Italian Labour Law e-Journal
Issue 2, Vol. 14 (2021)
ISSN 1561-8048
https://doi.org/10.6092/issn.1561-8048/14085

Who is afraid of unions representation? Some considerations on the *SAP SE* case in the light of EU Labour Law.

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Abstract

The contribution focuses on the *Bundesarbeitsgericht*'s question to the Court of Justice whether a provision according to which, in the case where an SE with its registered office in Germany is established by means of transformation, a separate selection procedure for persons nominated by trade unions for a certain number of supervisory board members representing the employees must be guaranteed (§ 21(6) *SEBG*), is compatible with Article 4(4) of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees. In the view of the Author the answer should be in the sense of compatibility.

Keyword: Societas Europaea; Transformation of the undertaking; Employees involvement; Information, consultation, codetermination; Unions representatives.

1. Preliminary remarks.

On 18 August 2020, the *Bundesarbeitsgericht* has requested a preliminary ruling to the Court of Justice of the EU (hereinafter the Court) on a case involving some crucial issues of the German codetermination system.[1] The request was received by the Court on 11 December 2020 and registered under C-677/20 *SAP SE*.

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[1] On the request *see* Freyler C., *Gewerkschaftsrepräsentanz im Aufsichtsorgan einer SE*, in *Recht der Arbeit (RdA)*, 2021, 118; Sura S., *Bestandsschutz für die Sitzgarantie von Gewerkschaftsvertretern im SEAufsichtsrat?*, in *Neue Zeitschrift für Arbeitsrecht – Rechtsprechungs-Report (NZA-RR)*, 2021, 168; Ulber D., Koch A., *Bestandsschutz für die Zahl der Gewerkschaftsvertreter im Aufsichtsrat nach § 21 Abs. 6 SEBG*, in *Zeitschrift für europäisches Sozial- und Arbeitsrecht (ZESAR)*, 2021, 223.

In the case at stake,[2] *IG Metall*, *ver.di* and SAP SE (hereinafter the parties) are in dispute regarding the effectiveness of provisions in an agreement concluded between the employer (SAP SE) and the special negotiating body on the involvement of employees (Agreement on employee involvement) in a *Societas Europaea* (hereinafter SE) within the meaning of § 21 *SEBG*.

SAP SE, a SE that adopts a two-tier board system, originally had the legal form of an *Aktiengesellschaft* under German law. In accordance with point 2 of the first sentence of § 7(1) *MitbestG*, it had a Supervisory Board consisting of eight members representing the shareholders and eight members representing the employees. In accordance with point 2 § 7(2) *MitbestG*, the Supervisory Board members representing the employees included six employees of the undertaking and two trade union representatives. The two trade union representatives were nominated by the trade unions represented within the employer's group and elected in an election process held separately from that for the other six Supervisory Board members representing the employees in accordance with §16(2) *MitbestG*. One has to stress the fact that, although not imposed by the law, trade unions representatives do not usually belong to the undertaking's workforce.

In 2014, SAP was transformed into an SE. Since that time, it has had a Supervisory Board composed of 18 members. In accordance with the Agreement on employee involvement concluded on 10 March 2014 by the employer and the special negotiating body, nine of the Supervisory Board members are employee representatives. The Agreement provides for more detailed requirements regarding how these members are appointed. According to Part II, point 3.1, of the Agreement, only SAP employees or representatives of trade unions represented within the SAP Group may be nominated and appointed as employee representatives on the Supervisory Board. The trade unions are also entitled to an exclusive right of nomination for a certain number of the employee representatives allotted to Germany according to Part II, point 3.3, of the Agreement; the individuals whom they have nominated are elected by the employees in a separate election process. This process is in accordance and widely identical with that formerly foreseen in the *MitbestG* and its election rules.

However, Part II, point 3.4, of the Agreement also contains provisions for the formation of a supervisory board reduced to 12 members, which can be activated by SAP upon decision of the AGM in accordance with a proposal of the supervisory board and the managing board. In this case, the Supervisory Board must include six employee representatives. The employee representatives in the first four seats allotted to Germany are elected by the employees working in Germany. The trade unions represented in the employer's group may also make nominations for some of the seats allotted to Germany; however, no separate election process is held for the individuals whom they have nominated.

[2] On the background of the case, *see* Grüneberg J., Hay D., Jerchel K., Sick S., *Europäische Aktiengesellschaft (SE): Wie weit reicht der Schutz der Unternehmensmitbestimmung? - Im Fokus: SE-Gründung durch Umwandlung und Gewerkschaftsvertreter im Aufsichtsrat*, in *Arbeit und Recht (AuR)*, 2020, 297 ff.

That provision has not been activated yet by SAP SE.

In the court-order proceedings initiated by *IG Metall* and *ver.di* (hereinafter the applicants), they asserted that the provisions in the Agreement on employee involvement concerning appointment of the employee representatives in a twelve-member supervisory board are invalid.

They hold the view that those provisions breach § 21(6) *SEBG*, as the trade unions are not granted an exclusive right to nominate employee representatives on the Supervisory Board, in other words, this right is not safeguarded by means of a separate election process.

SAP SE holds the view that the trade unions' exclusive right of nomination provided for in § 7(2), in conjunction with § 16(2) *MitbestG* is not protected by § 21(6) *SEBG*.

The lower German courts (the *Arbeitsgericht* Mannheim and the *Landesarbeitsgericht* Baden-Württenberg) rejected the applicants' claims. The applicants has appealed those decisions on a point of law in front of the *Bundesarbeitsgericht*, which widely shares applicants' view on the interpretation of § 21(6) *SEBG*.

In fact, the *Bundesarbeitsgericht*'s question to the Court of Justice is whether § 21(6) *SEBG*, which determines that, in the case where an SE with its registered office in Germany is established by means of transformation, a separate selection procedure for persons nominated by trade unions for a certain number of supervisory board members representing the employees must be guaranteed, is compatible with Article 4(4) of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (hereinafter the Directive or Dir.).

I will structure this essay in four paragraph respectively on the SE and its relationship with the involvement of employees (par. 1); the involvement of employees in the SE (par. 2); the definitions provided by the Directive and their crucial relevance (par. 3); the Agreement on the involvement of employees and the application of the Standard Rules (par. 4). A Conclusion will close this essay.

2. The SE and Labor Law.

As well-known, Council Regulation (EC) No 2157/2001 of 8 October 2001 (hereinafter the Regulation or Reg.)[3] establishes a Statute for a SE, which aims "at creating a uniform legal framework within which companies from different Member States should be able to plan and carry out the reorganization of their business on a Community scale.". (Recitals 1&2 Dir.). According to the EU Legislator, "the completion of the internal market means not only that barriers to trade must be removed, but also that the structures of production must be adapted to the Community dimension". For that purpose, it is essential that

[3] *See* on it, from a labour law perspective, Fuchs M., Marhold F., *Europäisches Arbeitsrecht*, 4th edition, Verlag Österreich, 2014, 397 ff.; Sick S., *Europäische Aktiengesellschaft (SE) und grenzüberschreitende Verschmelzung – SE-Betriebsrat und Arbeitnehmerbeteiligung*, in Düwell F.J., *Betriebsverfassungsgesetz. BetrVG. WahlO. EBRG. SEBG. Handkommentar*, 5th edition, Nomos, 2018, 2009 ff.

"companies the business of which is not limited to satisfying purely local needs" should be able to "reorganize their business on a Community scale" (Recital 1 Reg.).

This kind of reorganization presupposes that "existing companies from different Member States are given the option of combining their potential by means of mergers" (Recital 2 Reg.). However, as we will see immediately after, there is the possibility of transformation of a public limited-liability company with a registered office and head office within the Community into a SE, provided that it has a subsidiary in a Member State other than that of its registered office.

In such a perspective, it is essential to ensure that "the economic unit and the legal unit of business in the Community coincide". For that purpose, provision should be made for the creation of "companies formed and carrying on business under the law created by a Community Regulation directly applicable in all Member States" (Recital 6 Reg.).

The provisions of such a Regulation will permit "the creation and management of companies with a European dimension", "free from the obstacles arising from the disparity and the limited territorial application of national company law" (Recital 7 Reg.).

Therefore, the use of a regulation is justified by the fact that from the disparity and the limited territorial application of national company law obstacles arise for the completion of the internal market.

In this framework, it shall be possible to create SE by enabling:

(i) companies from different Member States to merge or to create a holding company;

(ii) companies and other legal persons carrying on economic activities and governed by the laws of different Member States to form joint subsidiaries (Recital 10 Reg.);

(iii) a public limited-liability company with a registered office and head office within the Community to transform itself without going into liquidation, provided it has a subsidiary in a Member State other than that of its registered office. (Recital 11 Reg.).

In particular, "a public limited-liability company, formed under the law of a Member State, which has its registered office and head office within the Community may be transformed into an SE if for at least two years it has had a subsidiary company governed by the law of another Member State" (Article 2(4) Reg.).

As already highlighted in the above, although explicitly allowed by the Regulation, transformation is a rather peculiar modality of establishing a SE, since no plurality of companies or other legal persons carrying on economic activities is at stake. For this reason, as we will see below, the EU Legislator pays a particular attention to the consequences of transformations on the involvement of employees, the risk being that a transformation would be mainly if not exclusively aimed at getting rid of participation mechanisms that characterize a public limited-liability company under a national jurisdiction that recognizes participation rights (as it is for Germany).

3. The Involvement of employees in the SE.

The rules on the involvement of employees "in issues and decisions affecting the life of their SE". (Recital 21 Reg.) are laid down in the Directive,[4] the provisions of which form an "indissociable complement to the Regulation and must be applied concomitantly" (Recital 19 Reg.). Consequently, the entry into force of the Regulation was deferred so that each Member State might incorporate first into its national law the provisions of the Directive (Recital 22 Reg.).

The choice to regulate the involvement of employees within the SE by a Directive is based on "the great diversity of rules and practices existing in the Member States as regards the manner in which employees' representatives are involved in decision-making within companies [that] makes it inadvisable to set up a single European model of employee involvement applicable to the SE" (Recital 5 Dir.).

Nevertheless, as far as the involvement of employees by means of participation is concerned, the Regulation contains some specific provisions that shall be respected by all the Member States.

First, in case of adoption of the two-tiers system (management and supervisory organs), although the members of the supervisory organ shall be appointed by the general meeting, In case of the first supervisory organ they may be also appointed by the statutes. Yet, this shall apply without prejudice (…) "to any employee participation arrangements" determined pursuant to the Directive (Article 40(2) Reg.). Such a provision aims at allowing the election also of the members of the first supervisory organ, if so provided by a national legislation implementing the Directive or by the Agreement reached between the management or the administrative organs of the SE and the special negotiating body.

Second, in case of adoption of the one-tier system (management organ only) even if the number of members of the administrative organ or the rules for determining it shall be laid down in the SE's statutes and a Member State may set a minimum and, where necessary, a maximum number of members, the administrative organ shall, however, consist of at least three members where employee participation is regulated in accordance with the Directive (Article 43(2) Reg.). The uneven minimum number of the members of the administrative organ is provided in order to guarantee the presence of at least one representative of the employees, against one member appointed by the management or one by consensus. This is a first example of the quantitative approach EU Law adopts when regulating the composition of the administrative organs of the SE with reference to the involvement of employees according to the participative model.

[4] There is a wide literature on the Directive. For a general analysis, *see*, at least: Blanpain R., *European Labour Law*, 13th edition, Wolters Kluwers, 2012, 830 ff.; Felten E., *Directive 2001/86/EC*, in Ales E., Bell M., Deinert O., Robin-Olivier S. (eds.), *International and European Labour Law. Article-by-Article Commentary*, Nomos, 2018, 1535 ff.; Mulder B.J., *2001/86: Consultation in SE*, in Schlachter M. (ed.), *EU Labour Law a Commentary*, Wolter Kluwers, 2015, 601 ff.; Nielsen R., *EU Labour Law*, Djøf Publishing, 2013, 212 ff.; Seifert A., *Employee Participation at Board Level in Europe*, in Basedow J., Su C., Fornasier M., Liukkunen U. (eds), *Employee Participation and Collective Bargaining in Europe and China,* Mohr Siebeck, 2016, pp. 209 ff.; Weiss M., *European Labour Law in Transition from 1985 to 2010*, in *The International Journal of Comparative Labour Law and Industrial Relations*, 2010, 3, 10.

Third, the member or members of the administrative organ shall be appointed by the general meeting. The members of the first administrative organ may, however, be appointed by the statutes. This shall apply without prejudice to any employee participation arrangements determined pursuant to the Directive (Article 43(3) Reg.). This means that if an employee participation arrangement provides for the appointment of members of the administrative organ by the general meeting or by other election procedures, such a provision will prevail on any other contained within the statutes.

Fourth, where there is no relevant provision in the statutes, the chairman of each organ shall have a casting vote in the event of a tie. However, there shall be no provision to the contrary in the statutes where half of the supervisory organ consists of employees' representatives (Article 50(2) Reg.). This means that the presence of a participation arrangement, which provides that half of the supervisory organ consists of employees' representatives excludes the possibility for the SE statute to deprive the chairman of each organ, of a casting vote in the event of a tie.

Both provisions (Article 43(3) Reg. and Article 50(2) Reg.) emphasize the prevalence of the participation arrangements as agreed under Article 4 Directive on any unilateral decisions taken within the SE statute by the management or the administration organ.

Fifth, the general meeting shall decide on matters for which it is given sole responsibility also by "the legislation of the Member State in which the SE's registered office is situated adopted in implementation of Directive" (Article 52(b) Reg.). By consequence, not only the participation arrangements as agreed under Article 4 Directive shall be taken into consideration as prevailing regulations but also the legislation of the Member State in which the SE's registered office is situated adopted in implementation of Directive.

Concluding on this point, one can argue that the provisions of the Regulation on the involvement of employees within the SE are aimed at underlying the priority that the Directive shall have on the Regulation above all when involvement is realized through participation.

The fact that the EU Legislator pays particular attention to the involvement of employees (whatever the form of it) is confirmed by the statement that, in the view of promoting "the social objectives of the Community, "special provisions have to be set (…) aimed at ensuring that the establishment of an SE does not entail the disappearance or reduction of practices of employee involvement existing within the companies participating in the establishment of an SE" (Recital 3 Dir.). Of course, this applies also when a transformation is at stake and just one company is involved within the process.

The reference to "the social objectives of the Community" is of the highest relevance since it recalls, at least, the provision of Article 151 TFEU,[5] according to which "the Union and the Member States (…) shall have as their objectives the promotion of (…) improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained". In my view, as already advocated elsewhere,[6] Article 151

[5] On Art. 151 TFEU, *see* Kenner J., *Article 151 TFEU*, in Ales E., Bell M., Deinert O., Robin-Olivier S. (eds.), *International and European Labour Law*, 143 ff.

[6] Ales E., "*Non regresso" senza* dumping *sociale ovvero del "progresso" nella modernizzazione (del modello sociale europeo)*, in *Diritti Lavori Mercati*, 2007, 5 ff.

TFEU (former Article 136 TEC), as modified by the Amsterdam Treaty provides for a general non-regression principle, meaning that for no reasons from the transposition or the implementation of any EU pieces of legislation can derive a worsening of the social protection level already provided by a national legislation. This applies, of course, also to the Directive, in the sense that the establishment of a SE shall be without prejudice of existing national provisions on the involvement of employees, both from a qualitative and quantitative point of view.

Within this framework has to be understood the specific reference made by the EU legislator to participation rights if and when they exist within one or more companies establishing an SE: "they should be preserved through their transfer to the SE, once established, unless the parties decide otherwise. (Recital 7 Dir.).

One may wonder whether the sentence "unless the parties decide otherwise" referred to participation rights if and when exist within one or more companies establishing a SE may provide an illimited autonomy of the agreement in dismantling them. If the wording of the Recital is unambiguous, as we will see below, the systematic interpretation reveals that that would be a rushed conclusion, since several provisions of the Directive support the opposite view.

This does not mean that the importance of the will of the parties can be underestimated. In fact, according to the Directive, "the concrete procedures of employee transnational information and consultation, as well as (…) participation, to apply to each SE should be defined primarily by means of an agreement between the parties concerned or, in the absence thereof, through the application of a set of subsidiary rules." (Recital 8 Dir.). In all fairness, however, even the statement that subsidiary rules provided by the Directive apply only in absence of agreement, cannot be taken for granted, as we will demonstrate elaborating on Article 7 Directive (see below, par. 4).

The cautiousness of the EU Legislator towards the negative effects that the establishment of a SE may entail for the involvement of employees is confirmed by the remark that "the voting rules within the special body representing the employees for negotiation purposes, in particular when concluding agreements providing for a level of participation lower than the one existing within one or more of the participating companies, should be proportionate to the risk of disappearance or reduction of existing systems and practices of participation. That risk is greater in the case of an SE established by way of transformation or merger than by way of creating a holding company or a common subsidiary" (Recital 10 Dir.).

In the same vein, in order to ensure employees' participation in the relevant organs of the SE if and when such participation existed before its establishment within the participating companies, above all but not only "in the absence of an agreement subsequent to the negotiation between employees' representatives and the competent organs of the participating companies," standard requirements shall apply to the SE, once established (Recital 11 Dir.)

Moreover, the Directive "should not affect other existing rights regarding involvement and need not affect other existing representation structures, provided for by Community and national laws and practices" (Recital Dir. 15). This means that the establishment of employees' involvement arrangements at SE level shall not prejudice already existing rights

or representation structures as provided for different levels of companies' organization such as national subsidiaries or establishments to which they will continue to apply. This is a first clue that the autonomy of the parties is limited, at least by pre-existing features of the involvement of employees.

On the other hand, "Member States should still have the option of not applying the standard rules relating to participation in the case of a merger, given the diversity of national systems for employee involvement. (Recital Dir. 9).

Against that background, the rather obvious objective of the Directive is to regulate the involvement of employees by arrangements that shall be established in every SE in accordance with the negotiating procedure referred to in it (Articles 3 to 6 Dir.) or, under the circumstances specified in Article 7, in accordance with the Annex (Article 1 Dir.).

Article 1 Directive makes clear that there are two alternative routes to arrangements on the involvement of employees within the SE: the first and foremost is the negotiating procedure; the second, to be activated under the circumstances specified in Article 7, is the Annex with the standard rules there provided on information, consultation and participation. As spelt out by the Directive, these are separate routes, since "the agreement shall not (…) be subject to the standard rules referred to in the Annex", "unless provision is made otherwise therein" (Article 4(3) Dir.).

4. The Definitions and their Relevance.

Some of the definitions contained in Article 2 are of the utmost importance in order to understand the attitude of the Directive towards the involvement of employees in general and participation in particular.

First, by defining "participating companies" as the companies directly participating in the establishing of an SE (Article 2 lett. b), the Directive confirms once again its better disposition for the plurality of actors that characterizes mergers and holding companies and joint subsidiaries.

Second, by understanding "employees' representatives" as the employees' representatives provided for by national law and/or practice (Article 2(e) Dir.), the Directive, as usual for EU Law when it comes to workers' representation, is careful not to interfere with the choice of each Member State as far as their definition is concerned, respectful as it is of their industrial relations and statutory systems. This is a crucial point of reflection for us in the view of making assumptions on the answer the Court could give to the *Bundesarbeitsgericht*. In fact, being each Member State free to choose who are employees representatives, one cannot claim the German legislation, interpreted as confirming the separate election process for unions members within the surveillance body of a SE, to be against the Directive.

Such an interpretation is not challenged by the definition of "representative body" as the body representative of the employees set up by the agreements referred to in Article 4 or in accordance with the provisions of the Annex, with the purpose, where applicable, of exercising participation rights in relation to the SE (Article 2 lett. f). In fact, as we will see below (par. 4), the representative body is to be understood as "the discussion partner of the

competent organ of the SE", thus recalling the *betriebliche Mitbestimmung* as opposed to the *unternehmerische Mitbestimmung* if participation is at stake.

Such an interpretation is confirmed by the definition of "participation", to be understood as "the influence of the body representative of the employees [*betriebliche Mitbestimmung*] and/or the employees' representatives in the affairs of a company by way of (i) the right to elect or appoint some of the members of the company's supervisory or administrative organ, or (ii) the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ" (*unternehmerische Mitbestimmung*) (Article 2(k) Dir.).

Also in this case, the Directive is not interfering with the freedom of each Member State to decide by its own national legislation who will be the representative of the employees and how they will be appointed (even by a separate election process for unions members). The qualitative aspect of employees representation is totally up to Member States, and this applies to any form of "involvement of employees", which means any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company (Article 2(h) Dir.).

As far as participation is concerned, the Directive adopts a clear quantitative approach with reference to the limitations Member States (and the parties of the agreement, above all) will face. This is confirmed by the definition of "reduction of participation rights" in terms of "a proportion of members of the organs of the SE within the meaning of Article 2(k), which is lower than the highest proportion existing within the participating companies" (Article 3(4) Dir.). Should the result of the negotiations lead to such a reduction, the special negotiating body shall take decisions by qualified instead of by an absolute majority of its members and employees of the SE.

5. The Agreement and the Standard Rules.

Article 4 Directive regulates the "Content of the agreement" arranging the involvement of employees in the SE. The provisions contained within Article 4 may be derogated by the parties ("without prejudice to the autonomy of the parties") but are subject to par. 4, which states that "in the case of an SE established by means of transformation, the agreement shall provide for at least the same level of all elements of employee involvement as the ones existing within the company to be transformed into an SE.".

Article 4(4) is the provision against which the compatibility of § 21(6) *SEBG* with EU Law has to be proved. In particular, as already mentioned in the above, to the extent that it determines that, in the case where an SE with its registered office in Germany is established by means of transformation, a separate selection procedure for persons nominated by trade unions for a certain number of supervisory board members representing the employees must be guaranteed.

In the light of the aforesaid, the wording of Article 4(4) Dir. leaves no doubt on the compatibility, since: (i) it requires the agreement to provide "at least the same level of all elements of employee involvement as the ones existing within the company to be

transformed into an SE"; (ii) "employee involvement" entails information, consultation and participation (Article 2(h) Dir.); and (iii) there are no reasons to understand the expression "the same level of all elements" as excluding a separate election process for unions members.

These conclusions are indirectly confirmed by the provisions on the contents of the agreement, in relation to which the Directive envisages two possibilities.

On the one hand, the establishment of a representative body, which, as anticipated in the above, will be the "discussion partner of the competent organ of the SE in connection with arrangements for the information and consultation of the employees of the SE and its subsidiaries and establishments". The agreement shall also determine the composition, number of members and allocation of seats on the representative body (Article 4(2)(b) Dir.): once again all quantitative elements of the involvement of employees.

On the other hand, "if, during negotiations, the parties decide to establish arrangements for participation, [the agreement shall specify] the substance of those arrangements including (if applicable) the number of members in the SE's administrative or supervisory body which the employees will be entitled to elect, appoint, recommend or oppose, the procedures as to how these members may be elected, appointed, recommended or opposed by the employees, and their rights" (Article 4(2)(g)). Although not made explicit by the Directive, it is rather clear that such "arrangements for participation" may establish a representative body in the form of a SE works council or ("(if applicable)") provide for workers representatives' participation within the SE's administrative or supervisory body.

Whatever the solution adopted by the parties (information and consultation without or with participation), it is evident that the Directive approaches the involvement of employees from a quali-quantitative point of view, since it combines the quantitative approach, aimed at protecting the level of participation already reached by any national systems, and the qualitative one, to the extent that it leaves Member States free to determine who workers' representatives are going to be, also by a separate election process for union members in the supervisory board.

A strong confirmation of the conformity of § 21(6) *SEBG* with EU Law can be found in Article 7 that defines the condition of application of the "standard rules" on the involvement of employees that shall be laid down by Member States and must satisfy the provisions set out in the Annex.

In particular, as anticipated in the above, Article 7(3) Dir. allows Member States to exclude the application of the reference provisions in part 3 of the Annex (those on participation: see below) in the case of SE established by merger. On the other hand, if the Member State does not resort to their exclusion, the reference provisions shall apply only "if, before registration of the SE, one or more forms of participation applied in one or more of the participating companies covering at least 25% of the total number of employees in all the participating companies, or if, before registration of the SE, one or more forms of participation applied in one or more of the participating companies covering less than 25% of the total number of employees in all the participating companies and if the special negotiating body so decides" (Article 7(2)(b) Dir.).

In the case of an SE established by setting up a holding company or establishing a subsidiary, the reference provisions shall apply only "if, before registration of the SE, one or

more forms of participation applied in one or more of the participating companies covering at least 50% of the total number of employees in all the participating companies; or if, before registration of the SE, one or more forms of participation applied in one or more of the participating companies covering less than 50% of the total number of employees in all the participating companies and if the special negotiating body so decides" (Article 7(2)(c) Dir.).

On the contrary, "the standard rules fixed by the national legislation of the Member State of registration in accordance with part 3 of the Annex" shall apply "in the case of an SE established by transformation, if the rules of a Member State relating to employee participation in the administrative or supervisory body applied to a company transformed into an SE" (Article 7(2)(a) Dir.).

According to Part 3 of the Annex on the "Standard rules for participation", "in the case of an SE established by transformation, if the rules of a Member State relating to employee participation in the administrative or supervisory body applied before registration, all aspects of employee participation shall continue to apply to the SE (lett. (a)).

In view of all this, one could argue that the German Legislator, in the case of an SE established by transformation, had no other choice but to adopt a provision like § 21(6) *SEBG*, as interpreted by the *Bundesarbeitsgericht*, in order not to violate the Directive, in particular Article 4(4) but also Article 7(2)(a) in combination with part 3 of the Annex. In fact, both provisions require Member States to guarantee the same level of involvement of employees in all its aspects in the case of SE established by transformation and this applies also to participation rights: implicitly, as far as Article 4(4) Dir. is concerned, since, according to Article 2(h) Dir., involvement of employees includes participation; explicitly as for Article 7 Dir., which requires "all aspects of employee participation shall continue to apply to the SE".[7]

6. Final remarks.

In conclusion, in the light of the aforementioned, there are at least four grounds of compatibility of § 21(6) *SEBG*, as interpreted by the *Bundesarbeitsgericht*, with EU Law.

First, against Article 4(4) Directive, the fact that the definition of "involvement of employees" provided by the Directive encompasses participation (arg. *ex* Article 2(h)), thus requiring that in the case of an SE established by means of transformation, the agreement shall provide for at least the same level of all elements of as the ones existing within the company to be transformed into an SE.

Second, against Article 2(e) Directive, the fact that the definition of "employees' representatives" means the representatives of the employees provided for by national law and/or practice, thus leaving to the Member States their qualitative determination as union members.

[7] Comes to the same conclusion, Teichmann C., *Gewerkschaftssitze im Aufsichtsrat nach Umwandlung in eine SE*, in *Zeitschrift für Wirtschaftsrecht (ZIP)*, 2021, 105 ff.

Third, against Article 2(k) and Article 3(4) second phrase Directive, which approach the involvement of employees from a quali-quantitative point of view, combining the quantitative approach, aimed at protecting the level of participation already reached by any national systems, and the qualitative one, to the extent that it leaves Member States free to determine who workers' representatives are going to be.

Fourth, against Article 7(2)(a) Directive, read in combination with part 3 of the Annex, which requires that "in the case of an SE established by transformation, if the rules of a Member State relating to employee participation in the administrative or supervisory body applied before registration, all aspects of employee participation shall continue to apply to the SE".

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