Book Review - Gunther Mävers: *Die Mitbestimmung der Arbeitnehmer in der Europäischen Aktiengesellschaft* (Employee Participation in the European Stock Company – *Societas Europaea*)

Gunther Mävers, *Die Mitbestimmung der Arbeitnehmer in der Europäischen Aktiengesellschaft*, Studien zum ausländischen, vergleichenden und internationalen Arbeitsrecht, Bd. 12. Nomos Verlagsgesellschaft: Baden-Baden 2002, ISBN3-7890-7710-0, 454 pp., € 69,-.

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During the Nice summit on 7 December 2000 – 9 December 2000, European heads of state finally agreed on the statute of the *Societas Europaea* (the European company). After 40 years of discussions, proposals, countless opinions, rejections and further delays, at last an agreement was reached. There is a Council Regulation on the European company's statute itself[1] and a Council Directive on the employee involvement in the *Societas Europaea's* corporate governance[2].

As early as August 2000, Gunther Mävers delivered his doctoral thesis on employee involvement in the SE's corporate governance to Cologne's University Law School. An agreement on the European company seemed almost impossible; therefore he finished his thesis with a couple of proposals to a prospective compromise.

The decision during the Nice summit came completely unpredicted. Has his thesis become superfluous by now?

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[1] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

[2] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute of the European company with regard to the involvement of employees.

https://doi.org/10.1017/S2071832200012281 Published online by Cambridge University Press

The employee's involvement in the *Societas Europaea's* corporate governance became the most disputed issue in terms of the European company. Mävers gives a large amount of background information and tells the entire history; both essential in order to evaluate the law currently in force.

First of all, he introduces his readers to corporate governance and to employee involvement in those Member States that most influenced today's law. Germany's legislation has not only been trend-setting in time, it was also trend-setting in the range of workers' participation in Europe.

Mävers begins by presenting basic structures of German corporate law. Contrary to English corporate law, under which companies are equipped with a board of directors[3] - described as a one-tier system - German companies are set up in a two-tier system with two different boards: The managerial board[4] is in charge of the everyday management of the company. The separate supervisory board employs or dismisses the managerial board's members, fixes the managers' salaries, monitors the other board's corporate governance and annual accounts and makes the very fundamental decisions. The managerial board is the company's only organ entitled to represent the company to outside parties; the supervisory board is empowered to take actions inside the company.

Initially, employee participation in the supervisory board of German companies had been voluntarily introduced by companies of the coal and the iron and steel industries directly after World War II. Only a few years later, in 1951, when the highly disputed *Montan-Mitbestimmungsgesetz* (Act on Employees' Participation in Corporate Governance in Coal, Iron and Steel Industries) was passed by parliament, the models established voluntarily were transformed into statutory law. Since that time, employees and shareholders are represented equally in the supervisory board of companies in the coal, iron and steel industries, while the chairperson is a neutral person, elected by majority vote of both, employee representatives and shareholders. The *Montan-Mitbestimmungsgesetz* 1951 is applicable to enterprises of the coal, the iron and steel industries, constituted as public limited companies, private limited companies and incorporated cost-book mining companies employing more than 1,000 employees. However, since it is not the managerial but the supervisory board where employee participation takes place, employees neither directly elect their executive managers nor directly decide on the corporate governance. Still do employees control their executive managers indirectly and thus influence the decisions on company policies.

[3] Verwaltungsrat, conseil d'administration.

[4] Vorstand, directoire.

https://doi.org/10.1017/S2071832200012281 Published online by Cambridge University Press

Only one year later employee participation in the supervisory board was extended to other industries. However, since the political climate had changed already, under the *Betriebsverfassungsgesetz* (Works Constitution Act) 1952 employee participation in the supervisory board remained far below the level of representation reached in the coal, iron and steel industries: only a third of the supervisory board members are employee representatives. As the *Montan-Mitbestimmungsgesetz* 1951 the *Betriebsverfassungsgesetz* 1952 applies only to companies of a specific legal form (public limited companies, private limited companies, incorporated cost-book companies under mining law, co-operatives and mutual insurance companies) employing a certain minimum number (at least 500) of employees. Contrary to the *Montan-Mitbestimmungsgesetz* 1951 the scope of application of the *Betriebsverfassungsgesetz* 1952 is not limited to certain branches or industries.

In the years after 1952 the trade unions tried intensively to persuade the legislator to extend the model of the *Montan-Mitbestimmungsgesetz 1951* to all areas of industry. Finally, in 1976 a compromise was reached and a third model of employee representation in the supervisory board was established: in companies falling under the *Mitbestimmungsgesetz* 1976 the supervisory board consists of an equal number of employee representatives and shareholder representatives. Contrary to the model in the coal, iron and steel industries, there is no neutral chairperson provided for. In case of a tie, a second ballot has to be held. If this second ballot again results in a tie the chairperson of the supervisory board has the casting vote. The chairperson is to be elected by a two-third majority of all members of the supervisory board. If the necessary majority is not attainable, the chairperson is elected by the shareholders only. The *Mitbestimmungsgesetz* 1976 is applicable to enterprises of a specific legal form (public limited companies, partnerships limited by shares, private limited companies, incorporated cost-book mining companies, and co-operatives) employing at least 2,000 employees.

The reader is also informed about the other influential concepts from the Netherlands, France, Great Britain and Sweden. The German model, however, was and currently is the furthest reaching model of employee participation in corporate governance. It also served as a model for the first proposals for employee participation in the *Societas Europaea*. Consequently, the author starts his analysis from the point of view of the aforementioned German system but exclusively focuses on employee involvement in the company's competent decision-making entities.

As soon as the initiative to introduce an EC-wide legal framework for companies had been taken by the Commission and Member State governments, Member States fought for the greatest possible export of their own national corporate law. A first major conflict arose from the suggestion to introduce a compulsory one- or two-tier system, a second about employee involvement in corporate governance. The solu-

tion to both disputes largely depended on the legal technique the European company was approached with; either a basic structure with additional provisions by each Member State or a uniform and complete corporate law body.

Mävers starts with the Commission's first proposals on a *Societas Europaea* of 1970 and 1975. He also presents other activities of the Commission concerning the issue of employee participation in corporate governance. He later reviews the 1989 and 1991 proposals. Each of those legal acts is analyzed in the same way and scrutinized with regard to the same questions. Following a single analytical structure certainly contributes to the clear arrangement of the historic outline.

The other side of the same coin consists in somewhat clumsy, awkward passages: The author relates many opinions on the discussed legal acts by trade unions, employers' associations, the Economic and Social Committee, Parliament etc. Albeit, opinions on a political decision like employee participation lead to politician-like answers: "In general, we welcome and look upon this proposal favourably, but in particular…" Mävers more or less hides behind press releases and leaves his readers to official statements. His readers are left without the essentials and without interpretation of the statements. Given arguments lack a background in which they can be fitted.

Of course, background information is very hard to get due to secrecy of Council deliberations and a lack of accessible documents. However, readers long to know the exact reasons and details for why the proposals and initiatives have not been passed. Many questions remain unanswered: Did some governments' attitude to employee involvement change in the light of altering political majorities at home? What scope was left to effect a compromise? Which alliances have been formed during the consultations? Which provisions were undisputed? Who raised the final objection and why?

Relying on Mävers' study, readers are able to answer a number of these questions. After several failures, the Commission declined to enforce a uniform corporate law. The Commission, for the sake of compromise, worked towards a European framework with enough flexibility for national preferences. Since then, European companies were allowed to choose between a one- or two-tier system. Still, employee participation remained to be the key to the *Societas Europaea's* approval or dismissal.

Allegedly all German governments fought for their high level of employee participation against Great Britain and Spain, who refused this kind of involvement. Or as

Mävers puts it, each government tried to export their own concept instead of striving for a common level as a compromise.[5]

Diplomatic work towards an agreement meant slight changes of the disputed passages. Particularly from the 1997 *Davignon*-Report onwards, the Luxembourg, British, Austrian and German presidencies each adjusted the pending proposals to the respective negotiations. Diplomats started to alter contents and partially worked with references to other provisions within the same legal act. At this stage, readers run the risk of losing their overview and cannot perceive how the initial concept is softly bending to one direction or another. Unfortunately, readers might miss a clear thread to follow because Mävers limits himself to outlines of the current wordings and refers to previous chapters. However, is there a thread in the content to be followed at all?

The author still gives the best in-depth illustration of the legislation process I have read. The book highlights a classical example of European legislation. Spanish governments had always opposed any kind of employee co-determination. But they also needed French help to fight ETA-terrorism, since terrorists often used France as a safe harbour for planning and preparing bombings in the Basque Provinces. In the end, the French President Chirac and the Spanish Prime Minister Aznar traded the approval of the present kind of employee involvement for closer co-operation fighting terrorism.[6] How can a book on a legislation process like this be expected to be better structured and arranged than the legislation process itself? The author fought very hard to give the best presentation possible.

But what was finally decided?

A European company can be founded in four different ways: (1) by merger of at least two existing national companies from at least two different Member States ("SE by merger")[7], (2) by foundation of a holding of at least two existing companies from at least two Member States ("holding-SE")[8], (3) by formation of a subsidiary of at least two existing companies from at least two different Member States ("sub-

[5] Page 372.

[6] Klaus J. Hopt, Europäische Zeitung für Wirtschaftsrecht, 13. Vol. 2002, page 1, left column.

[7] Art. 2 (1), Artt. 17 – 31 Reg. (EC) 2157/2001.

[8] Art. 2 (2), Artt. 32 - 34 Reg. (EC) 2157/2001; see hereto Oplustil, Selected problems concerning formation of a holding SE (*societas europaea*), in: 4 German Law Journal No. 2 (1 February 2003), available at: http://www.germanlawjournal.com/article.php?id=230.

sidiary-SE")[9] and (4) by conversion of an existing national company with an existing subsidiary in another Member State ("SE by conversion")[10].

The provisions concerning the formation of a European company, its structure in form of a one- or two-tier system, its general meeting, annual accounts, and liquidation are included in the Regulation. However, since the Regulation does not establish one uniform model of a European company but offers a variety of models from which the Member States have to choose, the Regulation in many respects needs implementation into national law. The Regulation as well as the Directive dealing with employee participation have to be implemented into national law by 8 October 2004.[11]

Employee involvement in corporate governance in the European company is a very complex matter. The Directive distinguishes between information and consultation on the one hand and participation on the other. In the context of the Directive, information means the informing of the body representative of the employees and/or employees' representatives by the organ of the SE on questions which *inter alia* concern the SE, while consultation means the establishment of a dialogue and an exchange of views between the body representative of the employees and/or employees' representatives and the competent organ of the SE. Participation, eventually, entails the influence of the body representative of the employees or the employees' representatives in the affairs of a company by way of the right to elect or appoint some of the members of the company's supervisory or administrative organ or the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ.

The Directive, however, does not regulate in what matter employees are to be informed, consulted or allowed to participate. Since the differences between the different models of employee involvement in the different Member States were too huge to be bypassed, the Directive only provides a procedural framework which shall lead to information, consultation and participation. As a consequence, the level of information, consultation and participation, may vary from company to company.

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[9] Art. 2 (3), Artt. 35, 36 Reg. (EC) 2157/2001.

[10] Art. 2 (4), Art. 37 Reg. (EC) 2157/2001.

[11] Art. 9 (1) c Reg. (EC) 2157/2001; see, for an extensive discussion, Teichmann, The European Company – A Challenge to Academics, Legislators and Practitioners, in: 4 German Law Journal No. 4 (1 April 2003), available at: http://www.germanlawjournal.com/article.php?id=259.

As far as information and consultation are concerned, the SE-Directive follows the model of Directive 94/45/EC on European Works Councils. European companies shall be fitted with a negotiated involvement of employees in the *Societas Europaea's* corporate governance. Negotiations take place between a special negotiating body representative of the employees[12] on the one hand and the participating companies' competent organs on the other hand. An agreement on information and consultation has to be concluded in any case. The parties to the negotiation are however free to agree on their preferred kind and extent of information and consultation. Contrary to companies falling under the European Works Council Directive, an agreement on employee participation may additionally be concluded. If a European company is formed by means of conversion, 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 European company. Any reduction of the existing level of workers' participation requires a majority by two thirds within the special negotiating body.[13] In case an amicable agreement cannot be reached within 6 months (or 12 months at the very latest), a certain level of information, consultation and, under certain circumstances, participation, as laid down in the Directive's annex, shall apply.[14] Member States shall take adequate precautions against a misuse of European companies aimed at minimization of employee involvement. The annex entails the most disputed provisions of the Directive: In brief, the level of employee participation in the *Societas Europaea*'s corporate governance is designed not to fall behind the highest level of the participating companies.[15]

Is this to be the end to all ambitious plans for another boost to the common market? Does the European company in its current form help to make the European Union the most competitive economic area in the world? Will German companies be denied access to European companies by prospective partners in order to evade German levels of workers' involvement?[16] Will German companies be able to benefit from the foreshadowed € 30 billion annual savings[17] by transformation into a *Societas Europaea*?

[12] Art. 3 (2) Dir. 2001/86/EC.

[13] Art. 3 (4) Dir. 2001/86/EC.

[14] Art. 7 Dir. 2001/86/EC.

[15] Para 18 Dir. 2001/86/EC.

[16] Frankfurter Allgemeine Zeitung, 17.6.2003, page 18.

[17] Mario Monti, Wertpapiermitteilungen, Vol. 1997, page 607.

"The proof of the pudding is in the eating." Time will tell about the *Societas Europaea*'s success or failure. Undoubtedly, the legislative technique to count on subsidiary national corporate law promotes legislatory competition. Maybe we will soon experience a competition for best practice in corporate law. Germany's 103-year-old civil code bears legal competition between land charge[18] and mortgage charge[19] and thus fosters prudent decisions between the two. What some may welcome as a step towards better legislation, is what others might fear as a "Delaware-effect". As a matter of fact, there is no *Societas Europaea as such*, there are as many different European Companies as Member States.

Will European companies first register in Spain or Great Britain without any employee participation at all and later on transfer the registered office to another Member State?[20] Mävers warns of insisting on too high of a standard on workers' involvement. Those who do so, might after all end up with nothing at all. Was this potential result of the legislative process just "bad luck" or actually intended by the governments who officially fought hard in order to safeguard employee involvement?

After all, when will we first get on touch with European companies in practice? The Regulation will become effective by 8 October 2004. A national Act to transfer the Directive is currently undergoing the usual legislative procedure. Much more than employee involvement, the crucial obstacle is the taxation of the European company. Taxation of a formation will have to comply with the provisions of Directive 90/434/EC. However, at present there are no legislative proposals in order to solve the taxation problems.

Gunther Mävers' final proposals to a (then seemingly impossible) agreement came remarkably close to the actual provisions. His summary on the legislative process is anything but superfluous!

[18] Grundschuld, § 1191 German Civil Code.

[19] Hypothek, § 1113 German Civil Code.

[20] Art. 8 Reg. EC No 2157/2001.