Case C-677/20

Request for a preliminary ruling

Date lodged:

11 December 2020

Referring court or tribunal:

Bundesarbeitsgericht (Germany)

Date of the decision to refer:

18 August 2020

Applicants:

Industriegewerkschaft Metall (IG Metall)

ver.di – Vereinte Dienstleistungsgewerkschaft

Other parties concerned:

SAP SE

SE-Betriebsrat der SAP SE

BUNDESARBEITSGERICHT (FEDERAL LABOUR COURT)

[…]

ORDER

[…]

In the court-order proceedings with the parties concerned

1. Industriegewerkschaft Metall, […]

[…] Frankfurt am Main,

Applicant, appellant and appellant on a point of law

2. ver.di – Vereinte Dienstleistungsgewerkschaft, […] Berlin,

Applicant, appellant and appellant on a point of law, […]

3. SAP SE, […] Walldorf,

[…]

4. SE-Betriebsrat der SAP SE (SAP SE Works Council), […] Walldorf,

[…] **[Or. 2]**

5. Konzernbetriebsrat der SAP SE (SAP SE Group Works Council), […] Walldorf,

[…]

6. Deutscher Bankangestellten-Verband e. V., […] Düsseldorf,

7. Christliche Gewerkschaft Metall (CGM), […] Stuttgart,

8. Verband angestellter Akademiker und leitender Angestellter der

chemischen Industrie e. V., […]

[…] Cologne,

the First Chamber of the Federal Labour Court […] ordered as follows:

I. The Court of Justice of the European Union is requested pursuant to Article 267 TFEU to provide an answer to the following question:

Is Paragraph 21(6) of the Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft (German Law on involvement of employees in a European company), which determines that, in the case where an SE [*Societas Europaea*; European Company] with its registered office in Germany is established by means of transformation, a separate selection procedure for persons nominated by trade unions for a certain number of supervisory board members representing the employees must be guaranteed, compatible with Article 4(4) of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees?

II. The proceedings in the appeal on a point of law are stayed pending the decision of the Court of Justice of the European Union on the request for a preliminary ruling. **[Or. 3]**

Grounds

A. Subject matter of the main proceedings

The parties concerned are in dispute – in so far as relevant for the proceedings to refer for a preliminary ruling – regarding the effectiveness of provisions in an agreement concluded between the employer and the special negotiating body on the involvement of employees in a *Societas Europaea* (Agreement on employee involvement) within the meaning of Paragraph 21 of the German Law on involvement of employees in a European company (the SEBG).

The employer (third-named party concerned) is an SE with a two-tier board system. It has an SE Works Council (fourth-named party concerned) and a Group Works Council (fifth-named party concerned). The applicants are two trade unions represented in the employer's undertaking. Other trade unions represented among the employer's workforce or within its group are also parties to the proceedings (parties named under 6. to 8.).

The employer originally had the legal form of an Aktiengesellschaft (private company limited by shares) under German law. In accordance with point 2 of the first sentence of Paragraph 7(1) of the Gesetz über die Mitbestimmung der Arbeitnehmer (German Law on employee participation; 'the MitbestG'), it had a Supervisory Board consisting of eight members representing the shareholders and eight members representing the employees. In accordance with point 2 of Paragraph 7(2) of the MitbestG, the Supervisory Board members representing the employees included six employees of the undertaking and two trade union representatives. The two trade union representatives were nominated by the trade unions represented within the employer's group and elected in an election process held separately from that for the other six Supervisory Board members representing the employees in accordance with Paragraph 16(2) of the MitbestG.

In 2014, the employer was transformed into an SE. Since that time, it has had a Supervisory Board composed of 18 members. In accordance with the Agreement on employee involvement concluded on 10 March **[Or. 4]** 2014 by the employer and the special negotiating body, nine of the Supervisory Board members are employee representatives. The Agreement provides for more detailed requirements regarding how these members are appointed. According to Part II, point 3.1, of the Agreement, only SAP employees or representatives of trade unions represented within the SAP Group may be nominated and appointed as employee representatives on the Supervisory Board. The trade unions are also entitled to an exclusive right of nomination for a certain number of the employee representatives allotted to Germany according to Part II, point 3.3, of the Agreement; the individuals whom they have nominated are elected by the employees in a separate election process.

Part II, point 3.4, of the Agreement also contains provisions for the formation of a supervisory board reduced to 12 members. In this case, the Supervisory Board must include six employee representatives. The employee representatives in the first four seats allotted to Germany are elected by the employees working in

Germany. The trade unions represented in the employer's group may also make nominations for some of the seats allotted to Germany; however, no separate election process is held for the individuals whom they have nominated.

In the court-order proceedings initiated by the applicants, they asserted that the provisions in the Agreement on employee involvement concerning appointment of the employee representatives in a twelve-member supervisory board are invalid. They hold the view that those provisions breach Paragraph 21(6) of the SEBG, as the trade unions are not granted an exclusive right to nominate employee representatives on the Supervisory Board, in other words, this right is not safeguarded by means of a separate election process.

The employer holds the view that the trade unions' exclusive right of nomination provided for in Paragraph 7(2), in conjunction with Paragraph 16(2), of the MitbestG is not protected by Paragraph 21(6) of the SEBG.

The lower courts rejected the applicants' claims. With this appeal on a point of law, the applicants continue to pursue the form of order sought. **[Or. 5]**

B. Relevant national law

I. The Gesetz über die Mitbestimmung der Arbeitnehmer (German Law on Employee Participation) ('the MitbestG') of 4 May 1976 *(BGBl. (Federal Law Gazette) I, p. 1153, last amended by the Law of 24 April 2015 – BGBl. I p. 642)* reads as follows (in extract form):

'Paragraph 7

Composition of the Supervisory Board

(1) The supervisory board of an undertaking

1. with normally no more than 10 000 employees shall be composed of six members representing the shareholders and six members representing the employees;

2. with normally more than 10 000 employees, but no more than 20 000, shall be composed of eight members representing the shareholders and eight members representing the employees;

3. with normally more than 20 000 employees shall be composed of 10 members representing the shareholders and 10 members representing the employees.

(2) The members of the supervisory board representing the employees shall include

1. in a supervisory board containing six employees' representatives, four employees of the undertaking and two trade union representatives;

2. in a supervisory board containing eight employees' representatives, six employees of the undertaking and two trade union representatives;

3. in a supervisory board containing 10 employees' representatives, seven employees of the undertaking and three trade union representatives.

(5) The trade unions referred to in subparagraph 2 must be represented in the undertaking itself or in a different undertaking whose employees participate in the election of the undertaking's supervisory board members in accordance with this Law. **[Or. 6]**

Paragraph 16

Election of trade union representatives to the Supervisory Board

(2) The election shall be held on the basis of nominations from the trade unions represented in the undertaking itself or in a different undertaking whose employees participate in the election of the undertaking's supervisory board members in accordance with this Law. …'

II. The Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft (German Law on involvement of employees in a European company; 'the SEBG') of 22 December 2004 *(BGBl. (Federal Law Gazette) I, p. 3675, 3686, last amended by the Law of 20 May 2020 – BGBl. I. p. 1044*) in the version applicable from 1 March 2020 reads as follows (in extract form):

'Paragraph 2

Definitions

(8) "Involvement of employees" means any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company.

(…)

(12) "Participation" means the influence of employees on the affairs of a company by means of

1. exercising the right to elect or appoint some of the members of the company's supervisory or administrative organ, or

2. exercising the right to recommend or oppose the appointment of some or all of the members of the company's supervisory or administrative organ.

Paragraph 21

Content of the agreement

(1) The written agreement between the management boards and the special negotiating body shall lay down the following, without prejudice to the autonomy of the parties otherwise and subject to subparagraph 6: **[Or. 7]**

(3) In the event that the parties conclude an agreement on participation, its content must be laid down. In particular, the following should be agreed:

1. the number of members of the supervisory or administrative organ of the SE whom the employees are able to elect or appoint or whose appointment they are able to recommend or oppose;

2. the procedure by which the employees are able to elect or appoint these members or to recommend or oppose their appointment; and

3. the rights of these members.

(6) Without prejudice to the relationship of this Law to other provisions on employee participation within the undertaking, in the case of an SE established by means of transformation, the agreement shall provide for at least the same level of all elements of employee involvement as the ones existing within the company to be transformed into an SE. […].'

C. Relevant provisions of EU law

Article 4 of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees […] reads as follows (in extract form):

'Content of the agreement

1. The competent organs of the participating companies and the special negotiating body shall negotiate in a spirit of cooperation with a view to reaching an agreement on arrangements for the involvement of the employees within the SE.

2. Without prejudice to the autonomy of the parties, and subject to paragraph 4, the agreement referred to in paragraph 1 between the competent organs of the participating companies and the special negotiating body shall specify: **[Or. 8]**

4. Without prejudice to Article 13(3)(a), in the case of an SE established by means of transformation, the agreement shall provide for at least the same level of all elements of employee involvement as the ones existing within the company to be transformed into an SE.'

D. Relevance and clarification of the question referred

The decision in the present legal dispute depends on whether the requirements in Paragraph 21(6) of the SEBG for the formation of an agreement on employee involvement concerning employee participation upon the establishment of an SE by means of transformation of an Aktiengesellschaft under German law are compatible with Article 4(4) of Directive 2001/86/EC.

I. The applicants' application, by which they seek a form of order – in so far as of interest in the present proceedings – for the provisions on determining the employee representatives in a 12-member supervisory body contained in the Agreement on employee involvement of 10 March 2014 to be found invalid, would succeed on the basis of national law alone.

1. The application is admissible.

[…] **[Or. 9]** […]

2. The application would also be well founded. The provisions in the employer's Agreement on employee involvement of 10 March 2014 on the appointment of employee representatives in a 12-member supervisory board would be invalid. They would be in breach of Paragraph 21(6) of the SEBG.

(a) In principle, the parties to an agreement on employee involvement in accordance with Paragraph 21(1) of the SEBG may organise a procedure for employee involvement within the meaning of Paragraph 2(8) of the SEBG autonomously. This makes it possible for them to make provisions specially tailored to the requirements of the planned SE and to develop mixed forms or new concepts or procedures alongside the use of existing involvement systems. This is intended to ensure a meaningful balance of the legal situations existing in

individual Member States while ensuring appropriate adaptation to the requirements and structures of the SE to be established […].

(b) However, the autonomy granted to the parties to an agreement on employee involvement is, in accordance with Paragraph 21(1) of the SEBG, subject to the express condition of the guarantee provided for in subparagraph 6 of that paragraph. Accordingly, **[Or. 10]** where an SE is established by means of transformation of an Aktiengesellschaft, the agreement must provide for at least the same level of all elements of employee involvement as the ones existing within the company to be transformed into an SE *(first sentence of Paragraph 27(6) of the SEBG)*. Therefore, where an SE is established by means of transformation of an Aktiengesellschaft, the Law restricts the parties' autonomy in negotiations in favour of achieving greater preservation of the status quo […].

(c) According to the standard methods of interpretation of national law, the present Chamber is satisfied that the first sentence of Paragraph 21(6) of the SEBG requires parties to the agreement on employee involvement, where an SE is established by means of transformation, to ensure in that agreement that the elements of a procedure for employee involvement that characterise employees' influence on the company's decision-making, in the sense of Paragraph 2(8) of the SEBG, also remain at the same level in the SE to be established. These elements are to be initially determined on the basis of the decisive national law, each in relation to the procedures for employee involvement within the meaning of Paragraph 2(8) of the SEBG that already exist in the Aktiengesellschaft to be transformed. It must be ensured that the level of the elements accordingly characterising employees' influence on the company's decision-making also remains the same in the SE. It must be noted here that the first sentence of Paragraph 21(6) of the SEBG does not require that the procedures existing in the company be transformed and the legal situation therein be preserved in full. Therefore, there must be a guarantee that the procedural elements which decisively characterise the influence of employees' representatives in the company to be transformed remain qualitatively the same in the agreement on employee involvement that will apply to the SE.

(d) On this basis, the provisions on appointing employees' representatives in a 12-member supervisory board contained in the employer's Agreement on employee involvement would not be compatible with the requirements of Paragraph 21(6) of the SEBG. **[Or. 11]**

(aa) The procedural elements of company participation characterising employee influence in an Aktiengesellschaft under German law providing employee participation in accordance with point 2 of the first sentence of Paragraph 7(1), in conjunction with point 2 of Paragraph 7(2), of the MitBestG include the separate process for electing employees' representatives nominated by the trade unions to the supervisory board in accordance with Paragraph 16 of the MitbestG.

(1) In accordance with point 2 of Paragraph 7(2) of the MitbestG, where a supervisory board is composed of eight members representing the shareholders and eight members representing the employees, the members representing the employees must include six employees of the undertaking and two trade union representatives. The process of electing the trade union representatives is conducted separately from that for the other supervisory board members representing the employees and is based on nominations by the trade unions that are represented within the undertaking or in a different undertaking whose employees are participating in the election *(first sentence of Paragraph 16(2) of the MitbestG)*. While the other supervisory board members representing the employees must be employed within the undertaking or in an undertaking belonging to its group, the trade unions are entitled to nominate external persons for election; these persons need not be members of the nominating trade union or employed by it.

(2) The right of the trade unions to nominate persons for a certain number of the supervisory board members representing the employees, as provided for in the German Law on Employee Participation, is based on the acknowledgement by the German legislature that involvement of employee representatives nominated by trade unions constitutes a key element in the opinion-forming of the supervisory board, precisely because they are independent […]. Since its entry into force on 1 July 1976, the Law has always assumed that, on the employee side, the participation of representatives of the superordinately organised workforce, in other words, of the trade unions represented in the undertaking or group, is absolutely necessary in order to ensure the equal involvement of shareholders and employees in the supervisory boards of undertakings in terms of their respective rights and weighting. Restricting possible **[Or. 12]** employee representatives exclusively to persons who are members of the business association is accordingly not in the interests of employees themselves […]. According to the legal appraisals, the employee representatives on the supervisory board who have been nominated by the trade unions, and whose representation is legitimised by being elected by employees, enhance employee participation. This is intended to ensure that the persons sitting as employee representatives on the supervisory board are highly familiar with the circumstances and requirements of the undertaking while at the same time having external expertise […].

(bb) With this, the right of trade unions to submit nominations for a certain number of supervisory board members representing the employees, which is safeguarded by a separate election process, constitutes a characteristic element for the employee participation procedure in an Aktiengesellschaft whose employees participate in accordance with point 2 of Paragraph 7(1), in conjunction with point 2 of Paragraph 7(2), of the MitbestG, which must be guaranteed at the same qualitative level in the agreement on employee involvement in the case of transformation into an SE in accordance with Paragraph 21(6) of the SEBG […] **[Or. 13]** […]

(1) Accordingly, it would be necessary to ensure the right of trade unions to nominate persons for a certain number of supervisory board members representing the employees in the agreement on employee involvement. To this extent, this would also require a separate procedure for selection of these persons by the employees or their representatives – that is separate from the procedure of appointing the other employee representatives. Only a right of nomination that is safeguarded in this way continues to ensure the same level of employee involvement in the new SE, by means of the equal involvement of employees in the supervisory board in terms of rights and weighting, according to the ideas of the German legislature and intended by Paragraph 7(2), point 2, in conjunction with Paragraph 16(2), of the MitbestG, and therefore the influence of employees on the company's decision-making (that existed prior to the transformation) within the meaning of Paragraph 2(8) of the SEBG in employee participation within the meaning of Paragraph 2(12) of the SEBG.

(2) The guarantee in Paragraph 21(6) of the SEBG is also effected in the number of employee representatives nominated by trade unions who would have to be elected through a separate appointment procedure. In accordance with points 1 and 2 of Paragraph 7(2) **[Or. 14]** of the MitbestG, two of the six or eight members representing the employees on a 12-member or 16-member supervisory board respectively in an Aktiengesellschaft are to be trade union representatives. Where a supervisory board consists of 20 members, three of the 10 supervisory board members representing the employees are to be trade union representatives *(point 3 of the first sentence of Paragraph 7(1), in conjunction with Paragraph 7(2), point 3, of the MitbestG)*. This weighting made by the German legislature determines the level of employees' influence on the company's decision-making that is safeguarded by Paragraph 21(6) of the SEBG. Therefore, the number of members representing the employees on the supervisory board of the SE, which is proportionally dependent on the size of the supervisory board, must continue to be guaranteed, in so far as mathematically possible. If the size of the supervisory board is reduced – as is potentially the case in the main proceedings – from formerly 16 members in the Aktiengesellschaft to 12 in the SE, the parties to the Agreement on employee involvement would be obliged to allow the trade unions an exclusive right of nomination for at least one supervisory board member representing the employees.

(3) The trade union's exclusive right of nomination for a certain number of supervisory board members representing the employees, which is to be ensured in the agreement on employee involvement, would not have to be restricted to German trade unions represented in the undertaking or group. With the negotiated solution, the parties to the Agreement on employee participation – subject to taking account of the requirements of Paragraph 21(6) of the SEBG – are given the means of making provisions specially tailored to the planned SE, in order to make it possible to alter its structures appropriately. The unique features of an SE include the involvement of employees across the European Union and the resulting internationalisation of employee representatives on the Supervisory

Board. It would run counter to this objective if nominations were limited to German trade unions alone.

(e) The provisions on the 12-member supervisory board in the employer's Agreement on employee involvement of 10 March 2014 are not sufficient to fulfil these requirements arising from Paragraph 21(6) of the SEBG. Although the trade unions represented in the employer's **[Or. 15]** Group are able to submit nominations for election as supervisory board members representing the employees, the provisions in Part II, point 3.4, of the Agreement on employee involvement do not adequately ensure that the employees' representatives on the Supervisory Board will also actually include a person nominated by trade unions, since no provision is made for any separate selection procedure.

II. As far as the present Chamber is concerned, however, this raises the question of whether its proposed interpretation of Paragraph 21(6) of the SEBG is compatible with the requirements of Article 4(4) of Directive 2001/86/EC.

Under the EU-law provision, without prejudice to Article 13(3)(a) of that directive, in the case of an SE established by means of transformation, the agreement must provide for at least the same level of all elements of employee involvement as the ones existing within the company to be transformed into an SE. Should the standard be based on a different understanding with a lower level of protection applicable across the European Union, to be ensured to the same extent by all Member States as the case may be, the present Chamber would be obliged to interpret Paragraph 21(6) of the SEBG correspondingly in accordance with EU law.

The present Chamber is unable to judge with the certainty expected for a court of last instance what requirements to be implemented by Member States arise from Article 4(4) of Directive 2001/86/EC for the level of protection to be guaranteed in the agreement on employee involvement for the benefit of employees. The provision has not been the subject of interpretation by the Court of Justice to date. The correct application of EU law in this case is also not obvious. The Court of Justice of the European Union is accordingly required to provide the necessary interpretation of Article 4(4) of Directive 2001/86/EC.