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Judgment of the Court in Case C-677/20 | IG Metall and ver.di

The transformation of a company governed by national law into a European company (SE) must not reduce the participation of trade unions in the composition of the Supervisory Board

Where national law requires, in respect of the company to be transformed, a separate ballot for the election of employees' representatives nominated by the trade unions, that electoral arrangement must be preserved

Two German trade unions, IG Metall and ver.di, dispute before the German courts the arrangements for appointing employees' representatives within the Supervisory Board of the European company SAP, which consists of an equal number of members representing the shareholders and the employees.

The contested arrangements were agreed upon between SAP and the special negotiating body¹ established within that company in the context of its transformation – until then, SAP had been a public limited-liability company established under German law – into a European company (SE). Those arrangements provide that, if the number of the members of SAP SE's Supervisory Board is reduced from 18 to 12, the trade unions may still nominate candidates for a portion of the six seats allotted to the employees' representatives; however, those candidates are no longer elected on the basis of a ballot that is separate from that established for the election of the other members representing the employees. Therefore, it is no longer guaranteed that the employees' representatives within that Supervisory Board will actually include a trade union representative.

The German Federal Labour Court, before which the case has been brought, states that, on the basis of German law alone, it is appropriate to grant the claim of the two trade unions and annul the contested arrangements. According to German law, when an SE is established by means of transformation, the elements of a procedure for the involvement of employees which characterise the employees' influence on decision-making within a company must continue to exist to the same extent.

According to that court, the holding of a separate ballot for the election of candidates nominated by the trade unions has the aim precisely of strengthening the influence of employees' representatives on decision-making within a company, by ensuring that those representatives include persons who are highly familiar with the circumstances and requirements of the undertaking, while at the same time having external expertise.

Having doubts as to whether Directive 2001/86 supplementing the Statute for an SE as regards employees' involvement provides a level of uniform protection that is different from and lower than that provided for under German law and which applies, as the case may be, to all the Member States, the Federal Labour Court has asked the Court of Justice to interpret that directive.

¹ This body represents the employees of the participating companies and concerned subsidiaries or establishments.

Pursuant to that directive, in the case of an SE established by means of transformation, the agreement on arrangements for the involvement of employees applicable to that SE must provide for at least the same level of all elements of employee involvement as those existing within the company to be transformed into an SE ('before and after' principle).

By its judgment delivered today, the Court finds that **the agreement on arrangements for the involvement of employees applicable to an SE established by means of transformation must provide for a separate ballot with a view to electing, as employees' representatives within the SE's Supervisory Board, a certain proportion of candidates nominated by the trade unions, where the applicable national law requires such a separate ballot as regards the composition of the Supervisory Board of the company to be transformed into an SE.**

Accordingly, in the present case, it is in the light of the German law as it applied to SAP before it was transformed into an SE, in particular the German Law on Employee Participation, that it is necessary to assess whether the involvement agreement ensures at least the same level of employee involvement in decision-making within that company after its transformation into an SE.

The Court points out that the **EU legislature took the view** that the great diversity of rules and practices existing in the Member States as regards the manner in which employees' representatives are involved in decision-making within companies made it **inadvisable to set up a single European model of employee involvement applicable to the SE.**

Thus, **the EU legislature sought to eliminate the risk that the establishment of an SE**, in particular by means of transformation, **might lead to a reduction**, or even a disappearance, **of the rights regarding involvement that the employees of the company to be transformed into an SE enjoyed** under national law and/or practice.

The Court states, **in addition**, that **the right to nominate a certain proportion of candidates for election as employees' representatives within a supervisory board of an SE established by way of transformation**, such as SAP, **cannot be reserved to the German trade unions alone but must be extended to all trade unions represented within the SE, its subsidiaries and establishments, in such a way as to ensure that those trade unions are treated equally** in respect of that right.

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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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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