

Conference „European Company Law: the way forward“

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Panel Discussion „Workers‘ Participation” – Prof. Dr. Martin Henssler

First of all I would like to thank those who organised this conference for making the important issue of workers‘ participation part of today’s agenda. Without solving this issue there can be no progress in European company law. We have all learned this lesson the hard way in the past decades.

I. The status quo of workers‘ participation on the board level in Europe

I am convinced that there is no other labour law issue where opinions throughout the member states are divided to such an extreme extent. To demonstrate this, I would like to give you a short overview of the current situation in the European member states:

14 European states still eschew workers‘ participation completely or virtually completely¹:

- **Belgium; Bulgaria; Greece; Great Britain; Ireland; Italy; Portugal; Spain; Rumania², Estonia; Latvia; Lithuania; Malta und Cyprus**

In **France**, employee representatives at board level are normally present only in state-owned and recently privatised companies.³ However, these representatives do not have the same rights as other board members – in particular they cannot vote.⁴ This means that there is no true board level workers‘ participation in France.

11 European countries have introduced workers‘ participation at board level with employee representation of up to one-third of all board members:

- **Austria** (for stock corporations (AGs) and for limited companies with at least 300 employees); **Luxembourg** (for companies with at least 1000 employees)⁵; the **Netherlands** (for companies with at least 100 employees, share capital of more than 16.000,- € and an existing works council)⁶; **Denmark** (for companies with at least 35 employees)⁷; **Finland** (representation of 20% for companies with at least 150 employees)⁸; **Sweden** (two representatives for companies with at least 25 employees, three board level representatives for companies with at least 1000

¹ See *van het Kaar*, European Company Law (ECL) 2009, 55, 57 f. Some of these states do have workers‘ participation in the public sector.

² See *Stroinski/Stanuch*, European Company Law (ECL) 2009, 82, 86 f.

³ See generally *Carle*, European Company Law (ECL) 2009, 88 ff.

⁴ *Carle*, European Company Law (ECL) 2009, 88, 90.

⁵ See *van het Kaar*, European Company Law (ECL) 2009, 55, 57.

⁶ See generally *Phoelich*, European Company Law (ECL) 2009, 92 ff.

⁷ See *Hansen/Werlauff*, European Company Law (ECL) 2009, 68, 72 f.

⁸ See *Hansen/Werlauff*, European Company Law (ECL) 2009, 68, 73 f.

employees)⁹; **Hungary** (for companies with at least 200 employees)¹⁰; **Poland** (only for state-owned and recently privatized companies)¹¹; the **Czech Republic** (for companies with at least 50 employees); the **Slovak Republic** (for public limited companies with at least 50 employees); **Slovenia** (for companies with at least 50 employees)¹². You can see that the minimum number of employees for board level representation varies enormously from 5 to 1000 employees and no unifying trend can be made out.

Germany is the only European country to have a system that goes beyond a representation of one-third. §§ 1 sec. 1, 7 sec. 1.1 MitbestG (Co-Determination Act of 1976) stipulates that there must be equal employee representation for companies with more than 2000 employees. **Slovenia** had a similar system of equal representation until the Slovenian Constitutional Court declared the respective statute unconstitutional in 2001. In **Germany** there are current efforts to extend workers' participation at board level even further. Both the Social Democratic Party and the Left Party of Germany have filed a petition in the German parliament (Bundestag) on the issue. Following this petition there has been a committee meeting last week which I attended as a legal expert.¹³

European harmonisation of the law of workers' participation at board level cannot possibly be achieved in the foreseeable future. The European Union should therefore not concentrate its efforts on reaching this unattainable goal. Legislation on workers' participation should instead remain the domain of the member states.

However, this does not mean that there should not be some common basic principles. National laws on workers' participation should be in line with the fundamental idea of a European Union. Furthermore they should not block necessary reforms in other areas of law. I can see four possible steps to deal with the current situation:

II. Possible Actions of the European Commission

1. Limiting the Member States' Capability to block Reforms

As a first step the European Commission should limit the member states' capability to block reforms. The current situation is unsatisfactory. As the member states have very different opinions about what is adequate workers' participation, the process of harmonisation of European law is hindered not only in the field of labour law, but also in other areas of law.

⁹ See also *Hansen/Werlauff*, European Company Law (ECL) 2009, 68, 71.

¹⁰ *Stroinski/Stanuch*, European Company Law (ECL) 2009, 82, 85.

¹¹ *Stroinski/Stanuch*, European Company Law (ECL) 2009, 82 ff.

¹² *Stroinski/Stanuch*, European Company Law (ECL) 2009, 82, 85 f.

¹³ See BT-Drucks. 17/2122 und 17/1413.

The member states' fundamentally different approaches to workers' participation have proven to inhibit the introduction of supranational forms of company in the past. Because of the conflicts surrounding workers' participation, it took more than three decades for the Council Regulation on the Statute for a European Company to be adopted. Ongoing negotiations for the introduction of a European Private Company (*Societas Privata Europaea*) are threatened by the conflict as well. The compromise proposed by the Swedish Presidency of the Council of the European Union has not even been taken into serious consideration. It is doubtful whether the recent Hungarian proposal for a regulation will meet a better fate. This blockade cannot be accepted any more. Member states should not be able to block the introduction of new supranational forms of company with the aim of enforcing a certain system of workers' participation. A possible solution could be an „enhanced cooperation“ between member states willing to come to an agreement under the provisions of Art. 326 to 334 of the Treaty on the Functioning of the EU. Member states that are unwilling to consent to the majority agreement would have to individually relinquish the introduction of the new form of company without being able to keep the other member states from establishing it.

2. Application of the Concepts of the Cross Border Merger Directive

A second aspect that I find particularly dissatisfying is the fact that the controversies surrounding workers' participation even block the development of companies with single-tier board systems. The systems of co-determination which provide for employee representation of more than one-third are generally very much tailored to the participation in supervisory boards. Their goal is to establish workers' participation in monitoring corporate governance, but not to involve the employee representatives in the actual management of the corporation. Future provisions should therefore differentiate very clearly between single-tier systems and dual board systems. The European Cross-Border Merger Directive already makes this important distinction. The compromise that has been employed in the Cross-Border Merger Directive should be applied to all European companies. This would mean that member states would be able to stipulate a maximum employee representation of one-third for all European companies with a monistic board system. Art. 16 sec. 4 lit c of the Cross Border Merger Directive allows the member states to introduce regulations enabling one-tier system companies to limit workers' participation to one third.¹⁴ So far only the UK has made use of this provision. The UK Companies (Cross-Border Mergers) Regulations 2007 stipulate in § 39 that the UK transferee company may limit the proportion of directors elected through employee participation to a level of one-third of the directors.

3. Inclusion of Employees throughout the European Union

¹⁴ See generally Henssler, ZHR 173 (2009), 222, 228.

There is one further flaw in national regulations on co-determination that is unacceptable from a European point of view. They generally include only employees that work nationally and ignore employees that work abroad either in regional offices or in subsidiaries. The VW corporation, for instance, does not have employee representatives of their Czech subsidiary SKODA or the Spanish subsidiary SEAT in their supervisory boards. This means that German-based employees are clearly in a favourable position compared to Czech or Spanish based where branch closures caused by production cuts are concerned. This differential treatment might not be classifiable as discrimination against foreign workers, but it does contradict basic European common market principles. Models of co-determination based on the Societas Europaea, the Societas Cooperativa Europaea or the Cross Border Merger Directive rightfully demand the inclusion of all European-based employees. This should apply to all companies with cross-border activities within the European Union. Since member states have no interest in the implementation of such a regulation, European legislature should enforce it.

4. Introduction of a mandatory negotiation procedure

One further step is necessary for the European Union to come closer to the harmonisation of national laws on co-determination. Parallel to the regulations on European works councils, a mandatory negotiation procedure for all companies of a certain size (eg from 1000 employees onwards) with cross-border activities within the European Union should be introduced. This is a concept of negotiation that has proven to be very effective in the context of the Societas Europaea, the Societas Cooperativa Europaea and cross border mergers. The Council Directive supplementing the Statute for a European Company with regard to the involvement of employees stipulates that worker involvement provisions in the Societas Europaea will be decided upon by negotiations between employees and management before the creation of the SE. If agreement cannot be reached, provisions contained in the Directive will apply. This allows for a flexible model of workers' participation that can be tailored to the needs of the specific company. Member states could establish statutory default rules that would apply in case negotiations fail. Thus, national differences would remain untouched, but at the same time a European best practice model could be developed and serve as a benchmark for international corporations.