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Faculty of Law

The ECJ's *Erzberger* ruling: a door widely opened to national models of employee participation?



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Research question

- ***Do national rules of codetermination (i.e. of employees' right to elect their representatives to supervisory bodies of their companies) violate or not the basic provisions of EU law banning discrimination and unfounded, disproportionate barriers to free movement of persons?***



The context

- EU law protects workers' right to information and consultation within the undertaking but does not regulate or harmonize the rules of co-determination.
- Nowadays, the co-determination exists, albeit in different forms and at different levels, in 17 Member States of the EU.
- Even though EU law does not prohibit these nation-specific rules, it requires that they do not clash with far-reaching, transversal, provisions laying in the fundamentals of the EU and its Internal market, such as:
 - **Art 18 TFEU** prohibiting discrimination of the grounds of country of origin.
 - **Art 45 TFEU** providing for free movement of workers within the EU Internal market.



The dispute

- TUI AG, seated in Germany, employs 20 % of its staff in Germany and 80 % abroad.
- Only 20 % of employees, subject to German labour and company legislation can vote or stand candidates to TUI AG headquarters' supervisory board.
- 80 % of employees are not represented at the supreme level of TUI AG strategic management.
- If an employee of a „German unit“ of TUI AG is transferred to its branch abroad, he/she loses right to vote or to stand candidate or must leave his/her seat in the supervisory board.
- K. Erzberger, a shareholder of TUI AG, attacked this system for breach of EU law.



The CJEU case and its importance

- Reference for preliminary ruling (C-566/15) made by Berlin Higher Regional Court asked about compatibility of the German situation with Arts 18 and 45 of TFEU.
- Negative answer by CJEU would have caused legal chaos in German headquarters of many companies as their supervisory boards and their decisions might have been deprived of legality.
- Trade unions and left-from-center forces took the case as another neo-liberal attack on national social model of industrial relations.



Commission's opinion

- European Commission intervened twice before the CJEU:
 - On the first occasion, it argued that Art 45 TFEU was breached, i.e. a flagrant barrier to free movement right had been laid down by German laws on co-determination.
 - On the second occasion, it proposed a compromise: although there was a breach of Art 45 TFEU, it could be justified by „an important policy objective“.



CJEU analysis – breach of Art 18 TFEU

- Art 18 TFEU = *lex generalis* on non-discrimination applicable only to situations that are not governed by more specific anti-discrimination provisions of EU law.
- Art 45 TFEU = *lex specialis* applicable to situations in which free movement of workers is hindered by a national law that treats differently local and migrant workers.
- **No need to subject the facts of the case to Art 18 TFEU scrutiny, only the Art 45 TFEU must be applied.**



CJEU analysis – breach of Art 45 TFEU

- Employees of TUI AG outside of Germany have never exercised free movement and the Art 45 is not applicable to their situation.
 - TUI AG has in other MSs only subsidiaries registered there as legal persons subject to local laws, not dependent branches governed by German company standards (potentially also labour standards).
- Employees of TUI AG in Germany cannot rely on „carrying with them“ their German rights and benefits if they are being transferred to work in other MSs.



EU law after Erzberger

- EU law (Arts 18, 45 TFEU) does not prohibit cross-border co-determination (as in Daimler or Volkswagen) where employees of foreign subsidiaries are involved in creation of supervisory boards at German headquarters.
- EU law (Arts 18, 45 TFEU) does not oblige to open co-determination to employees of foreign subsidiaries (as in TUI AG).
- The only condition is that within each MS's national law ambit there is no discrimination on grounds of nationality / country of origin of their employees.



Open questions after Erzberger

- Are employees at subsidiaries of German companies abroad equally represented when strategic plans are made at companies' headquarters? Do not German employees' representatives at supervisory boards defend primarily the jobs and salaries at home?
 - *If this is not local protectionism and uneven treatment, then what is?*
 - *If lex specialis (Art 45 TFEU) is found non-applicable, should not we resort to lex generalis (Art 18 TFEU) and answer the question of its applicability?*



Open questions after Erzberger

- Are employees at dependent branches of German companies abroad in the same situation as employees at subsidiaries? Do not they resemble a bit the commuting workers? Are they not really discriminated against if they cannot vote and stand candidates to supervisory boards in Germany?
 - ***CJEU avoided this question (raised at the hearings by its President K. Lenaerts!), because it was not needed to judge upon the situation in TUI AG. However, is there now an equal legal certainty also for companies that have branches and not subsidiaries in other MSs?***



Open questions after Erzberger

- What about arguments raised by the Commission, the AG, some Member States, namely:
- There is a barrier to free movement, but it is justifiable because of:
 - An important public policy objective (i.e Arts 9 and 45(3) TFEU)?
 - National social, economic and cultural particularities, even a specific component of national identity (i.e. Art 4(2) TEU)?
 - Such a barrier is “too indirect and uncertain“ to significantly restrain free movement?
- Answers to these questions may appear risky for coherence and functioning of EU law (EU Internal market), but it does not mean that these questions and the reasoning / feeling they reflect do not exist in Member States!



Next step? Way forward?

- **European one:** ETUC proposal (2016) of a directive imposing on MSs an obligation to have a system of employee representation at transnational companies.
- **National one:** Open unambiguously national models of co-determination to cross-border situations (like it is already the case in some MSs).
- **Judicial one:** Wait for another CJEU ruling on co-determination in slightly different circumstances.



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Thanks for your attention



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