Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

18 July 2017*

(Reference for a preliminary ruling — Free movement of workers — Principle of non-discrimination — Election of workers' representatives to the supervisory board of a company — National legislation restricting the right to vote and to stand as a candidate to employees of establishments located in the national territory)

In Case C-566/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Kammergericht (Berlin Higher Regional Court, Germany), made by decision of 16 October 2015, received at the Court on 3 November 2015, in the proceedings

Konrad Erzberger

v

TUI AG,

intervening parties:

Vereinigung Cockpit e.V.,

Betriebsrat der Tui AG/Tui Group Services GmbH,

Frank Jakobi,

Andreas Barczewski,

Peter Bremme,

Dierk Hirschel,

Michael Pönipp,

Wilfried H. Rau,

Carola Schwirn,

Anette Stempel,

Ortwin Strubelt,

* Language of the case: German.

Marcell Witt,

Wolfgang Flintermann,

Stefan Weinhofer,

ver.di -Vereinte Dienstleistungsgewerkschaft,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, M. Ilešič and J.L. da Cruz Vilaça, Presidents of Chambers, A. Borg Barthet, J. Malenovský, E. Levits (Rapporteur), J.-C. Bonichot, A. Arabadjiev, C. Vajda, S. Rodin and F. Biltgen, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 24 January 2017,

after considering the observations submitted on behalf of:

– Mr Erzberger, by J. Brandhoff, C. Behme and S. Richter, Rechtsanwälte,

– **TUI** AG, by C. Arnold and M. Arnold, Rechtsanwälte,

– the Vereinigung Cockpit e.V., by M. Fischer, Rechtsanwältin,

– the Betriebsrat der **TUI** AG/**TUI** Group Services GmbH and Others, by M. Schmidt, Rechtsanwältin,

– the German Government, by J. Möller and T. Henze, acting as Agents,

– the French Government, by R. Coesme, acting as Agent,

– the Luxembourg Government, by P. Kinsch, avocat,

– the Netherlands Government, by H. Stergiou, acting as Agent,

– the Austrian Government, by G. Eberhard, acting as Agent,

– the European Commission, by M. Kellerbauer and D. Martin, acting as Agents,

– the EFTA Surveillance Authority, by M. Moustakali and C. Zatschler, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 May 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 18 and 45 TFEU.

2 The request has been made in proceedings between Mr Konrad Erzberger and TUI AG, established in Germany, of which he is a shareholder, regarding the composition of the supervisory board, more particularly, concerning the right to vote and to stand as a candidate in elections of workers' representatives to that board.

Legal context

3 Paragraph 96 of the Aktiengesetz (Law on public limited companies) of 6 September 1965 (BGBl. 1965 I, p. 1089), provides:

'(1) The supervisory board shall be composed

in the case of companies subject to the Law on employee participation, of members representing the shareholders and members representing the employees,

…

in the case of other companies, of members representing the shareholders alone.

…'

4 Paragraph 1 of the Gesetz über die Mitbestimmung der Arbeitnehmer (Law on employee participation) of 4 May 1976 (BGBl. 1976 I, p. 1153) ('the MitbestG'), entitled ''Undertakings affected', states:

'(1) In undertakings

1. established in the form of a joint stock company, a limited partnership with shares, a limited liability company or a cooperative, and

2. which normally employ more than 2 000 persons,

this Law shall confer on employees a right of participation.

…'

5 Paragraph 3(1)(1) of the MitbestG provides:

'The following shall be regarded as employees within the meaning of this Law

1. persons designated in Paragraph 5(1) of the Law on industrial relations …'

6 The first sentence of Paragraph 5(1) of the MitbestG states:

'Where an … undertaking is the dominant undertaking within a group …, the employees of the group shall be treated as employees of the dominant undertaking for the purposes of the application of this Law.'

7 Paragraph 7 of the MitbestG states:

'(1) The supervisory board of an undertaking

…

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

…

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

…'

8 Paragraph 10 of the MitbestG is worded as follows:

'(1) In each establishment of the company, the employees shall elect delegates by secret ballot.

(2) Employees of the undertaking who are 18 years of age or over shall be entitled to vote in the election of delegates, …

(3) Employees referred to in the first sentence of subparagraph 2 who satisfy the conditions for eligibility to stand for election laid down in Paragraph 8 of the Law on industrial relations shall be eligible for election as delegates.

…'

9 Paragraph 8 of the Betriebsverfassungsgesetz (Law on industrial relations) (BGBl. 2001 I, p. 2518) provides:

'(1) All employees with voting rights who have been employed in or principally worked for the establishment as homeworkers for six months shall be eligible for election. The said period of six months shall be deemed to include any immediately preceding period during which the employee was employed in another establishment belonging to the same company or group of companies …

(2) If the establishment has been in existence for less than six months, such employees as are employed in the establishment and fulfil the other conditions for eligibility at the announcement of the election for the works council shall be eligible, as an exception to the requirement of six months' service under subparagraph 1.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 Mr Erzberger is a shareholder of TUI, which is the parent company of a group of companies ('the TUI group'), operating in the tourism sector.

11 The TUI group is a global operator. In the European Union, that group employs around 50 000 persons, of which slightly more than 10 000 work in Germany.

12 **Since TUI falls within the scope of application of the MitbestG, that company is managed by two organs, namely the management board, responsible for running the company, and the supervisory board, whose task is to supervise the management board with the participation of the workers. That supervisory board includes 20 members. Half of that board consists of shareholder representatives and half of representatives appointed by the employed workers.**

13 The referring court notes that, according to the majority opinion among German legal writers and in the case-law, the concept of worker, for the purpose of the application of the MitbestG, covers solely workers of undertakings located in the national territory. According to that majority opinion, the workers of a subsidiary of a group located outside the territory of Germany, inter alia in another Member State, are deprived of the right to vote and to stand as a candidate in elections of representatives to the supervisory board of the parent company of the group concerned. Moreover, any worker of the TUI group who carries out tasks within the supervisory board of the parent company of that group must give up those tasks where he takes up a post within one of the subsidiaries of that group located in a State other than the Federal Republic of Germany.

14 That approach is based not on the terms of the MitbestG but on the 'principle of territoriality', according to which the German social order cannot extend to the territory of other States, and on the origins of that law.

15 Mr Erzberger considers, by contrast, that TUI's supervisory board is not properly constituted. Preventing workers employed by a subsidiary of the TUI group located in a Member State other than the Federal Republic of Germany, who it can be assumed are in general not German citizens, from participating in the composition of TUI's supervisory board, infringes Article 18 TFEU. Moreover, the loss of membership in the supervisory board, in the case of a transfer to a Member State other than the Federal Republic of Germany, is, he claims, likely to dissuade workers from exercising their right to free movement throughout the territory of the Member States, provided for by Article 45 TFEU.

16 **Since TUI disputes that opinion, Mr Erzberger exercised his right, provided for under national legislation, to bring an action before a court in the event of a dispute as to the statutory provisions applicable to the composition of the supervisory board.**

17 The Landgericht Berlin (Berlin Regional Court, Germany) dismissed the latter's action. There was neither discrimination on the grounds of nationality nor restriction of the freedom of movement of workers, since the loss of the right to vote in the case of a transfer is not decisive for the decision of workers to take a post in a Member State other than the Federal Republic of Germany.

18 On appeal, the Kammergericht (Berlin Higher Regional Court, Germany) held that there might be an infringement of EU law. According to that court, it is possible that the German legislation on employee participation gives rise to discrimination against employees based on nationality and restricts freedom of movement for workers.

19 First, unlike workers employed in Germany, those who are employed in another Member State, in this case approximately 80% of the employees of the TUI group, are not represented on TUI's supervisory board.

20 Secondly, according to the Kammergericht (Berlin Higher Regional Court), risk of losing their membership on the supervisory board in the case of a transfer is likely to dissuade workers from applying for posts which are actually on offer in a Member State other than the Federal Republic of Germany and, to that end, from moving freely within the territory of the Union.

21 The referring court cannot identify any sufficient justification in that regard. In those circumstances, the Kammergericht (Berlin Higher Regional Court) decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is it compatible with Article 18 TFEU … and Article 45 TFEU … for a Member State to grant the right to vote and to stand as a candidate for election as the workers' representatives in the supervisory body of a company only to those workers who are employed in establishments of the company or in affiliated companies that are within the national territory?'

Consideration of the question referred

Preliminary remarks

22 In order to give a useful reply to the question posed by the referring court, it is necessary to take into account the range of situations affecting the different workers employed by a company belonging to the TUI group.

23 It should also be noted, as the representative of TUI stated at the hearing, that, outside Germany, the TUI group only has establishments with separate legal personality.

The workers of the TUI group employed in a subsidiary established in a Member State other than the Federal Republic of Germany

24 The referring court asks, first of all, in essence, whether Articles 18 and 45 TFEU must be interpreted as precluding Member State legislation, such as that at issue in the main proceedings, which provides that the employees of a group of companies employed in a subsidiary located in the territory of another Member State do not have the right to vote and to stand as a candidate in elections of workers' representatives to the supervisory board of the parent company of that group.

25 According to settled case-law, noted by the Advocate General in point 39 of his Opinion, Article 18 TFEU, which enshrines the general principle of non-discrimination on grounds of nationality, is intended to apply independently only to situations governed by EU law in respect of which the Treaty lays down no specific prohibition of discrimination (judgment of 4 September 2014, *Schiebel Aircraft*, C-474/12, EU:C:2014:2139, paragraph 20 and the case-law cited).

26 Article 45(2) TFEU provides, in favour of employees, for specific rules governing non-discrimination on the basis of nationality in respect of employment conditions.

27 It follows that the situation of employees referred to in paragraph 24 of the present judgment must be examined solely on the basis of Article 45 TFEU.

28 In that regard, it should be noted that, according to settled case-law, the Treaty rules governing freedom of movement for persons cannot be applied to activities which have no factor linking them with any of the situations governed by EU law. Therefore, those rules are not applicable to workers who have never exercised their freedom to move within the Union and who do not intend to do so (see, to that effect, judgment of 1 April 2008, *Government of the French Community and Walloon Government*, C-212/06, EU:C:2008:178, paragraphs 33, 37 and 38).

29 As the Advocate General pointed out in points 49 and 55 of his Opinion, the fact that the subsidiary which employs the workers at issue is controlled by a parent company established in a Member State other than that in which that subsidiary is established is not relevant in order to establish a link with either of the situations contemplated by Article 45 TFEU.

30 It follows that the situation of employees referred to in paragraph 24 of the present judgment does not fall within the scope of Article 45 TFEU.

The workers of the TUI group employed in Germany who leave that employment in order to be employed in a subsidiary belonging to the same group established in another Member State

31 Next, the referring court asks, in essence, whether Articles 18 and 45 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, according to which the workers employed in the establishments of a group located in the territory of that Member State are deprived of the right to vote and to stand as a candidate in elections of workers' representatives to the supervisory board of the parent company of that group, established in that Member State, and, as the case may be, the right to act or to continue to act as a representative on that board, where those workers leave their employment in such an establishment and are employed by a subsidiary belonging to the same group established in another Member State.

32 This refers to the situation of workers who, within the TUI group, make use of their right under Article 45 TFEU. Therefore, as the Advocate General pointed out in point 68 of his Opinion and as follows from paragraphs 25 and 26 of the present judgment, Article 18 TFEU does not apply to that situation.

33 According to the Court's settled case-law, all the provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by Union nationals of occupational activities of all kinds throughout the EU, and preclude measures which might place Union nationals at a disadvantage when they wish to pursue an activity in the territory of a Member State other than their Member State of origin. In that context, nationals of the Member States have in particular the right, which they derive directly from the Treaty, to leave their Member State of origin to enter the territory of another Member State and reside there in order to pursue an activity there. As a result, Article 45 TFEU precludes any national measure which is capable of hindering or rendering less attractive the exercise by Union nationals of the fundamental freedoms guaranteed by that article (see, to that effect, judgments of 1 April 2008, *Government of the French Community and Walloon Government*, C-212/06, EU:C:2008:178, paragraphs 44 and 45, and of 10 March 2011, *Casteels*, C-379/09, EU:C:2011:131, paragraphs 21 and 22).

34 However, primary EU law cannot guarantee to a worker that moving to a Member State other than his Member State of origin will be neutral in terms of social security, since, given the disparities between the Member States' social security schemes and legislation, such a move may be more or less advantageous for the person concerned in that regard (see, by analogy, judgments of 26 April 2007, *Alevizos*, C-392/05, EU:C:2007:251, paragraph 76 and the case-law cited, and of 13 July 2016, *Pöpperl*, C-187/15, EU:C:2016:550, paragraph 24).

35 Therefore, as the Advocate General in essence stated in points 75 and 78 of his Opinion, Article 45 TFEU does not grant to that worker the right to rely, in the host Member State, on the conditions of employment which he enjoyed in the Member State of origin under the national legislation of the latter State.

36 In that regard, it should be added that, in the absence of harmonisation or coordination measures at Union level in the field concerned, the Member States remain, in principle, free to set the criteria for defining the scope of application of their legislation, to the extent that those criteria are objective and non-discriminatory.

37 In that context, EU law does not, in the field of representation and collective defence of the interests of workers in the management or supervisory bodies of a company established under national law, a field which, to date, has not been harmonised or even coordinated at Union level, prevent a Member State from providing that the legislation it has adopted be applicable only to workers employed by establishments located in its national territory, just as it is open to another Member State to rely on a different linking factor for the purposes of the application of its own national legislation.

38 In the present case, the participation mechanism established by the MitBestG, which seeks to involve workers, by means of elected representatives, in the decision-making and strategic bodies of the company, is subject, in this respect, both to German company law and to German labour relations law, the scope of application of which the Federal Republic of Germany is entitled to limit to workers employed by establishments located in its territory, since such a delimitation is based on an objective and non-discriminatory criterion.

39 In the light of the above, the loss of the rights at issue in the main proceedings, incurred by the workers referred to in paragraph 31 of the present judgment, cannot be held to constitute an impediment to the free movement of workers guaranteed by Article 45 TFEU.

40 As regards in particular workers who, after having been granted a mandate as representative, during their period of employment in an establishment located in Germany, to the supervisory board of a German company, leave Germany in order to be employed by a company established in the territory of another Member State, the fact that those workers are required, in such circumstances, to give up the exercise of their mandate in Germany is merely the consequence of the Federal Republic of Germany's legitimate choice to limit the application of its national legislation in the field of participation to workers employed by an establishment located in German territory.

41 In the light of the foregoing considerations, the answer to the question referred is that Article 45 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which the workers employed in the establishments of a group located in the territory of that Member State are deprived of the right to vote and to stand as a candidate in elections of workers' representatives to the supervisory board of the parent company of that group, which is established in that Member State, and as the case may be, of the right to act or to continue to act as representative on that board, where those workers leave their employment in such an establishment and are employed by a subsidiary belonging to the same group established in another Member State.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 45 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which the workers employed in the establishments of a group located in the territory of that Member State are deprived of the right to vote and to stand as a candidate in elections of workers' representatives to the supervisory board of the parent company of that group, which is established in that Member State, and as the case may be, of the right to act or to continue to act as representative on that board, where those workers leave their employment in such an establishment and are employed by a subsidiary belonging to the same group established in another Member State.

[Signatures]