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The ECJ *Erzberger* Case: An Analysis Of German Co-determination And EU Law

Titiaan Keijzer, Olivier Oost & Marnix van Ginneken[*]

German co-determination law regarding large companies mandates that employees elect half of the members of the Supervisory Board. However, only employees working in Germany are involved in this process, whilst those outside Germany are not. On November 3, 2015, the European Court of Justice received a request from the Appeals Court Berlin for a preliminary ruling in the Erzberger-case, whether this system complies with EU law, specifically the provisions prohibiting discrimination on grounds of nationality (Art. 18 TFEU) and/or restrictions concerning the free movement of employees (Art. 45 TFEU). On July 18, 2017, the European Court of Justice ruled that the current German co-determination system does not violate EU law. In this article, we critically analyse this decision. Furthermore, we explore what the consequences and the options for the German legislator would have been if the ECJ had found that the German system does violate EU law.

1. Introduction

Both in the German and the Dutch corporate governance systems, employees are considered important stakeholders. Both systems contain two elements of co-determination: Works Councils (Dutch: "ondernemingsraad", German: *Betriebsrat*) relating to an enterprise ("onderneming", organisational unit), and, under certain circumstances, employee representation in the Supervisory Board of the (group) company. Regarding the latter, the Dutch structure regime ("structuurregeling") provides that Works Councils of 'large' companies[1] are entitled to nominate up to one third of the members of the Supervisory Board ("Raad van Commissarissen").[2] Similarly, German co-determination law (*Mitbestimmungsrecht*) grants half of the seats of the Supervisory Board (*Aufsichtsrat*) to employee representatives. However, according to § 7 Mitbestimmungsgesetz (MitbestG), only employees working at companies or subsidiaries and branches thereof based in Germany are allowed to cast their vote or to stand for election. In the *Erzberger*-case, the Appeals Court (*Kammergericht*) Berlin requested a preliminary ruling from the European Court of Justice (hereafter: ECJ) to clarify whether the German system complies with European Union (hereafter: EU) law, specifically with the provisions prohibiting discrimination on grounds of nationality (Art. 18 of the Treaty on the Functioning of the European Union (hereafter: TFEU) and/or restrictions concerning the free movement of employees (Art. 45 TFEU).[3] It concerns *indirect* (*de facto*) discrimination, since the wording of § 7 MitbestG does not discern between German and non-German employees *as such*.[4] In Germany, *Erzberger* was considered a landmark case.[5] The ECJ was of the same opinion, as the case was heard by the Grand Chamber, on January 24, 2017. Following the conclusion of Attorney-General (hereafter: A-G) Saugmandsgaard Øe of May 4, 2017, the ECJ on July 18, 2017 held that the current German co-determination system does not violate EU

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[1] This could both concern the NV ("naamloze vennootschap") and the BV ("Besloten Vennootschap").

[2] Laid down in S. 2:152-164a DCC concerning the PLC and S. 2:262-274a DCC for the Limited; see J. van Bekkum et al., 'Corporate Governance in the Netherlands', *Electronic Journal of Corporate Law* 2010/3, at http://www.ejcl.org.

[3] See Kammergericht Berlin 16 October 2015, 14 W 89/15 and the request for a preliminary ruling from the Kammergericht Berlin (Germany) lodged on 3 November 2015 – C-566/15 (*Konrad Erzberger / TUI AG*).

[4] On the distinction between direct and indirect discrimination, see C. Barnard, *The Substantive Law of the EU*, Oxford: Oxford University Press 2010, p. 239-41. See also ECJ 21 June 1974, ECLI:EU:C:1974:68, C- 2/74 (*Reyers*).

[5] See e.g. J. Jahn, 'Kulturrevolution im Aufsichtsrat', at http://blogs.faz.net/; J.F. Tornau, 'Ungeheurer Eingriff', *Magazin Mitbestimmung* 2015, p. 40: 'Noch ist rein gar nichts entschieden. Man muss das betonen, wenn selbst der seriösen "Frankfurter Allgemeinen Zeitung" (FAZ) vor lauter Aufregung der Konjunktiv verloren ging.'

law.[6] In this article, we describe the German co-determination system and critically analyse the judgement of the ECJ. Furthermore, we explore what the consequences and the options for the German legislator would have been if the ECJ had found that the German system violates EU law.

2. German co-determination law

2.1 System

As noted, German co-determination law consists of two elements: employee involvement through a Works Council and employee representation on the Supervisory Board.[7] Provisions regarding the Works Council can be found in the Betriebsverfassungsgesetz (BetrVG). According to § 1 BetrVG, a *Betrieb* (enterprise; a company can consist of several enterprises) is obliged to set up a Works Council when it – in the ordinary course of business – has more than five employees with voting rights, three of which are eligible for election.[8] The Works Council has certain rights, including several information and approval rights.[9] Provisions regarding the Supervisory Board are laid down in the MitbestG (governing companies with more than 2,000 employees) and the Drittelbeteiligungsgesetz (DrittelbG, governing companies with less than 2,000 employees). In this article, we focus on employee representation on the Supervisory Board and the rights of the Works Councils related to this. We do not discuss other rights of the Works Council, which are also substantial.

2.2 Composition of the Supervisory Board

An *Aktiengesellschaft* (AG)[10] is obliged to constitute a Supervisory Board, regardless of its size and the number of employees (§ 95 Aktiengesetz (AktG)). The *Gesellschaft mit beschränkter Haftung* (GmbH)[11] only is required to set up a Supervisory Board when it reaches certain size-related requirements. Otherwise, instituting a Supervisory Board is voluntary.[12] In this article, we focus on the AG, as most companies with cross-border economic activities, including listed companies, are an AG.[13] The Supervisory Board of an AG should consist of at least three members. The articles of association may prescribe a higher number, dividable by three.[14] The amount of issued share capital determines the *maximum* size of the Supervisory Board. If less than € 1,5 million, the maximum number of members is 9; between € 1,5 and € 10 million, 15; above € 10 million, 21.[15]

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[6] See Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, on which H.-J. Hellwig, 'German Corporate Co-Determination of Employees and EU Law – The Opinion of the Advocate-General of the CJEU of 4 May 2017' (2017), at www.law.ox.ac.uk; *NZG* 2017, p. 703, *EuZW* 2017, p. 403, *EuZW* 2017, p. 419, case note by J. Heuschmid & N. Videbaek Munkholm, *ZIP* 2017, 961; see also ECJ 18 July 2017, ECLI:EU:C:2017:562, on which *EWiR* 2017, 489, *ZIP* 2017, 1413; E. McGaughey, 'Good for Governance: Erzberger v TUI AG and the Codetermination Bargains' (2017), at www.law.ox.ac.uk. .

[7] Comparing one and two tier boards, see e.g. W.J.L. Calkoen, *The One-Tier Board In The Changing And Converging World Of Corporate Governance A Comparative Study Of Boards In The UK, The US And The Netherlands* (diss. Rotterdam), Deventer: Kluwer 2012; see also P. Davies et al., *Corporate Boards in Law and Practice: A Comparative Analysis in Europe*, Oxford: OUP 2013.

[8] Employees are eligible for election when they have worked at the *Betrieb* for more than six months, § 8 BetrVG. For active voting rights, see § 7 BetrVG. We abstain from discussing the provisions regarding *Tendenzebetriebe* (religious or political organizations for which different rules apply, see § 118 BetrVG).

[9] See R. Richardi et al., *Betriebsverfassungsgesetz*, München: C.H. Beck 2016, § 80, nr. 49-50, § 99, nr. 203-207.

[10] Which is typically considered the equivalent of the NV. See e.g. Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies, art. 1.

[11] Usually held tob e the equivalent of the BV. In this sense, see e.g. K. A. M. van Vught, 'Arbitrage van besluiten van rechtspersonen. Fremdkörper of geheimtip?', *Ondernemingsrecht* 2016/101.

[12] See A. Baumbach/A. Hueck/M. Beurskens et al., *GmbHG*, München: C.H. Beck 2013, § 52, nr. 23; see also G. Spindler in *Münchener Kommentar GmbHG*, München: C.H. Beck 2016, § 52, nr. 9-12.

[13] Furthermore, the DrittelbG is limited in scope, as it merely governs companies with more than 500 employees (or less than 500 employees, when the company was established before 10 August 1994), § 1 (1) DrittelbG.

[14] § 95 AktG.

[15] See M. Habersack in *Münchener Kommentar zum Aktiengesetz*, München: C.H. Beck 2014, § 95, nr. 9-15; see also Hüffer/Koch 2016, § 95, nr. 2-5.

The size of the Supervisory Board is subsequently determined by the number of employees. As mentioned above, the DrittelbG applies to 'smaller' companies (less than 2,000 employees), whilst the MitbestG governs 'larger' companies (more than 2,000 employees). For calculating these numbers, a group approach is adopted,[16] which we will discuss later on. The MitbestG has priority over the AktienG.[17] § 4 DrittelbG mandates that one third of the Supervisory Board should consist of employee representatives, which are directly elected (§ 5 DrittelbG)]. The MitbestG requires half of the Supervisory Board to be employee representatives. If the company includes less than 10,000 employees, the Supervisory Board consists of 12 members (of which 6 are employee representatives). At 10,000 to 20,000 employees, this number is 16 (8 employee representatives); at more than 20,000, 20 (10).[18] In companies consisting of less than 8,000 employees, the representatives are (again) directly elected (§ 9 (2) MitbestG); if there are more than 8,000 employees, indirect elections, centred around the *Betriebe,* are being held (§ 9 (1) and 10 MitbestG). Most authors agree that currently, employees outside Germany do not count when determining whether the MitbestG or the DrittelbG applies.[19] Active and passive voting rights are only granted to employees of companies and subsidiaries or branches thereof based in Germany, but not to employees of subsidiaries and branches abroad. This restriction cannot be found in the wording of § 7 MitbestG. Instead, this (prevailing) approach is derived from the *travaux préparatoires* of § 7 MitbestG and the territoriality principle, which purportedly prohibits the German legislator from intervening in foreign jurisdictions.[20] There are cases in which the trade unions used their powers to nominate a representative of foreign (even non-EU) employees, but that is certainly not common practice.[21]

The members of the Supervisory Board elect a chairman and a deputy-chairman (§ 27 MitbestG). A majority of two thirds is required; if this majority is not reached in the first round of voting, a second round is held. There, shareholder representatives elect the chairman and employee representatives the deputy-chairman (by simple majority).[22] As a result, the chairman is usually a shareholder representative; after all, they can force a second vote. This is not without consequences, as the chairman has a casting vote in deadlock situations.[23] Use of this casting vote is, however, uncommon as consensual decision-making is preferred.[24] In case the Supervisory Board includes 6

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[16] See § 5 MitbestG, on which Oetker, § 5, nr. 7; see also Gach, § 5, nr. 22-23.

[17] The DrittelbG does not. Otherwise, the Supervisory Board would consist of half members. See furthermore § 95 AktienG and § 1 (2) (1) DrittelbG. We exclude the Montanmitbestimmungsgesetz (which specifically governs steel and coal companies). German co-determination law has a long (and somewhat political) history. On this, see E. McGaughey, 'The Codetermination Bargains: The History of German Corporate and Labour Law', *Columbia Journal of European Law* 2016, p. 135; see also W. Bayer, 'Die Erosioin der deutschen Mitbestimmung', *NJW* 2016, 1930; J. Shearman, 'Corporate Governance: An Overview of the German Aufsichtsrat', *Journal of Business Law* 1995, p. 517.

[18] §7 (1) MitbestG.

[19] See e.g. M. Winter, E. Marx & N. De Decker, 'Zählen und wählen Arbeitnehmer nach deutschem Mitbestimmungsrecht?', *Neue Zeitschrift für Arbeitsrecht (NZA)* 2015, p. 1111. This also raises questions in relation to EU Law – see notably the *Deutsche Börse* cases: Landgericht Frankfurt am Main 16 februari 2015, 3-16 O 1/14 (*Deutsche Börse I*), *AG* 2014, p. 629, *DB* 2015, p. 912, case note by C.H. Seibt, *EWiR* 2015, p. 245, case note by T. Wansleben, *GWR* 2015, p. 209, case note by A. Josupeit & C. Von Eiff, *NZG* 2015, p. 683, *ZIP* 2015, p. 634 case note by R. Krause, and (somewhat cynical) P. Hanau, 'Prof. Riebles Einsatz für die Mitbestimmung', *ZIP* 2015, p. 1147; see also (on appeal) Oberlandesgericht Frankfurt am Main 17 juni 2016 (*Deutsche Börse II*), 21 W 91/15, *AG* 2016, p. 793, *NZG* 2016, p. 1186, *ZIP* 2016, p. 2223.

[20] *BT-Drucksache* 7/4845, 10 March 1976, p. 4. On the territoriality principle, see H.-J. Hellwig & C. Behme, 'Gemeinschaftsrechtliche Probleme der deutschen Mitbestimmung', AG 2009, p. 261; see also Winter, Marx & De Decker 2015; Ulmer/Habersack/Henssler 2012, § 3, nr. 47-50.

[21] One notable example is DaimlerChrysler. See Ulmer/Habersack/Henssler 2012, § 3, nr. 41.

[22] § 27 (2) MitbestG. See P. Ulmer/M. Habersack/M. Henssler, *Mitbestimmungsrecht*, München: C.H. Beck 2012, § 27, nr. 7-8; see also B. Gach 2014 in *Münchener Kommentar zum Aktiengesetz*, München: C.H. Beck 2014, § 27, nr. 5-11.

[23] § 29 (2) MitbestG, see e.g. Gach 2014, § 29, nr. 9-14; see also H. Oetker in *Erfurter Kommentar zum Arbeitsrecht,* München: C.H. Beck 2017, § 29, nr. 3-8.

[24] See M. Roth, 'Corporate Boards in Germany', in: P. Davies et al., *Corporate Boards in Law and Practice: A Comparative Analysis in Europe*, Oxford: OUP 2013, p. 334.

or 8 employee representatives, 2 of them should be nominated by trade unions. When the Supervisory Board consists of 10 employee representatives, this applies to 3 of them (§ 7 (2) MitbestG). The remaining positions are taken by the employees of the company themselves. At least one of them should be part of higher management.[25] Arguably, because of the casting vote attributed to the chairman, the shareholder representatives have a slight advantage over the employee representatives in the composition of the Supervisory Board.

2.3 Defective composition of the Supervisory Board

Because of the complexity of the regulations described above and their interdependence, it is not always evident whether the Supervisory Board has been composed in accordance with the law. Stakeholders, which notably includes the Management Board (*Vorstand*), individual members of the Supervisory Board and individual shareholders, can file a request for evaluating of the composition of the Supervisory Board. This is the so-called *Statusverfahren*-procedure of § 97-99 AktienG.[26] Furthermore, § 21 MitbestG enables employees (at least 3) and the Works Council to initiate a procedure at the *Arbeitsgericht* regarding defects in the election of representatives of a *Betrieb*. The violation of essential regulations concerning active and passive voting rights is required, in order for such a procedure to be successful.[27] These procedures overlap, which influenced national German litigation prior to the *Erzberger*-case at the ECJ considerably (as it was argued that shareholder who had invoked § 97-99 AktienG were required to initiate their proceedings at the *Arbeitsgerichte*). However, in our analysis, we will abstain from comparing § 97-99 AktienG with § 21 MitbestG, focusing on the substantive relation between German co-determination and EUs law.

3. German co-determination law and European Law

3.1 Preliminary observations

The Appeals Court Berlin deemed an interpretation of § 7 MitbestG consistent with EU law impossible,[28] despite the fact that the current (prevailing) approach is not derived from the wording of § 7 MitbestG but only from its *travaux préparatoires* in conjunction with the territoriality principle. In the Erzberger case before the ECJ, written pleadings were not only received from the litigating parties, but also from Vereinte Dienstleistungsgewerkschaft and Vereinigung Cockpit (trade unions), the German and the Austrian government and the European Commission (EC). At the oral hearing of January 24, 2017, observations were made by the German, French, Luxemburg, Dutch and Austrian governments, the EFTA Surveillance Authority and the EC. While the EC, in its written pleadings, considered § 7 MitbestG discriminatory, it maintained in the oral hearings that a potential violation *may* be justified to protect the interests of employees.[29] Such conflicting signals highlight the complexity and importance of the *Erzberger*-case.

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[25] § 15 (1) MitbestG, which refers to the *leitende Angestellte* of § 5 (3) BetrVG: this includes, among others, those who are authorized to hire and fire personnel. For the DrittelbG, see § 3 (1)DrittelbG and Ulmer/Habersack/Henssler 2012, § 3, nr. 4.

[26] See Goette & Habersack in *Münchener Kommentar zum Aktiengesetz*, München: C.H. Beck 2014, § 98, nr. 12-23.

[27] See Gach 2014, § 21, nr. 4-11.

[28] See Kammergericht Berlin 16 October 2015, 14 W 89/15, *AG* 2015, p. 872, *DB* 2015, p. 2689, A. Verse, 'Die Entwicklung des europäischen Gesellschaftsrechts', *EuZW* 2016, p. 330, *EWiR* 2015, p. 761, case note by J.C. Giedinghagen & S. Angelé, *GWR* 2015, p. 521, case note by M. Schröter, F. Rödl, 'Diskriminierende Mitbestimmung?', *JZ* 2016, p. 980, Winter, Marx & De Decker 2015, J. Heuschmid & D. Ulber, 'Unternehmensmitbestimmung auf dem Prüfstand des *EUgH*', *NZG* 2016, p. 102, *ZIP* 2015, p. 1291, *ZIP* 2015, p. 2172. See also (in first instance) Landgericht Berlin 1 June 2015, 102 O 65/14, *AG* 2015, p. 587, *DB* 2015, p. 1588, case note by C.H. Seibt, *EWiR* 2015, p. 635, case note by M. Winstel, *ZIP* 2015, p. 1291.

[29] However, the EC advocated the expansion of co-determination rights towards employees in the EU. See Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, footnote 63. The discussions of the oral hearing of January 24, 2017 can be retrieved through J. Heuschmid & D. Hlava, 'Verfahren vor dem EuGH', *NZA* 2017, p. 429; see also Hellwig, *supra* note 6. After the *Erzberger*-hearing, the EC released a press statement, arguing it had defended German co-determination rules. See http://www.europa.eu/rapid/press-release_STATEMENT-17-141_en.htm.

As was discussed by the A-G, art. 18 TFEU is more general in nature and is, as such, substantiated by the more specific art. 45 TFEU,[30] so that an analysis of art. 18 TFEU can be omitted when art. 45 TFEU applies (or EU law is not applicable at all). In national German litigation prior to the ECJ-case however, judges distinguished strictly between arguments relating to art. 18 TFEU and arguments concerning art. 45 TFEU. Below, we follow the structure of the A-G and the ECJ; substantively, the arguments that were put forward earlier remain relevant.

3.2 Competency of the ECJ and scope of the preliminary questions

The preliminary questions of the Appeals Court Berlin were interpreted as to consisting of two elements. First, would EU law benefit employees of TUI in other Member States (than Germany), entitling them to active and passive voting rights for the Supervisory Board of the German parent company? Second, would EU law protect TUI-employees in Germany when these were to be deprived from their active and passive voting rights upon seeking employment in another Member State?[31] In relation to the former, both the A-G and the ECJ noted that TUI lacks branches in other Member States, only maintaining subsidiaries (i.e. bodies with separate legal personality). Therefore, issues involving branches are omitted from the analysis.[32] At first sight, this tailored approach appears commendable. The image changes, however, when one considers that the preliminary questions of the Appeals Court Berlin were not formulated narrowly. A more general ruling of the ECJ could have proved beneficial for other questions of German co-determination law that now – at least for the time being – remain unanswered, e.g. whether one should account for employees in other Member States when determining whether either the MitbestG or the DrittelbG applies.[33] More importantly however, this approach cleverly circumvents questions that could have arisen because of the fact that, whereas German co-determination law does not grant voting rights to employees of a branch, located in Germany, of a foreign subsidiary to the German parent company, it would grant voting rights if the same branch were a sub-subsidiary.[34] As such, it could be argued that German co-determination law discriminates between branches and companies located in other Member States, which is not allowed under EU law.[35] This issue has now not been resolved.

Although art. 45 TFEU guarantees the free movement of employees in the EU and prohibits any discrimination based on nationality, this primarily relates to issues regarding remuneration, and not necessarily to more indirect aspects of employment such as co-determination. However, the ECJ has confirmed several times that art. 45 TFEU should be interpreted broadly.[36] Therefore, it does not come as a surprise that, in the *Erzberger*-case, both the A-G and the ECJ deem active and passive voting rights for employee representation in the Supervisory Board to fall within the scope of 'other conditions of work and employment'. With art. 45 TFEU applicable, art. 18 TFEU no longer plays a role.

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[30] Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, § 38-41, ECJ 18 July 2017, ECLI:EU:C:2017:562, § 25-27. The ECJ itself has occasionally struggled with the distinction between art. 18 TFEU and art. 45 TFEU as well. See e.g. ECJ 24 November 1998, ECLI:EU:C:1998:563, C-274/96 (*Bickel & Franz*).

[31] Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, § 33-37, ECJ 18 July 2017, ECLI:EU:C:2017:562, § 24-31.

[32] Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, § 35, ECJ 18 July 2017, ECLI:EU:C:2017:562, § 23.

[33] See *supra*, note 19. This was also acknowledged by A-G Saugmandsgaard Øe. See conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, footnote 37.

[34] See BT-Drucksache 7/4845, 10 March 1976, p. 4, and Ulmer/Habersack/Henssler 2012, § 5, nr. 55.

[35] See ECJ 29 April 1999, ECLI:EU:C:1998:557, C-311/97 (*Royal Bank of Scotland*).

[36] See e.g. ECJ 16 September 2004, ECLI:EU:C:2004:530, C-465/01; ECJ 30 September 1975, ECLI:EU:C:1975:120, C-32/75 (*Cristini*). Both cases relate to articles 7 and 8 of Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, which substantiates art. 45 TFEU.

3.3 Art. 45 TFEU: two categories of employees

3.3.1 Employees based outside Germany

Both the A-G and the ECJ argue that art. 45 TFEU is not applicable, because employees outside Germany have not (necessarily) used their right of free movement, nor had any intentions of doing so. As most employees of subsidiaries based in e.g. France will probably be French, these employees are deemed purely internal, so that art. 45 TFEU is not applicable (the same holds for art. 18 TFEU). According to the ECJ, the cross-border nature of corporate groups does not alter the strictly national character of this situation, nor is it deemed relevant that employees in other Member States are impacted by decisions taken by the Supervisory Board, and may suffer from underrepresentation there.[37]

Two observations can be made. First, for German *companies*, as opposed to employees, the cross-border element seems difficult to ignore. In case of a secondment to a branch in another country, the argument may no longer hold, as was also recognized by the A-G.[38] The line of reasoning – that employees in France would be 'mostly' French – is reminiscent of that adopted by the German courts. There, it was held that co-determination rights would be irrelevant to most employees when deciding whether to obtain employment in another country.[39] However, the ECJ ruled in its earlier case law that producing detailed (statistical or empirical) evidence of the discriminatory effect of national measures was unnecessary. Instead, it sufficed to show that a national measure could potentially have discriminatory effects.[40] This aspect was wholly absent in the analysis of the A-G and the ECJ. Second, it seems reasonable to presuppose that, as the ECJ does, the nationalities of a company and its employees will usually largely coincide. In that case, to consider the current German co-determination scheme indirectly discriminatory, the presence of a rather substantial part of the companies' employees in other EU Member States is required. In the *BayWa*-case of the *Landgericht München*, the court deemed this condition not met, as the BayWa company employed 11,900 in Germany and 15,400 in the EU as a whole.[41] Indeed, in relation to an individual company with little activities in other EU Member States, one could argue that the discriminative effect of § 7 MitbestG is not sufficiently present. However, in a more general sense, and despite the denial of the ECJ, the (substantively) discriminatory effect appears self-evident. With only representatives of German employees in the Supervisory Board, the interests of employees in other Member States may be less cared after in the decision making-process, e.g. when identifying possibilities for layoffs .[42] As such, the *Erzberger*-ruling of the ECJ upholds the situation where the interests of German employees are likely to be protected at the expense of their EU-colleagues. TUI, specializing in holidays, can serve to illustrate this point: it employs 10,000 in Germany and 40,000 in other EU Member Staes, mostly in the UK (27,000).

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[37] Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, § 48-56, ECJ 18 July 2017, ECLI:EU:C:2017:562, § 24-30.

[38] Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, § 25 & 37.

[39] Thus, the Landgericht Berlin e.g. ruled that 'European anti-discrimination law does not apply to employees with a 'home state contract' who do not wish to leave their home country', incomprehensibly referring to ECJ 2 October 1997, ECLI:EU:C:1997:458, C-122/96 (*Saldanha*).

[40] See e.g. ECJ 23 May 1996, ECLI: EU:C:1996:206, C-237/94 (*O'Flynn*); see also ECJ 11 July 1974, ECLI:EU:C:1974:82, C-8/74 (*Dassonville*); ECJ 30 November 1995, ECLI:EU:C:1995:411, C-55/94 (*Gebhard*).

[41] See Landgericht München 27 August 2015, 5 HK O 20 285/14, *AG* 2016, p. 49, S. Fischer, 'Europaweite Wahl zum mitbestimmten Aufsichtsrat?', *NZG* 2014, p. 737, *NZG* 2015, p. 1275, *ZIP* 2015, p. 1929, case note by L. Pütz. In this context, the *Landgericht München* refers to ECJ 10 February 1994, ECLI:EU:C:1994:52, C-398/92 (*Mund & Fester/Hartrex*). Figures as of September 2014.

[42] See the *Report of the Reflection Group On the Future of EU Company Law*, 5 April 2011, p. 53-54, which recommends the European Commission to start an infringement procedure (Art. 258 TFEU) against Germany, on which H.-J. Hellwig & C. Behme, 'Die deutsche Unternehmensmitbestimmung im Visier von Brüssel?', *AG* 2011, p. 741. Consequently, the argument that considering § 7 MitbestG in violation of EU Law would be fruitless, in relation to companies of which the Supervisory Board already consists of the maximum number of members allowed, also fails.

3.3.2 Employees based in Germany

For employees based in Germany, the cross-border element required for application of art. 45 TFEU is not deemed hypothetical (as opposed to those outside Germany) by the A-G nor the ECJ.[43] For example, the tension between German and EU law is clear when an incumbent member of the Supervisory Board is forced to give up his seat after accepting employment abroad, although within the same corporate group. Meanwhile, ever since the *BayWa*-case, the German courts have ruled that the foregoing does not constitute a restriction on the free movement of employees, as the contract of employment with the *Betrieb* for which the employee was elected would be terminated.[44] However, in a domestic intra-company 'transfer', (active and) passive voting rights remain unaffected.

In relation to employees based in Germany, both the A-G and the ECJ argue that national co-determination laws of the Member States have not been harmonized or coordinated.[45] Taking Directive 2002/14/EC into consideration, this approach appears slightly oversimplified, although it merely concerns the more basic forms of employee participation.[46] Indeed, German courts, ever since the initial *Hornbach*-ruling of the *Landgericht Landau*, ruled that EU law does not require Member States to harmonize their co-determination laws *extensively*, in the sense that different national systems should be made compatible.[47] As such, Germany would not be required to 'lower' its co-determination standards, nor are other Member States obliged to introduce additional legislation.[48] Instead, German co-determination law should simply be applied in accordance with EU Law.

Concerning the scope of art. 45 TFEU, the A-G and the ECJ maintain that a migrant employee benefits from equal treatment with national employees in the host Member State. However, art. 45 TFEU supposedly does not grant the migrant employee the right to 'export' employment conditions of the Member State of departure. Indeed, art. 45 TFEU does not cover disparities (differences in treatment that result from divergences between the laws of the Member States).[49] Presumably, neither the Treaties nor the case law of the ECJ offers a basis on which to draw a distinction between two unconnected companies established in different Member States and two companies belonging to the same group of companies but established in different Member States.[50] Therefore, Member States are not obliged to grant migrant employees the same participation rights as enjoyed by those employed in the Member State of departure. However, they are allowed to do so in their national law.[51] Such reasoning ignores that the *Erzberger*-case does not involve 'exporting' social rights as it is about retaining them when transferring abroad. Additionally, German co-determination law is based around the concept of the corporate group, providing a fine basis for comparing employees of German and non-German subsidiaries that are part of the same group. As such, the matter at hand does not concern a disparity, as it is unilaterally caused by German co-determination law.[52]

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[43] Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, § 60-69, ECJ 18 July 2017, ECLI:EU:C:2017:562, § 31-41 & 48.
[44] See *supra*, note 41.
[45] Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, § 65-68, ECJ 18 July 2017, ECLI:EU:C:2017:562, § 36.
[46] Directive 2002/14/EC Of The European Parliament And Of The Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.
[47] See Landgericht Landau 18 September 2013, HK O 27/13 (*Hornbach I*), *AG* 2014, p. 376, *EWiR* 2013, p. 787, case note by C. Behme, *GWR* 2013, p. 518, case note by H. Krauss, *NZG* 2014, p. 213, case note by T. Wansleben, *ZIP* 2013, p. 2107; see also (in appeal) Oberlandesgericht Zweibrücken 20 February 2014, 3 W 150/13 (*Hornbach II*), AG 2014, p. 629, EWiR 2015, p. 105, case note by T. Wansleben, NZG 2014, p. 740, ZIP 2014, p. 1224, caste note by L. Pütz & S. Sick.
[48] See conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, § 65-66; see also T. Wansleben, 'Zur Europarechtswidrigkeit der unternehmerischen Mitbestimmung', *NZG* 2014, p. 213, including additional references, notably to M. Habersack, 'Wandlungen des Aktienrechts', *AG* 2009, p. 1. For a different view, see *GWR* 2013, p. 518, case note by Krauss.
[49] Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, § 75-76, ECJ 18 July 2017, ECLI:EU:C:2017:562, § 34-35.
[50] Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, § 79-81.
[51] Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, § 82-83, ECJ 18 July 2017, ECLI:EU:C:2017:562, § 37-41.
[52] See *supra*, note 16. See also T. Wansleben, 'Die (deutsche) unternehmerische Mitbestimmung und das Unionsrecht' (2017), at www.ssrn.com, concerning the appropriate comparison; E.W. Ros, *EU Citizenship and Direct Taxation* (diss. Rotterdam), p. 148-150; p. 156-157.

3.4 Justification?

While the A-G concluded that § 7 MitbestG does not violate EU law, he did consider possible justifications, acknowledging the possibility that the ECJ would find § 7 MitbestG in violation of EU law. In the following, we discuss the merits of these justifications.

3.4.1 ECJ Graf*-exception*

Starting with the *BayWa*-ruling of the *Landgericht München*, German courts have recognized that EU law prohibits the application of national provisions that hinder the employment of EU-citizens in other Member States. This was the case in ECJ *Bosman*.[53] However, relying on ECJ *Graf*,[54] these courts have consistently ruled that the connection between having active and passive voting rights for appointing members of the Supervisory Board and the labor market is too indirect and uncertain to constitute an infringement. In the *Bosman* case, a Belgian soccer player saw a transfer from Club Luik to USL Dunkerque fall through because his new employer was required to pay a transfer fee, despite his contract having come to an end. The ECJ ruled that this constituted a breach of art. 45 TFEU. In *Graf*, an Austrian national did not receive unemployment compensation, since under Austrian law, such compensation was only granted to those unemployed involuntarily. Graf, however, voluntarily ended his Austrian job to take up a new position in Germany. The ECJ rejected Graf's argument that Austrian law hindered his ability to seek employment in another country, because the connection to labor market access was too indirect and uncertain.[55] In the *Erzberger*-case, the A-G rightfully concluded that invoking *Graf* would not be successful, as the consequences of having to resign as a member of the Supervisory Board (especially concerning passive voting rights, but also in relation to active voting rights) are not indirect and uncertain at all.[56]

3.4.2 The principle of territoriality

Ever after the initial *Hornbach I* ruling, German courts have invoked the principle of territoriality as a justification of a possible restriction of the freedom of movement.[57] Accordingly, the argument was made that legislation concerning co-determination can only cover employees in Germany, since the legislator is (constitutionally) prohibited from intervening in foreign jurisdictions. However, the principle of territoriality can be understood in different ways.[58] The current restrictive view is not compulsory, as was early recognized in German literature.[59] Therefore, strictly speaking, Germany is not prevented from including employees in other Member States in its German (!) co-determination system – the German government actually conceded this during the oral hearings of January 24, 2017.[60] The A-G also argued that inclusion of employees based in other Member States would not entail an interference with their sovereignty or legislative powers.[61] Additionally, the A-G noted that, while the principle of territoriality, in earlier ECJ case law, had been considered capable of justifying a restriction of the freedom of movement, this applies primarily in relation to tax law and in combination with the objective of preserving the allocation between Member States of the power to impose taxes.[62] Therefore, the A-G rejected this justification.

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[53] See ECJ 15 December 1993, ECLI:EU:C:1995:463, C-415/93 (*Bosman*).
[54] See ECJ 27 January 2000, ECLI:EU:C:2000:49, C-190/98 (*Graf*).
[55] On the differences between *Bosman* and *Graf*, see Bernard 2010, p. 258. See also ECJ 11 April 2000, ECLI:EU:C:2000:199, C-51/96 and C-191/97 (*Deliège*).
[56] Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, footnote 59.
[57] See *supra*, note 47.
[58] On the various aspects of territoriality, see e.g. C. Ryngaert, *Jurisdiction in International Law*, Oxford: OUP 2009, p. 42.
[59] See K. Duden, 'Zur Mitbestimmung in Konzernverhältnissen nach dem Mitbestimmungsgesetz', Zeitschrift für das Gesamte Handels- und Wirtschaftsrecht (ZHR) 1977, p. 145; see also C. Ebenroth & T. Sura, 'Transnationale Unternehmen und deutsches Mitbestimmungsgesetzes', ZHR 1980, p. 610.
[60] Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, footnote 75.
[61] Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, § 96-99.
[62] Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, § 92-94.

3.4.3 National social, economic and cultural peculiarities

Finally, Germany argued that its co-determination law not only serves the interests of employees, but rather the general interest. In fact, during the oral hearing of January 24, 2017, it was stated that employee participation is a central element of the culture of cooperation in Germany. The A-G considered that employee participation in the Supervisory Board constitutes a legitimate objective and acknowledged that EU law recognizes the diversity in national social policies. Therefore, he maintained that, as EU law currently stands, the arrangement and conduct of German Supervisory Board elections reflect legitimate economic and social policy choices, which are a matter for the Member States. Consequently, § 7 MitbestG was deemed justified, in accordance with national social, economic and cultural particularities.[63]

Two remarks are in order. First, the scope of this line of reasoning of the A-G is not entirely clear, but if the result would be that Member States whose provisions of national law are challenged before the ECJ can simply invoke art. 4 (2) TEU as a justification, the supremacy of EU law, as acknowledged in *Van Gend & Loos*[64] and *Costa/Enel*,[65] would be eroded substantially. In that case, the *Erzberger*-decision could potentially be seen as part of the current wider, more systematic backlash against the EU. Second, the Attorney General considered German co-determination law proportionate, appropriately ensuring corporate employee participation, and not going beyond what is necessary to achieve that objective. In this respect however, the reasoning of the A-G seems rather superficial. The only argument appears to be that conformity between the Member States concerning proportionality and necessity is not required.[66] As such, this argument fails to show why the German solution would meet the required criteria.

4. Alternatives for the current German system

4.1 Introduction

If the ECJ would have held that § 7 MitbestG was in violation of EU law, the effects would have been considerable, especially in relation to incumbent Supervisory Boards.[67] It has been argued that the appointment of all members of German Supervisory Boards, appointed in accordance with German co-determination law, would be invalid.[68] With the ruling of the ECJ, a situation of legal uncertainty on a very large scale has been prevented. In itself, that will be considered by many a desired outcome and will justify the decision. The question now remains what would have happened if the ECJ would have held that the current system of German co-determination law to be in violation of EU law. We do not aim to be exhaustive, but in § 4.2, we put forward several options that could have been contemplated by the German legislator to modify German co-determination law in such a way that it would no longer violate EU law.

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[63] Interestingly, earlier in his conclusion, the A-G had hesitated to view German co-determination law as an element of national identity in the sense of art. 4 (2) of the Treaty on the European Union (hereafter: TEU). Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, § 101-106.

[64] See ECJ 5 February 1963, ECLI:EU:C:1963:1, C-26/62 (*Van Gend & Loos*).

[65] See ECJ 15 July 1964, ECLI:EU:C:1964:66, C-6/54 (*Costa/Enel*).

[66] Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, § 107-108. As the *Erzberger*-case is politically highly important, it has been predicted the ECJ would allow the scheme 'because it is Germany' (Hellwig, *supra* note 6). This appears somewhat farfetched, although the ECJ was well aware of the political aspects. See conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, § 57 ('[W]ithout prejudging the relevance of those considerations in the national political context.')

[67] In Kücükdeveci, the ECJ ruled that national courts may not apply provisions that are in violation of EU law. See ECJ 19 January 2010, ECLI:EU:C:2010:21, C-555/07 (*Kücükdeveci)*, § 53.

[68] Such a ruling of the ECJ could also have been relevant in relation to § 4 DrittelbG governing smaller companies, since the DrittelbG is structured similarly to the MitbestG. See Hellwig & Behme 2009; see also Winter, Marx & De Decker 2015.

4.2 Options for modifying German co-determination law

4.2.1 Repealing § 7 MitbestG and § 4 DrittelbG

The first option would be to repeal § 7 MitbestG and § 4 DrittelbG. Such an approach would have farreaching consequences, as Supervisory Boards would then only consists of shareholder representatives. It has been argued that this option would be at odds with the German stakeholder model. However, § 76 and § 116 AktienG mandate that a company should pursue long term value creation, taking into account the interests of stakeholders, including employees. Thus, repealing § 7 MitbestG and § 4 DrittelbG would mean a shift from a *structure*-based (direct) stakeholder model to an (indirect) model. Nevertheless, Supervisory Board members would still have to take into account the interests of employees. There would no longer be members appointed by or on behalf of employees, but their interests would still have to be taken into account as per § 76 and § 116 AktienG.[69] This would also address the often heard criticism that the current co-determination system causes certain *governance*-problems. Basically, there are two factions in the Supervisory Board, and especially the employee representatives will be inclined to be very focussed on the interests of German employees. Furthermore, formal decision-making in the Supervisory Board is often preceded by preliminary meetings on both sides (employee and shareholder representatives), where certain views and opinions are formed, thereby preventing actual discussions and debates taking place in the full Supervisory Board.[70] This makes the decision making process less effective. Avoiding direct employee representatives on the Supervisory Board could improve the effectiveness and speed of decision making. Abolishing employee representation may also create room to increase certain areas of expertise present in the Supervisory Board.[71] At the same time, it could lead to smaller Supervisory Boards. It has been argued that companies with a smaller board function more effectively.[72] In sum, it can be argued that repealing § 7 MitbestG and § 4 DrittelbG could lead to more efficient corporate governance and create a more balanced approach, where there would be more room to take into account the interests of non-German employees. However, having said this, it is very clear that the idea of abolishing co-determination on the Supervisory Board is unthinkable in the current political climate in Germany. It is not going to happen, at least not in the foreseeable future. If anything, the sentiment is going in the direction of protectionism. Left-wing political parties like the *SPD* and *Die Linke* have even suggested to apply German co-determination law on entities incorporated under the laws of other Member States with business activities in Germany.[73]

4.2.2 Mitigating the exclusive effects of § 7 MitbestG and § 4 DrittelbG

An alternative to repealing § 7 MitbestG and § 4 DrittelbG would be to mitigate the effects of excluding employees based outside Germany from co-determination. To this end, inspiration may be drawn from the Dutch structure regime. As noted in § 1, the structure regime in principle mandates that, in relation to large companies, the Works

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[69] This distinction was made by Advocate-General (Dutch Supreme Court) L. Timmerman, 'Grondslagen van geldend ondernemingsrecht', *Ondernemingsrecht* 2009/2; see also L. Timmerman, 'Principles Of Prevailing Dutch Company Law', *European Business Organization Law Review* 2010, p. 609.

[70] See M.M.G.B van Drunen, 'Medezeggenschap van werknemers op het niveau van de raad van commissarissen in Duitsland', *Ondernemingsrecht* 2012/8, referring to K. Pistor, 'Codetermination: A Sociopolitical Model with Goverenance Externalities', in: M.M. Blair & M.J. Roe, *Employees and Corporate Governance*, Washington DC: Brookings Institution 1999, p. 189.

[71] See K.J. Hopt & P.C. Leyens, 'Board Models in Europe - Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy', *European Company and Financial Law Review* 2004, p. 135.

[72] See R. Kraakman e.a. (red.), *The Anatomy of Corporate Law*. *A Comparative and Functional Approach*, Oxford: OUP 2009, p. 69; see also D. Yermack, 'Higher Market Valuation of Companies with a Small Board of Directors', *Journal of Financial Economics* 1996, p. 185; T. Eisenberg, S. Sundgren & M.T. Wells, 'Larger Board Size And Decreasing Firm Value In Small Firms', *Journal of Financial Economics* 1998, p. 35; J.J.L. Coles, N.D. Daniel & L. Naveen, 'Boards: Does One Size Fits All?', *Journal of Financial Economics* 2008, p. 329.

[73] *BT-Drucksache* 17/1413, 21 April 2010 and *BT-Drucksache* 17/2122, 16 June 2010. On this, see H.-J. Hellwig & C. Behme, 'Gemeinschaftsrechtswidrigkeit und Anwendungsvorrang des Gemeinschaftsrechts in der deutschen Unternehmensmitbestimmung', *ZIP* 2010, p. 871.

Council is entitled to nominate up to one third of the Supervisory Board members[74], a nomination that is virtually always adopted. However, international holdings based in the Netherlands, of which the (group) employees in majority are employed abroad, are exempted from applying the structure regime at the level of the holding company.[75] Instead, the structure regime applies to the Dutch subsidiary, albeit in a mitigated form.[76] As a result, the Dutch Works Councils generally only have co-determination rights with respect to the constellation of the Supervisory Board at the level of the Dutch subsidiary, not at the level of the international holding company. This way, Dutch employees in principle only have influence on the activities within the Netherlands. This takes away any concerns of violation of EU law, and gives a more balanced approach to the role played by the employees.

4.2.3 Towards more inclusive employee representation

A third option is that § 7 MitbestG and § 4 DrittelbG would be amended by granting active and passive voting rights to employees of subsidiaries and branches employed in other Member States than Germany. As was discussed in § 3.4.2, the argument of the territoriality principle does not necessarily prevent this. A more inclusive co-determination approach could be achieved in several manners. Under Danish law, employees of branches in other (EU and EEA) Member States are, and employees of controlled subsidiaries in other (EU and EEA) Member States can be included in the system of employee representation. This is subject to an affirmative vote of the General Meeting of Shareholders of the Danish parent company. Under Norwegian law, a co-determination agreement to this end can be concluded.[77] Another idea could be to revive the privately initiated draft bill (the Mitbestimmungsgesetzentwurf, MitbestG-E). The *Arbeitskreis Unternehmerische Mitbestimmung* proposed in 2009 a revision of German co-determination law, which however met with criticism from the trade unions.[78] The MitbestG-E contained a provision (§ 33b) pursuant to which active and passive voting rights could granted, in the course of a *Mitbestimmungsvereinbarung* (co-determination agreement), to employees of subsidiaries and branches in other EU member states. § 33b (3) MitbestG-E even allowed for employees *outside* the EU to be represented. This could solve a practical problem in the future (as shown by e.g. the *TUI*-case in relation to the Brexit), but would also resolve a more important, fundamental issue. After all, it is difficult to understand why EU-based employees deserve more co-determination rights than non-EU employees do. At the same time, the familiarity with the MitbestG-E could contribute to its reception, since it will be perceived as a German initiative instead of a European obligation.

5. Conclusion

On November 3, 2015, the ECJ received a request from the Appeals Court Berlin for a preliminary ruling in the *Erzberger*-case. The question posed was whether the German co-determination scheme complied with art. 18 and art. 45 TFEU. On July 18, 2017, the ECJ ruled that the current German co-determination system does not violate EU law. In this article, we critically analysed the judgement of the ECJ. We also discussed a number of options that would be at the disposal of the German legislator to adjust the German co-determination system, in case the ECJ would have come to the conclusion that this system violates EU law.

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[74] In short: the companies' issued capital and the reserves combined amount up to at least 16 million euros; the company is under the legal obligation to establish a Works Council; and the company employs at least 100 in the Netherlands (S. 2:153 (2) and 2:158 (6) DCC in relation to the PLC; 2:263 (2) and 2:268 (6) DCC for the Limited).

[75] S. 2:153 (3) (b); 2:26s3 (3) (b) DCC; S. 2:155 (1) (a); 265 (1) (a) DCC.

[76] The provision that the Supervisory Board appoints and dismisses the Executive Board does not apply, see S. 2:155 (1) (a) DCC in relation to S. 2:162 DCC.

[77] See Conclusion of the A-G of 4 May 2017, ECLI:EU:C:2017:347, footnote 58; see also Wansleben (*supra* note 52); Hellwig *supra* note 5; Heuschmid & Videbaek Munkholm *supra* note 5.

[78] For the MitbestG-E, see http://safe-frankfurt.de/, on which Hellwig & Behme 2010. For earlier initiatives to modify the German co-determination law, see J.J. du Plessis et al, *German Corporate Governance in an International and European Context*, Berlin: Springer 2007, p. 187.

In the *Erzberger*-case, the ECJ benevolently respected the German system of co-determination. This case could have faced had a very different outcome however, had the ECJ not narrowly interpreted the preliminary questions of the Appeals Court Berlin, had it not ignored the cross-border element inherent to German co-determination law and had it recognized that this case not so much concerns a disparity uncovered by art. 45 TFEU, but rather stems from German co-determination law itself. In that case, the ECJ would probably have been forced to recognize that neither the *Graf*-exception, nor the principle of territoriality or the presence of national peculiarities could justify the restrictive effects of § 7 MitbestG, at least not in a proportionate manner. By taking the route it has chosen to, the ECJ has prevented the creation of a situation of enormous legal uncertainty in Germany. Holding that the German co-determination system is in violation of EU law would have meant an earthquake for Germany[79] and would have led to public outcry. It probably would even have fuelled anti-EU sentiments. From that perspective, many will feel that the current outcome is desirable, even though, as discussed, from a strictly legal perspective, it could have been different. In any case, given the current state of affairs, the German legislator does not have to choose from the options we discussed in § 4. It is our assessment that the German co-determination system will not fundamentally change in thse near future. At the same time, the *Erzberger*-decision is unlikely to be the end of the discussion.

[79] See *supra* note 5 ("Ungeheurer Eingriff").