

GERMAN CODETERMINATION COMPATIBLE WITH EU LAW

Advocate General before the ECJ on the TUI case on 4 May 2017

WHAT IS IT ALL ABOUT?

**ECJ: is German codetermination
compatible with European law?**



TUI small shareholder Erzberger

- Voting rights and eligibility of non-German employees in the supervisory board (Art. 18 TFEU)
- Restriction of workers' freedom of movement due to the loss of codetermination when moving from one country to another (Art. 45 TFEU)

A SIGH OF RELIEF AFTER THE OPINION

'In today's Opinion, Advocate General Saugmandsgaard Øe proposes that the Court should hold that legislation such as that at issue in the main proceedings does not infringe the freedom of movement for workers or the general prohibition of discrimination on grounds of nationality.'

'Although the Advocate General is not convinced that the German employee participation system may be characterised as an element of national identity, he considers it to be beyond doubt that that system constitutes an essential element of the German employment market and more broadly of the German social order.'

(from the ECJ press release, 4 May 2017)

Further information can be obtained from the members of the trade union ECJ taskforce coordinated by the Hans-Böckler-Stiftung and the DGB.

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The ECJ Advocate General presented his Opinion in the *TUI* case on 4 May 2017. **In his view, the German law on employee participation does not infringe EU law.** The ECJ judges must now make the final decision.

If the Advocate General's Opinion in the *TUI* case on 4 May 2017 is followed, employees in companies with codetermination need not fear also in the future that their active and passive codetermination rights in the supervisory board might be called into question by companies due to the primacy of European freedom of movement rights for workers. National codetermination regulations thus do not contradict workers' freedom of movement in the European Union.

According to the ECJ's press release on the *TUI* case an EU member state, as in this case Germany, is not obliged to open up national codetermination rights to all the employees of a company in the European Union. The general European right to be able to settle as an employee in any part of the European Union of one's own accord thus does not entail that an individual is restricted in their freedom of movement if, in the event of relocating to another EU country, they lose their codetermination rights in Germany.

Also, a citizen of another EU country who is an employee of a subsidiary of a company group with codetermination in Germany accordingly has no legal right to participate in codetermination in the supervisory board in Germany.

Codetermination, in the Advocate General's view, is beyond doubt an essential element of the German labour market and of the German social order. This makes it permissible to limit the effects of a European right. Thus even if the ECJ finds that the national law on employee participation constitutes a limitation on freedom of movement, that would not nullify codetermination.

If the ECJ follows the Advocate General's Opinion the dark shadow that the *TUI* case has cast over legal certainty for workers and companies would be lifted, at least for the time being. **A final decision on the part of the ECJ is to be expected later this year.**

The general threat to codetermination in Germany has thus not been lifted: legal loopholes in the German codetermination laws must therefore be closed during the forthcoming legislative period. The internationalisation of companies and of their decision-making structures continues apace. If the employee representatives on supervisory and administrative boards are to reflect the interests and views of all employees in a transnational company what should their composition be and how should they be selected? This question is at the top of the trade union agenda.

According to the European Commission's plans, company mobility – for example, by cross-border merger, division or transfer of seat – should be more strongly regulated at European level than hitherto. It must be ensured that no employee lose their national codetermination as a consequence. Rather it should be a matter of gaining new codetermination rights at the European level.

According to the Advocate General of the ECJ, there is no contradiction in shaping the European single market and, at the same time, retaining and further developing national codetermination rights.

<https://www.mitbestimmung.de/html/generalanwalt-mitbestimmung-mit-eu-recht-5340.html>