

“Europe needs the voice of labour”

The European Court of Justice (ECJ) has to decide whether the German system of employee board-level representation is compatible with EU law. A shareholder of the travel company TUI has brought an action to challenge the German rules on the choice of supervisory board members. Norbert Kluge, an expert in the area, explains that Europeanisation and board-level representation go together well.

Those bringing the case argue, among other things, that employees could hesitate to take up a job in foreign subsidiary because they would then lose their right to be elected onto, or to elect, the supervisory board. This sounds a pretty artificial argument. What really lies behind the case?

We need to be clear. The plaintiffs are not interested in making the German system of employee board-level representation (“co-determination”) more legitimate. Their aim is to get rid of it. And they would not be at all unhappy if this were to have consequences for employee rights in other European countries – the 18 of the 28 EU states plus Norway where the employees’ right to be represented on supervisory or unitary boards is part of the basic legal structure. The action is the umpteenth attempt by the opponents of co-determination to use Europe as a lever to eliminate workers’ rights in Germany. This may come as a surprise, but despite the often repeated praise for co-determination from business circles, parts of the economic elite and their legal supporters in Germany have never come to terms with employee representation at board level.

EU member states can express a view to the ECJ. What positions have they taken up?

The German government has presented its view to the ECJ. Based on its previous statements – that co-determination is a fully protected legal right – it considers the claim to be unfounded. We also know that Austria has submitted a statement to the court along similar lines. It supports the position that national regulations, like the German co-determination legislation, do not obstruct the free movement of labour or contradict the ban on discrimination.

Are there other influential forces that employees can look to in defence of their co-determination rights?

There are the unions, under the umbrella of the European Trade Union Confederation. And there are members of the European Parliament who are convinced of the benefits of co-determination and want to regulate for socially responsible and better corporate governance, with a legally stronger “workers’ voice”.

What concrete measures would strengthen co-determination in Europe?

In October 2014, European unions unanimously passed a resolution calling for a new integrated architecture for employee involvement at European level. Their demands are for an EU directive that will set minimum standards for information, consultation and participation at company level, in all cases where European, as opposed to national, company law is being used.

However, it is important that European minimum standards are not seen as an invitation to question national co-determination rights. We need to close legislative loopholes both nationally and at European level, before such a directive is passed.

For example?

In registering a European Company, an SE, the law prescribes that there must be an agreement on the participation of employees at the transnational top of the company. But experience shows that particularly small and middle-sized German companies in practice misuse SEs to say goodbye forever to the German system of board-level representation. They switch to being a European Company just before they reach the employee thresholds that would make board-level representation obligatory under German rules. Or at the very least they freeze their current level of employee representation at a lower level than would otherwise be the case. This abuse must be stopped.

Does co-determination work in countries that operate across borders with varying national regulations?

It is apparent that employees in transnational companies are increasingly resistant to being played off against one another. This is the effect of around 20 years of practical experience with European Works Councils.



Those bringing the case want to get rid of co-determination.



The German government considers co-determination to be a fully protected legal right. It has expressed a view to the ECJ.

To find out more about the detailed impact of employee representation on transnational companies – taking account of all the continuing national differences – we created a European expert group “Workers’ Voice in Corporate Governance” in autumn 2015. We are asking for academic and practice-based proposals, on which European-level rules for better corporate governance can be established – including powerful rights for employee participation. <

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