

Mulder, Bernhard Johann

Research Report

The law concerning the election of employees' representatives in company bodies: Report in light of the CJEU case Konrad Erzberger v TUI AG, C 566/15

Mitbestimmungsreport, No. 29

Provided in Cooperation with:

The Hans Böckler Foundation

Suggested Citation: Mulder, Bernhard Johann (2017) : The law concerning the election of employees' representatives in company bodies: Report in light of the CJEU case Konrad Erzberger v TUI AG, C 566/15, Mitbestimmungsreport, No. 29, Hans-Böckler-Stiftung, Düsseldorf

This Version is available at:

<https://hdl.handle.net/10419/175257>

Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

Terms of use:

Documents in EconStor may be saved and copied for your personal and scholarly purposes.

You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.

If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.

REPORT

MBF-Report Nr. 29, 01.2017

THE LAW CONCERNING THE ELECTION OF EMPLOYEES' REPRESENTATIVES IN COMPANY BODIES

Report in light of the CJEU case Konrad Erzberger v TUI AG, C 566/15

Bernard Johann Mulder

AT A GLANCE

- *No general EU rules* exist on employee participation in corporate bodies.
- Legislation on employee influence is subject to the *national legislator*.
- *No discrimination* is at hand when applying national law to a home-state employee or employer regardless of their nationality, *but not* applying that national law to an employee or employer outside the country's borders.
- Another arrangement would require that the EU legislator take its *legislative competence* in use.

CONTENT

1. Introduction	2
2. Legislative framework	3
3. Non-discrimination, equal treatment and free movement of workers	5
4. Conclusion	7
Imprint	8

1. INTRODUCTION

This paper assesses the juridical aspects of the right to vote for and be elected as an employee representative in company bodies. The assessment is made in light of the pending case [Konrad Erzberger v TUI AG, C566/15](#), at the Court of Justice of the European Union (CJEU). The case was referred to the CJEU by the Kammergericht Berlin (Germany) and lodged on 3 November 2015. The matter of the case is the election of employees' representatives in an internationally active company's board and the compatibility of German co-determination law with European Union (EU) law. Nevertheless, the assessments will not elaborate on German law specifically, but more on the law concerning the election of employees' representatives in corporate bodies in light of freedom of movement for workers according to the Treaty of Functioning of the European Union (TFEU) and the secondary legislation.

The question referred for the request for a preliminary ruling from the Kammergericht Berlin in [Konrad Erzberger v TUI AG, C566/15](#), and thus the starting point of this report, is:

'Is it compatible with Article 18 TFEU (non-discrimination) and Article 45 TFEU (freedom of movement for workers) for a Member State to grant the right to vote and stand as a candidate for the employees' representatives in the supervisory body of a company only to those workers who are employed in establishments of the company or in affiliated companies within the domestic territory?'

„Ist es mit Artikel 18 AEUV (Diskriminierungsverbot) und Artikel 45 AEUV (Freizügigkeit der Arbeitnehmer) vereinbar, dass ein Mitgliedstaat das aktive und passive Wahlrecht für die Vertreter der Arbeitnehmer in das Aufsichtsorgan eines Unternehmens nur solchen Arbeitnehmern einräumt, die in Betrieben des Unternehmens oder in Konzernunternehmen im Inland beschäftigt sind?“

The question is thus whether an EU Member State's legislation is compatible with EU law when it stipulates rights only for domestic employees and not for employees in establishments in another EU Member State, although that establishment is linked to the domestic company, for instance as a subsidiary or a branch. Conversely, one could ask

whether an EU Member State could export its legislation to another EU Member State, even if it is outside its own jurisdiction, which of course would be contrary to the international and national regulation on conflict of laws. By contrast, one could ask to what extent an EU Member State's legislation is compatible with EU law when the right to vote and to be eligible only cover domestic employees, although the managerial decision could have, or even in fact has, effects for employees in an establishment outside the Member State's borders. These questions also imply the issue of the extent to which the CJEU's answer to the referred question in the pending case will affect models of employee involvement, employee co-determination, employee participation, employee influence or industrial relations in the EU Member States in general. What effect would the CJEU judgment have on the other eighteen national systems of board-level employee representation if it sees an incompatibility in the German system of employee representation in corporate bodies? The Scandinavian countries, for instance, with, comparatively speaking, quite developed employee involvement rules, might face some challenges as a consequence thereof. Both Danish and Norwegian legislation spell out that employees in foreign subsidiaries and branches are subjects of the law concerning the election of employees' representatives in company bodies. The Swedish rules, however, do not spell this out explicitly, but they do not exclude workers in subsidiaries or branches abroad from the right to vote or be eligible. Neither does German legislation on co-determination exclude employees in subsidiaries or branches abroad from becoming a member of a German supervisory board. This can also be underpinned by several examples, such as Daimler AG and Volkswagen AG. But still, this is an empirical issue, considering what the legislation in fact results in. The rulings guaranteeing employees' right to vote and to be elected in subsidiaries or branches abroad must therefore be combined with rules of enforcement. Such a guarantee is not now clear in the Scandinavian countries' legislation. Consequently, it is uncertain whether this kind of regulation *per se* would be consistent with the legal system, for example with the law on jurisdiction and applicable law. Furthermore, the national regulati-

on on employee influence, where the employer has an obligation to negotiate with the trade union, might also be put under strain if the CJEU rules that the German rules are incompatible with EU law. It could be asked, as a consequence, to what extent employees and trade unions abroad could invoke such legislation in another country.

In its opinion in the proceedings the German government concludes that the German legislation is compatible with EU law:¹

‘It is compatible with Article 18 TFEU (prohibition against discrimination) and Article 45 TFEU (free movement of workers) for a Member State to grant the right to vote for and to be eligible to stand as employees’ representatives in the supervisory body of a company only to those employees who are employed in establishments of the company or in a group establishment [affiliated companies] within the domestic territory of the Member State.’²

„Es ist mit Artikel 18 AEUV (Diskriminierungsverbot) und Artikel 45 AEUV (Freizügigkeit der Arbeitnehmer) vereinbar, dass ein Mitgliedstaat das aktive und passive Wahlrecht für die Vertreter der Arbeitnehmer in das Aufsichtsorgan eines Unternehmens nur solchen Arbeitnehmern einräumt, die in Betrieben des Unternehmens oder in Konzernunternehmen im Inland beschäftigt sind.“

The European Commission concludes, contrary to the German government, that such legislation is not compatible with EU law, implying that Article 45 TFEU is applicable:³

‘It is incompatible with Art. 45 TFEU for a Member State to grant the right to vote for and be eligible to stand as employees’ representatives in the supervisory board of a company only to those employees who are employed in establishments of the company or group establishments within the domestic territory if the Member State structures the co-determination right in such a way that it includes situations which, when viewed objectively, could be present both in the same Member State as well as in another Member State.’⁴

„Es ist mit Art. 45 AEUV unvereinbar dass ein Mitgliedstaat das aktive und passive Wahlrecht für die Vertreter der Arbeitnehmer in das Aufsichtsorgan eines Unternehmens nur solchen Arbeitnehmern einräumt, die in Betrieben des Unternehmens oder in Konzernunternehmen im Inland beschäftigt sind, wenn der Mitgliedstaat das Mitbestimmungsrecht so gestaltet, dass es Sachverhalte umfasst die bei

objektiver Betrachtung sowohl im selben Mitgliedstaat als auch in einem anderen Mitgliedstaat vorliegen können.“

This report will not discuss the procedural aspects of the case, such as whether it is at all within the competence of the CJEU to decide on the referred question because of issues of jurisdiction and applicable law. Neither will it discuss whether the question would be of a hypothetical nature.⁵ Nor will the report discuss national (German) legislation as such.⁶ Instead, it examines the referred question from the Kammergericht Berlin to the CJEU in terms of abstract, general and theoretical observations. The examination will, however, discuss the observations in the view of the substantive case and focus on whether there can be a breach of EU law when a Member State’s legislation covers only those employees who work in an establishment in that Member State regarding the right to vote for and be eligible to stand as an employees’ representative in company bodies, but does not apply to those employees who are working in another establishment in the same group outside that Member State.

The main result will be that what is essential in EU law is that legislation on employee influence and employee participation be subject to the national legislator. A general regulation at EU level about employee participation in corporate bodies does not exist. It can therefore not be considered as discrimination and contrary to EU law to apply national law to a home-state employee or employer regardless of their nationality, but not to employees or employers outside the country’s borders, no matter whether the establishment is situated in a host state within the EU or not. Another arrangement would require that EU take its legislative competence in use, as the EU legislator has done, for example, regarding employee representation in European works councils, employees’ involvement in a European company, the application of home-state provisions on posted workers to another Member State, or with regard to employee participation in a cross-border merger situation.

2. LEGISLATIVE FRAMEWORK

Article 18 TFEU and Article 45 TFEU contain the fundamental rules on the principle of non-discrimination on grounds of nationality and guarantee the-

1 Bundesrepublik Deutschland, Stellungnahme in der Rechtssache C566/15, 15 February 2016.

2 About the translation, cf. the translation of the referred question.

3 European Commission, Schriftsatz, sj.j(2016)745503, 9 February 2016. Cf. Krause, The Commission’s opinion on the TUI Case – A critical commentary, in Hans Böckler Stiftung CoDetermination-Report no. 23, Acid test ECJ, [online] http://www.boeckler.de/pdf/p_mbf_report_2016_23e.pdf [accessed 1 September 2016].

4 About the translation, cf. the translation of the referred question quoted above.

5 See for an overview, Craig/De Búrca, EU law, 6th ed. 2015 pp. 466–508. Cf. Moser, 180/83, EU:C:1984:233, and Kremzow, C299/95, EU:C:1997:254.

6 See instead Habersack/Behme/Eidenmüller/Klöhn (eds), Deutsche Mitbestimmung unter europäischem Reformzwang, 2016, and Heuschmid, Unternehmensmitbestimmung à l’allemande und Unionsrecht, in Mulder/Hotvedt/Nesvik/Sundet (eds), Sui generis. Festschrift til Stein Evju, 2016.

se as a fundamental principle of EU law. The provisions on free movement of workers seek to obtain and secure the EU internal market.

Article 18 TFEU: 'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. [...] The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.'

Article 45 TFEU: '1. Freedom of movement for workers shall be secured within the Union. [...] 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. [...] 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: [...] (a) to accept offers of employment actually made; [...] (b) to move freely within the territory of Member States for this purpose; [...] (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; [...] (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission. [...] 4. The provisions of this Article shall not apply to employment in the public service.'

Although labour law legislation lies under the national legislator, the EU has, according to provisions in Title X on social policy (Articles 151–161) TFEU with regard to the Member States, a mandate to take its legislative powers in use also in the field of employee involvement. Accordingly, the EU has adopted rules concerning employee influence and participation for certain situations. These rules contain minimum levels, meaning that a Member State is allowed to have more far-reaching rules on employee influence and employee participation.

The EU has adopted several Directives aimed directly at influence and participation:⁷

- Directive [2009/38/EC](#) on European Works Councils
- Framework Directive [2002/14/EC](#) on information and consultation
- Directive [2001/86/EC](#) on consultation in SE companies
- Directive [2003/72/EC](#) on employee involvement in European Cooperative Societies (SCE)

Besides these, there are provisions in other Directives focused mainly on other issues than em-

ployee influence and participation, but contain rules on employee involvement related to the situation at issue in the present paper.⁸

- Directive [98/59/EC](#) on collective redundancies, Article 2
- Directive [2001/23/EC](#) on business transfer, Article 7
- Directive [2008/104/EC](#) on temporary agency work, Article 8
- Framework Agreement Directive [97/81/EC](#) on part-time work, Annex Clause 5.3(e)
- Framework Agreement Directive [1999/70/EC](#) on fixed-term work, Annex Clause 6

Legislation concerning employee influence and participation is directed at national circumstances, when it is not explicitly directed at transnational ones. In some Directives these transnational events are considered. These Directives concern mainly company law:⁹

- Directive [2005/56/EC](#) on cross-border mergers, Article 16
- Directive [2004/25/EC](#) on takeover bids, Article 14

Obviously, there is no general EU legislation regulating employee participation in corporate bodies. To some extent, as just shown, the EU legislator has adopted rules on employee participation in internationally active companies' bodies, but they concern specific situations and are not generally applicable to all situations regarding employee participation in company bodies. Hence, it is the rules in the legislation of the Member State in which the establishment is situated that govern the right to vote for and to be eligible to stand as employee representative in company bodies. This legislation must not, of course, be contrary to EU law.¹⁰ This entails that national provisions must not be discriminatory on grounds of nationality. According to the principle that national legislation must be interpreted in conformity with EU law, national courts are obliged 'to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that EU law is fully effective and to achieving an outcome consistent with the objective pur-

⁷ See comments on the Directives in Franzen/Gallner/Oetker (eds), *Kommentar zum europäischen Arbeitsrecht*, 2016, and in Schlachter (ed.), *EU Labour Law*, 2014.

⁸ See comments on the Directives in Franzen/Gallner/Oetker (eds), *Kommentar zum europäischen Arbeitsrecht*, 2016, and in Schlachter (ed.), *EU Labour Law*, 2014.

⁹ See Van Gerven (ed.), *Common Legal Framework for Takeover Bids in Europe*, Volume 1, 2008, Van Gerven (ed.), *Common Legal Framework for Takeover Bids in Europe*, Volume 2, 2010, Van Gerven (ed.), *Cross-Border Mergers in Europe*, Volume 1, 2010, and Van Gerven (ed.), *Cross-Border Mergers in Europe*, Volume 2, 2011.

¹⁰ Cf. *Commission v Cyprus*, C515/14, EU:C:2016:30, para. 38, and *Pöpperl*, C187/15, EU:C:2016:550, para. 22.

sued by it'.¹¹ This principle has, however, certain limits: the principle 'cannot serve as the basis for an interpretation of national law *contra legem*'.¹² If an interpretation of national law in conformity with EU law is not possible, 'the national court must fully apply EU law and protect rights which the latter confers on individuals displaying, if necessary, any provision in so far as its application would, in the circumstances of the case, lead to a result contrary to EU law'.¹³ Because there is no general EU law on employee participation in corporate bodies, and general EU law does not apply, there cannot be a breach of EU law when a Member State's legislation covers only those employees who work in an establishment in a Member State regarding the right to vote for and be eligible to stand as employees' representatives in company bodies, but does not apply to those employees who are working in another establishment in the same group outside that Member State.

Discrimination on grounds of nationality is prohibited according to Article 18 TFEU. Article 21 TFEU entitles the right of a Union citizen 'to move and reside freely within the territory of the Member States'. Article 45 TFEU states that 'Freedom of movement for workers shall be secured within the Union' and that that 'entail[s] the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'.

For exercising the rights laid down in the provisions of the TFEU on freedom of movement for persons, the CJEU has constantly held that EU nationals have the right to leave their Member State of origin (home state) to enter another Member State (host state) to reside there in order to pursue an economic activity.¹⁴ The provisions of the TFEU on freedom of movement for persons are intended to facilitate the pursuit by EU nationals of occupational activities of all kinds throughout the European Union. The provisions therefore preclude measures that might put EU nationals at a disadvantage when they wish to pursue an economic activity in the territory of a Member State other than their Member State of origin.¹⁵

The aim of Article 18 TFEU is to ensure that the principle of equal treatment is being upheld for the purpose of free movement of individuals. Together with the provisions on European citizenship in Article 20 TFEU and Article 21 TFEU, all EU citizens can invoke Article 18 TFEU.¹⁶ Article 18 TFEU sup-

ports the right to freedom of movement for workers in Article 45 TFEU by its fundamental principle prohibiting any discrimination on the grounds of nationality. Therefore, Article 18 TFEU is not to be applied where other specific rights of non-discrimination exist; Article 45 TFEU is thus *lex specialis* to and, when applicable, precludes the application of Article 18 TFEU.¹⁷ According to Article 18 TFEU no inter-state element is required for its applicability nor is economic activity required for individuals to enjoy rights of freedom of movement.¹⁸ Such an inter-state element is, however, required for Article 45 TFEU to apply.¹⁹ In Article 49 TFEU this inter-state requirement is made explicit by stating that 'restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited' (emphasis added).

3. NON-DISCRIMINATION, EQUAL TREATMENT AND FREE MOVEMENT OF WORKERS

As a basis for comprehensive protections against discrimination on grounds of nationality, workers can rely on Article 45 TFEU. These protections go beyond the protections offered by Article 18 TFEU, but 'which constitutes merely a particular expression of the general prohibition of discrimination on grounds of nationality laid down in the first paragraph of Article 12 EC'²⁰ (now Article 18 TFEU).

In order for the EU rules on the free movement of workers to apply according to Article 45 TFEU, the person in question must fall within the scope of the treaty provision. The person in question must fall within the personal, material and territorial scope of the provision. Furthermore, there is, as mentioned above, a need for an inter-state element.²¹ Some kind of movement from one Member State to another is hence required for the applicability of Article 45 TFEU, whether it be moving to another Member State for residence or as a frontier worker having

11 Pöpperl, C187/15, EU:C:2016:550, para. 43; cf. Ajos, C441/14, EU:C:2016:278, para. 31.

12 Pöpperl, C187/15, EU:C:2016:550, para. 44; cf. Ajos, C441/14, EU:C:2016:278, para. 32.

13 Pöpperl, C187/15, EU:C:2016:550, para. 45; cf. Ajos, C441/14, EU:C:2016:278, para. 33 f.

14 E.g. Commission v Cyprus, C515/14, EU:C:2016:30, para. 39, and Pöpperl, C187/15, EU:C:2016:550, para. 23.

15 Cf. Pöpperl, C187/15, EU:C:2016:550, para. 23.

16 Cf. Grzelczyk, C184/99, EU:C:2001:458, para. 32.

17 See Pennings, Non-Discrimination on the Ground of Nationality in Social Security, *Utrecht Law Review*, volume 9, Issue 1 (January) 2013 pp. 118–134. Cf. Skanavi, C-193/94, EU:C:1996:70, para. 20.

18 See Eman and Sevinger, C300/04, EU:C:2006:545, para. 57; and Baumbast, C413/99, EU:C:2002:93, para. 83.

19 See Grzelczyk, C184/99, EU:C:2001:458, para. 32, Carpenter, C60/00, EU:C:2002:234, para. 28; Geven, C213/05, EU:C:2007:438, para. 12; and Renneberg, C527/06, EU:C:2008:566, para. 36. Cf. Saunders, 175/78, EU:C:1979:88, para. 11. See also Steinmeyer in Franzen/Gallner/Oetker (eds), *Kommentar zum europäischen Arbeitsrecht*, 2016, pp. 36–39.

20 Commission v Austria, C465/01, EU:C:2004:530, para. 25.

21 See Grzelczyk, C184/99, EU:C:2001:458, para. 32, Carpenter, C-60/00, EU:C:2002:234, para. 28; Geven, C213/05, EU:C:2007:438, para. 12; and Renneberg, C527/06, EU:C:2008:566, para. 36. Cf. Saunders, 175/78, EU:C:1979:88, para. 11. See also Steinmeyer in Franzen/Gallner/Oetker (Hrsgb.), *Kommentar zum europäischen Arbeitsrecht*, 2016, pp. 36–39.

their residence in one Member State and working in another. If the conditions are not met, the situation in question could be regarded as a situation that falls under the applicability of Article 18 TFEU. According to Article 18 TFEU no inter-state element is required.²²

The Workers' Free Movement Regulation 492/2011 supplements the provisions in Article 45 TFEU.²³ In the Workers' Free Movement Regulation the contour of the basic equal treatment principle is set out and contains substantive rights and entitlements for workers. Section 2 (Articles 7–9) Workers' Free Movement Regulation concerns the exercise of employment. Also, as far as the effect of the Regulation is concerned, the exercising of the freedom of movement for workers in connection with the election of employee representatives in company bodies shall be examined solely in relation to Article 45 TFEU.²⁴ This means that for the applicability of the Regulation an inter-state element is required. Article 7.1 Workers' Free Movement Regulation states that 'A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality' (emphasis added).

Recently, the Workers' Free Movement Regulation was supplemented by the Facilitating Workers' Free Movement Directive 2014/54/EU (date for transposition at the latest was 21 May 2016.) The Facilitating Workers' Free Movement Directive sets out rights for migrant EU citizens and their families. The purpose of this Directive is to ensure the better application at national level of EU citizens' right to work in another Member State. According to Article 1 Facilitating Workers' Free Movement Directive, the Directive aims at giving practical effect to the rights established under Article 45 TFEU and the Workers' Free Movement Regulation when a Union citizen is exercising their right as a worker. Also the Citizens' Rights Directive 2004/38/EC supplement the Workers' Free Movement Regulation. It also sets out rights for migrant Union citizens and their families, for the purpose of integration and securing the internal market. It applies to all citizens, not just to those who are economically active. However, the Directive is not specific to workers, but lays down the general principle of equal treatment for all Union citizens. The Directive is aimed at preserving the rights for Union citizens to move and reside and, when exercising them, not to lose their civil rights.

The presumption for the application of these legislative acts – primary EU law (Article 45 TFEU) as well as secondary law (Workers' Free Movement Regulation, Facilitating Workers' Free Movement Directive, and Citizens' Rights Directive) – is that

there has been a discriminatory action on grounds of nationality because the employee has made use of the freedom of movement. Accordingly, they prescribe equal treatment in the territory of the Member State between employees, irrespective of nationality. Thus, an inter-state element is provided for. When there is no inter-state element, such as when a Member State prescribes rules applicable to workers of any nationality employed within this state's borders, the provisions do not apply. The provisions could, however, be applicable if an employee actually has moved from one Member State to another. But even if there were an inter-state element, this does not necessarily mean that an employee abroad can invoke the former Member State's legislation. For example, an employee who has moved from one Member State (home state) to another state, within or outside the EU (host state) is not entitled to invoke the home state's rules on election of employees' representatives in company bodies when employed in an establishment in the host state. A Member State's legislation has *prima facie* no effect beyond its borders. In this case it would be about applying one Member State's legislation in another Member State. This would infringe the sovereignty of the other Member State. A worker employed in another country could, thus, not *prima facie* invoke either the provisions on election of employees' representatives in a company body, or, for example, the provisions on protection of employment due to redundancy or the provisions on the right to strike. A decision taken by a group establishment in one country with effects on establishments in another country does not change this. A Member State's legislation could not be exported to and applicable in another state. As it appears from the law on jurisdiction (choice of forum) and applicable law (choice of law) the actual situation has to be governed by national legislation (see further the Regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters 1215/2012 (Brussels I Regulation), the Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Lugano Convention), and the Regulation on the law applicable to contractual obligations 593/2008 (Rome I Regulation)). If the EU legislator wanted another arrangement, that would require that the EU take its legislative competence in use, as the EU has done, for example, when adopting the European Works Council Directive 2009/38/EC and the Posting of Workers Directive 1996/71/EC.

Furthermore, the provisions prescribe equal treatment between workers as regards conditions of work and employment. By that is meant a wide range of conditions, both agreed upon inter partes, between the single employee and the employer, but also normative conditions in a collective agreement that flow into the employment contract. In

²² See *Eman and Sevinger*, C300/04, EU:C:2006:545, para. 57; and *Baumbast*, C413/99, EU:C:2002:93, para. 83.

²³ Cf. Recital 3 of Regulation 492/2011.

²⁴ Cf. *Angonese*, C281/98, EU:C:2000:296, para. 28.

this respect, the notion of conditions of work and employment means conditions regulating employment between an employer and employee on individual rights, but not such conditions that are given to the employees collectively, such as the right to vote for and the right to be eligible to stand for a corporate body. The right to vote for and be eligible as employees' representative in company bodies are "collective in nature"²⁵ and are therefore collective rights intended to benefit workers as a collective group. Conditions of work and employment that are collective in nature are therefore not covered by the notion of conditions of work and employment in Article 45.2 TFEU.

Thus, the legislation on freedom of movement for workers does not apply in the situation in which a Member State provides for rights to be invoked for domestic employees only, irrespective of an employee's nationality, but not for employees in establishments in another EU Member State, because there is no inter-state situation and therefore no discrimination on the grounds of nationality. There is no impediment to market access, and no breach of either Article 18 TFEU or Article 45 TFEU, when an employee is not entitled to invoke a Member State's legislation in another Member State. 'Such an event is too uncertain and indirect a possibility for legislation to be capable of being regarded as liable to hinder freedom of movement for workers'²⁶ and constitutes no unjustified obstacle to freedom of movement of workers. The application of national rules leading in practice to the result that only those workers who are employed in establishments of the company or in a group establishment (affiliated companies) within the domestic territory of the Member State are granted the right to vote for and to be eligible to stand as employees' representative in the supervisory body of a company therefore do not breach either Article 18 TFEU or Article 45 TFEU.

4. CONCLUSION

A decision at the highest level in a corporate group can, of course, and also perhaps is intended to, affect employees in the whole group's establishments, domestic or abroad. But legislation in one Member State could not be invoked to apply also in another country, if there is no preparation for that. The EU legislator does not acquire the authority to regulate on this area unless the EU legislator has made use of its legislative competence, provided for in the Treaties. Until it has done so, every Member State still has its legislative power. Which country's legislation shall apply (choice of law) and which country's court has to hear the dispute

(choice of forum) has to be determined in accordance with international private law, such as Brussels I Regulation, Lugano Convention and Rome I Regulation. If the EU legislator has taken its legislative competence in use, as in the case of rulings on posting of workers, European works councils and European companies, EU law prevails. However, regarding the law on the election of employees' representative in company bodies, the EU legislator has taken no such legislative initiative. Therefore, national legislation prevails.

It cannot be useful to consider all aspects of differences of freedom of movement between the various Member States; it is more useful to consider how far the harmonization of Member States' legislation should go to complete an operational internal market. Consequently, the situation is not to be considered discriminatory when an employee moves from a domestic establishment to an establishment abroad and therefore is no longer covered by the home state's legislation. This loss is not due to nationality as such, but due to applicable law. A Member State's legislative system cannot be applied in another Member State. Thus, there is no legal support in EU law for extending a Member State's law to be applicable in another Member State. In addition, according to Article 153 TFEU 'the Union shall support and complement the activities of the Member States' on 'representation and collective defence of the interests of workers and employers, including co-determination'. Each Member State is, as long as it is compatible with EU law, entitled to keep its legal arrangements on employees' representation in company bodies. Finally, but importantly, the case of an employee moving from one establishment to another establishment abroad is to be considered too uncertain and indirect, and therefore national legislation granting the right to vote for and stand as a candidate as employees' representative in a supervisory body of a company only to those workers who are employed in establishments of the company or in affiliated companies within the domestic territory cannot be regarded as liable to hinder freedom of movement for workers.

In summary:

- *No general EU rules* exist on employee participation in corporate bodies.
- Legislation on employee influence is subject to the *national legislator*.
- *No discrimination* is at hand when applying national law to a home-state employee or employer regardless of their nationality, *but not* applying that national law to an employee or employer outside the country's borders.
- Another arrangement would require that the EU legislator take its *legislative competence* in use.

²⁵ Mono Car Styling, C12/08, EU:C:2009:466, para. 42. Cf. Cf. Walrave, 36/74, EU:C:1974:140, para. 17.

²⁶ Graf, C-190/98, EU:C:2000:49, para. 25.

ABSTRACT

The European Court of Justice examines the conformity of German co-determination under European law. Professor of law Bernard Johann Mulder, University of Oslo, argues that, in the case at issue, national law is not incompatible with EU law. Consequently, there is no discrimination on the grounds of nationality, and there is no obstacle to the free movement of workers.

IMPRINT

Issue

The law concerning the election of employees' representatives in company bodies
MBF-Report 29/2017
ISSN 2364-0413

Author

Prof. Dr. Bernard Johann Mulder
Associate Professor,
LL.M., LL.D.,
Department of Private Law,
Faculty of Law,
University of Oslo,
Norway

Editorial Office and Contact Details

Dr. Sebastian Sick, LL.M.Eur.
Head of Company Law Unit
Hans-Böckler-Stiftung
Hans-Böckler-Straße 39
40476 Düsseldorf
Telefon +49 211 7778-257
sebastian-sick@boeckler.de
www.boeckler.de
www.mitbestimmung.de

Production

**teamADwork
Werbe GbR**
Düsseldorf,
January 2017
www.teamadwork.de

