

Curbing negative integration: German supervisory board codetermination does not restrict the common market

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Case C-566/15 *Konrad Erzberger v. TUI AG*, EU:C:2017:562

Martin Höpner*

Abstract

TUI v Erzberger is a landmark decision on the normative meaning and scope of the fundamental freedoms. Mr Erzberger complained that the territoriality principle as the linking factor of German supervisory board codetermination violates European law. He argued that lack of voting rights among the employees of foreign subsidiaries was in violation of the ban on discrimination in Article 18 TFEU. He further argued that the possible loss of voting rights when domestic employees move across borders within the same company group makes the move less attractive and therefore violates the free movement of workers in Article 45 TFEU. The Appeals Court Berlin referred the case to the Court of Justice of the European Union, which ruled that the German regulation does not violate European law. The ruling went further than should have been necessary in order to reject the plaintiff's legal view. It stated, first, the legality of the territoriality principle as the linking factor of national labour law as long as no European secondary law rules otherwise. Second, the Court raised fundamental insights about the telos of Article 45 TFEU and stated that its purpose is not to neutralise the heterogeneity of the social regulations of the Member States.

Keywords

Social Europe, Codetermination, European market freedoms, Negative integration, Territoriality principle

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*Max-Planck-Institut für Gesellschaftsforschung, Germany

Corresponding author:

Martin Höpner, Max-Planck-Institut für Gesellschaftsforschung, Paulstraße 3, Köln 50676 Germany.

E-mail: hoepner@mpifg.de

I. Introduction

Political scientists and lawyers alike have described European integration as a process with a built-in tendency towards liberalisation. This political non-neutrality, according to the seminal work of Scharpf, does not stem from particular ‘left’, ‘right’, or ‘liberal’ preferences of the European elites, but from the asymmetry between the speeds and potentials of two different integration modes: positive and negative integration.¹

The transfer of market-restricting regulations to the European level – positive integration – always requires common political action. But heterogeneous states find it difficult to agree on common standards and the internal heterogeneity of the European Union (EU) has increased with each new round of enlargement.² Core areas of the national production and welfare regimes, such as taxation and labour law, have therefore turned out to be resistant to harmonisation attempts until today. Employees’ board-level codetermination is a striking example. The respective national regulations and traditions are so different³ that unique solutions can hardly succeed. All harmonisation projects have therefore resulted in political deadlock and this is unlikely to change in the foreseeable future.⁴

By contrast, the removal of actual or assumed common market barriers – negative integration – does not necessarily require common political action. It can be enforced judicially. Since its pathbreaking *Dassonville*⁵ decision, the Court of Justice of the EU (CJEU) has interpreted the European market freedoms⁶ as bans on restriction rather than bans on discrimination. According to

1. F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999); F. Scharpf, ‘The Joint-Decision Trap Revisited’, 44 *Journal of Common Market Studies* (2006), p. 845. See also D. Ashiagbor, ‘Collective Labor Rights and the European Social Model’, 3 *Law and Ethics of Human Rights* (2009), p. 223; D. Grimm, *The Constitution of European Democracy* (Oxford University Press, 2017); M. Höpner and A. Schäfer, ‘Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting’, 66 *International Organization* (2012), p. 429; C. Joerges, ‘Europe’s Constitution in Crisis and the Emergence of a New Constitutional Constellation’, 15 *German Law Journal* (2014), p. 985; C. Joerges and F. Rödl, ‘Informal Politics, Formalised Law and the Social Deficit of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval’, 15 *European Law Journal* (2009), p. 1; S. Schmidt, *The European Court of Justice and the Policy Process* (Oxford University Press, 2018); P. de Sousa, ‘Negative and Positive Integration in EU Economic Law: Between Strategic Denial and Cognitive Dissonance?’, 13 *German Law Journal* (2012), p. 979; W. Streeck, ‘Public Power Beyond the Nation-State: The Case of the European Community’, in R. Dore and D. Drache (eds.), *States against Markets. The Limits of Globalization* (Routledge, 1996), p. 22.5. An example for a more optimistic view is Kelemen, who argues that negative integration usually encourages positive integration: R. Kelemen, ‘The Court of Justice of the European Union in the Twenty-First Century’, 79 *Law and Contemporary Problems* (2016), p. 117, p. 125.
2. M. Höpner and A. Schäfer, ‘Integration among Unequals: How the Heterogeneity of European Varieties of Capitalism Shapes the Social and Democratic Potential of the EU’, *Max Planck Institute for the Study of Societies Discussion Paper* No. 12/5 (2012), http://www.mpifg.de/pu/mpifg_dp/dp12-5.pdf.
3. A good overview can be found in A. Conchon, ‘Board-level Employee Representation Rights in Europe’, *European Trade Union Institute Report* No. 121 (2011), <https://www.etui.org/Publications2/Reports/Board-level-employee-representation-rights-in-Europe>.
4. P. Windolf, ‘Codetermination and the Market for Corporate Control in the European Community’, 22 *Economy and Society* (2006), p. 137.
5. Case 8/74 *Dassonville*, EU:C:1974:82.
6. I use the terms ‘market freedoms’ and ‘fundamental freedoms’ interchangeably in this article. Note that ‘fundamental freedoms’ must not be confused with ‘fundamental rights’; see the details in D. Ashiagbor, 3 *Law and Ethics of Human Rights* (2009), p. 223, 236; N. de Boer, ‘Fundamental Rights and the EU Internal Market: Just how Fundamental are the EU Treaty Freedoms – A Normative Enquire Based on John Rawls’ Political Philosophy’, 9 *Utrecht Law Review* (2013), p. 148; S. Gregor, ‘Why Market Freedoms are no Fundamental Rights: A Competence Approach’, 6 *Croatian*

the latter principle, every national regulation that restricts the transnational exercise of one of the fundamental freedoms, even if the regulation is discrimination-free, is in potential violation of European law and must pass the *Cassis de Dijon*⁷ (or *Gebhard*⁸) test. This move had far-reaching consequences. Interpreted as individual rights for restriction-free market access, the market freedoms could from now on be used to attack a much wider range of disguised inner-European protectionisms.

This advantage, however, came at a price. The ban on discrimination of foreign market participants did not run the risk of being used for the liberalisation of purely internal regulations. The principle of non-restriction, by contrast, blurs the line between the protection of the transnational market access on which the common market relies, on the one hand, and liberalisation of internal affairs with only modest significance for international trade, on the other hand.⁹ Restrictions are defined as matters that hinder or make the exercise of market freedoms less attractive.¹⁰ Consider the social market economy to which the Treaty of Lisbon refers¹¹ as a network of interrelated institutions, organisations and practices that transcend economic behavior in order to bring it in line with societal needs, as regimes in which markets are systematically restricted. It follows logically that the principle of non-restriction, if interpreted extensively, systematically clashes with the social market economy or, put differently: with the promise of a ‘Social Europe’.

The principle of non-restriction therefore requires strict and clear barriers against over-interpretation. The contours of such barriers, however, have remained unclear until today. In order to fall within the scope of the fundamental freedoms, contested regulations and practices still require a transnational aspect. But most regulations with internal purpose *also* affect the transnational exercise of economic freedoms, which makes the requirement of the transnational dimension a blurry barrier at best. The proportionality test has not contained the liberalising potential of the fundamental freedoms, too. As a consequence, 40 years after *Dassonville* and *Cassis de Dijon*, we still witness an ongoing struggle between two competing manifestations of the European market freedoms: fundamental freedoms as individual rights for transnational market access or as individual rights for internal liberalisation.

The *Erzberger* case on the territoriality principle as the linking factor of German supervisory board codetermination regulation was part of this struggle. If the foreign ownership of a firm was sufficient to let national labour law fall within the scope of the freedom of establishment in *AGET Iraklis*,¹² why not argue that the German codetermination law falls within the range of the ban of restrictions of the fundamental freedoms? Why not complain that the absence of active and passive voting rights to the employee seats of codetermined supervisory boards of transnational corporations, which applies to foreign employees, violates the principle of non-discrimination? And, if this is so, why not also complain that the threat of becoming the victim of such discrimination, if

Yearbook of European Law and Policy (2010), p. 1; T. Kingreen, ‘Grundfreiheiten’, in A. Bogdandy and J. Bast (eds.), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge* (Springer, 2009), p. 705.

7. Case 120/78 *Cassis de Dijon*, EU:C:1979:42.

8. Case C-55/94 *Gebhard*, EU:C:1995:411.

9. T. Kingreen, in A. Bogdandy and J. Bast (eds.), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge*, p. 705.

10. Case C-55/94 *Gebhard*, para. 37.

11. Article 3(3) TEU.

12. Case C-201/15 *AGET Iraklis*, EU:C:2016:972.

employees intend to move across borders, makes the exercise of the free movement of workers less attractive?

From the point of view of codetermination opponents, testing the respective potentials of negative integration was at least worth a try – and as we will see below (Section 2), our plaintiff, TUI shareholder Mr Erzberger, got pretty far indeed. He found a court that requested the Court of Justice of the EU for a preliminary ruling under Article 267 of the Treaty on the Functioning of the EU (TFEU). Also, fortunately and perhaps surprisingly, the Commission backed his legal opinion (Section 3). His success story, however, ended here. Not only did the Court reject the plaintiff's and the Commission's legal interpretation in the case at hand, both the Court and the Advocate General also used the opportunity for clarifications regarding the purpose of the free movement of workers and generally underlined the need to curb over-interpretations of the fundamental freedoms (Section 4). The decision should therefore also be read as an inspiration for the ongoing EU reform debate (Section 5).

2. Factual and legal background

TUI is the parent company of a group of tourism companies.¹³ The headquarter is located in Germany. The group employs approximately 50,000 workers, approximately 10,000 of them domestically.¹⁴ Because TUI is within the scope of the 1976 Codetermination Act (the *Mitbestimmungsgesetz*),¹⁵ the parent company has a codetermined supervisory board with 10 of the 20 supervisory board seats distributed to the employee side.¹⁶ The employee representatives are being chosen by the means of an election procedure. According to the dominant legal view inside Germany, the German legislator cannot order supervisory board elections outside its own territory. This implies that workers in other Member States than Germany lack both active and passive voting rights, and that a worker who moved from a domestic to a foreign part of the TUI group would lose his voting right.¹⁷ It also implies that an elected employee representative would lose his mandate if he moved to a foreign part of the company group. Both European harmonisation and coordination of the national codetermination regulations are absent so far, which is due to the heterogeneity of the respective traditions and practices on the Member State level. A European regulation of possible collusions between the territorial scopes of the national codetermination laws does not exist.

13. On the following, see Case C-566/15 *Konrad Erzberger v. TUI AG*, EU:C:2017:562, para. 3-21; Opinion of Advocate General Saugmandsgaard Øe in case C-566/15 *Konrad Erzberger v. TUI AG*, EU:C:2017:347, para. 5-24.

14. Case C-566/15 *Konrad Erzberger v. TUI AG*, para. 12. The CJEU noted that neither TUI nor members of the TUI group have dependent branches in member states other than that in which they have their headquarters. Given that TUI is a globally operating business operator, this may come as a surprise. The decisive point here is the specification of the constellation under analysis: The legal dispute is about transnational corporations with independent legal statuses within the respective countries, not about foreign dependent branches without independent legal statuses.

15. On the historical evolution of German codetermination and its expression of a 'social consensus' between capital and labour, see E. McGaughey, 'The Codetermination Bargains: The History of German Corporate and Labor Law', 23 *Columbia Journal of European Law* (2016), p. 135.

16. See in particular para. 7 of the *Mitbestimmungsgesetz* on the composition of the supervisory board and para. 10 *Mitbestimmungsgesetz* on the election procedure.

17. This exclusion does not follow from the wording of the *Mitbestimmungsgesetz* but from the dominant interpretation of the Act in the light of the principle of territoriality. See the details in H. Fuchs, R. Köstler and L. Pütz, *Handbuch zur Aufsichtsratswahl. Wahlen der Arbeitnehmervertreter nach dem Mitbestimmungsgesetz und dem Drittelbeteiligungsgesetz*. 6. Auflage (Bund, 2016), p.34, 38.

Konrad Erzberger is a TUI shareholder who argues that the composition of the TUI supervisory board constitutes an infringement of Articles 18 (ban on discrimination) and 45 (free movement of workers) TFEU. According to the plaintiff, TUI's application of the Codetermination Act violates the European ban on discrimination because the lack of voting rights discriminates against workers outside Germany, while at the same time it violates the ban on restrictions of the free movement because it makes the inner-company group move of workers across borders less attractive. The proceedings were brought at first instance before the district court (*Landgericht*) Berlin,¹⁸ which on 12 May 2015 ruled that the German Codetermination Act does not infringe European law and that the supervisory board of TUI is therefore lawfully composed. Mr Erzberger appealed against that decision to the Appeals Court (*Kammergericht*), which referred the case to the CJEU. The referring court raised doubts on whether the German practice is in line with the ban on discrimination on the grounds of nationality as well as with the free movement of workers. It referred the following question to the CJEU:

Is it compatible with Article 18 TFEU (principle of non-discrimination) and Article 45 TFEU (freedom of movement for workers) for a Member State to grant the right to vote and stand as a candidate for the employees' representatives in the supervisory body of a company only to those workers who are employed in establishments of the company or in companies of the group within the national territory?¹⁹

The fact that the case was heard by the Grand Chamber indicates that the CJEU president perceived it to be of wider importance for the interpretation of European law. Approximately 100 participants attended the public hearing held on 24 January 2017. The language of the proceedings was German, and so is the language of the bulk of so-far published professional articles on the case.²⁰ Written and oral observations were submitted by the plaintiff Mr Erzberger, TUI, the TUI works council, the trade unions ver.di and Cockpit, the European Commission, the governments of Germany, France, Luxembourg, the Netherlands and Austria, and the European Free Trade Authority's Surveillance Authority. TUI, its works council, the trade unions and all national governments expressed the view that the German practice was in line with European law, while

18. The German Company Act (*Aktiengesetz*), para. 97-99 enables shareholders to engage in so-called status proceedings (*Statusverfahren*) in which they can legally question the composition of the supervisory board.

19. Case C-566/15 *Konrad Erzberger v. TUI AG*, para. 21.

20. For commentaries in English, see: T. Keijzer, O. Oost and M. Ninneken, 'The ECJ Erzberger Case: An Analysis of German Co-Determination and EU Law', 14 *European Company Law Journal* (2017), p. 217; B. Mulder, 'The Law Concerning the Election of Employees' Representatives in Company Bodies', 8 *European Labour Law Journal* (2017), p. 96. For commentaries in German, see: J. Heuschmid and N. Munkholm, 'Zur Unionsrechtskonformität der Unternehmensmitbestimmung', 28 *Europäische Zeitschrift für Wirtschaftsrecht* (2017), p. 419; J. Heuschmid, 'Unternehmensmitbestimmung verstößt nicht gegen Unionsrecht', *Hugo-Sinzheimer-Institut Newsletter* No. 3/17 (2017), <http://www.hugo-sinzheimer-institut.de/hsi-newsletter/europaeisches-arbeitsrecht/2017/newsletter-032017.html>; T. Klein and D. Leist, 'Nationales Arbeitsrecht und Negative Integration', 16 *Zeitschrift für europäisches Sozial- und Arbeitsrecht* (2017), p. 468; F. Rödl, 'Diskriminierende Mitbestimmung?', 71 *Juristenzeitung* (2016), p. 980; F. Rödl, 'Wichtige Einsichten: Territorialanknüpfung des Arbeitsrechts und allseitige Kollisionsnormen mit Unionsrecht vereinbar', 11 *Europäische Zeitschrift für Arbeitsrecht* (2018), 88; E. Schanze, 'Die Pluralität der Mitbestimmungslösungen in Europa', 62 *Die Aktiengesellschaft* (2017), p. 573. In addition to the professional attention to the case, the newspaper coverage was extensive as well, which underlines that *Erzberger v. TUI* was perceived as a landmark case in Germany.

the European Free Trade Authority's Surveillance Authority sided with the legal opinion of Mr Erzberger.

3. Two observations by the European Commission

Among the observations brought forward, the written and oral observations by the Commission are of particular interest. Its written observation, dating from 9 February 2016 and leaked soon after,²¹ came as a shock to the defenders of German supervisory board codetermination. The Commission argued that the election procedure to the employee seats of supervisory boards falls within the scope of Article 45(2) TFEU, due to its reference to 'other conditions of work and employment'. Furthermore, it pointed out that the possibility of a loss of the active and passive voting rights when workers move from Germany to other EU Member States constitutes a transnational matter sufficient for activation of the ban on restrictions.²² Since the contested regulation discriminates EU foreigners and makes the move across borders less attractive, the Commission argued, it has to pass the *Gebhard* test;²³ and given that the restriction cannot be justified, the regulation violates European law.²⁴ In short, the Commission fully sided with the legal view of the plaintiff.

In the view of the observers from both sides, the Commission's unpredicted input changed the parameters of the dispute. First, the written observation showed that the request for a preliminary ruling from the German Appeals Court and the legal view of the plaintiff were not as obscure as some had argued. Whether or not on solid legal ground, it was obviously at least defensible. Second, both sides were aware of the fact that the Commission's observations are significant predictors of the final judgments.²⁵ Third, the observation had political implications beyond the *Erzberger* case. Since the *Viking* and *Laval* judgments,²⁶ the European Federation of Trade Unions had asked for a re-balancing of market freedoms and regulations with social purpose,²⁷ and the Commission had responded by announcing that it would increase the weight of 'Social Europe' on its agenda.²⁸ Right during the *Erzberger* dispute, the Juncker Commission had also prepared its 'European Pillar of Social Rights', presented on 26 April 2017. But obviously, these announcements had no visible impact on the Commission's legal interpretation of the reach and scope of the market freedoms: Its written observation sent no signal for a more restricted interpretation of their normative content. As a consequence, the defenders of German codetermination increased their

21. The document is in German and labeled with the number sj.j(2016)745503.

22. European Commission, document sj.j(2016)745503, para. 16.

23. *Ibid.*, para. 22.

24. *Ibid.*, para. 29.

25. According to Michael Malecki's analysis of around 1,500 preliminary rulings, the CJEU follows the Commission's legal opinions in 75% of the cases. See M. Malecki, 'Do ECJ Judges All Speak With the Same Voice? Evidence of Divergent Preferences from the Judgments of Chambers', 19 *Journal of European Public Policy* (2012), p. 59.

26. Case C-438/05 *Viking Line*, EU:C:2007:772; Case C-341/05 *Laval un Partneri Ltd*, EU:C:2007:809.

27. See European Trade Union Congress, 'Proposal for a Social Progress Protocol', *ETUC* (2008), <https://www.etuc.org/proposal-social-progress-protocol>.

28. See for example the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 2 July 2008 - Renewed Social Agenda: Opportunities, Access and Solidarity in 21st Century Europe, COM(2008) 412 final.

lobbying efforts²⁹ and hoped that the Commission would correct its observation in the oral hearing on 24 January 2017.

In fact, the correction of the Commission's observation in the oral hearing came as much as a surprise as the content of its initial observation. But the details are important here. By no means did the Commission ask the Court to rule the way it did. By contrast, the Commission's agent reinforced the view that Article 45 TFEU applied to the regulation in question and that the German practice caused a restriction of the free movement of workers. Up to this point, the entire argumentation remained in line with the written observation and with the plaintiff's legal view.

The difference between both observations was that the oral observation recognized employees' codetermination as a matter of general interest. The Court, the Commission's agent argued, should oblige the German government to remove the restriction of the free movement of workers, but should leave it to the national courts to decide whether the given regulation could be replaced by a less restrictive procedure without dismantling employees' supervisory board codetermination entirely; if this turned out to be not possible, the Commission argued, the given election procedure should be considered proportionate (see further details on the proportionality aspect in Section 4.C.). Given that the Commission fully stuck to its view that the German practice restricted workers to move across borders, the title of the press release that the Commission published directly after the oral hearing had ended was, to say the least, strange: 'Commission defends national rules on employee participation rights before the Court of Justice of the EU'.³⁰

4. The judgment and the Advocate General's Opinion

Because the Court's judgment from 18 July 2017 largely followed the Opinion of the Danish Advocate General Henrik Saugmandsgaard Øe delivered on 4 May 2017, I will in the following stick to the judgment and only additionally refer to the Advocate General's Opinion where necessary. Both the Court and the Advocate General analyzed two constellations separately: the possible discrimination of employees of the TUI group employed in subsidiaries established in Member States outside Germany (4.A.) and the possible restriction of the freedom of movement of workers employed domestically (4.B.). I will in addition pay attention to potential justifications of the possible – but, according to the judgment, absent – discriminations and restrictions (4.C.). Comments and discussion of open questions will be incorporated into the subsequent sections.

A. Workers employed in subsidiaries outside Germany

The Court analyzed this constellation in two steps. It first made clear that Article 45 TFEU contains the more specific ban on discrimination concerning the matters within its scope. It is then a *lex specialis* to Article 18 TFEU and therefore rules out the application of the latter. Article 45(2) TFEU states that the freedom of movement entails the abolition of any discrimination with respect to 'other conditions of work and employment'. Since, the Court argued, the election procedure to

29. For example, the trade union-related Hans Böckler Foundation held a large conference on 'Co-determination in Europe' on 21 December 2016 in Luxembourg.

30. European Commission, 'Statement: Commission Defends National Rules on Employee Participation Rights before the Court of Justice of the EU', *European Commission* (2017), http://europa.eu/rapid/press-release_STATEMENT-17-141_en.htm.

codetermined supervisory boards is part of these ‘other conditions’,³¹ the constellation must be examined solely on the basis of the *lex specialis*.³²

In the second step, the Court discussed whether Article 45 TFEU puts a ban on the regulation under analysis. The rules governing the freedom of movement, it argued, are not applicable to workers who have never exercised their freedom to move across EU borders and who, in the case at hand, do not intend to do so. The transnational matter necessary to activate the ban, it concluded, is not given.³³ The Advocate General discussed this question in much more detail and argued that the fact that the subsidiary which employs the workers at issue is controlled by a parent company located in another Member State – a transnational matter with regard to company law indeed – does not constitute a link to the matters within the scope of Article 45 TFEU.³⁴ As a consequence, the Court concluded, the analyzed constellation does not fall within the respective scope and no ban applies.³⁵

So far, this argument is straightforward and in line with most expectations. But it is irritating that the analysis of the constellation ended here. If Article 45 TFEU applies, it suppresses the application of the less specific ban on discrimination laid down in Article 18 TFEU. But because the constellation, according to the Court, is not covered by Article 45 TFEU, wouldn’t it have been necessary to go back to the non-specific ban on discrimination and therefore to test the German regulation against Article 18 TFEU? How can Article 45 TFEU rule out the application of Article 18 TFEU if the constellation lacks links to Article 45 TFEU? The problem becomes even more apparent in the light of the wordings of the Advocate General, who wrote that there is ‘no need for the Court to give a ruling with regard to Article 18 TFEU if Article 45 TFEU *were applicable*’³⁶ as well as that ‘Article 45 *does not apply*’³⁷ (my emphases).

The only possible solution to this puzzle is that the Court – and the Advocate General – used the term *applicability* with two different meanings here. Article 45 TFEU *does* apply – and, according to the Court, conclusively rules which kinds of discrimination are allowed and which are not. Article 45, in other words, rules that *any* European ban on discrimination does not apply if employees do not move across borders; or, as Rödl puts it,³⁸ it allows the Member States to let their labour law end at their borders.

Why did the Court choose this peculiar way of rejecting the accusation of an unlawful discrimination? As some observers noted,³⁹ it would have been easily possible to perform a test against Article 18 TFEU and to arrive at the very same conclusion. Remember that the ban within Article 18 TFEU applies only ‘within the scope of application of the Treaties’ and that no European harmonisation or coordination of company board codetermination regulations has ever occurred. But any respective minimum coordination would then have re-activated, or would re-activate in

31. Case C-566/15 *Konrad Erzberger v. TUI AG*, para. 26; Opinion of Advocate General Saugmandsgaard Øe in Case C-566/15 *Konrad Erzberger v. TUI AG*, para. 44.

32. Case C-566/15 *Konrad Erzberger v. TUI AG*, para. 27.

33. *Ibid.*, para. 28.

34. *Ibid.*; Opinion of Advocate General Saugmandsgaard Øe in Case C-566/15 *Konrad Erzberger v. TUI AG*, para. 49-55.

35. Case C-566/15 *Konrad Erzberger v. TUI AG*, para. 29.

36. Opinion of Advocate General Saugmandsgaard Øe in Case C-566/15 *Konrad Erzberger v. TUI AG*, para. 40.

37. *Ibid.*, para. 45.

38. F. Rödl, 11 *Europäische Zeitschrift für Arbeitsrecht* (2018), p. 88, 93.

39. B. Mulder, 8 *European Labour Law Journal* (2017), p. 96, 103; F. Rödl, 11 *Europäische Zeitschrift für Arbeitsrecht* (2018), p. 88, 91.

the future, the applicability of Article 18 TFEU. The Court intended, by contrast, to state something more general and more significant for future cases: that the territoriality principle of national labour law is consistent with European primary law.⁴⁰ For this more fundamental reason, a codetermination law that does not cover subsidiaries outside a country's own territory does not constitute a violation of the European ban on discrimination.

B. Workers employed in domestic subsidiaries

The CJEU was also asked whether the fact that workers would be deprived of their active and passive voting rights if they moved from German to foreign subsidiaries of the same company group constitutes an unlawful obstacle to the free movement of workers. In response, the Court stated that a transnational matter was given in the constellation under analysis, with the implication that the answer had to be provided in the light of Article 45 of the TFEU alone.⁴¹ The possible loss of the voting right and the possible loss of the mandate in the case of a supervisory board member moving to a foreign subsidiary, the Court decided, does not qualify to constitute an impediment to the free movement.⁴² Although this outcome alone is not very surprising, the details are – again – remarkable.

Among the previous CJEU rulings on Article 45 TFEU, C-190/98 *Graf*⁴³ comes closest to the constellation under analysis. In *Graf*, the CJEU had to decide whether the loss of a right for compensation on termination of employment equal to a two months' salary constituted an obstacle to the free movement of workers. The Court answered this in the negative, arguing that the assumption that such a regulation could prevent workers from moving across borders was too 'hypothetical',⁴⁴ 'uncertain',⁴⁵ and 'indirect'.⁴⁶ Parts of the literature and some of the plaintiff's opponents had therefore asked the Court to decide the *Erzberger v. TUI* case in the spirit of *Graf*.⁴⁷ The CJEU, however, engaged in no analysis of the regulation's likely impact on the workers' willingness to move across borders at all and opted for a much more general solution. This is the wording:

[P]rimary 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 (...). Therefore (...), 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.⁴⁸

40. Ibid.

41. Case C-566/15 *Konrad Erzberger v. TUI AG*, para. 32.

42. Ibid., para. 39.

43. Case C-190/98 *Graf*, EU:C:2000:49.

44. Ibid., para. 24.

45. Ibid., para. 25.

46. Ibid.

47. In the literature: J. Heuschmid and N. Munkholm, 28 *Europäische Zeitschrift für Wirtschaftsrecht* (2017), p. 419, p. 423; B. Mulder, 8 *European Labour Law Journal* (2017), p. 96, 103. In the oral hearing, the agents of TUI, of the trade union ver.di, and of the German and Austrian governments suggested answering the quest for a preliminary ruling in the light of *Graf*.

48. Case C-566/15 *Konrad Erzberger v. TUI AG*, para. 34 and 35.

The Court moved on by re-stating that the EU legislator has so far refrained from any harmonisation or coordination measures in the field concerned. In such a constellation, the Member States remain free to set the criteria for defining the scope of application of their legislation, as long as the criteria are objective and non-discriminatory.⁴⁹ Article 45 TFEU does therefore not prevent Germany from providing that its legislation is applicable only to workers employed by establishments located in its national territory, just as it is open to other EU members to rely on different linking factors for the purposes of the application of their respective legislations.⁵⁰ As a consequence, the possible loss of the voting rights at issue cannot be held to constitute an impediment to the free movement of workers.⁵¹

This answer is more fundamental than the one provided in *Graf*. Rather than speculating about the likelihood with which the territoriality principle of the application of codetermination law may prevent workers from moving across borders, it adopted a *teleological* view about the *overall purpose* of Article 45 TFEU: It does not, according to the Court, aim at guaranteeing equal working conditions across borders. The practical implication is that difficulties arising from the heterogeneity of national labour laws do not constitute unlawful obstacles to Article 45 TFEU *even if* their impacts on the workers are less uncertain and indirect than in the *Graf* case. Note that the Court did not and could not derive this insight from the wording of the *Dassonville* test on restrictions of the fundamental freedoms. The clarification rather curbs the range of constellations to which this test can be legitimately applied.

C. Potential justifications

Because there was no restriction to be justified, the Great Chamber remained silent about whether a possible restriction of the free movement caused by Germany's codetermination regulation would have passed the *Gebhard* test. The Advocate General, by contrast, elaborated extensively on whether and why a restriction of Article 45 AEUV, if it were given in the case at hand, would have passed the justification test. The details deserve our attention.

In order to appreciate the Advocate General's analysis, let us first consider where a narrow interpretation of the *Gebhard* test might lead. The first question would be whether the regulation is justified by overriding reasons of the public interest – a relatively unproblematic step because employee protection qualifies as such a reason.⁵² But in order to pass the *Gebhard* test, measures also have to achieve their objective and, in particular, not go beyond what is necessary to achieve that objective.⁵³ The codetermination regulation under analysis would therefore not pass the test if its aim could also be achieved in a less restrictive way. In order to perform the test, the Advocate General (or the Court) would therefore have had to assess the potentials of application of the German election procedure beyond German borders.

A detailed and complex analysis would have been required here. TUI and the German government argued in their written and oral statements that Germany cannot apply the respective

49. *Ibid.*, para. 36.

50. *Ibid.*, para. 37.

51. *Ibid.*, para. 39.

52. Beyond others: Para. 17 of the Community Charter of the Fundamental Social Rights of Workers, to which Article 151 TFEU refers. See Opinion of Advocate General Saugmandsgaard Øe in Case C-566/15 *Konrad Erzberger v. TUI AG*, para. 104.

53. Case C-55/94 *Gebhard*, para. 37.

procedure outside its own territory. Is this correct? Let us for the sake of the thought experiment assume that the German legislator can oblige domestic headquarters to ask the managements of foreign subsidiaries to organize elections for the supervisory boards of the headquarters. Even if this were true, the problem would be by no means solved.

Why is that? Consider that the election procedure to the German supervisory board is remarkably complicated and demanding.⁵⁴ Not the local managements but the local employees, with help from their trade unions, have to initiate and execute the elections. The preparation of the elections takes the respective election boards up to one year. They need to assess who is authorized to vote and who is not by, for example, distinguishing between workers and so-called ‘executive employees’ (*leitende Angestellte*), a concept that is unknown in many countries other than Germany. For that purpose, the managements have to pass sensible data to the election boards, a procedure that is in line with German data protection rules but may collide with the respective rules of other countries. If conflicts arise, foreign courts within the respective jurisdictions would have to settle them by applying not their law, but a German codetermination law.

As we see, those who argued that the German procedure as it stands lacks the capacity of being applied to foreign subsidiaries very probably had a valid point. But the test following from a strict reading of the *Gebhard* formula would not necessarily end here. Does the ban on restrictions, we could further ask, permit EU Member States to opt for a codetermination model that is so complicated that it cannot be transnationalized? What if another, simpler way of electing supervisory board members, open for transnationalisation and therefore open for being applied without restricting the free movement of workers, was available in theory? On the other hand, however: Can Germany, on the basis of a test regarding the justification of restrictions of market freedoms, be obliged to deprive German workers of their right to organize the election procedure for their representatives in the supervisory boards, just in order to make the application to foreign company group parts more easy?⁵⁵

To make a long story short – this narrow reading of the proportionality test, precisely the one which the Commission had suggested in its oral statement (compare Section 3), is not how the Advocate General proceeded. The codetermination regulation under analysis, he argued, is an essential element of the German social order⁵⁶ and therefore justified by a legitimate objective.⁵⁷ He considered that legislation, ‘in accordance with the national social, economic and cultural particularities’,⁵⁸ proportionate to that objective and not going beyond what is necessary to achieve that objective. The maintenance of such regulation, he argued, is justified, ‘in so far as *it reflects*

54. Third Electoral Regulation implementing the Law on Employee Participation of 27 May 2002 (*Dritte Wahlordnung zum Mitbestimmungsgesetz*) was most recently amended by regulation of 26 August 2015. Note that the most important handbook just on the election procedure of the employee representatives (not on the proceedings of the supervisory board!) is a book with 555 pages: H. Fuchs, R. Köstler and L. Pütz, *Handbuch zur Aufsichtsratswahl. Wahlen der Arbeitnehmervertreter nach dem Mitbestimmungsgesetz und dem Drittelbeteiligungsgesetz. 6. Auflage*. On the employee representatives in the supervisory boards in general: R. Köstler, M. Müller and S. Sick, *Aufsichtsratspraxis. Handbuch für Arbeitnehmervertreter im Aufsichtsrat. 10., überarbeitete Auflage* (Bund, 2013).

55. In the oral hearing on 24 January 2017, much time went into these details, often caused by questions raised by the Advocate General. It could therefore be assumed that he would largely solve the case on the basis of the proportionality test in his written Opinion.

56. Opinion of Advocate General Saugmandsgaard Øe in Case C-566/15 *Konrad Erzberger v. TUI AG*, para. 103.

57. *Ibid.*, para. 106.

58. *Ibid.*, para. 107.

certain legitimate economic and social policy choices that are a matter for the Member States' (my emphasis).⁵⁹

This is a remarkably autonomy-friendly and democracy-friendly reading of the proportionality test. It does not ask whether the particular, potentially restrictive aspect of the measure is without alternative and therefore mandatory. It rather identifies the broader body of regulation as part of the general order about which the legislator has to have wide democratic discretion. Rather than putting the democratic choice under justification pressure, this interpretation of the justification test asks whether the room of democratic choice among several non-mandatory alternatives is justified. It is not difficult to appreciate this reading as appropriate, given the political sensibility of the regulation under analysis. But note that the Advocate General could only perform this step by moving away from the narrow wording of the *Gebhard* formula and by implicitly raising the question about the very purpose of the justification test instead, just as the Court did when it asked about the *telos* of Article 45 TFEU.

5. Political implications

Its implications for 'Social Europe' make *Erzberger v. TUI* an important decision. Given the heterogeneity of the social regulations within the EU, it would be irresponsible to fuel false expectations with regard to the prospects of social harmonisation. A European company-level codetermination regulation is, as things stand today, as unrealistic as European-wide collective agreements on payments and working conditions or, for example, a common social security system. If 'Social Europe' shall have any purposeful meaning, it has to proceed differently: by the means of a more effective European protection of social regulations where they manifest themselves empirically, that is, at the Member State level.

As we have seen in detail, *Erzberger v. TUI* offers significantly more impulses for such protection than necessary in order to reject Mr Erzberger's and the Commission's attempts to declare the German election procedure to the supervisory boards of transnational firms an obstacle to the common market. With regard to the potential discrimination of the employees of foreign subsidiaries, the Court could, after having stated that the ban within Article 45 AEUV does not apply, easily have performed an additional test against Article 18 AEUV and could have derived the very same conclusion. Similarly, with regard to the potential restriction of the free movement of domestic workers, the Court could have easily responded in the spirit of *Graf*. The Court's preliminary ruling, however, opted for a set of more fundamental answers and thereby signaled its willingness to define limits to the narrowly interpreted *Dassonville* formula.

Article 45 TFEU, the Court made clear in the first part of its ruling, generally allows Member States to choose the territoriality principle as the linking factor for the purpose of the application of their labour law.⁶⁰ An additional test against the ban on discrimination in Article 18 TFEU does not take place. As long as no European regulation rules otherwise, the choice of the linking factor is a purely internal matter. The existence of transnational firm groups and the possible move of workers between their units do neither change the non-applicability of the ban within Article 45 TFEU nor the fact that no additional test against Article 18 TFEU takes place.

59. *Ibid.*, para. 111.

60. F. Rödl, 11 *Europäische Zeitschrift für Arbeitsrecht* (2018), p.88, 93.

The recent *AGET Iraklis* decision⁶¹ illustrates the overall implications of this clarification. In *AGET Iraklis*, the CJEU had to decide whether a Greek mass dismissals regulation was in violation to the freedom of establishment in Article 49 TFEU. The Court declared the Greek legislation unlawful because it failed the proportionality test.⁶² Although no one had moved across borders, the foreign ownership of *AGET Iraklis* qualified as a transnational matter that moved the constellation within the scope of Article 49 TFEU. As Klein and Leist have convincingly pointed out,⁶³ the *AGET Iraklis* decision deserves critical review in the light of the insights raised in *Erzberger v. TUI*.

The second part of the decision has equally important implications. Primary EU law, the Court declared, cannot guarantee that moving across borders has neutral implications for the worker who moves, even if the resulting lack of neutrality makes the move less attractive. Put otherwise, a social regulation can by no means be an unlawful obstacle to the common market just because it does not exist everywhere else in the EU. The aim of the fundamental freedoms, we can conclude, is not to neutralize the heterogeneity of the Member States' social regulations by the means of negative integration.

This clarification does not arise from an interpretation of the wording of the *Dassonville* formula but, more fundamentally, restricts the range of cases to which it can be legitimately applied. Consider why the clarification became necessary in the first place: If the freedom of movement was still a ban on direct and indirect discrimination on the ground of nationality, the problem that the Court tried to curtail here would not have arisen.⁶⁴ The teleological insight that the purpose of the free movement of workers cannot be to neutralize the heterogeneity of the Member States' social regulations is without alternative, one might argue. But couldn't – and shouldn't – the very same teleological argument have been raised in the highly disputed *Viking* and *Laval* cases? Is it, the CJEU could and should have asked, really the purpose of the fundamental freedoms to subordinate trade union demands to a proportionality test and thereby to alter the sensitive balance of power between capital and labour?⁶⁵

Erzberger v. TUI may give way to a more autonomy-protective and democracy-protective reading of the European market freedoms.⁶⁶ With regard to spelling out the implications for future cases, however, the CJEU could have done better. The peculiar combination of the general applicability of Article 45 TFEU although no one has moved across borders, the non-applicability of the specific ban within it, and the nevertheless remaining non-applicability of Article 18 TFEU, is remarkably weakly explained in the *Erzberger* decision. With respect to the reasons for the lack of applicability of Article 18 TFEU, the Court has chosen to remain entirely silent. The respective explanations will hopefully be delivered in further decisions.

61. Case C-201/15 *AGET Iraklis*.

62. See the details in K. Polomarkakis, 'A Tale of two Approaches to Social Europe: The CJEU and the Advocate General drifting apart in Case C-201/15 *AGET Iraklis*', 24 *Maastricht Journal of European and Comparative Law* (2017), p. 423.

63. T. Klein and D. Leist, 16 *Zeitschrift für europäisches Sozial- und Arbeitsrecht* (2017), p. 468; F. Rödl, 71 *Juristenzeitung* (2016), p. 980.

64. F. Rödl, 11 *Europäische Zeitschrift für Arbeitsrecht* (2018), p. 88, 95.

65. C. Joerges and F. Rödl, 15 *European Law Journal* (2009), p. 1; S. Sciarra, 'Viking and Laval: Collective Labour Rights and Market Freedoms in the Enlarged EU', 10 *Cambridge Yearbook of European Legal Studies* (2007), p. 563; D. Seikel, 'Class Struggle in the Shadow of Luxembourg. The Domestic Impact of the European Court of Justice's Case Law on the Regulation of Working Conditions', 22 *Journal of European Public Policy* (2015), p. 1166.

66. The same holds true for the Advocate General's reading of the proportionality test (compare Section 4.C.).

Pure speculation about the likely impact on future decisions, however, under-appreciates the significance of the decision. *Erzberger v. TUI* signals, to put it this way, a *Keck*⁶⁷ moment and raises the fundamental question about the very purpose, the *telos*, of the European market freedoms. This is a genuinely political question.⁶⁸ Remember in this context that the EU is in the mid of a reform discussion.⁶⁹ Until today, this discussion has been largely focused on the distribution of political competences between the EU and its members. I therefore propose to read *TUI v. Erzberger* as an impulse to widen the EU reform discussion to the possibility of a political – rather than purely judicial – steering of the European fundamental freedoms.

In both of their two dimensions, the fundamental freedoms are accessible to political steering. This holds true, first, for their range of applicability. Just as the Member States had excluded public employees from the range of applicability of the free movement of workers in Article 45(4) TFEU, the treaty partners are today free to specify regulations and practices such as collective labour law for which the bans on restriction within certain or all fundamental freedoms shall not apply. Bast et al.⁷⁰ and Heuschmid⁷¹ have made detailed suggestions regarding the possible wordings and positioning of such clarifications. Accessibility to political steering is, second, also given with regard to the normative meaning of the market freedoms. The governments are free to write into the treaties that certain or all of them shall be bans on discrimination rather than restriction.⁷² They are also free to differentiate between policy fields and practices and decide, for example, that collective labour law and the collective action of the social partners shall only be covered by a European ban on discrimination on the ground of nationality.⁷³

In sum, careful reading of *Erzberger v. TUI* should, therefore, remind us that the matters the CJEU has put on the table are potential objects of political deliberation and political choice, rather than objects in the discretion of the European judges alone.⁷⁴ A judicially as well as political-economically informed research agenda on the dynamics of European integration can help by offering orientation.

67. Joined cases C-267/91 and C-268/91 *Keck and Mithouard*, EU:C:1993:905.

68. Compare, for example, D. Ashiagbor, 3 *Law and Ethics of Human Rights*. (2009), p. 223; C. Barnard, 'Restricting Restrictions: Lessons for the EU from the US', 68 *Cambridge Law Journal* (2009), p. 575, see in particular, p. 577 and p. 605; F. Scharpf, 'De-Constitutionalization and Majority Rule: A Democratic Vision for Europe', *Max Planck Institute for the Study of Societies Discussion Paper No. 16/14* (2016); P. de Sousa, 13 *German Law Journal* (2012), p. 979, 1009.

69. See in particular European Commission, 'White Paper on the Future of Europe. Reflections and Scenarios for the EU27 by 2025', *European Commission* (2017), https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf.

70. J. Bast, F. Rödl and J. Terhechte, 'Funktionsfähige Tarifvertragssysteme als Grundpfeiler von Binnenmarkt und Währungsunion', 48 *Zeitschrift für Rechtspolitik* (2015), p. 230.

71. J. Heuschmid, 'Der Arbeitskampf im EU-Recht', in W. Däubler (ed.), *Arbeitskampfrecht. Handbuch für die Rechtspraxis* (Nomos, 2018), p. 162, in particular, p. 109.

72. Among the proponents of such a reading of the market freedoms is Kingreen. See T. Kingreen, in A. Bogdandy and J. Bast (eds.), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge*, p. 705.

73. Note that the range of reform options is actually wider. See the distinction between five reform options in M. Höpner, 'Grundfreiheiten als Liberalisierungsgebote? Reformoptionen im Kontext der EU-Reformdebatte', *Max Planck Institute for the Study of Societies Discussion Paper No. 17/10* (2017), http://www.mpifg.de/pu/mpifg_dp/2017/dp17-10.pdf.

74. Of course, most of the respective steering options require treaty changes and therefore unanimity on the part of the member state governments. One may argue that such reforms are therefore as unrealistic as far-reaching positive integration projects in sensitive areas such as labor law and taxation (see Section 1). Their actual chances are, however, better because they do not require agreement on common standards.