükdeveci – margin number 51; BVerfG from 6.7.2010 – 2 BvR 2661/06, BVerfGE 126, 286 (301 et seq.); as well as explanation Nr. 17 on the Final Act of Lisbon, ABl. EU No. C 115 from 9.5.2008, 344; also Oppermann/Classen/Nettesheim, Europarecht, 5th Ed. 2011, Section 10 margin number 32 et seq.; Ruffert in Calliess/Ruffert, TEU/TFEU, 4th Ed. 2011, Art. 1 TFEU margin number 16; Streinz, Europarecht, 9th Ed. 2012, margin number 222 et seq.

19 Hellwig/Behme, AG 2009, 261 (264 et seq., 271); Hellwig/Behme, ZIP 2010, 871 (873); Hellwig/Behme, AG 2011, 740 (743); a different view from Latzel, Gleichheit in der Unternehmensmitbestimmung, 2010, margin number 740 et seq., who argues for the application of German corporate co-determination in foreign matters without prior revision of provisions.

20 Considering this, Rieble/Latzel, EuZA 2011, 145 (166).

21 Made expressly clear in Hellwig/Behme, ZIP 2009, 1791 (1794); and Hellwig/Behme, AG 2011, 740 (743).

22 Report of the Reflection Group on the Future of EU Company Law, 2011, P. 53 et seq., available online at http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf. Positive response from Hellwig/Behme, AG 2011, 740 (742 et seq.).

23 KOM (2011) 164 finally from 5.4.2011, available online at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0164:FIN :DE:PDF.

24 See the presentations by Henssler und Malmberg, available online at http://ec.europa.eu/internal_market/company/modern/index_en.htm#consultation2012.

25 Available online at http://ec.europa.eu/internal_market/consultations/2012/company_law_en.htm.

26 The German Co-Determination Act (MitbestG) forms the centre of this discussion. For co-determination according to the One-Third-Participation Act (DrittelbG), the following explanations apply accordingly.

27 District Court Düsseldorf from 5.6.1979 – 25 AktE 1/78, AG 1980, 83; District Court Frankfurt/M. from 1.4.1982 – 2/6 AktE 1/81, DB 1982, 1312.

28 Bayer, ZGR 1977, 173 (177 et seq.); Bellstedt, BB 1977, 1326 (1328 et seq.); Duden, ZHR 141 (1977), 145 (184); Ebenroth/Sura, ZHR 144 (1980), 610 (616 et seq.); Großfeld in Staudinger, Neubearbeitung 1998, Internationales Gesellschaftsrecht margin number 525 et seq.; Henssler in Ulmer/Habersack/Henssler, Mitbestimmungsrecht, 2nd Ed. 2006, Section 3 MitbestG margin number 36; Kindler in MünchKomm/BGB, 5th Ed. 2010, IntGesR margin number 600 et seq.; Koberski in Wlotzke/Wißmann/Koberski/Kleinsorge, Mitbestimmungsrecht, 4th Ed. 2011, Section 3 MitbestG margin number 27 et seq.; Oetker in Großkomm/AktG, 4th Ed. 1999, Section 5 MitbestG margin number 33.

29 BT -Drucks. 7/4845 from 10.3.1976, 4.

30 District Court Frankfurt/M. from 1.4.1982 – 2/6 AktE 1/81, AG 1983, 202 = DB 1982, 1312; Henssler in Ulmer/Habersack/Henssler, Mitbestimmungsrecht, 2. Aufl. 2006, Section 3 MitbestG margin number 38; Raiser/Veil, MitbestG und DrittelbG, 5th Ed. 2009, Section 1 MitbestG margin number 20.

foreign subsidiaries[31] or at least for those employed in legally dependent subsidiaries abroad[32] have not, as yet, been generally accepted. The prevailing view is that this applies regardless of how many employees German groups have in other (European) countries, even if on a case-by-case basis, the majority of the workforce is not (any longer) employed in Germany.

The exclusion of the part of the workforce of a company or group located abroad from supervisory board elections has, for some time now, been perceived as unsatisfactory.[33] This applies to the employer[34] as much as it does to the unions,[35] even if there is no consensus as to the best remedial action. A certain degree of mitigation has been reached by the fact that the German unions are able to propose a foreign employee representative for election as stipulated in Section 16 para. 2 sentence 1 German Co-Determination Act (MitbestG),[36] as seen previously at DaimlerChrysler[37] and today at Daimler and at Opel. Such a gentlemen's agreement cannot, however, solve the problem of the representation of foreign personnel subsections.[38]

The aforementioned criticism of the current system of employee representation on a co-determined supervisory board can obviously not be left at a simple reference to the problems of the current legal situation, rather it goes a crucial step further in that it recognises a violation of Union law. The infringement of Union law is determined by way of two points: firstly due to a violation of the employees' freedom of movement at the expense of inner-German employees (see also III.), and secondly due to the discrimination against foreign employees (see also IV.). The fact that one regulation puts both inner-German and foreign employees at a disadvantage is remarkable. However, this cannot be ruled out from the start if the measuring stick of European law is used to evaluate the various different elements and effects of a national regulation. Moreover, in individual cases, the freedom of establishment (see V.) and free movement of capital (see VI.) have been introduced to the issue.

III. On the restriction of freedom of movement of inner-German employees

The first line of argumentation relates to the freedom of movement for employees as ensured by Art. 45 TFEU, which deals with immediately applicable Union law[39] and which in particular obliges civil law legislators.[40]

1. Employees' freedom of movement as a prohibition of restriction

This fundamental freedom does not contain a prohibition of discrimination alone, which forbids every differing treatment of employees due to their nationality and with respect to their working conditions (Art. 45 para. 2 TFEU).[41] In fact, since the Bosman ruling at the latest, Art. 45 TFEU has been understood by the ECJ to be a prohibition of restriction, which may hinder national regulations which are applied consistently but are still suited to restricting freedom of movement or to making it less attractive.[42] This applies not only to influx restrictions intended to protect a national labour market[43] but also to

31 Birk, RIW [Law of International Business] 1975, 589 (596); Däubler, RabelsZ [The Rabel Journal of Comparative and International Private Law] 39 (1975), 444 (451 et seq.); Grasmann, ZGR 1973, 317 (328 et seq.); Reich/Lewerenz, AuR 1976, 261 (264).
32 Lutter, ZGR 1977, 195 (207 et seq.); to an extent also Henssler in GS Heinze, 2005, P. 333 (342); Henssler, RdA 2005, 330 (331).
33 See the Commission on the Modernisation of German Corporate Co-Determination (Kommission zur Modernisierung der deutschen Unternehmensmitbestimmung) ("Biedenkopf II"), 2006, P. 33 et seq.
34 BDA/BDI (Eds.), Mitbestimmung modernisieren, Bericht der Kommission Mitbestimmung (2004), P. 50 et seq.; in addition the statement of the representatives of companies on the report by academic representatives of the Co-Determination Commission ("Biedenkopf II"), 2006, P. 63.
35 Statement of the DGB Federal Board (DGB-Bundesvorstand), dept. Co-Determination and Legal Policy on the report of the Co-Determination Commission ("Kommission Mitbestimmung") by BDA and BDI (2004), P. 14 et seq., available online at http://www.dgb.de/themen/++co++article-mediapool-3a97d875bdc e81357ee6a2488ae88d13; also the statement of the employee representatives on the report of the academic representatives of the Co-Determination Commission ("Biedenkopf II"), 2006, P. 74; additionally Seyboth, AuR 2007, 15 (18); also Klebe/Köstler in FS Wißmann, 2005, P. 443 (449).
36 On permissibility see Henssler in Ulmer/Habersack/Henssler, Mitbestimmungsrecht, 2nd Ed. 2006, Section 16 MitbestG margin number 4; Wißmann in Wlotzke/Wißmann/Koberski/Kleinsorge, Mitbestimmungsrecht, 4th Ed. 2011, Section 7 MitbestG margin number 38.
37 Cf. Gentz, NZA 2000, 3 (5); in detail Zinger, Die Internationalisierung der Belegschaften multinationaler Unternehmen mit Sitz in Deutschland, 2002, P. 227 et seq.
38 Windbichler in Jürgens/Sadowski/Schuppert/Weiss, Perspektiven der Corporate Governance, 2007, P. 282 (286).
39 See ECJ from 4.12.1974 – C-41/74, [1974], 1337 – Van Duyn – margin number 5/7; from 11.1.2007 – C-208/05, [2007], I-213 – ITC – margin number 67.
40 Forsthoff in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, 2011, Art. 45 TFEU margin number 138 et seq.
41 More on this under IV.
42 ECJ from 15.12.1995 – C-415/93, [1995], I-4165 – Bosman – margin number 92 et seq.; also ECJ from 26.1.1999 – C-18/95, [1999], I- 374 – Terhoeve – margin number 37 et seq.; from 1.4.2008 – C-212/06, [2008], I-1683 – Gouvernement de la communauté française and Gouvernement wallon – margin number 43 et seq.; in detail Birk, ZAS 1999, 1 (3 et seq.); Brechmann in Calliess/Ruffert, TEU/TFEU, 4th Ed. 2011, Art. 45 TFEU margin number 49 et seq.; Franzen in Streinz, TEU/TFEU, 2nd Ed. 2012, Art. 45 TFEU margin number 86 et seq.; Hilf/Pache, NJW 1996, 1169 (1172); Nettesheim, NVwZ [New Journal for Administartive Law] 1996, 342 et seq.; against the classification of employee freedom of movement as a prohibition of restriction see Mülbert, ZHR 159 (1995), 2 (32); for the comprehension of all fundamental freedoms as transnational integration norms, see also Kingreen in von Bogdandy/Bast, Europäisches Verfassungsrecht, 2nd Ed. 2009, P. 705 (710 et seq., 726 et seq.).
43 From the perspective of a restriction of the freedom of movement of employees to move from foreign countries to Germany, there appear to be no concerns about the restriction of election rights to inner-German employees; see e.g. Köster, Unternehmensmitbestimmung in EG-Auslandsgesellschaften mit Verwaltungssitz in Deutschland, 2007, P. 195; Schubert, Unternehmensmitbestimmung und internationale Wirtschaftsverflechtung, 1984, P. 99.

exit restrictions which inhibit people leaving a national labour market and thus impair employee freedom of movement.[44] Yet in contrast to the prohibition on discrimination of Art. 45 para. 2 TFEU and Art. 7 and 8 Regulation (EU) no. 492/ 2011[45], it is unimportant whether the national provisions deal with working conditions[46] in the broadest sense or not[47].

2. Co-determination as an apparent restriction of inner-German employees

On these fundamental principles developed by the ECJ, there is understood to be an infringement of Union law by German co-determination law, from the perspective of a restriction of inner-German employees.[48] Since an employee who has thus far been employed in Germany loses his/her active election right by moving permanently to a foreign branch office or subsidiary, and in the same way a supervisory board member belonging to the company loses his/her mandate according to Section 24 para. 1 German Co-Determination Act, such movement is made unattractive for the employee, restricting his/her freedom of movement, and lacking reasonable justification.[49]

3. Commentary

A detailed analysis, however, shows that the theory of a restriction of freedom of movement of workers employed in Germany due to the design of the election regulations set out by German co-determination legislation is unconvincing.[50] Prevailing opinion is that the boundlessness of the protected domain of employee freedom of movement in the development of Art. 45 TFEU from a prohibition of discrimination to a simple prohibition of restriction will force an appropriate restriction of this fundamental freedom. As such, the opinion which is widespread in the literature, modelled after the Keck ruling of the ECJ on the scope of the free movement of goods[51], proposes distinguishing between restrictions on access to jobs requiring justification on the one hand and professional access regulations not requiring justification on the other.[52] Although the ECJ itself has avoided referring to its Keck ruling in connection with Art. 45 TFEU, it tries at a situational level to tackle the problem that with the conception of employee freedom of movement as a prohibition of restriction, not only neutral (i.e. non-discriminatory) formal access requirements, but apparently also neutral material regulations of member state law violate Union law, as long as they cannot be justified. As such, in the Graf case, which dealt with the exclusion of severance resulting from an employee giving notice, the ECJ spoke of the fact that the occurrence of requirements for the acquisition of severance was "too uncertain" and "too indirect" to hinder or prevent an employee making use of his/her right to freedom of movement.[53] As the Advocate General Fennelly clarified, in such cases in which the employee loses benefits related to a certain employment law system as a result of a transnational change in place of work, the question is whether this disadvantage is equal to a rejection of market access.[54]

With this background, one can first of all rule out that an employee deliberately neglects an opportunity for professional advancement often associated with the voluntary move to a foreign branch office or subsidiary for the sole reason that he/she would lose out on the opportunity to participate actively in supervisory board elections.[55] This most definitely applies to the consideration that a worker at first employed in Germany would not be prepared to accept a job in a foreign branch office or subsidiary because he/she fears that German sites would be favoured over foreign sites in case of a corporate crisis. Here, the aforementioned dictum of the ECJ in the Graf case applies, that such an event is too uncertain and too indirect[56] in order to be classed as relevant to freedom of movement.[57] In other words, even in an abstract sense, the regulation does not set any behavioural incentives which might hinder the fulfilment of a common labour market.[58]

An effective motivational effect is thus only con-

44 ECJ from 15.12.1995 – C-415/93, [1995], I-4165 – Bosman – margin number 94 et seq.; from 27.1.2000 – C-190/98, [2000], I-493 – Graf – margin number 21 et seq.; from 17.3.2005 – C-109/04, [1995], I-2421 – Kranemann – margin number 25 et seq.

45 Formerly Art. 7 and 8 (EWG) No. 1612/68.

46 Including the social and tax law frameworks.

47 Cf. e.g. ECJ from 2.10.2003 – C-232/01, [2003], I-11525 – vanLent – margin number 14 et seq.

48 Hellwig/Behme, AG 2009, 261 (268 et seq.).

49 Hellwig/Behme, AG 2009, 261 (268 et seq.); in agreement Rieble/Latzel, EuZA 2011, 145 (158); as well as Müller-Graff, EWS 2009, 489 (497).

50 In rejection also Wißmann in Wlotzke/Wißmann/Koberski/Kleinsorge, Mitbestimmungsrecht, 4th Ed. 2011, preface point 63b; in principle sceptical is also Teichmann, Beilage zu ZIP 48/2009, 10 (12), who however considers the corrections prompted by the EU due to passive electoral rights to be possible there (footnote 25).

51 ECJ from 24.11.1993 – verb. C-267/91, C-268/91 – [2003], I-6097 – Keck and Mithouard – margin number 15 et seq.

52 Cf. Birk, ZAS 1999, 1 (9 et seq.); Franzen in Streinz, TEU/TFEU, 2nd Ed. 2012, Art. 45 TFEU margin number 90; Körber, Grundfreiheiten und Privatrecht, 2004, P. 274 et seq.; Nettesheim, NVwZ 1996, 342 (344); Reichold, ZEuP 1998, 434 (447 et seq.); Schroeder, JZ 1996, 254 (255); similarly Schulte Westenberg, Zur Bedeutung der Keck-Rechtsprechung für die Arbeitnehmerfreizügigkeit, 2009, P. 175 et seq.

53 ECJ from 27.1.2000 – C-190/98, [2000], I-493 – Graf – margin number 24 et seq.

54 Opinion from 16.9.1999 in C-198/98, [2000], I-493 – Graf – margin number 31 et seq. In this respect also Forsthoff in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, 2011, Art. 45 TFEU margin number 227 "specifically regulations hindering access" / "spezifisch den Zugang behindernde Regelungen".

55 As described by Latzel, Gleichheit in der Unternehmensmitbestimmung, 2010, margin number 113 et seq., 142; unclear Hellwig/Behme, AG 2009, 261 (268 et seq.).

56 On the interpretation of these criteria Deckert/Schroeder, JZ 2001, 88 (90).

57 ECJ from 27.1.2000 – C-190/98, [2000], I-493 – Graf – margin number 24 et seq.

58 On this criterion Thomas, NVwZ 2009, 1202 (1206).

ceivable from the start in cases in which a move abroad would result in the loss of a mandate. Yet, even in such a case, there is a specific connection missing between the scope of German co-determination and the fulfilment of the domestic market as goal of employee freedom of movement. The end of a mandate cannot qualify as an obstacle to international employee mobility.[59] This is shown by the following test: the mandate of a company-employed supervisory board member expires upon termination of the employment relationship.[60] As such, it is insignificant whether the employee terminates the employment relationship in order to retire prematurely, to join another employer in Germany or abroad, to join the board[61] or to move permanently[62] to a foreign branch office or subsidiary belonging to the same company. This latter case, the focus of the criticism, is thus merely one constellation amongst many others which lead to the loss of mandate. The decisive reason for the expiration of a mandate is thus not the move abroad, but the termination of affiliation (as an employee) to a company located in Germany. The loss of a mandate may make the move to a foreign competitor "less attractive" if we only consider the conceptual aspect. However, it is evident that in such a case, an employee who was previously employed in Germany may not retain his/her supervisory board mandate only in order to avoid hindering his/her move to another job abroad. From the domestic market perspective, this being the most important aspect in this context, it is unclear why a permanent move to a foreign branch office or subsidiary should be any different. In this respect, this is akin to the loss of German legal protection against unfair dismissal (subject to a reference to German employment law), which frequently happens in connection with a permanent move to, e.g. Denmark or Great Britain[63] and which cannot be understood as a restriction of access to the Danish or British labour market.

Put generally, the national employment law systems cannot be understood as "exit hindrances" which require justification, even if it cannot be ruled out that employees factor in the loss of a high level of protection from their member state when they relocate internationally for a new job. The various legal frameworks count as location conditions which must be taken into account by migrant workers as beneficiaries of freedom of movement for employees in making the decision about which location they wish to work in; these location conditions cannot be called into question in hindsight with reference to an apparent restriction of their freedom of movement.[64] As long as a material gap in protection does not represent a hindrance to access to sectors of Member States' labour markets, the very content of the issue means that it is not a case covered by the prohibition of restriction. In other words, the function of Art. 45 TFEU is not to level off the differences between the various national legal systems,[65] but rather to ensure equal markets and market freedom.[66] If employees whose employment contracts are associated with the German-based establishments of German companies, are entitled to co-determination rights, while this is not the case for employees whose employment contracts are associated with foreign branch offices or companies, this fact expresses the various forms of the various countries' national employment law systems. In itself, this does not affect the freedom of migrant workers to subject themselves to a different legal system. A view which understands a different standard of protection in terms of employment law as a restriction of employees' freedoms which requires justification, in moving from one member state with a higher level of protection to a member state with a lower level would in any case collide with various employment law guidelines which assume the essential possibility that individual Member States will choose to implement a higher level of protection beyond a basic common standard.[67]

The aforementioned issues remain unaffected even by reference to the established case law of the ECJ[68], according to which employee freedom of movement protects against the loss of social benefits resulting from working in several different Member States.[69]In these cases, the issue was always

59 On this requirement see Roloff, Das Beschränkungsverbot des Art. 39 EG (Freizügigkeit) und seine Auswirkungen auf das nationale Arbeitsrecht, 2003, P. 151 et seq.
60 Henssler in Ulmer/Habersack/Henssler, Mitbestimmungsrecht, 2nd Ed. 2006, Section 24 MitbestG margin number 7; Wißmann in Wlotzke/Wißmann/ Koberski/ Kleinsorge, Mitbestimmungsrecht, 4th Ed. 2011, Section 24 MitbestG margin number 10.
61 On the loss of mandate in this case, see Henssler in Ulmer/ Habersack/Henssler, Mitbestimmungsrecht, 2nd Ed. 2006, Section 24 MitbestG margin number 7.
62 Otherwise there is only a "transmission" of work activities, which leaves the mandate intact.
63 See Art. 3 para. 1, 8 para. 1 and 2 Regulation (EC) No. 593/2008 (Rome I Regulation).
64 GA Fennelly, Opinion from 16.9.1999 in C-198/98, [2000], I-493 – Graf – margin number 32; also Forsthoff in Grabitz/Hilf/ Nettesheim, Das Recht der Europäischen Union, 2011, Art. 45 TFEU margin number 286.
65 ECJ from 21.10.1975 – C-24/75, [1978], 1489 – Kenny/ Insurance Officer – margin number 18/20; from 27.9.1988 – C-313/86, [1988], 5391 – Lenoir/Caisse d'allocations familiales des Alpes-Maritimes – margin number 15; Birk, ZAS [Journal for Labour and Social Law in Germany and Europe] 1999, 1 (5).
66 On the domestic market orientation of fundamental freedoms see Hoffmann, Die Grundfreiheiten des EG-Vertrags als koordinationsrechtliche und gleichheitsrechtliche Abwehrrechte, 2000, P. 41 et seq.
67 E.g. Art. 5 Collective Redundancies Directive 98/59/EC, Art. 8 Transfers of Undertakings Directive 2001/23/EC, Art. 9 Temporary Agency Work Directive 2008/104/EC.
68 ECJ from 28.6.1978 – C-1/78, [1975], 1149 – Petroni – margin number 11/ 13; from 9.7.1980 – C-807/79, [1980], 2205 – Gravina – margin number 6; from 25.2.1986 – C-284/84, [1986], 685 – Spruyt – margin number 19; from 2.5.1990 – C-293/88, [1990], I-1623 – Winter-Lutzins – margin number 14; from 7.3.1991 – C-10/90, [1991], I-1134 – Masgio – margin number 16 et seq.
69 Along these lines also Latzel, Gleichheit in der Unternehmensmitbestimmung, 2010, margin number 113.

that migrant workers who have been employed in more than one Member State during their working lives and have thus made use of their right to freedom of movement, should not suffer disadvantages in comparison with those employees who spent their entire working lives in one single Member State. This case law has nothing to do with the loss of mandate of a company-employed supervisory board member as happens at the end of every employment contract. The fact that the loss of a supervisory board mandate may affect an employee to a greater degree than the loss of other employee rights cannot be denied, but this is irrelevant when we consider that the passive electoral rights of company-employed supervisory board members do not constitute a legal position which could, from the point of view of a restriction of employee freedom of movement, be disconnected from the continuing legitimation of those employees who are entitled to active electoral rights. A supervisory board mandate is an altruistic and not a self-serving position which conveys permanent entitlement to those who have held such a position just once in their working lives and which is comprehensively provided security for by legislation on freedom of movement.

Conversely, a French employee moving from a French parent company to a German subsidiary could not question the unlawfulness of non-unionized strikes in Germany[70] with the same reasoning, namely that they put him/her at a disadvantage in case of industrial disputes, that for this reason a move is "less attractive" for him/her and thus represents a barrier to moving, at least for French employees. If Regulation (EC) No. 864/2007 (Rome II Regulation) ties in – for the question of liability for damages from forthcoming or already conducted industrial action – with the legal basis in which the industrial action is intended to take place or has taken place, this would be an underestimation of the function of Art. 45 TFEU, namely viewing this principle as a restriction of employees' freedom of movement for those employees moving to work under a more rigid industrial dispute system.

IV. On the discrimination of foreign employees

The second line of argumentation affects the question of discrimination against foreign employees. However, there is no consensus on the issue of which exact regulation is to be used as a testing standard. As such, a part of the literature detaches the design of corporate co-determination from the scope of Art. 45 para. 2 TFEU as well as from Art. 8 Regulation (EU) No. 492/2011 and seeks instead to refer to the general prohibition of discrimination on the grounds of nationality according to Art. 18 TFEU.[71] Other opinions categorise supervisory board co-determination of employees as "other working conditions" in terms of Art. 45 para. 2 TFEU and thus reach the freedom of movement discrimination prohibition[72] thanks to the precedence of Art. 45 TFEU over Art. 18 TFEU[73], which considering the ECJ's[74] broad understanding of Art. 8 (EEC) no. 1612/68 (now Art. 8 Regulation (EU) no. 492/2011) is convincing in and of itself.[75] Furthermore, it is claimed that a general Union law principle of participation of those concerned exists, against which all Member State co-determination provisions have to be measured.[76]

1. Co-determination as alleged discrimination against foreign employees

Despite these differences in approach, all theories boil down to the same line of thought: German co-determination legislation does not discriminate against foreigners as such, but through the association of active and passive electoral rights to the place of work, a disproportionate number of employees are affected negatively. Furthermore, the prohibition of discrimination also encompasses indirect discrimination. According to this, the restriction of the active and passive electoral rights to employees working in Germany already represents an impermissible discrimination of workers employed abroad by German companies and groups, because no justification can be given. This formal discrimination continues in a material discrimination against foreign personnel because during distribution conflicts, the German employee representatives usually throw their weight in favour of employees working in Germany, thus putting foreign employees at a disadvantage ("Germanic co-determination imbalance").[77]

2. No all-encompassing harmonisation imperative

A unanimously recognised point of departure is that

70 See Otto, Arbeitskampf- und Schlichtungsrecht, 2006, Section 6 margin number 22 et seq.

71 According to Hellwig/Behme, AG [Journal of Stock corporation, Corporate, and Financial markets law] 2009, 261 (264 et seq.); to an extent also Steindorff, ZHR 141 (1977), 457 (460 et seq.).

72 See Latzel, Gleichheit in der Unternehmensmitbestimmung, 2010, margin number 138 et seq.; Rieble/Latzel, EuZA 2011, 145 (155 et seq.), for a recourse to Art. 18 TFEU thereat (151); also ambiguous is Habersack, AG 2007, 641 (648).

73 See ECJ from 23.2.1994 – C-419/92, [1994], I-505 – Scholz – margin number 6; from 25.6.1997 – C-131/96, [1997], I-3659 – Mora Romero – margin number 10 et seq.; from 29.4.2004 – C-387/01, [2004], I-4981 – Weigel – margin number 57 et seq.; Franzen in Streinz, TEU/TFEU, 2nd Ed. 2012, Art. 45 TFEU margin number 5.

74 Also Birk, RIW 1989, 6 (12); Coester/Denkhaus, EAS, 1999, B 2100 margin number 6; Franzen in Streinz, TEU/TFEU, 2nd Ed. 2012, Art. 45

75 Cf. ECJ from 4.7.1991 – C-213/90, [1991], I-3507 – ASTI I – margin number 20 et seq.; from 18.5.1994 – C-213/90, [1994], I-1891 – AS- TI II – margin number 5 et seq.; from 16.9.2004 – C-465/01, [2004], I-8291 – Kommission/Österreich – margin number 30 et seq.

76 Latzel, Gleichheit in der Unternehmensmitbestimmung, 2010, margin number 100 et seq.; Rieble/Latzel, EuZA 2011, 145 (158 et seq.).

77 Rieble/Latzel, EuZA 2011, 145 (152).

the Union law prohibition of discrimination does not force the Member States to create an all-encompassing levelling off of their legal systems.[78] Otherwise the legislative competence remaining after Union law would be undermined. Furthermore, there is no comprehensive standard for the question of which member state defines the standard to which the other Member States must adhere. The very situation that the national legal systems have varying levels of corporate co-determination does not represent an infringement of the prohibition of discrimination on the grounds of nationality. This consideration alone can obviously not dispel the accusation of discrimination by way of exclusion of foreign personnel,[79] because it does not deal with the general co-determination standard in other Member States which indisputably cannot be blamed on German legislators, rather it deals with the scope of electoral legislation in German companies and groups with a transnational organization alone. As such, the problem has evidently been considered from all sides, but has not been solved.

3. Lacking or limited relevance for the domestic market

As such it is most definitely questionable whether the issue of active and passive electoral rights with regard to employees working abroad exhibits any relevance for the domestic market,[80] because only in this case is the Union law prohibition of discrimination brought to bear.[81] Even a representative of the theory of the unlawfulness of German co-determination (with regard to Union law) mentions that in those cases in which an employee fulfils his/her employment contract in the same country in which his/her employer is based, we are dealing with a purely domestic issue.[82] This kind of constellation is at least prima facie the case with those employees who are employed by a legally independent foreign company. If such a company based e.g. in France is not part of a group and a German customer is only then willing to place a large order if the labour costs can be reduced significantly, this situation will certainly not lead to the employees' contracts gaining a transnational character. As such, a justification is required for why the acquisition by a German company of controlling interest in the French company alone transforms the working relationship of the employees into a domestic issue in which the European law prohibition of discrimination can take hold. It is clear that in this way, a corporate law influence arises which transcends the Member State boundaries. From this domestic market relevance, established at corporate law level, it is at least not inevitable that the employment contracts of those employed entirely abroad and who are neither considering a transnational move, nor are legally associated with a foreign employer, can display the necessary relevance to the domestic market.[83] Inasmuch as one presumes the existence of domestic market relevance despite this issue, one should at least be aware of the fact that the transnational character does not arise from the work of the employee abroad, nor from the action of German legislators,[84] but rather from the actions of companies alone. Even this presents the question of whether argumentation based on European law is on the right track, meaning that through the acquisition or sale of their controlling interests in foreign firms, companies activate the prohibition of discrimination which is applicable to the nationality of their employees and thus are able to switch corporate co-determination on and off like a torch.

4. Limited legislative competence of the German legislator

A further objection to the evaluation of the exclusion of foreign personnel in German co-determination legislation as infringing Union law results from the view of the ECJ according to which the limits of legislative competence of the Member States also mark the limits of the prohibition of discrimination.[85] As such, the ECJ elaborated that the legal regulations of Member States cannot be rejected as discriminatory on the grounds that they do not include issues which lie outside of the sovereignty of the various Member States.[86] This addresses the problem of which possibilities for the expansion of corporate co-determination to foreign personnel are available to the German legislator according to the rules of international law. In considering this question, which is often discussed under the keyword "territoriality principle", we must presume the existence of the

78 Hellwig/Behme, ZIP 2010, 871 (872); Latzel, Gleichheit in der Unternehmensmitbestimmung, 2010, margin number 239 et seq.; furthermore ECJ from 21.10.1975 – C-24/75, [1978], 1489 – Kenny/Insurance Officer – margin number 18/20; von Bogdandy in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, 2011, Art. 18 TFEU margin numbers 9 and 53; Epiney in Calliess/Ruffert, TEU/TFEU, 4th Ed. 2011, Art. 18 TFEU margin number 10; Fastenrath, JZ 1987, 170 (171).

79 As suggested by Teichmann, supplement to ZIP 48/2009, 10 (11).

80 On the exclusion of purely domestic issues from the scope of the European law prohibitions of discrimination, see Epiney in Calliess/Ruffert, TEU/TFEU, 4th Ed. 2011, Art. 18 TFEU margin number 31 et seq. with further references.

81 Also sceptical appears Wißmann in Wlotzke/Wißmann/Koberski/Kleinsorge, Mitbestimmungsrecht, 4th Ed. 2011, preface point 63b.

82 Latzel, Gleichheit in der Unternehmensmitbestimmung, 2010, margin number 87.

83 In this respect also Nienerza, Unternehmerische Mitbestimmung in grenzüberschreitenden Konzernen, 2005, P. 63.

84 A different perspective from Latzel, Gleichheit in der Unternehmensmitbestimmung, 2010, margin number 104 et seq., who attempts to derive the international character from the inclusion of German subsidiaries by way of the German Co-Determination Act, even though the German legislator expressly excludes foreign subsidiaries.

85 For more detail see Plötscher, Der Begriff der Diskriminierung im Europäischen Gemeinschaftsrecht, 2003, P. 111 et seq.

86 Cf. ECJ from 14.7.1994 – C-379/92, [1994], I-3453 – Peralta – margin number 47.

following principles:[87] on the one hand, a domestic provision may extend to foreign issues inasmuch as a "genuine link" is present. On the other hand, the "genuine link doctrine" is not a carte blanche to impose legal obligations on legal entities which are generally subject to a foreign state authority, thus undermining the sovereignty of the other Member State. Thus, international law accepts interventions in foreign affiliated companies as addressees of obligations only under very restrictive preconditions, inasmuch as it does not reject them entirely.[88]

With all this in mind, some of the literature sees no problem in the inclusion of employees of foreign subsidiaries in German co-determination.[89] The idea behind this is that the sole object is to confer an advantageous legal position to employees working abroad by way of granting them active and passive electoral rights. This view is obviously unrealistic. On the contrary – as the complex Election Ordinances of the German Co-Determination Act clearly show – the employer being the party responsible for conducting elections is expected to shoulder significant costs. As such, it appears doubtful whether the German legislator has the right to impose these costs on foreign companies as legal obligations enforceable through the courts for the mere reason that such companies belong to German parent companies.[90] The fact that private corporate influence does not stop at national borders, does not mean that state influence is also so far-reaching.[91] This problem cannot be escaped by encouraging the German legislator to create a negotiated solution on the basis of which the representatives of the entire workforce of the company or group concludes a co-determination agreement with the employer.[92] This approach also requires a state regulatory framework to lay down in particular the way that foreign personnel is to be represented. In the face of the large differences in structure of collective representation of employee interests in the individual Member States, the German representative structures could not be translated indiscriminately for foreign companies. Recourse to mechanisms found in the SE Employee Involvement Directive[93] which also apply to international mergers[94] is not a way out of the problem either.[95] Should the Member States have agreed on a transnational provision for corporate co-determination in specific cases, this would not result in any Member State receiving the legal power to expand these provisions to cover other scenarios over the heads of the other Member States.[96] If, however, the German legislator is fundamentally hindered in taking comprehensive influence on the legal systems of the other EU Member States by way of election regulations,[97] a corresponding reticence may not be assessed as undue discrimination under Union law.[98]

An association with the corporate management power of a German parent company[99] would not be subject to an objection of lacking regulatory power, but it is only possible in certain constellations a priori[100] and would as such create new inequalities. The same is true of a differentiation in the sense that only employees working permanently for dependent branch offices are included in German co-determination, especially considering that due to the customary practice of founding foreign subsidiaries, this would only be a minor correction. Furthermore, a simple opening of German co-determination legislation allowing representatives of employees working in Germany to grant workers employed abroad active and passive electoral rights, taking into account the foreign employers, would not affect foreign claims to sovereignty.[101] The mere fact that the German legislator does not expressly supplement a mandatory law with non-mandatory elements in order to enable employers and (German) employees to conclude an agreement suiting their needs and in favour of foreign employees, does not mean that this could be evaluated as discrimination against employees as prohibited by European law.

5. Features of purely indirect discrimination

After all, it is indisputable that the exclusion of foreign personnel is not about differentiating according to nationality, but is at most a case of indirect ("con-

87 Extensive commentary from Ziegenhain, Extraterritoriale Rechtsanwendung und die Bedeutung des Genuine-Link-Erfordernisses, 1992, P. 1 et seq., 21 et seq.
88 In complete rejection see e.g. F.A. Mann, SJZ [Swiss Law Journal] 82 (1986), 21 (26); in detail Meng, Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht, 1993, P. 509 et seq.
89 As posited already by Däubler, RabelsZ 39 (1975), 444 (453); Duden, ZHR 141 (1977), 145 (182); Heuschmid, Mitentscheidung durch Arbeitnehmer – ein europäisches Grundrecht?, 2009, P. 239 et seq.; Lutter, ZGR 1977, 195 (208); Steindorff, ZHR 141 (1977), 457 (459 et seq.); furthermore Großfeld in Staudinger, revised edition 1998, Internationales Gesellschaftsrecht margin number 525.
90 In rejection see Kommission zur Modernisierung der deutschen Unternehmensmitbestimmung ("Biedenkopf II"), 2006, P. 36; Henssler in GS Heinze, 2005, P. 333 (342); Jacobs, supplement to ZIP 48/2009, 18 (21); Lubitz, Sicherung und Modernisierung der Unternehmensmitbestimmung, 2005, P. 142; also Habersack, AG 2007, 641 (648); doubtful also Bellstedt, BB 1977, 1326 (1328).
91 This appears to be the opinion of Rieble/Latzel, EuZA 2011, 145 (161).
92 Also Habersack, AG 2007, 641 (648 et seq.); in this regard also Hommelhoff, ZGR 2010, 48 (62).
93 Art. 3 Directive 2001/86/EC.
94 Art. 16 para. 3 Directive 2005/56/EC.
95 Also Hellwig/Behme, AG 2009, 261 (267).
96 As such unconvincing Latzel, Gleichheit in der Unternehmensmitbestimmung, 2010, margin number 365 et seq.
97 In the same sense Hommelhoff, ZGR 2010, 48 (61).
98 Different perspective from Hellwig/Behme, AG 2009, 261 (265 et seq.); Rieble/Latzel, EuZA 2011, 145 (161 et seq.); also Latzel, Gleichheit in der Unternehmensmitbestimmung, 2010, margin number 364: "Considerations of practicability are of little interest to Union law" / "Praktikabilitätserwägungen interessieren im Unionsrecht ... wenig".
99 As put by Hellwig/Behme, AG 2009, 261 (266 et seq.).
100 Also Habersack, AG 2007, 641 (648).
101 Cf. Kommission zur Modernisierung der deutschen Unternehmensmitbestimmung ("Biedenkopf II"), 2006, P. 35 et seq.

cealed") discrimination. As such, in an initial understanding it cannot be denied that the connection of active and passive electoral rights to employment with a company – which in itself does not represent an inadmissible criterion for differentiation according to European law – implies that the non-inclusion of foreign personnel predominantly affects foreign employees.[102] However, it would fall short to conclude solely on the basis of this finding that the situation can be classified as inadmissibly discriminatory according to Union law.[103]

As such we must remind ourselves that the legal instrument of indirect discrimination in the area of employee freedom of movement was developed by the ECJ primarily to tackle such national law provisions which can have a particularly negative affect on migrant workers.[104] Personnel employed by foreign branch offices or subsidiaries is almost entirely composed of local employees.

Furthermore, the ECJ's case law restricts discrimination which may be relevant in a European law sense to cases in which different provisions can be applied to comparable situations or in which the same provision is applied to different situations.[105] Strictly speaking, with regard to foreign personnel this situation does not exist, because the German legislator does not apply any of its own, different provisions to comparable situations, rather simply abstaining from the extension of German co-determination legislation to employees working abroad, thus also abstaining from a normative regulation.

Furthermore, every indirect form of discrimination assumes unequal treatment in comparable situations. At that, the applicable composition of comparison groups, or the composition of the tertium comparationis proves itself a central aspect of the application of the prohibition of discrimination.[106] The representatives of the theory of the Union law infringement of German co-determination now simply assume that the company or group create the common umbrella which must lead, almost automatically, to a fundamental equal treatment with regard to the right to elect members to the supervisory board. In fact, the starting point is far more problematic. If we wish to avoid prior decisions in this matter which would prejudge the result, we would be well advised to search Union law for assessments which could give more detailed information about which standard of comparison is applied by European law. Since this concerns the election of employee representatives, Art. 8 Regulation (EU) No. 492/2011 is predominantly relevant.[107] This regulation, which substantiates the prohibition of discrimination from Art. 45 para. 2 TFEU,[108] remarkably stipulates an entitlement to equal treatment with regard to the collective representation of employee interests only inasmuch as the employee concerned possesses the nationality of one Member State and is employed in the territory of another Member State. Equal treatment is not prescribed exactly in cases in which an employee is (permanently) employed outside of the territory. This provision can be understood as the expression of the fundamental idea that for the collective representation of employee interests, the principle of work location should apply, meaning that every employee, independent of his/her nationality, should enjoy the protection of those representative structures at his/her place of employment which have been developed during the social history of that Member State. On the other hand, the prohibition of discrimination is not intended to force the Member States to export parts of their collective employment law in order to offer workers employed in other Member States the same level of protection. This principle must also then be valid when we are concerned with working conditions in transnational companies. If we – correctly – categorise the corporate co-determination of the employees as a working condition, in order to activate the prohibition on discrimination in terms of employee freedom of movement, we cannot swap levels on the issue of composition of comparison groups, so to speak, and then continue to

102 Incidentally it ought to be mentioned that without attribution to the group, the employees of foreign and inner-German subsidiaries would have neither active nor passive electoral rights. If the German parent company in itself reaches the threshold amount, the non-allocation would not change anything about equal co-determination even though the employee representatives on the supervisory board would participate in decisions in this case which affect the entire group workforce. From the perspective of European law, this means that it is difficult to draw the conclusion that a Member State legislator which introduces corporate co-determination must imperatively provide for attribution to the group in order to ensure that foreign employees, who typically work for legally independent subsidiaries, are also represented.

103 Generally in rejection was already Birk, RIW 1989, 6 (12); Ebenroth/Sura, ZHR 144 (1980), 610 (613); Lutter in FS Zweigert, 1981, P. 251 (261); Schubert, Unternehmensmitbestimmung und internationale Wirtschaftsverflechtung, 1984, P. 99 et seq.

104 Cf. ECJ from 8.5.1990 – C-175/88, [1990], I-1779 – Biehl – margin number 14; from 28.1.1992 – C-204/90, [1992], I-249 – Bachmann – margin number 9; from 23.5.1996 – C-237/94, [1996], I-2617 – O'Flynn – margin number 20 et seq.; Plötscher, Der Begriff der Diskriminierung im Europäischen Gemeinschaftsrecht, 2003, P. 137 et seq.; Riesenhuber, Europäisches Arbeitsrecht, 2009, Section 3 margin number 33.

105 Cf. ECJ from 14.2.1995 – C-279/93, [1995], I-225 – Schumacker – margin number 30; from 22.3.2007 – C-383/05, [2005], I-2555 – Talotta – margin number 18; from 18.12.2007 – C-341/05, [2007], I-11767 – Laval – margin number 115.

106 More detail given by Fabis, Die Auswirkungen der Freizügigkeit gem. Art. 48 EG-Vertrag auf Beschäftigungsverhältnisse im nationalen Recht, 1995, P. 52 et seq.; Görlitz, Struktur und Bedeutung der Rechtsfigur der mittelbaren Diskriminierung im System der Grundfreiheiten, 2005, P. 238 et seq.; Plötscher, Der Begriff der Diskriminierung im Europäischen Gemeinschaftsrecht, 2003, P. 41 et seq., 136 et seq.

107 See also Birk, RIW 1989, 6 (12) zur Vorgängerregelung des Art. 8 Council Regulation (EEC) Nr. 1612/68.

108 Cf. Brechmann in Calliess/Ruffert, TEU/TFEU, 4th Ed. 2011, Art. 45 TFEU margin number 4; Franzen in Streinz, TEU/TFEU, 2nd Ed. 2012, Art. 45 TFEU margin number 11 et seq.; on the relationship between primary and secondary legal safeguarding see also Coester/Denkhaus, EAS [European Labour and Social Law], 1999, B 2100 margin number 6.

argue in a purely corporate law sense referring to a standardised corporate management authority affecting all personnel of a group.

6. Factual reasons for indirect unequal treatment

Even if we ignore this aspect, the result is indisputable that not every indirect unequal treatment can be treated automatically as inadmissible discrimination. The case law of the ECJ demonstrates uncertainty with regard to the specification of the legal instrument of indirect discrimination. These affect on the one hand the relationship between comparability and justification[109] and on the other hand the question of whether in relation to the criterion of nationality, indirect discrimination is already eliminated if an outwardly neutral connection to objective considerations which are unrelated to nationality are in appropriate relation to a legitimate purpose as pursued by national law,[110] or whether imperative reasons of common interest must exist and the national provision must be appropriate and necessary in order to achieve the regulatory purpose.[111] In the end, the issue is that factual reasons exist which have enough weight to legitimise differentiated treatment, even if foreign employees are affected more strongly than German employees.[112]

With this in mind, the answer to the question of the discriminatory character of German corporate co-determination as well as all other corresponding Member State provisions should be sought in how Union law separates the European constitution from Member State constitutions.[113] If German law only traces the lines on which the coordination of the two levels are based, then the purpose of the prohibition of discrimination cannot be to destroy such a concept. As such we should first note that it falls under the competence of the Member States to stipulate to companies active on their territory how the employer and employee parties ("capital" and "work") should deal with their conflicts of interest. On the other hand, it is the Union's task to provide for a harmonisation of national provisions by way of secondary legal acts and in particular to create an appropriate legal framework for employee co-determination for transnationally active companies, as was the case[114] with the Societas Europaea[115] and the European Works Council.[116] The prohibition of discrimination is not intended to anticipate such conscious political action[117], establishing special regulations for companies active throughout Europe which are based only on the socio-political ideas of individual Member States.[118] Exactly this is the consequence of the contrary view, which focuses on trans-nationalising corporate co-determination using the European law prohibition on discrimination, and gaining entry to the domain of the Union law legislator.

7. Consequential problems

It would be inconsistent to get stuck on the issue of corporate co-determination of employees. In fact, in attempting to expand the domestic employment law systems by way of the prohibition of discrimination to include transnationally active companies, the remaining voicing options of the employee representative bodies with regard to decisions taken by the management ought to be brought to account, because the matter within the various national systems is primarily one of political power constellations and historical coincidence which determine whether the employees voice their interests through institutionalised forms of participation or rather by way of collective action. As such, an expansion of German co-determination to cover transnational companies with French branch offices or subsidiaries would lead to the fact that the entire group personnel could, at least in international distribution conflicts, invoke the French right to strike in order to prevent a "Gallic strike imbalance", which would discriminate against German employees. This admittedly somewhat exaggerated argumentation shows that each Member State system is composed of a number of overlapping elements. The function of European law prohibitions of discrimination are misunderstood if we use them to extract individual components from the various national systems in order to create a standardised special employment law for transnationally active companies and groups, which orientates itself on the source legal systems relevant for the company or group management.[119] The European law concept of negotiated settlements and the interception model, as can be found in SEs and international mergers, can lead to the re-

109 More detail in Plötscher, Der Begriff der Diskriminierung im Europäischen Gemeinschaftsrecht, 2003, P. 64 with further references.
110 Also ECJ from 11.2.1974 – C-152/73, [1974], 153 – Sotgiu – margin number 13; from 23.5.1996 – C-237/94, [1996], I-2617 – O'Flynn – margin number 19; from 7.5.1998 – C-350/96, [1998], I-2521 – Clean Car Autoservice – margin number 31; from 15.3.2005 – C-209/03, [2005], I-2119 – Bidar – margin number 19.
111 Also Franzen in Streinz, TEU/TFEU, 2nd Ed. 2012, Art. 45 TFEU margin number 84 with reference to ECJ from 31.3.1993 – C-31/ 92, [2005], I-1663 – Kraus – margin number 32, which obviously dealt with the character of Art. 45 TFEU as a prohibition of restriction.
112 Also in the approach of Hellwig/Behme, AG 2009, 261 (265).
113 See also Rödl in von Bogdandy/Bast, Europäisches Verfassungsrecht, 2nd Ed. 2009, P. 855 (888 et seq.).
114 See also the approach of the Cross-Border Mergers Directive 2005/56/EC.
115 Directive 2001/86/EC.
116 Directive 2009/38/EC (previously Directive 94/45/EC).
117 See also Kischel, EuGRZ [European Charter of Fundamental Rights] 1997, 1 (7), who expressly denies a commitment to the EU law principle of equal treatment for activity in the area of non-exercised competences.
118 Apparently also Rödl in von Bogdandy/Bast, Europäisches Verfassungsrecht, 2nd Ed. 2009, P. 855 (899 et seq.), however without expressly addressing the prohibition of discrimination. In principle for a decentralised regulation in the area of employee co-determination is Fleischer, ZGR 2012, 160 (176).
119 To an extent see also the Kommission zur Modernisierung der deutschen Unternehmensmitbestimmung ("Biedenkopf II"), 2006, P. 37.

sult that Member State participation structures are transferred to other national labour relations. However, in this case the transfer is legitimised via a secondary legislative act, which in principle demands unanimity,[120] and is not imposed upon the Member States by way of an expansion of the prohibition of discrimination.

For this reason, the apparent European law principle of the equal treatment of all employees in corporate co-determination[121] is insubstantial. The elimination of the "national introversion"[122] of corporate co-determination of employees is without doubt desirable. However, the question of how much the structure of collective labour relations should be changed in the various Member States must be decided on at EU legislative policy level. The coordination of interests of the Member States necessary for such a decision cannot be replaced by an extensive application of the prohibitions of discrimination in order to establish special legal systems in all transnationally active companies; these in turn may lead to significant friction with regard to the remaining national labour relations.

V. On the infringement of the freedom of establishment

The non-inclusion of foreign personnel in German co-determination is occasionally assessed as a possible violation of the freedom of establishment (Art. 49, 54 TFEU).[123] However, the approach is unclear because the bearer of this fundamental freedom is the company, but not individual organs of the company, or even individual organ members. If members of a co-determined supervisory board have to be convinced of a relocation of headquarters, or a corresponding resolution cannot be reached, then we are concerned with the forming of opinions within the company and not a restriction of the freedom of establishment.

VI. On the infringement of the free movement of capital

Lastly, there are a few voices that claim that the exclusion of the foreign component of a workforce from supervisory board co-determination can be classed as an impairment of free movement of capital (Art. 63 TFEU).[124] Since the scope of active and passive electoral rights does not change anything about the total weight of the employee influence, it is not evident why a foreign investor should abstain from acquiring shares in a German company because only the inner-German and not the foreign personnel is represented on the supervisory board.[125]

VII. On the legal consequences

Since the restriction of the scope of German co-determination to inner-German workforces as presented thus far cannot be classified as undue discrimination of the employees of German companies or groups working abroad according to Union law, the following shall only briefly address the legal consequences which would arise if the issue was to be treated from a different perspective. As mentioned at the beginning, part of the literature assumes that subject to new legal provisions for future supervisory board elections, the German provisions could no longer be applied due to the indisputable primacy of application of European law. The supervisory boards would thus have to be filled with shareholder representatives alone at each election. Additionally, status proceedings according to Section 98 German Stock Corporation Act (AktG) could be initiated at any time.[126]

Such legal consequences would overstep the mark by far. If one believes that the exclusion of the part of the workforce working abroad infringes Union law, then only the exclusion in itself falls victim to the non-application principle resulting from European law.[127] As such, the case Kücükdeveci on the calculation of extended periods of notice according to Section 622 para. 2 sentence 2 German Civil Code (BGB) is decisive in stipulating that only the non-consideration of length of service of younger employees, and not e.g. the extension of periods of notice as such, is subject to the verdict of inapplicability.[128] It is true that we are missing an explicit legal norm which could simply be declared to be applicable. However, this would not prevent us from correcting the prevailing opinion of the scope of German co-determination, where necessary. [129] The effet utile gives us no reason to deduce that a Member State regulation will always become completely inapplicable if just one sub-aspect should prove to be discriminatory. Additionally, an argumentation does not make sense which merely suspends co-determination of dependent employees with reference to the safeguarding of employee interests in order to concede the field to shareholders alone. A reduction to purely national matters[130] in the responsibility of employee representatives in office in

120 This applies for the enactment of provisions on the basis of Art. 153 para. 1 lit. et seq, para. 2 sentence 3, 352 TFEU.
121 Cf. Latzel, Gleichheit in der Unternehmensmitbestimmung, 2010, margin number 100 et seq.; Rieble/Latzel, EuZA 2011, 145 (158 et seq.).
122 See Heuschmid, Mitentscheidung durch Arbeitnehmer – ein europäisches Grundrecht?, 2009, p. 238.
123 Hellwig/Behme, AG 2009, 261 (270).
124 Meilicke, GmbHR [GmbH-Review] 2003, 793 (805); also Hirte in Hirte/Bücker, Grenzüberschreitende Gesellschaften, 2nd Ed. 2006, Section 1 margin number 51.
125 See also Hellwig/Behme, AG 2009, 261 (270).
126 Hellwig/Behme, AG 2009, 261 (270 et seq.).
127 Additionally it would barely be possible to avoid the inclusion of foreign personnel in the calculation of threshold numbers, cf. Heuschmid, Mitentscheidung durch Arbeitnehmer – ein europäisches Grundrecht?, 2009, P. 238.
128 ECJ from 19.1.2010 – C-555/07, [2010], I-365 – Kücükdeveci – margin number 51; Federal Labour Court from 9.9.2010 – 2 AZR [Central Register of Foreign Nationals] 714/08, NZA 2011, 343.
129 Teichmann, ZIP 2010, 874 (875); in agreement Latzel, Gleichheit in der Unternehmensmitbestimmung, 2010, margin number 743 et seq.
130 Considered by Rieble/Latzel, EuZA 2011, 145 (166).

the supervisory boards is, not least due to the legally barely feasible separation of issues of transnational significance from those of solely inner-German significance, not a workable solution.[131]

Inasmuch as one – with good reason – holds the view that in cases of possible discrimination, a simple change of the prevailing opinion on the exclusion of foreign personnel is insufficient, and rather that the German legislator must issue specific regulations in order to enable the inclusion of employees working abroad, this would speak for a suspension of the exclusionary effect of Union law according to Art. 264 para. 2 TFEU, including a deadline for the national legislator to adapt its own law to European law requirements.[132] If, in this context, one refers to the responsibility of the other Member States to ensure the conduction of corresponding elections in their various territories,[133] this evidently shows once more that the German legislator's means have been expanded to create internationally standardised collective working conditions for transnational companies headquartered in Germany. The European law prohibition of discrimination should thus not be interpreted that it prevents the individual Member States from autonomously deciding how working relations in their territories should be regulated in the case of transnationally active companies.

VIII. Conclusion

The currently popular theory of the unlawfulness of the non-inclusion of the foreign personnel of German companies and groups in German corporate co-determination according to European law is unconvincing. With regard to the issue of a restriction of the freedom of movement of employees working in Germany, the specific context is lacking between the loss of mandate and a transnational process. Additionally, the assumption of discrimination of employees working abroad is ultimately erroneous. The European law prohibition of discrimination is overstretched if one wishes to use it to derive a special employment law system for transnational companies. The challenges posed to the Member States' collective employment law system through transnational business activities must be handled by way of Union law secondary legislative acts, and not by using the prohibition of discrimination as a lever.[134]

131 Also Latzel, Gleichheit in der Unternehmensmitbestimmung, 2010, margin number 759.
132 Cf. Rieble/Latzel, EuZA 2011, 145 (167).
133 Latzel, Gleichheit in der Unternehmensmitbestimmung, 2010, margin number 747.
134 Following Schack, ZZP [Civil Procedure Review] 1995, 47.

REGIONAL COURT BERLIN

Court order File Number: 102 O 65/14 AktG [German Stock Corporation Act]
In the proceedings according to section 98, 99 German Stock Corporation Act
Participants:
1. nnnnnnnnnnnnn ,
- Legal Representatives: Attorneys nnn
2. nnnnnnn
Applicant,
Respondent,
- Legal Representatives: Attorneys nnn
3. nnnnnnn a decision was passed on June 1, 2015 by the Chamber for Commercial Matters 102 of the Regional Court Berlin, presided by the judge at the District Court XX, the commercial judge XX and the commercial judge XX based on the hearing held on May 12, 2015: The Applicant's applications were rejected.
AVR1
2. The Respondent shall bear the costs of the proceedings based on a value of EUR 50,000.00. The costs of the participants are not refunded.

Reasons

I. The participants dispute the composition of the supervisory board existing at the Respondent.
The Respondent is a tourism company and, according to its Articles of Association (the Articles), has its seat in Berlin and XX. The company is entered in the Commercial Register at the District Court Berlin-Charlottenburg under the number HRB XX and the District Court XX under the number HRB XX. The Respondent's shares are quoted on the German stock exchange as Prime Standard and the Respondent is also included in the MDAX.

The Respondent is the group parent company of the XX-Group, a worldwide leading tourism corporate group. The group's headquarters are located in XX.

According to the 2013/2014 annual report, the Respondent and its corporate subsidiaries had approximately 77,309 employees worldwide as of the end of September 2014. Of these staff members, some 10,100 are employed in Germany; approximately 40,000 are employed in other EU states whereby the majority work in Great Britain.

The Respondent's supervisory board currently has 20 members; this information can be derived from Clause 1 paragraph 1 sentence 2 of the Respondent's Articles in the version dated December 9, 2014. In accordance with the provisions of the German Co-Determination Act [Mitbestimmungsgesetz (MitbestG)], the committee is made up of ten members representing shareholders and ten members representing employees.

The Applicant became a shareholder of the Respondent mid-2014. The Applicant is of the opinion that the Respondent's supervisory board is inappropriately composed, as the German provisions governing corporate co-determination – according to which the active and passive right to vote when electing employee representatives to the supervisory board is only granted to those employees working in Germany – infringes Union law.

3 Consequently, the Applicant considers the German Co-Determination Act to be inapplicable, and feels that the Respondent's supervisory board should be composed exclusively of representatives of the shareholders.

The Applicant notified the Respondent's board of directors of this legal opinion in a letter dated July 17, 2014. The Respondent replied to this letter on July 29, 2014 and notified the Applicant that the current composition of the Respondent's supervisory board conformed with the pertinent legal provisions in terms of Section 97 paragraph 1 German Stock Corporation Act [Aktiengesetz (AktG)], as neither German nor European Supreme Court jurisdiction existed which could lead to an inapplicability of the provisions of the German Co-Determination Act.

The Applicant pursues the confirmation of his legal opinion in these current proceedings. As the overall German Co-Determination Act – however, in any case the provisions governing the employees' supervisory board members in terms of Section 9 et seq. German Co-Determination Act – cannot be applied due to the infringement of a high-ranking Union law, the decisive factor for the composition of the Respondent's supervisory board is not Section 96 paragraph 1 var. 1 German Stock Corporation Act but Section 96 paragraph 1 var. 6 German Stock Corporation Act. The Respondent's supervisory board would therefore have to consist exclusively of shareholder representatives up until such a time as the German Co-Determination Act is restructured in line with Union law.

The status procedure is considered permissible as it is the only procedure type in which the legal issues raised could be clarified. In this regard it is immaterial that the German Co-Determination Act, which forms the basis of his legal opinion, is not applicable to the Respondent's supervisory board.

The circumstance that those employees working in European states for German companies with an obligation of co-determination, in contrast to their colleagues working in Germany, are not actively or passively entitled to voting rights, represents an indirect discrimination based on nationality and therefore breaches Art. 18 TFEU [Treaty on the Functioning of the European Union]. The exclusion of foreign employees from voting in supervisory board elections typically affects nationals of other Member States and is therefore indirectly dependent on a person's nationality. The discrimination is exclusively and directly caused by German law which leads to the discrimination of German and foreign employees of the same German parent company.

Furthermore, the circumstance that when changing his/her job in order to work in a foreign compa-

ny or a foreign subsidiary of the same German parent company, an employee previously working in Germany would thus lose his active and in particular his passive right to vote for the supervisory board, makes changing jobs less attractive. This not only represents a discrimination of foreign employees but also restricts the freedom of movement of German employees.

4 Here, the equally inherent breach of the principle of non-discrimination in terms of Art. 45 TFEU is merely incidental, as the co-determination at company level is not a legislative provision of labour law. The matter at hand merely relates to the consequences of an employee's job change within the same group of companies. The consequence of the loss of the right to vote when moving to a foreign company or a foreign subsidiary should also be seen as concrete and not merely as uncertain or vague. It must be admitted that Union law does not provide for a harmonization of co-determination regulations; however, this does not change the fact that national regulations should not be allowed to violate primary law.

Breach of the principle of non-discrimination and movement of workers could not be justified by a reference to the territoriality of German co-determination. Juristic literature repeatedly shows regulatory means de lege ferenda regarding the possibility of appropriately including a foreign workforce in the system of German co-determination.

An interpretation of the German right to co-determination compliant with Union law could not lead to an inclusion of foreign employees in the election of employee representatives to the supervisory board as this would clearly be in contradiction to the intention of the historical German legislator. Furthermore, it would require an initial clarification of the actual requirements of Union law. As far as there is no assurance of a result in line with Union law, the application of the norms applied pursuant to national law would have to remain denied. It is not the task of Articles 18 and 45 TFEU to achieve or preserve a participation level of employees in company organs.

As the outcome of the proceedings would predominantly depend on European Union law, this would require making a submission to the European Court of Justice (ECJ) in the event that the court were not to follow the Applicant's legal opinion. These are issues of considerable importance from the point of legal policy. The quicker clarity can be achieved here, the quicker the German legislator can react and initiate the steps required to bring about reform.

The Applicant requests

the determination that the Respondent's supervisory board is not composed in accordance with the legal provisions applicable to the board and, pursuant to Section 96 paragraph 1 var. 6 German Stock Corporation Act, should only consist of supervisory board members made up of shareholders (shareholder representatives).

5 Alternatively,to postpone the proceedings and to make a submission to the European Court of Justice by way of a preliminary ruling procedure according to Art. 267 TFEU with regard to the following legal issues for a preliminary decision

1) Is Art. 18 TFEU to be interpreted in such a way that it contradicts a regulation of national law, such as that of Germany, whereby the active and passive voting right to elect employee representatives to the supervisory board of a stock corporation is only granted to those employees employed by the company who work in domestic establishments but not to employees who work in establishments in other Member States of the European Union;the active and passive voting right to elect employee representatives to the supervisory board of a stock corporation for an employee employed by a subsidiary is only granted if it is a domestic subsidiary and the employee works for a domestic establishment of the subsidiary but not to the employees who are employed by a subsidiary headquartered in another Member State of the European Union?

Is Art. 45 TFEU to be interpreted in such a way that it contradicts a regulation of national law, such as that of Germany, according to which an employee previously working in an inner-German establishment of a co-determined stock corporation or an establishment belonging to a domestic subsidiary, when his occupation is relocated to another establishment in a different Member State or his employment relationship changes to the extent that he is now employed by a subsidiary with seat in another Member State, does not only lose his active and passive right to vote in the elections of employee representatives to the supervisory board but, in addition, is excluded with immediate effect as an incumbent elected employee representative in the supervisory board against the loss of a passive voting right?

Are Articles 18 and 45 TFEU to be interpreted in such a way that in the event of an affirmation of question 1 and/or question 2 they deny the application of the relevant provisions of national law, such as in Germany, with the consequence that elections of employee representatives to the supervisory board within the scope of corporate co-determination, in which those employees employed by a foreign company or working in a foreign company are not involved, are generally not to take place at all, until the possibility of a discrimination-free participation has been assured even for the foreign employees?

The Respondent submits a motion to reject the applications.

The Respondent considers the status procedure under corporate law for the Applicant's relief as inadmissible. It is undisputed that the Respondent's

supervisory board, when applying the German Co-Determination Act, is properly constituted and its composition therefore also conforms to the regulations of Section 96 paragraph 1 German Stock Corporation Act. As far as it could be disputed as to whether the German Co-Determination Act is in line with Union law, and therefore applicable, the status procedure is inadmissible to clarify this question. It is not the intent and purpose to initiate a preliminary ruling procedure by the ECJ to clarify whether the German legislator would have to initiate steps to reform the co-determination regulations.

6 At any rate, the Respondent considers the subject itself as unsubstantiated. The number of supervisory board members at the Respondent already corresponds to the maximum number pursuant to Section 7 paragraph 1 sentence 1 (3) of the German Co-Determination Act so that even a consideration of foreign employees would not change anything in terms of the size of the supervisory board.

Contrary to the Respondent's opinion, the scope of application of Union law has not been expanded. When it comes to the area of labour law, the EU Member States are not under any obligation to generally treat all EU citizens equally. Therefore, it cannot represent a breach of Union law if, within the individual Member States, different standards exist under labour law. In this connection, it must also be noted that corporate co-determination is generally not regulated by Union law; the corresponding legal provisions only exist in two very restricted regulatory areas whereby on the one hand the SE [Societas Europaea] and on the other hand the transnational amalgamation of stock corporations are affected.

For an alleged disparate treatment of employees there is already a lack of a divergent treatment under the same circumstances. Those foreign employees who, in the Applicant's opinion, are disadvantaged, actually do not leave the territory of their relevant Member State. That in itself lacks the required transnational reference for discrimination relevant under Union law.

In terms of prevailing opinion, the circumstance that employees of foreign group companies do not take part in electing employee representatives to the supervisory board and are also not themselves electable, does not represent a discrimination based on nationality. This is already evident in that even employees who are not German nationals could participate in an election of employee representatives as a matter of course as far as these employees are part of a German company within a group company with seat in Germany. Even an indirect disadvantage is not present as Germany, as a public authority, does not have any regulatory competence for the active and passive voting rights of employees of foreign companies to the supervisory board of a company with seat in Germany. With regard to foreign employees, there is currently also no comparable situation to domestic employees that is regulated differently.

7 Equally, the free movement of workers in terms of Art. 45 TFEU is also not affected. The European primary law does not grant employees any guarantee that, in the event of a relocation of their work to another Member State, the same working, social and tax outline conditions will apply. Furthermore, according to the German Co-determination Act, the right to vote and the eligibility to be voted as a member to the supervisory board are not a part of the "working conditions" according to Art. 45 TFEU as this does not present any reference to either the concept of remuneration or employment. A supervisory board mandate is an inter-company position, conditional on an employment relationship, yet, without any effect on the remuneration or the employment of employees.

The activity of employee representatives on the supervisory board of a company is also not comparable to that of a works council. The employee representatives are, just as members of the supervisory board representing shareholders, primarily obligated to the interests of the company.

The loss of the voting right and eligibility to the supervisory board in a company subject to the provisions of the German Co-Determination Act is in any case an irrelevant restriction of the free movement of workers under Union law. Not every disadvantage and every unpleasantness befalling an employee when relocating his workplace to another Member State is automatically an infringement of the prohibition of restriction in terms of Art. 45 TFEU. The latter also falls away if it is completely unsure whether an employee would otherwise refrain from moving his workplace to a Member State due to a specific circumstance. This particularly cannot be assumed in the facts of the case at hand whereby it could only become relevant if the employee were to move to another company of the same group abroad. Looking at this realistically, it would seem far-fetched that an employee working in Germany would make his professional career advancement dependent on the possibility to be either actively or passively eligible to the supervisory board. Also, where employees already have a supervisory board mandate, this mandate would in any case be terminated with the move to any other employer.

Even if one were to assume an unlawful encroachment of the rights of Art. 18 or Art. 45 TFEU, this would be justified, as the application of the German Co-Determination Act on foreign companies mandatorily contradicts the principle of territoriality.

Finally, the Applicant's desired legal consequence would have to be seen as absurd. The free movement of workers represents a protective right of the employees and cannot be called on to substantiate an effective restriction of employee rights. In addition, this would result in a contradictory result; namely, that in a purely Germany company there is a co-determination on the part of employees in the supervisory board and, on the other

8 hand, this is not the case in those companies with subsidiaries and/or branches in other foreign European states. A defect of the German Co-Determination Act with regard to an infringement of the regulations of the TFEU would, for this reason, have to be removed by a Union-conform interpretation. The wording of the law does not expressly restrict the applicability of the German Co-Determination Act to companies or branches in Germany.

The court is not obligated to present the questions raised by the Applicant to the European Court of Justice for a preliminary ruling. On the one hand, this does not relate to issues under Union law, on the other hand it is sufficiently clear as to how to rule in this regard.

As to the other details of the current state and the dispute, reference is made to the documents submitted for file by the parties involved in addition to their appendices, as well as the minutes of the hearing held on May 12, 2015.

II.

The declaratory relief sought by the Applicant was not successful, as the Respondent's supervisory board is currently composed in line with pertinent legal provisions.

A. The status procedure initiated by the Applicant was permissible.

According to Section 98 paragraph 1 German Stock Corporation Act, if there is any dispute or uncertainty regarding the provisions under which the supervisory board is composed, the Regional Court, in whose district the company has its seat, shall make a decision following the request of an applicant who is entitled in terms of this provision.

In view of the existence of the seat according to the Respondent's Articles of Association, the local competence of the Regional Court Berlin was readily evident.

The Applicant is indisputably the shareholder of the Respondent and, pursuant to Section 98 paragraph 2 sentence 1 (3) German Stock Corporation Act, was therefore entitled to initiate a court ruling with regard to the composition of the Respondent's supervisory board.

Also the further criterion of the dispute with regard to the pertinent regulations governing the composition of the Respondent's supervisory board was present.

9 As far as the Respondent on the one hand feels that the dispute described by the Applicant does not exist on the basis of the regulations of the German Co-determination Act, as the supervisory board when applying these regulations is appropriately composed in accordance with Section 7 paragraph 1, paragraph 2 German Co-determination Act, this may apply to the matter, if considered in isolation. However, the Applicant particularly asserts that, in his opinion Section 7 German Co-Determination Act is not pertinent for the Respondent's supervisory board, as this contradicts the application proviso of the primacy of Union law. Whether this is actually the case here was a question of the merits of the claim and not the permissibility of the application.

The Respondent further accurately asserts that this status procedure was neither a judicial review nor a preliminary ruling procedure. Based on this circumstance, the applications within the scope of Section 98 German Stock Corporation Act are also impermissible if these merely contain an abstract legal issue which does not refer to either the supervisory board of the involved parties or is not relevant for its composition (cf. also OLG [Higher Regional Court] Zweibrücken, NZG [New Journal for Company Law] 2014, 740).

The area of applicability of the judicial status procedure comprises the clarification as to which of the five models mentioned in Section 96 paragraph 1 German Stock Corporation Act is decisive for the actual company. Consequently, the procedure pursuant to Section 98, 99 German Stock Corporation Act is (only) permissible if the dispute refers to the participation of the employees on the supervisory board in general or to the extent of the participation (cf. Hopt/Roth/Peddinghaus in Hopt/Wiedemann, Commentary on the German Stock Corporation Act, margin note 11 on Section 98 German Stock Corporation Act).

In this procedure, the Applicant creates a sufficiently direct reference between the legal opinion he represents – the inapplicability of Section 7 German Co-Determination Act – and the composition of the Respondent's supervisory board by seeking relief for the determination that, pursuant to Section 96 paragraph 1 var. 6 German Stock Corporation Act, the members of the supervisory board should only be made up of shareholders. According to Section 98 German Stock Corporation Act this represents an issue for litigation.

c) In accordance with Section 98 paragraph 1 sentence 1 (1-5), on the part of the eligible party, the right to submit an application is not bound to any other preconditions (cf. Hüffer/Koch, German Stock Corporation Act, 11th edition, margin note 4 on Section 98 German Stock Corporation Act).

Although it is not clear whether the existence of the criterion of "uncertainty" or the "dispute" in terms of Section 98 paragraph 1 sentence 1 German Stock Corporation Act have to be determined (cf. in this regard Hopt/Roth/Peddinghaus, loc. cit.; MünchKomm/Habersack, German Stock Corporation Act, 3rd edition, margin note 5 on Section 98 German Stock Corporation Act). A "dispute" according to the standard definition already exists if the board of directors and another involved party seriously conflict regarding the composition of the supervisory board (cf. Münch-Komm/Habersack, loc. cit.).

10 Such a dispute became obvious in summer 2014 from the correspondence between the Appli-

cant and the Respondent's board of directors so that even from this point of view the application was also permissible. The fact that it was the Applicant himself who triggered the "dispute" was equally as insignificant as the question as to the (further) intentions that motivated the Applicant to initiate the status procedure. As already mentioned above, merely legislative motivations would only then be damaging if these would not have been quashed in a permissible procedural motion.

B. The procedural motions, however, could not be successful on substance. In the Chamber's opinion, the current structure of German co-determination existing for group parent companies, branches and/or subsidiaries, even in other EU states, neither breaches the principle of non-discrimination of Art. 18 TFEU nor the guaranteed free of workers in Art. 45 TFEU. Therefore, the alternatively applied for presentation to the ECJ, in terms of Art. 267 TFEU, was also out of the question, as the required relevance to answer the Applicant's formulated questions was lacking for the court to make a decision.

1.In terms of Section1 paragraph 1 German Co-Determination Act, the employees in a company founded in the legal form of a stock corporation have a co-determination right according to the German Co-Determination Act, if the company usually has more than 2,000 employees. According to Section 6 paragraph 2 sentence 1 German Co-Determination Act, the composition of the supervisory board is determined by Sections 7 - 24 German Co-Determination Act. Accordingly, the supervisory board of a company that has more than 10,000 but less than 20,000 employees consists of six members of the supervisory board from shareholders and six members of the supervisory board from employees, in terms of Section 7 paragraph 1 No. 1 German Co-Determination Act.

In the present case, it was beyond dispute between the participants that in the Respondent's group of companies a little more than 10,000 employees were employed domestically so that on this basis alone, according the provisions mentioned, there was a necessity to assume the creation of a supervisory board consisting of twelve members. However, Clause 11 of the Respondent's Articles of Association determines that the company's supervisory board consist of 20 members so that for its composition the regulation of Section 7, paragraph 1 No. 3 in conjunction with paragraph 2 No. 2 German Co-Determination Act applies, and that consequently the committee should be composed of 10 supervisory board members who are shareholder representatives and 10 supervisory board members who are employee representatives of which three members must be trade union officials.

2. Contrary to the opinion represented by the Applicant, the reason that Section 7 German Co-Determination Act may not be applied is not due to an impermissible discrimination of employees of the Respondent's group companies situated in other EU states.

11 a) According to prevailing opinion, employees in foreign companies neither have an active or passive right to vote in supervisory board elections that take place in Germany (cf. for example, Habersack, appendix to ZIP [Journal for Commercial Law)] 48/2009, 1, 3). This also applies if they are employed in non-independent foreign branches or subsidiaries of German companies.

The election process is actually not attached to a specific employer, employee or employment relationship but to the company as the real organizational unit. Therefore, in this respect, the applicability of the relevant law is determined by the real statute, the law of the proven native place. Because the co-determination laws anchor the election process at operational level, employees in other companies as those situated in Germany de lege lata are practically excluded from the corporate co-determination (cf. Fischer, NZG 2014, 737, 738).

Based on the principle of Section 1 paragraph 1 German Co-Determination Act, group parent companies with less than 2,000 employees are not subject to co-determination. However, based on the regulation in Section 5 paragraph 3 German Co-Determination Act, the preconditions mentioned there allow for employees of subordinate companies within the group structure to be included in the group parent so that (even) in such companies a co-determined supervisory board must be established. Depending on the number of employees in the subsidiaries, a multiple co-determination at company and group level can take place pursuant to Section 5 paragraph 3 German Co-Determination Act, thus leading to an increase of the employees' active and passive voting rights.

Consequently, the elections to the supervisory board of the Respondent are initially to be seen as a purely intra-state process which is based on the fact that the German legislator has deemed it necessary to establish the co-determination in group companies even at the highest decision-making level.

The voting itself does not directly affect any interests of the European domestic market. The employment relationships of those employees who are employed by the Respondent's subsidiaries structured under foreign law are not affected with regard to the rights and obligations resulting from their employment relationship. This also applies with regard to corporate co-determination as far as the right to the seat of the company recognises such an institution.

12 d) The regulations of the German Co-Determination Act do not include any reference to the nationality of the employee eligible to vote so that a direct discrimination in terms of Art. 18 TFEU cannot be considered and also is not asserted by the Applicant.

In literature, however, the represented opinion is

that the missing participation of employees of a German parent company working for a group company situated abroad leads to an indirect discrimination which breaches Union law in terms of Art. 18 TFEU. The connection of the right to vote to the place of work would lead to a factual disadvantage of a clearly defined group of persons (by way of employees of foreign companies and subsidiaries), whose members are naturally predominantly foreign nationals.

Hereby, the concrete disadvantage primarily lies in the missing representation of foreign employees in the group's top management if and as far as there are any conflicts concerning location (cf. for example, Teichmann, appendix to ZIP 48/2009, 10, 11). In this respect, company and group-wide decisions, which would affect employees in various Member States alike, would represent a preferential treatment of the German employees. It would permit the privileged personnel to enforce their interests on the backs of the disadvantaged, that is to say those employees at foreign locations (as by Rieble/Latzel, EuZA [European Journal for Labour Law] 2001, 145, 149).

e) For various reasons, the Chamber cannot follow this argumentation adopted by the Applicant.

aa) As a starting point it must be noted that the area of corporate co-determination does not belong to the legal areas harmonized under European law. Also the "Reflection Group on the Future of EU Company Law" has noted that the questions as to whether, and to which intensity, the national company forms of Member States are subject to co-determination, is a legislative decision of Member States in which the European legislator should not intervene (cf. reference Hellwig/Behme, AG [Journal of Stock Corporation, Corporate, and Financial Markets Law] 2001, 740, 741). Therefore it must on principle be accepted that the national laws of EU states show a different level of corporate co-determination – without having to have a binding minimum standard from the point of view of European law – which would have to be granted to all employees within the Union (cf. appropriately also LG Landau, NZG 2014, 229)

bb) Against this background the principle of non-discrimination of Art. 18 TFEU does not force the Member States to ensure equal treatment for citizens of other EU states outside their own regulatory competence.

13 cc) A breach of Art. 18 TFEU by way of indirect discrimination due to nationality on principle presupposes, as the Respondent accurately represents, that the German legislator provides for different legal consequences for identical or comparable legal situations. Already here this is deficient as the connection of the co-determination regulations to the domestic place of employment is meaningful and consequently also not to be opposed.

The German holding company, as the parent company also for foreign companies, does not form a sufficient common umbrella to grant the domestic elections of employee representatives to their supervisory board a transnational quality which could lead to the direct applicability of European primary legislation. In this respect, the opinion that German co-determination would obtain a "group-dimensional character" by the connection to the parent company (as noted by Wansleben, NZG 2014, 213, 214) is not comprehensible. Merely due to the control by a German company, foreign companies and their employees could not simply be subject to the German co-determination statute. An argument against this is already that for companies founded under foreign law that also have their seat in their native country, their lex patriae is applicable in all other legal relationships. After all, employees of these companies are regularly employed by these companies themselves so that an oversimplification stating that they were employed by the same group as those employees employed and working in Germany is out of the question (so, however, says Wansleben, loc. cit.). However, if they are in an employment relationship subject to their lex patriae, and they do not intend to leave their country of origin, they are not in a situation regulated by the Union law according to the jurisdiction of the European Court of Justice whereby the European law principle of non-discrimination would have to be observed (cf. ECJ Decision as of October 2, 1997, Case C-122/96, BeckRS 2004, 74248).

The Applicant's and the corresponding opinions in the literature portrayal of "participation discrimination" of foreign employees as a result of their discrimination in group-wide company decisions can also not convince as a substantiation for the application of Art. 18 TFEU. On the one hand it is accurately emphasised that the employee representatives on the supervisory board are not obligated to protect concrete employee interests but – just as the shareholder representatives – the general welfare of the company (cf. Hellwig/Behme, AG 2011, 740, 744). On the other hand, already from a merely empirical point of view, it is not proven that structural changes in supra-national German companies regularly lead to preferential treatment of domestic locations, even if this is not meaningful for possible commercial reasons.

14 In this respect Rieble/Latzel admit that the "concrete protectionist effects of German co-determination are actually very difficult to prove" (cf. Rieble/Latzel, loc. cit. 154).

Against this background it is not apparent that the German legislator infringes on higher-ranking Union law by the restriction of co-determination to domestic companies. The criticised negative effects of German group co-determination is not an indirect discrimination in terms of Art. 18 TFEU but merely a reflex effect beneath the interference threshold of Union law.

dd) In the Chamber's opinion, an infringement of the German Co-Determination regulations against

Union law is equally not present with regard to the standardized right to free movement of workers in terms of Art. 45 TFEU.

In this respect there is a guideline by EJC jurisdiction that provisions which prevent or keep a citizen of a Member State from leaving his country of origin so as to make use of his right of freedom of movement represents impairments of this freedom even if they apply independently of the nationality of the affected employee (cf. EJC, Decision December 15, 1997, Case Bosman, C-415/93, BeckRS 2004, 77129). This does not only apply to barriers to entry which isolate a national job market but also for departure obstacles which are an obstacle to leaving a national job market and therefore hamper employee mobility. Hereby, contrary to the breach of the principle of non-discrimination of Art. 45, paragraph 2 TFEU, it does not matter for the thus defined prohibition of restriction whether the national provisions in the broadest sense relate to employment conditions.

The loss of the right to vote in elections of the employee representatives to the supervisory board associated with the change from one German group company to a foreign branch or subsidiary of the Respondent does not however, in the Chamber's opinion, represent a serious impairment for domestic employees to make use of their free movement rights. The EJC itself has limited the prohibition of restriction, as developed in the legal case nn, to the extent that measures which are too indirect or too uncertain are not subject to the prohibition of Art. 45 TFEU. In this respect, the Chamber also follows Krause's opinion that even those effects arising from the application area of Art. 45 TFEU, which do not represent a significant aspect for the decision to accept employment in another EU Member State for the overall majority of employees, should be excluded. Krause, AG 2012, 485, 489).

15 Even if the co-determination is located in company law, for the employee it belongs – in the broadest sense – to those employment conditions which are in any case different in the Member States of the Union and have to be accepted by migrant workers as beneficiaries of the free movement of workers. Unlike the locally situated works council, the employee participation on the supervisory board of a group parent company can, at best, only be of abstract significance even for the comprehensively informed employee.

A negative motivational effect is merely conceivable for those employees who hold an – altruistic – supervisory board mandate. In this case, however, this is an insignificantly small portion of the employees working in the Respondent's group of companies. Apart from that, the concrete situation, which is valued in parts of the literature as a breach of Art. 45 TFEU, only arises if one of these seven employee representatives on the supervisory board moves to a foreign subsidiary specifically belonging to the Respondent. In this respect, the legal consequence is the loss of the supervisory board mandate but this is in no way different to what would occur when moving to any other employer locally or abroad (cf. applicable Krause loc. cit. 490).

3. Finally, in terms of legal consequences, the opinion that the German co-determination of German group parent companies would have to be expanded to EU subsidiaries shows that this meets with radical reservations.

Based on the territorial principle under international law, the German legislator is, on principle, barred from intervening in the legislative powers of other EU states. Therefore, the connection of supervisory board elections of a German company with a foreign works constitution, for which a foreign legislative power exists, is forbidden (cf. Fischer, loc. cit., 739). In this respect, the currently existing restriction of the right to vote to employees employed by domestically situated companies rests on the missing legal power of the German legislator to bindingly formulate the election process abroad (cf. Oetker in the "Erfurter Kommentar zum Arbeitsrecht" [Erfurt Comment on Labour Law", 15th edition, including margin note 6).

As far as the territorial principle is not accepted as a justification for the retention of the current legal situation by the advocators of the legal opinion that the German co-determination is a breach of Union law (cf. Hellwig/Behme, AG 2009, 261, 266), there is a lack of practical solutions for legislative alternatives through which foreign employees could be granted the same voting rights as the German employees.

16 It is possible that the German parent companies may be required to ensure a participation of the employees of foreign group subsidiaries. However, this would not create a secure legal position for foreign employees as the German government could not assert the compliance of such regulations on foreign territories. If, in this regard, the question is raised that certain legal uncertainties would then be unavoidable (cf. Fischer loc. cit. 739) it would show that such a model is unsuitable to remove the alleged discrimination. Rather, the same result could be achieved with a Union-conform interpretation of Section 7 German Co-Determination Act (cf. also OLG [Higher Regional Court] Zweibrücken, NZG 2014, 740, 741; District Court Frankfurt/Main, ZIP 2015, 634, 635) as the employees from other EU states are not excluded from participating in supervisory board elections based on the wording of the regulation.

Other suggestions which consider it possible to easily transfer the co-determination model of the SE Employee Involvement Directive also to national company forms (cf. Hellwig/Behme, AG 2011, 740, 743) overlook that this is a harmonized legal area which assures the collaboration of the Member States.

c) After all is said and done, it may be desirable to consider a reform of the German co-determination

legislation with the inclusion of the reality of transnational companies and groups of companies. This is, however, a legislative issue which cannot be answered by courts of law. Until such a reform takes place, the existing law remains applicable as there is no priority applicability of Union law which could force the suspension of corporate co-determination.

4. In terms of the regulation in Section 99 paragraph 6 German Stock Corporation Act, the decision on costs ultimately serves the purpose of clarification. The Chamber was not able to recognize any facts to justify an exemption to order the Applicants to pay for the costs of the proceedings. A decision on costs for account of the Applicant is caused in particular by obviously unsubstantiated or impermissible applications (cf. Hüffer/Koch loc. cit., margin note 12 on Section 99 German Stock Corporation Act). In view of the above-mentioned discussion regarding the compatibility of the German Co-Determination Act with the regulations of the EU treaty, this evidence requirement was not met in this case. Equally, there were no indications which would have made it necessary to deviate from the standard business value of EUR 50,000.00 determined in Section 75 GNotKG [German Court and Notary Costs Act].

Instructions on the right to appeal:

Appeals against this decision can by made by means of a complaint or by way of direct appeal on points of law.

Appeals

The appeal must be lodged with the Landgericht Berlin, Littenstrasse 12-17, 10179 Berlin within a deadline of one month by submitting a written complaint signed by an attorney. The deadline commences with the written notification of the decision. If this takes place by service, in terms of the regulations of the Civil Procedure, the date of service shall be decisive. If the written notification takes place via postal delivery, and should the delivery be carried out inland, the document is considered to have been notified three days after it has been posted by mail unless the participant credibly states that the document has not reached him or only reached him at a later date. If the written notification cannot be effected to a participant, the deadline commences at the latest on the expiry of five months after the order (Section 38 paragraph 3 FamFG [Act on Proceedings in Family Matters of Non-contentious Jurisdiction]. If the end of the deadline falls on a Sunday, a public holiday or a Saturday, the deadline ends at the end of the next working day.

Direct appeal on points of law

The appeal against this decision can take place directly (direct appeal) on application and bypassing the complaints authority, if the participants agree to bypassing the complaints authority and the Federal Supreme Court permits the direct appeal. The application to permit a direct appeal and the explanations of the approval are deemed to be a waiver of the appeal against the decision.

Approval for the direct appeal must be applied for by submitting a writ (writ for approval) at the German Federal Supreme Court (Herrenstrasse 45a, 76133 Karlsruhe).

The deadline for submitting the application for approval of the direct appeal is one month. The deadline commences on submission of the full version of the decision, however after the expiry of five months after the decision was adopted at the latest. If the end of the deadline falls on a Sunday, a public holiday or a Saturday, the deadline ends at the end of the next working day.

The application must explain that the legal matter is of primary importance or is a continuation of the law or the assurance of a uniform jurisdiction that requires the decision of the Appellate Court. The application for approval of a direct appeal requires the representation by an attorney admitted to the German Federal Supreme Court; the relevant attorney shall sign the writ for admission.

To lodge the appeal, the written declaration of the Respondent's consent to the appeal must be attached to the admission application or submitted to the German Federal Supreme Court within the aforementioned deadline.

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