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German Tax and Legal News

A Revolution in Employee Participation in the Supervisory Board?

The Regional Court of Frankfurt/Main has taken a very progressive decision on the decisive shareholders for the applicability of a German co-determination which could lead to a complete new situation for most of the German groups of companies.

At least one third of supervisory board members has to be determined by the employees in German limited liability companies (Gesellschaft mit beschränkter Haftung – GmbH) and stock corporations (Aktiengesellschaft – AG) if the company has more than 500 employees. If it has more than 2,000 employees, one half of the supervisory board must consist of employee representatives. Previously – and in agreement with the prevailing opinion –only employees working in Germany were taken into account to determine the relevant number of employees. Contrary to said prevailing opinion the Regional Court (Landgericht – LG) in Frankfurt/Main (ruling dated February 16, 2015 – Case No.: 3-16 O 1/14) has now decided that employees working abroad should also be included to determine the size of the company which is relevant for applying the rules on employee participation. The ruling is not final and absolute. Should it remain valid, it would cause a revolution in the area of corporate employee participation in German companies.

The most frequent forms of employee participation in the supervisory board of German companies are the one-third participation pursuant to the German One-Third Participation Act (Drittelbeteiligungsgesetz) in excess of 500 employees and the employee participation on the basis of parity pursuant to the Participation of Employees Act (Mitbestimmungsgesetz - MitbestG) if the total number of eligible employees exceeds 2,000. The differences between these two forms of employee participation are considerable. It is not only half of the supervisory board members who must be determined by the employees if there is employee participation on the basis of parity; a supervisory board with employee participation on the basis of parity also has more rights and organizational possibilities than a supervisory board with one-third participation. The trade unions must also be taken into consideration when electing supervisory boards with participation on the basis of parity. Finally it is not only the employees who are employed by the company concerned who are counted in order to determine the number of relevant employees but also the employees who work at subsidiaries of the company. Such additions are not made for the one-third participation. Here it is generally only the employees of the company concerned who are included. It is only if there is a domination agreement with another company that the employees of the dependent company are also counted for the dominating company. It is therefore no wonder that a reasonable number of mid-sized companies are trying to retain the status quo of one-third participation precisely in case the magic “2,000 threshold” is exceeded. In the past few years it was often chosen here to establish a European Company (Societas Europaea or SE) where employee participation in the supervisory board can be specified compulsorily for the future by an agreement with employee representatives irrespective of whether the thresholds are exceeded or not. However, apart from all the employees of the company concerned the employees of its subsidiaries, both domestic and within the EU, are included in the respective negotiations with the employee representatives. Consequently there are also more foreign employee representatives in the supervisory boards of SEs.

This is different for stock corporations or limited liability companies under German law. Prevailing opinion assumes here that only the employees in Germany are to be taken in order to determine the number of employees. There are only a few exceptions permitted, e.g. secondments. Such prevailing opinion was certainly described as absolutely mainstream until now. The decision by the Regional Court in Frankfurt which clearly distances itself from this viewpoint is therefore all the more surprising. The instant case concerned so-called “status proceedings” for Deutsche Börse AG, which proceedings had been initiated by a minority shareholder (a university professor with a passion for law). At the relevant time Deutsche Börse AG had approx. 1,600 German employees and a further approx. 2,000

employees outside Germany who were mostly employed in foreign subsidiaries of Deutsche Börse AG.

The prevailing opinion does not generally include foreign employees on the grounds that German laws cannot have extraterritorial influence and could not therefore determine over the participation of foreign employees in the supervisory board, but it is not clearly stated in the wording of MitbestG. There are, however, clear statements on not including foreign employees. It is not contested by the Regional Court in Frankfurt which only focusses on the legal definition of affiliates which does not distinguish between German and foreign companies. The Regional Court therefore states that a foreign subsidiary of Deutsche Börse AG with its employees abroad must also be taken into account.

Whether the decision will ultimately remain valid cannot be easily predicted despite the absolute prevailing opinion. The arguments of the Regional Court cannot at any rate be dismissed totally out of hand. If said legal opinion is confirmed, it would mean a turning point in employee participation in Germany. Apart from the considerable additional work of new supervisory board elections and including foreign employees in an international voting procedure and organization, the influence of German employees and German trade unions in the supervisory boards of German companies would be reduced. Since this would also not be in the interest of the German trade unions, it remains to be seen what position they will assume in this respect.

German companies which are anyway considering re-arranging or freezing employee participation at one-third (or less) should now all the more contemplate establishing a European SE. Since the form and type of employee participation are more or less freely negotiable here, it is possible to counteract unpleasant surprises rendered by inconsistent court practice. German companies which exceed the 2,000 employee threshold when including their foreign employees (and also those of subsidiaries) should also at any rate consider this aspect seriously.