

DOSSIER CODETERMINATION IN DENMARK

Election of employees' representatives to the highest company body

Summary:

- In Denmark a national system has been further developed in the course of implementing the EU mergers directive. Only from within this context are the regulations justified and comprehensible.
- The Danish legislator – and also the social partners in Denmark – did not have a 'European' solution in mind here. Thus the regulation is no more 'European' than that of Germany.
- The Danish law on workers' participation at the highest level of the company is based on a different fundamental conception from German codetermination. In Denmark workers' representation on the board is systematically clearly separated from interest representation at the establishment level. Thus the organisation of the board is entirely – and is accepted as such by the trade unions – in the hands of the company management and ultimately of the general meeting. Which of course says nothing about what 'codetermination' in Denmark in fact 'can' be (see the findings of Conchon, Aline and Jeremy Waddington, 2015, Board Level Employee Representation in Europe. Routledge).
- From this also follows a different understanding of the function of the members of a Danish supervisory or administrative board. In Germany it is a common understanding of corporate governance that employees' representatives in the supervisory board under the aegis of codetermination are independent, which also finds expression in the fact that they organise their own elections. Works councils, if they exist, are a guarantee of the orderly conduct of elections.

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<https://www.mitbestimmung.de/html/nagelprobe-fur-den-eugh-3901.html>

Election of workers' representatives to the supervisory board Do employees in foreign affiliates have voting rights? The example of Denmark

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An article by Hans-Jürgen Hellweg appeared in FAZ on 7.12.2016 entitled 'Mitbestimmte Ausländer?' (Foreigners subject to codetermination).¹ The German legislator supposedly only has to transfer the tasks of election organisation to the company board in place of the German works councils, at least for foreign establishments. The board can itself take charge of the supervisory board elections of employees in foreign establishments across national borders. This is precisely the path Denmark has taken, with some success: there the board, with the involvement of local workers' representatives, organises elections both at home and abroad.² Let us take a closer look at the relevant Danish law.^{3, 4}

Voting Rights and Eligibility

Elections at the company itself or at the Danish parent company

§140 of the Danish Company Law lays down: 'In corporations that in the past three years have employed, on average, at least **35 workers**, the company's employees have the right to elect a number of members of the highest management body and their representatives, corresponding to half the members of the supervisory board. *Employees of a **foreign (branch) establishment** of a company located in another EU/EEA country shall be regarded **as employees of the company**.*

In order that employees may assume this office first of all 10 per cent of the workforce must support it. Full utilisation depends on the size of the company: from 500 workers and above it is 72.9 per cent.⁵

Affiliates are mentioned only in §141. *Para. 1: §140 is, accordingly, applicable to workers in a Danish parent company (cf. §§ 6 and 7) and its affiliates that are registered in Denmark, as well as its foreign (branch) establishments, which are located in an EU/EEA member state.* A clear distinction must be made, however, according to the wording of the statute:

¹ P. 16

² Ibid. for details, Symposium München 3/2106; ZHR Beiheft 2016 p. 162 ff., on Denmark p. 167 f.

³ On this see already ibid. ZHR Beiheft 2016 p. 173 ff., on Denmark p. 175f.

⁴ Translation of the relevant provisions in the Annex.

⁵ On this see: http://www.boeckler.de/pdf/impuls_2005_08_daenemark.pdf

§141 para 2: **Insofar as the parent company falls under §140, the workers of the parent company have the right** to elect 2 members, as well as their representatives [to the highest management organ of the parent company]. Here, then, the employees of the foreign ‘subsidiaries’ [the original wording in Danish] are regarded as employees of the company. By contrast, para. 3 provides for something else in relation to the affiliates: para. 3 ‘**The general meeting of the parent company can, having regard to the provisions on cross-border mergers and demergers in Chapter 16 and in the law on SE companies, resolve that employees in one or several foreign affiliates be permitted to belong to the circle of persons eligible for election and to vote.**

In other words, for the inclusion of employees from affiliates in the EU/EEA **the general meeting of the company alone shall be determinant**. And in addition to that: §142: the decision on the election of members for the highest management body in accordance with §§ 140 and 141 requires that **at least half of the employees of the corporation or of the subsidiary vote for it, unless** there is agreement between the **company management and the employees not to take a vote on it**. However, **the basic condition remains, the resolution of the general meeting, which can even select the subsidiary.**⁶

Carrying out elections across borders

According to Hellwig, the board, with the involvement of the local employees’ representatives, shall organise the elections. The author has already reported in Munich on the procedure with regard to the single case of the inclusion of foreign subsidiaries: ‘everyone was able to apply, were presented on the intranet and in this technical fashion all were able to vote.’

Thus there are also details here on implementation of the election of employees’ representatives. The registers of crafts and trades and of companies shall be responsible.⁷

According to §34 voting takes place in writing, by e-mail or something similar. And it has to be secret.

The so-called ‘cooperation committee’, which is widespread in Denmark, is important for the implementation of elections. ‘The cooperation committees’, to which the trade union representatives belong, are composed of employee and employer representatives on a parity basis. Such committees are constituted on the instigation

⁶ p. 176: and all investigations by the Danish trade union CO-industri, its own and relevant other institutions, yielded only one case: at Grundfos-Holding (whose main shareholder is a foundation), a German (half Danish) is the successor of a female representative from Hungary.

⁷ On this see the translation of the relevant §§ 48 f. in the Annex.

of the employer or the majority of employees in all enterprises with 35 employees or more. The main Danish employer organisation estimates that 70 per cent of companies in relation to which the establishment of a cooperation committee is relevant have indeed established one.⁸ This committee, which as already mentioned is established on a parity basis, sets up the election committee (also on a parity basis). However, if there is no cooperation committee the workforce members of the election committee are appointed by management. This is supposed to mean the shop stewards,⁹ but it is important to point out that this is only a recommendation.

According to information from Danish trade union colleagues, 'affiliates' abroad are sales offices or trading offices; a couple of employees are usually elected by postal vote. In light of the single case of the inclusion of foreign affiliates there need be no further reflection on use of the intranet.¹⁰

Summary

Employees in affiliates in the EU/EEA do not have a distinct right to participation in elections of employee representatives at the Danish parent company. In contrast to affiliates, a request from half of all employees both at home and abroad is not a sufficient condition (the company management and employees on the election committee can ignore this, §142); what is decisive is a resolution of the general assembly of the company.

Although the construction of the election committee in Denmark is clear, it goes back to the tradition of the establishment of cooperation committees. This 'management commitment'¹¹ is dubious not only from the standpoint that it involves the selection of the supervisors of the management itself, but above all it ignores the extremely wide variation of industrial relations in Europe. Thus the conception of 'challenge proof elections' across borders interferes in national systems of interest representation as a whole and would – and only if one brackets out what is feasible under company law – in the best case lead to the opposite.

Annex

Extract from Danish Company Law

Chapter 8 Employee representation

⁸ See for more detail Fulton: <http://de.worker-participation.eu/Nationale-Arbeitsbeziehungen/Laender/Daenemark/Betriebliche-Interessensvertretung>

⁹ Also on these elected trade union representatives see Fulton *ibid*.

¹⁰ On this see the author *ibid*. ZHR p. 178 f.

¹¹ Hellwig *ibid*. p. 168.

Company representation

§140: In stock corporations that in the past three years have, on average, employed at least 35 workers, the employees of the company have the right to elect a number of members of the highest management body of the company and its representatives, which corresponds to half the members of the supervisory board. Employees of a foreign (branch) establishment of a company that is located in another EU/EEA country are regarded as employees of the company. The employees can, however, always elect at least 2 members and their representatives. Insofar as the number of supervisory board members who are supposed to be elected by the employees does not constitute a whole number it is to be rounded up.

Paragraph 2: The employees have the right to elect a lower number of members and representatives if the number to which they are entitled in accordance with paragraph 1 cannot be elected.

Employees' representation in the group of companies

§141: §140 is, accordingly, applicable to employees in a Danish parent company, cf. §§ 6 and 7 and its affiliate companies that are registered in Denmark, as well as to their foreign (branch) establishments that are located in an EU/EEA member state.

Paragraph 2: Insofar as the parent company falls under §140 the employees of the parent company have the right to elect 2 members, as well as their representatives [to the highest management body of the parent company]. The total number of representatives to the highest management body elected by employees is to be half of the remaining members, although at least three members of the highest management body must be elected by the employees. The employees have the right to elect a lower number of members and representatives if the number to which they are entitled in accordance with paragraph 1 cannot be elected.

Paragraph 3: The general assembly of the parent company can, having regard to the provisions on cross-border mergers and demergers in Chapter 16 and in the law on SE companies, decide that employees in one or more foreign affiliate companies can belong to the circle of persons eligible for election and with a right to vote. If the company group has employees in Danish affiliate companies they must always be able to elect at least one representative. In the event that the number of employees in the Danish affiliate companies corresponds to more than 10 per cent of the total number of those persons who are permitted to participate in elections, they must be able to elect at least 2 representatives. If no majority is achieved – cf. §142 on the regulations on the group level – but the majority of the Danish affiliate companies vote for representation at the group level the regulation on the representation of employees [in the supervisory board] should be regarded as decided by the employees of the Danish affiliate companies, so that the elections of employee representatives

to the group supervisory board should then be implemented exclusively in the Danish affiliate companies.

§142: Election of employees' representatives

Decisions on the election of members to the the highest management body in accordance with §§140 and 141 are conditional on at least half the employees of the stock corporation or its affiliates voting for it, unless there is agreement between the company management and the employees that there should be no vote on this. The decision on this shall be communicated to the highest management body in such a way that it can subsequently be documented.

§143: The crafts and trade and company register (*Erhvervsstyrelsen*) can adopt rules on the following points:

1. who is to be regarded as an employee in relation to employee representation on the supervisory board;
2. calculation of the average number of employees in accordance with §§ 140 and 141;
3. precise implementation of elections in accordance with §§ 140–142, in particular provisions that guarantee a secret ballot;
4. the possibility that there can be derogation from specific provisions that were laid down in accordance with these paragraphs if there is agreement between the company management and the employees, including provisions on the establishment of voluntary systems for employee representation and the possibility for the central management body to therefore change the statutes of the stock corporation;
5. how the employees in stock corporations and groups in which, in accordance with §§ 140 and 141, supervisory board members were elected, are to be informed of the company's situation;
6. employment protection for members of the management body who were elected by the employees, including members who were elected by means of voluntary regulations, as well as in the case of disputes about this;
7. the consequences of violations of statutory provisions and regulations adopted on a statutory basis;
8. that the register of owners must also be accessible to an employee representative in companies and parent companies in which the employees have not elected supervisory board members in accordance with §§ 140 and 141;
9. possible communication about the calling of a general meeting to the employees of the company or of the group if they have informed the supervisory board that the election of employee representatives is to be held.

Implementation Rules

Bekendtgørelse om medarbejderrepræsentation i aktie- og anpartsselskaber

Voluntary expansion in the case of elections to the group supervisory board

§48. The general meeting can decide to expand the circle of employees who are eligible for election and to vote in the case of elections to the highest management body of the company as group representatives to include one of several foreign affiliates of a group of companies, cf. § 4, paragraph 2.

Paragraph 2. The employees in the foreign affiliate(s) can exercise their rights in accordance with paragraph 1 if at least half the persons with a right to vote in the foreign affiliate(s) (cf. §14 paragraph 2) have voted for it in a yes/no vote. It can also decide unanimously that the vote does not have to take place. If it is decided that the vote does not have to take place, instead elections should be held to the group supervisory board (cf. Paragraph 3).

Paragraph 3. If an expansion has been agreed (cf. Paragraph 1) and if at least half of those entitled to vote in the foreign affiliate(s) have voted to exercise their rights, or the group election committee has decided unanimously that a vote does not have to take place (cf. Paragraph 2), then the group election committee shall decide on the implementation of the election of representatives to the group supervisory board, including in what form the expansion of the circle of employees who are eligible for election and entitled to vote shall take, with a view to achieving the desired composition of representatives in the supervisory board. The group election committee shall ensure, in this situation, that the election is implemented correctly and that the principles of transparency and equal treatment are complied with, as well as that the body that, as the case may be, is tasked with implementing the elections ensures the equal participation of representatives of the employees of the board (the company management).

Paragraph 4. If an expansion has been agreed (cf. Paragraph 1) and at least half of those entitled to vote in the foreign affiliate(s) have declared in favour of exercising their rights (cf. Paragraph 2) the employees of affiliates who are registered in the IT system of the register of trades and crafts and of companies (*Erhvervsstyrelsen*) have the right to elect at least one representative to the highest management body of the parent company. If more than one-tenth of the employees entitled to vote in the affiliates of the group are employees of those affiliates that are registered in the IT system of the register of trades and crafts and of companies (*Erhvervsstyrelsen*) they have the right to elect at least two members to the highest management body of the parent company.