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Press and Information

Advocate General's Opinion in Case C-566/15
Konrad Erzberger v TUI AG

According to Advocate General Saugmandsgaard Øe, the German law on employee participation is compatible with EU law

Neither the freedom of movement for workers nor the general prohibition of discrimination on grounds of nationality precludes only employees employed on national territory from electing, and standing for election as, employees' representatives on a supervisory board

TUI AG, a German public limited company, is the head of the TUI group, a global travel operator. The group employs over 10 000 persons in Germany and around 40 000 persons in the other Member States of the European Union. Mr Konrad Erzberger, a shareholder in TUI AG, has challenged before the German courts the composition of the supervisory board[1] of that company, one half of which is, in accordance with the German law on employee participation,[2] appointed by the shareholders and the other by the employees.

Mr Erzberger claims that TUI AG's supervisory board should be composed only of members appointed by the shareholders. According to Mr Erzberger, the German law on employee participation is contrary to EU law: in providing[3] that only employees of the group employed in Germany may elect the members of the supervisory board representing the employees[4] and stand for election, that law infringes the freedom of movement for workers and the general prohibition of discrimination on grounds of nationality.

In that context, the Kammergericht Berlin (Higher Regional Court, Berlin, Germany) decided to refer a question to the Court of Justice on whether the German law on employee participation is compatible with EU law.

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.

As far as concerns employees of the TUI group employed outside Germany, the Advocate General takes the view that such employees are not, in principle, covered by the freedom of movement for workers. Freedom of movement confers rights only on employees who actually make use, are considering making use or have already made use of that fundamental freedom by leaving their Member State of origin in order to pursue an economic activity in another Member State.[5] It is, however, highly likely that a large number of the employees in question have never made use of that right. The fact that the company which employs an employee is owned or controlled by a company established in another Member State (in the present case, Germany) is

[1] In Germany, a public limited company is run by the management board. It is supervised by the supervisory board.
[2] The present case concerns only employee participation at the level of the company, within the supervisory board (*Aufsichtsrat*). It does not concern employee participation through the works council (*Betriebsrat*).
[3] The Kammergericht Berlin adds that that understanding of the legislation in question does not follow from its wording, but that it is the majority opinion of German legal writers and in the case-law.
[4] In the case of a parent company in a group such as TUI AG, employees of the undertakings within the group may take part in elections to the supervisory board of the parent company on the same basis as the latter's own employees.
[5] In such a situation, the freedom of movement for workers, first, ensures that the workers concerned are treated in the same way as national workers of the host Member State and, second, prohibits the Member State of origin from unduly restricting its nationals' right to leave its territory in order to pursue an economic activity in another Member State.

not in itself sufficient to affect the freedom of movement for workers. Furthermore, the general prohibition of discrimination on grounds of nationality does not apply to situations which are wholly internal to a Member State.

As regards the employees of the TUI group employed in Germany, the Advocate General considers, on the other hand, that the freedom of movement for workers is *applicable* where those employees leave or wish to leave Germany in order to take up a post in a subsidiary belonging to the group established in another Member State.[6] **Nonetheless,** the Advocate General considers that **the legislation at issue does not *restrict* the freedom of movement for workers,** even if an employee leaving Germany loses his particular right to vote and to stand. As EU law currently stands,[7] the Member States are not required to grant workers who leave their territory in order to pursue an economic activity in another Member State the same participation rights as those enjoyed by workers employed on national territory.

Should the Court come to another conclusion and find that the freedom of movement for workers has been restricted, the Advocate General considers that such a restriction **is, in any event, justified**. The maintenance of legislation such as that at issue in the main proceedings reflects certain legitimate economic and social policy choices that are a matter for the Member States.

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.

According to the Advocate General, it should be acknowledged that it is not possible to bring workers employed outside Germany within the personal scope of that system without having to modify its fundamental characteristics. Such an extension of the German system would assume that responsibility for arranging and conducting the elections be transferred from the employees and companies of the group to the management of the German parent company, which would run counter to the principles on which the system is based.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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[6] According to the Advocate General, there is no need to examine here the general prohibition of discrimination on grounds of nationality since that prohibition is given specific effect through the freedom of movement for workers which he considers to be applicable to such employees.

[7] The Advocate General notes, inter alia, that the issue has not been harmonised at EU level. He is, however, sympathetic to the idea that any worker employed by a group of companies should benefit, within the EU, from the same rights of participation within that group, irrespective of the location of his place of employment.