

PRESSEDIENST

22.09.2016

International Conference on Corporate Governance and Codetermination **Workers' participation in Europe: New prospects or will the ECJ drastically curtail it?**

The Brexit vote has shifted the balance in European politics. After two decades in which the European Commission has focused on moves in the direction of privatisation and deregulation the issue is now open again: which economic and social model is to be implemented in Europe: the neoliberal, Anglo-Saxon one or a continental model based on social partnership?

A key question with regard to Europe's future political and economic development – not to mention its credibility in the eyes of its citizens – will be whether workers' rights to a voice and participation will be strengthened or weakened. The experts who discussed the issue at the invitation of the Hans-Böckler-Stiftung and the Chambre des Salariés in Luxembourg were in agreement about this. The representation of employees in the management bodies of enterprises is widespread in Europe: 18 out of 28 EU member states today have statutory regulations guaranteeing employees involvement in the supervisory or administrative board of their company. For example, in Germany there is codetermination in the supervisory board. European countries with strong workers' participation also do well economically (for more detailed information see the digital press pack at the end of this press release).

'The Europe of the future cannot function without more involvement by society. And fair, binding involvement of employees is a crucial condition of this because it goes deep into vital daily issues. For this reason our country, too, has the relevant regulations', said Luxembourg's Minister of Labour, Employment and Social Economy Dr. Nicolas Schmit at the conference. 'We trade unions want secure jobs and production sites. Codetermination helps us in this. We are delighted to see that those EU member states with developed codetermination are in a better position than countries with weaker or no codetermination', explained Reiner Hoffmann, leader of the German Trade Union Confederation (DGB). 'Workers' participation is essential in its own right. It is also important to put the company on a long term and sustainable investment track and to tackle short termism in the boardroom', declared Pierre Habbard of the Trade Union Advisory Committee of the OECD.

The more autonomous and technologically challenging working conditions are the more important is workers' participation, Hoffmann emphasised. That was worked out at European level just under 20 years ago. Hoffmann referred to the closing report of an EU expert commission of

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1997: 'The workers that European companies need – namely qualified, mobile, committed and responsible workers who are in a position to adopt technological innovations and to take on board the goals of strengthening competitiveness and improving quality – cannot simply be regarded as recipients of instructions dictated by employers ... This notion of the workforce requires close, constant participation in the decision-making process at all company levels', declared former EU vice president Etienne Davignon. However, according to Hoffmann, 'the EU's implementation of this wise analysis in actual legislation is highly unsatisfactory. In particular, European company law has been far more of a headwind than a tailwind in relation to workers' participation so far.'

The experts evaluated current developments as contradictory. On one hand, even in the United Kingdom the debate has flared up again. New Prime Minister Theresa May has announced a 'bold positive vision' for her country. Part of this vision is that in future employees and customers are to be represented on the boards of British companies. The government will commence preparatory work on reform in the autumn.

European Commission president Jean-Claude Juncker would like to conserve the continental model, as his proposal for a new 'pillar of social rights' shows. And a draft report on employee representation in management bodies is currently being debated in the European Parliament's Committee for Employment and Social Affairs, with a vote scheduled for September. However, the two initiatives are not uncontroversial: opponents of extended rights in the world of work have already expressed their position. Furthermore, according to an analysis by ETUI lawyers the previous Commission proposals for the 'social pillar' are anything but viable. There is nothing in the Commission's proposals on promoting codetermination. However, it is the declared aim of the European treaties to support the EU member states in realising social policy goals. That expressly includes codetermination.

At the same time, Prof. Dr Johann Mulder of the law faculty of Oslo University has shown that, throughout Europe, workers' participation is in grave danger from another direction. At the moment there is a case pending at the European Court of Justice (ECJ) in which a small shareholder of the travel firm TUI is disputing whether German codetermination is in conformity with European law. The plaintiff argues that employees of German companies abroad are discriminated against because they do not have a say in elections of employee representatives for the supervisory board. German courts have always rejected similar cases in the past.

'We strongly assume: The small TUI AG shareholder is not interested in improving codetermination rights; he wants to abolish them', said DGB leader Reiner Hoffmann. Many lawyers, including Göttingen professor of labour law Dr. Rüdiger Krause, consider the legal argument to be contrived. After all, the workforces of foreign companies and subsidiaries do not have a vote simply because Germany cannot interfere with the

prevailing rights in other countries or prescribe rules on supervisory board elections. It is completely normal that certain legal entitlements change if employees move to a workplace abroad, for example, in relation to employment protection (for more detailed information see press pack). No one imagines that French strike law should apply to the German establishments of French companies. 'Essential in EU law is that legislation on worker influence is subject to the national legislator', underlined Prof. Dr. Mulder in Luxembourg. 'It can therefore not be considered as discrimination applying national law on a home state employee or employer regardless of his or her nationality but not on an employee or employer outside the country's borders.'

But even though there are good legal arguments against the case, the process remains open and, emphasised the experts in Luxembourg, the potential consequences are extremely far-reaching. While the German and Austrian governments have argued against the legal action before the court European Commission lawyers have adopted a number of the plaintiff's arguments in a position statement. If the plaintiff were to prevail there would be legal consequences with regard to interference in national workers' rights beyond Germany, warned Dr Norbert Kluge, the Hans-Böckler-Stiftung's codetermination expert. This would drastically weaken the regulations for workers' participation in other countries as well. Luxembourg would also be affected. This would mean a major step back in terms of building a Social Europe. That is no way to convey Europe to the public or employees in particular, said Luxembourg's Minister of Labour Schmit.

'It is not acceptable that European jurisprudence puts a well functioning national codetermination structure in Germany under pressure, while at the same time the European institutions do not have anything to offer by way of a fair, legally robust workers' participation at European level', said Peter Scherrer, deputy general secretary of the ETUC. The European trade unions pointed the way two years ago. Their proposal was by to ensure means of an EU directive a legal minimum standard for binding workers' participation in SEs. This would be without prejudice to more far-reaching national regulations on workers' participation. In other words, there would be a dependable floor with no risk of a race to the bottom.

Digital Press Pack

Workers' participation in Europe and the ECJ proceedings on the composition of the supervisory board at TUI AG:

Employee involvement in decision-making is widespread in Europe. Even so, companies still try to avoid their obligations. European minimum standards could prevent that.

Condensed story: <http://media.boeckler.de/Sites/A/Online-Archiv/19731>

Deeper analysis (European Trade Union Institute, available in French and German): <https://www.etui.org/Publications2/Reports/Workers-voice-in-corporate-governance.-A-European-perspective>

Video-interview on the issue with researcher Prof. Jeremy Waddington, Manchester University: <https://www.youtube.com/watch?v=GdvhOgto56k>

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 election of members to the supervisory board. Norbert Kluge, an expert in the area, explains that Europeanisation and board level representation go together well. Condensed story: <http://media.boeckler.de/Sites/A/Online-Archiv/19729>

Deeper analysis: http://www.boeckler.de/pdf/p_mbf_report_2016_23e.pdf

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