Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 28 April 2022 [1]

Case C-677/20

Industriegewerkschaft Metall (IG Metall),
ver.di – Vereinte Dienstleistungsgewerkschaft
v
SAP SE,
SE-Betriebsrat der SAP SE,
in the presence of
Konzernbetriebsrat der SAP SE,
Deutscher Bankangestellten-Verband eV,
Christliche Gewerkschaft Metall (CGM),
Verband angestellter Akademiker und leitender Angestellter der chemischen Industrie eV

(Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany))

(Reference for a preliminary ruling – Social policy – European company established by way of transformation – European company in a dualist form – Employee involvement – Election of employee representatives as members of the Supervisory Board – Separate ballot for employee representatives proposed by the trade unions)

I. Introduction

1. Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees [2] ('the SE Directive') is the result of negotiations lasting more than 30 years, as the first proposal for the creation of a European company ('an SE') was issued by the European Commission in 1970. For a long time the negotiations came up against an obstacle on two points: the dualist or monist structure of the company and employee involvement. After the draft was split into two proposals in 1989 – one for a regulation on the Statute of a European Company [3] and the other for a directive complementing the Statute for a European Company with regard to the involvement of

[1] Original language: French.

[2] OJ 2001 L 294, p. 22.

[3] See Proposal for a Council Regulation (EEC) on the Statute of a European Company (COM(89) 268 final – SYN 218), submitted by the Commission on 16 October 1989.

employees [4] – a compromise was eventually found. This resulted in the possibility for an SE to be created by way of transformation from a public limited-liability company formed under the law of one Member State if, for at least two years, it has had a subsidiary company governed by the law of another Member State. [5] This new fourth option for creating an SE, alongside a merger, the creation of an SE holding company and the creation of a subsidiary SE, resulted in provisions being added in the SE Directive to ensure that such a transformation of a company would not be used to circumvent a national employee involvement mechanism existing in the company to be transformed. Those provisions include Article 4(4) of the SE Directive, the interpretation of which is sought by the present request for a preliminary ruling. This is undoubtedly one of the key points of the compromise, which was accepted unanimously following the change of the legal basis for that directive, since that article is intended to 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'.

2. Since German law provides for a specific ballot to be held for the election of a particular number of trade union representatives among employee representatives within the Supervisory Board of an 'Aktiengesellschaft' (public limited-liability company), is that specificity among the elements that must be preserved where that 'Aktiengesellschaft' (public limited-liability company) is transformed into an SE, or may it be the subject of negotiation between the competent bodies of the company to be transformed and the special negotiation body ('the SNB'), which is the instrument established by the SE Directive to draw up the arrangements for employee involvement within the future SE, taking account of national legislation and practices, given that unification of the rules was not adopted by the EU legislature?

3. I shall propose that the answer should be that the SNB's autonomy of negotiation does not permit it to dispense with a separate ballot to elect, as employee representatives within the Supervisory Board, a certain proportion of candidates put forward by the trade unions, where that specific requirement is provided for and mandated by the national law applicable to the company to be transformed.

II. Legal framework

A. European Union law

4. Recitals 3, 5, 7, 8, 10, 18 and 19 of the SE Directive read as follows:

'(3) In order to promote the social objectives of the [European Union], special provisions have to be set, notably in the field of employee involvement, 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. This objective should be pursued through the establishment of a set of rules in this field, supplementing the provisions of [Regulation No 2157/2001].

……

[4] See Proposal for a Council Directive complementing the Statute for a European Company with regard to the involvement of employees (COM(89) 268 final – SYN 219) submitted by the Commission on 25 August 1989.

[5] See Article 2(4) of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statue for a European company (SE) (OJ 2001 L 294, p. 1).

(5) 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 makes it inadvisable to set up a single European model of employee involvement applicable to the SE.

…

(7) If and when participation rights 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.

(8) The concrete procedures of employee transnational information and consultation, as well as, if applicable, 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.

…

(10) 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.

…

(18) It is a fundamental principle and stated aim of this Directive to secure employees' acquired rights as regards involvement in company decisions. Employee rights in force before the establishment of SEs should provide the basis for employee rights of involvement in the SE (the "before and after" principle). Consequently, that approach should apply not only to the initial establishment of an SE but also to structural changes in an existing SE and to the companies affected by structural change processes.

(19) Member States should be able to provide that representatives of trade unions may be members of a special negotiating body regardless of whether they are employees of a company participating in the establishment of an SE. Member States should in this context in particular be able to introduce this right in cases where trade union representatives have the right to be members of, and to vote in, supervisory or administrative company organs in accordance with national legislation.'

5. Article 1 of the SE Directive, entitled 'Objective', provides:

'1. This Directive governs the involvement of employees in the affairs of European public limited-liability companies (*Societas Europaea*, hereinafter referred to as "SE"), as referred to in [Regulation No 2157/2001].

2. To this end, arrangements for the involvement of employees shall be established in every SE in accordance with the negotiating procedure referred to in Articles 3 to 6 or, under the circumstances specified in Article 7, in accordance with the Annex.'

6. In the words of Article 2 of the SE Directive, entitled 'Definitions':

'For the purposes of this Directive:

…

(e) "employees' representatives" means the employees' representatives provided for by national law and/or practice;

(f) "representative body" means 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 of informing and consulting the employees of an SE and its subsidiaries and establishments situated in the [European Union] and, where applicable, of exercising participation rights in relation to the SE;

(g) "special negotiating body" means the body established in accordance with Article 3 to negotiate with the competent body of the participating companies regarding the establishment of arrangements for the involvement of employees within the SE;

(h) "involvement of employees" means any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company;

…

(k) "participation" means the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of:

– the right to elect or appoint some of the members of the company's supervisory or administrative organ …

…'

7. Article 3 of the SE Directive, which appears in Section II, entitled 'Negotiating procedure', provides:

'1. Where the management or administrative organs of the participating companies draw up a plan for the establishment of an SE, they shall as soon as possible after publishing the draft terms of … a plan … to transform into an SE, take the necessary steps … to start negotiations with the representatives of the companies' employees on arrangements for the involvement of employees in the SE.

2. For this purpose, a special negotiating body representative of the employees of the participating companies and concerned subsidiaries or establishments shall be created in accordance with the following provisions:

…

(b) Member States shall determine the method to be used for the election or appointment of the members of the special negotiating body who are to be elected or appointed in their territories. They shall take the necessary measures to ensure that, as far as possible, such members shall include at least one member representing each participating company which has employees in the Member State concerned. Such measures must not increase the overall number of members.

Member States may provide that such members may include representatives of trade unions whether or not they are employees of a participating company or concerned subsidiary or establishment.

…

3. The special negotiating body and the competent organs of the participating companies shall determine, by written agreement, arrangements for the involvement of employees within the SE.

…

4. Subject to paragraph 6, the special negotiating body shall take decisions by an absolute majority of its members, provided that such a majority also represents an absolute majority of the employees. Each member shall have one vote. However, should the result of the negotiations lead to a reduction of participation rights, the majority required for a decision to approve such an agreement shall be the votes of two thirds of the members of the special negotiating body representing at least two thirds of the employees, including the votes of members representing employees employed in at least two Member States,

– in the case of an SE to be established by way of merger, if participation covers at least 25% of the overall number of employees of the participating companies, or

– in the case of an SE to be established by way of creating a holding company or forming a subsidiary, if participation covers at least 50% of the overall number of employees of the participating companies.

Reduction of participation rights means 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.

…’

8. Article 4 of the SE Directive, concerning the content of the agreement on the arrangements for the involvement of employees within the SE, reads as follows:

‘1. The competent organs of the participating companies and the special negotiating body shall negotiate in a spirit of cooperation with a view to reaching an agreement on arrangements for the involvement of the employees within the SE.

2. Without prejudice to the autonomy of the parties, and subject to paragraph 4, the agreement referred to in paragraph 1 between the competent organs of the participating companies and the special negotiating body shall specify:

…

(g) if, during negotiations, the parties decide to establish arrangements for participation, 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;

…

3. The agreement shall not, unless provision is made otherwise therein, be subject to the standard rules referred to in the Annex.

4. Without prejudice to Article 13(3)(a), 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 those existing within the company to be transformed into an SE.'

9. Article 7 of the SE Directive, entitled 'Standard rules', states in paragraphs 1 and 2:

'1. In order to achieve the objective described in Article 1, Member States shall, without prejudice to paragraph 3 below, lay down standard rules on employee involvement which must satisfy the provisions set out in the Annex.

The standard rules as laid down by the legislation of the Member State in which the registered office of the SE is to be situated shall apply from the date of the registration of the SE where either:

(a) the parties so agree; or

(b) by the deadline laid down in Article 5, no agreement has been concluded, and:

– the competent organ of each of the participating companies decides to accept the application of the standard rules in relation to the SE and so to continue with its registration of the SE, and

– the special negotiating body has not taken the decision provided in Article 3(6).

2. Moreover, the standard rules fixed by the national legislation of the Member State of registration in accordance with Part 3 of the Annex shall apply only:

(a) 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;

…

If there was more than one form of participation within the various participating companies, the special negotiating body shall decide which of those forms must be established in the SE. Member States may fix the rules which are applicable in the absence of any decision on the matter for an SE registered in their territory. The special negotiating body shall inform the competent organs of the participating companies of any decisions taken pursuant to this paragraph.'

10. In the words of Article 11 of the SE Directive, concerning the misuse of procedures:

'Member States shall take appropriate measures in conformity with [EU] law with a view to preventing the misuse of an SE for the purpose of depriving employees of rights to employee involvement or withholding such rights.'

11. Article 13(3) and (4) of the SE Directive provides:

'3. This Directive shall not prejudice:

(a) the existing rights to involvement of employees provided for by national legislation and/or practice in the Member States as enjoyed by employees of the SE and its subsidiaries and establishments, other than participation in the bodies of the SE;

(b) the provisions on participation in the bodies laid down by national legislation and/or practice applicable to the subsidiaries of the SE.

4. In order to preserve the rights referred to in paragraph 3, Member States may take the necessary measures to guarantee that the structures of employee representation in participating companies which will cease to exist as separate legal entities are maintained after the registration of the SE.'

12. The annex to the SE Directive contains the standard rules referred to in Article 7 of that directive. Part 3 of that annex, entitled 'Standard rules for participation', reads as follows:

'Employee participation in an SE shall be governed by the following provisions:

(a) 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. Point (b) shall apply *mutatis mutandis* to that end.

(b) In other cases of the establishing of an SE, the employees of the SE, its subsidiaries and establishments and/or their representative body shall have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body of the SE equal to the highest proportion in force in the participating companies concerned before registration of the SE.

If none of the participating companies was governed by participation rules before registration of the SE, the latter shall not be required to establish provisions for employee participation.

The representative body shall decide on the allocation of seats within the administrative or supervisory body among the members representing the employees from the various Member States or on the way in which the SE's employees may recommend or oppose the appointment of the members of these bodies according to the proportion of the SE's employees in each Member State. If the employees of one or more Member States are not covered by this proportional criterion, the representative body shall appoint a member from one of those Member States, in particular the Member State of the SE's registered office where that is appropriate. Each Member State may determine the allocation of the seats it is given within the administrative or supervisory body.

…’

B. German law

1. The MitbestG

13. Paragraph 7 of the Gesetz über die Mitbestimmung der Arbeitnehmer (Law on employee participation [6]) of 4 May 1976, as amended by the Law of 24 April 2015, [7] provides:

‘(1) The Supervisory Board of an undertaking,

1. with normally no more than 10 000 employees shall be composed of 6 members representing the shareholders and 6 members representing the employees;

2. with normally more than 10 000 employees, but no more than 20 000, shall be composed of 8 members representing the shareholders and 8 members representing the employees;

3. with normally more than 20 000 employees shall be composed of 10 members representing the shareholders and 10 members representing the employees.

…

(2) The members of the Supervisory Board representing the employees shall include

1. in a Supervisory Board containing six employees’ representatives, four employees of the undertaking and two trade union representatives;

2. in a Supervisory Board containing eight employees’ representatives, six employees of the undertaking and two trade union representatives;

3. in a Supervisory Board containing 10 employees’ representatives, seven employees of the undertaking and three trade union representatives.

…

(5) The trade unions referred to in subparagraph 2 must be represented in the undertaking itself or in a different undertaking whose employees participate in the election of the undertakings’ Supervisory Board members in accordance with this law.’

14. Paragraph 16 of the MitbestG provides, with regard to the election of the trade union representatives to the Supervisory Board:

‘(1) The delegates shall elect the Supervisory Board members responsible for representing the trade unions in accordance with Paragraph 7(2) by secret ballot and in accordance with the principles of a proportional ballot …

6 BGBl. 1976 I, p. 1153.

7 BGBl. 2015 I, p. 642; ‘the MitbestG’.

(2) The election shall be held on the basis of nominations from the trade unions represented in the undertaking itself or in a different undertaking whose employees participate in the election of the undertaking's Supervisory Board members in accordance with this law. …'

2. The SEBG

15. The Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft (Law on the involvement of employees in a European company [8]) of 22 December 2004, as amended by the Law of 20 May 2020,[9] in the version in force since 1 March 2020, provides the following definitions in Paragraph 2(8) and (12):

'(8) "Involvement of employees" means any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company.

…

(12) "Participation" means the influence of employees on the affairs of a company by means of

1. exercising the right to elect or appoint some of the members of the company's supervisory or administrative organ …'

16. Paragraph 21 of the SEBG, entitled 'Content of the agreement', provides:

'(1) The written agreement between the management boards and the special negotiating body shall lay down the following, without prejudice to the autonomy of the parties otherwise and subject to subparagraph 6:

…

(3) In the event that the parties conclude an agreement on participation, its content must be specified. In particular, the following should be agreed:

1. the number of members of the supervisory or administrative organ of the SE whom the employees are able to elect or appoint or whose appointment they are able to recommend or oppose;

2. the procedure by which the employees are able to elect or appoint these members or to recommend or oppose their appointment; and

3. the rights of these members.

…

(6) Without prejudice to the relationship of this Law to other provisions on employee participation within the undertaking, in the case of an SE established by means of

8 BGBl. 2004 I, p. 3686.

9 BGBl. 2020 I, p. 1044; 'the SEBG'.

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. …'

III. The dispute in the main proceedings and the question for a preliminary ruling

17. In 2014, a public limited-liability company governed by German law was transformed into an SE with a dualist system, called SAP SE, after entering into an agreement with the SNB concerning the involvement of employees in that company ('the agreement on employee involvement').

18. Before the transformation, in accordance with Paragraph 7(1) and (2) of the MitbestG, the company's Supervisory Board was composed of eight members representing the shareholders and eight members representing the employees. Among the employees' representatives, two were representatives of the trade unions, elected by separate ballot from that by which the other six employee representatives were elected.

19. Following the transformation, in accordance with the agreement on employee involvement, SAP SE has a Supervisory Board with 18 members, 9 of whom are employee representatives. Point 3.1 of Part II of the agreement on employee involvement provides that only employees of the SAP group or representatives of the trade unions represented within the group may be nominated or appointed as employee representatives on the Supervisory Board. Point 3.3 of Part II of the agreement confers on the trade unions an exclusive right to nominate a certain number of the employee representatives allocated to Germany, those trade union representatives being elected by a separate ballot.

20. When SAP SE planned to reduce its Supervisory Board to 12 members, the trade unions objected to the provisions of point 3.4 of Part II of the agreement, which provide that, where the Supervisory Board is composed of 12 members, the employee representatives corresponding to the first 4 seats allocated to Germany are to be elected by employees employed in Germany and that the trade unions represented within the group may nominate candidates for some of the seats allocated to Germany, but without a separate ballot for the election of their candidates. Those trade unions maintain that the provisions in question are contrary to Paragraph 21(6) of the SEBG, as they do not confer on the trade unions an exclusive right, guaranteed by a separate ballot, to nominate employee representatives on the Supervisory Board. SAP SE, on the other hand contends that those trade unions' exclusive right to nominate candidates, provided for in Paragraph 7(2) in conjunction with Paragraph 16(2) of the MitbestG, is not protected by Paragraph 21(6) of the SEBG.

21. The referring court, which is hearing an appeal against the decision at first instance, dismissing the action brought by the trade unions, including, in particular, Industriegewerkschaft Metall ('IG Metall') and Vereinte Dienstleistungsgewerkschaft ('ver.di'), is uncertain as to the validity of the rules on the appointment of the employee representative members of a Supervisory Board which is reduced to 12 members, laid down in the agreement on employee involvement, in the light of Paragraph 21(6) of the SEBG and Article 4(4) of the SE Directive.

22. The referring court explains, in the first place, that the contested provisions of the agreement on employee involvement are not compatible with the interpretation, in accordance with the relevant rules of interpretation of national law, of Paragraph 21(6) of the SEGB, which transposed Article 4(4) of the SE Directive.

23. In fact, the referring court considers that the autonomy granted to the parties in order to reach an agreement on employee involvement is subject, where an SE is established by way of the transformation of a public limited-liability company, to observance of at least the same level of all elements of employee involvement as those existing within the company to be transformed. It adds that those elements of employee involvement must be determined on the basis of the relevant national law in accordance with the procedures for employee involvement in the company to be transformed. It considers that there must be a guarantee that the procedural elements which decisively characterise the influence of employees in the company to be transformed will remain qualitatively the same in the agreement on employee involvement that will apply to the SE. The referring court states that the separate ballot procedure for employee representatives who may be external to the company, nominated by the trade unions which are represented in the company to be transformed or in another undertaking whose employees participate in electing the members of the Supervisory Board, is one of the procedural elements which characterise the employees' influence and that, on that basis, it must be guaranteed by a qualitatively equivalent measure in the agreement on employee involvement. It states that the guarantee that the equivalence of involvement will be maintained also applies to the number of trade union representatives that must be elected by separate ballot and that that exclusive right to nominate candidates should made available to all trade unions, not just German trade unions. It adds that that separate ballot permits the election of persons who are highly familiar with the circumstances and requirements of the undertaking while at the same time having external expertise and independence. The referring court concludes that the mechanism provided for in the agreement on employee involvement in the case of a Supervisory Board having 12 members, by not making provision for a separate ballot for the purpose of electing candidates proposed by the trade unions, does not sufficiently guarantee the presence of a trade union candidate within the Supervisory Board and is therefore not compatible with Paragraph 21(6) of the SEBG.

24. In the second place, the referring court is uncertain about the compatibility of the latter interpretation of its national law in the light of the requirements of Article 4(4) of the SE Directive.

25. In fact, the referring court considers that, if that article of the SE Directive were to be based on a different understanding with a lower level of uniform protection applicable across the European Union, it would be required to interpret Paragraph 21(6) of the SEBG in a manner consistent with EU law.

26. In those circumstances, the Bundesarbeitsgericht (Federal Labour Court, Germany) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Paragraph 21(6) of the [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, compatible with Article 4(4) of [the SE Directive]?'

27. IG Metall, ver.di, SAP SE, the Konzernbetriebsrat der SAP SE (Supervisory Board of the SAP SE group), the German Government and the European Commission have lodged written observations. Those parties, with the exception of the Supervisory Board of the SAP SE group, submitted their oral observations at the hearing on 7 February 2022, as did the Luxembourg Government.

IV. Analysis

28. Before I address the question submitted by the referring court, it is appropriate to present some observations relating to the validity of Article 4(4) of the SE Directive in the light of primary law, more specifically in the light of Article 49 TFEU on freedom of establishment and of Articles 16, 17 and 20 of the Charter of Fundamental Rights of the European Union. In fact, SAP SE maintains that Article 4(4) of the SE Directive impinges on those rights and freedoms in a way that is not necessary in order to attain the objectives of Regulation No 2157/2001 and the SE Directive to complete the internal market and promote EU objectives in the social sphere, when those objectives could equally be attained by the other rules relating to the procedure for the negotiation of the agreement on employee involvement and also by the existence of the standard rules applicable when the negotiations fail.

29. On those points, I recall that the Court has held, first, that it is for the referring court alone to determine the subject matter of the questions it intends to refer and, second, that since Article 267 TFEU does not make a means of redress available to the parties to a case pending before a national court, the Court cannot be compelled to evaluate the validity of EU law on the sole ground that that question has been put before it by one of parties in its written observations. [10]

30. In the present case, the question for a preliminary ruling concerns the interpretation of Article 4(4) of the SE Directive and the referring court does not indicate that it has any doubts as to the validity of that provision or that the question of its validity has been raised before it. There is thus no need for the Court to rule on its validity.

31. As regards the substance, the referring court asks, in essence, whether the specific ballot for the election of the trade union representatives to the Supervisory Board of an SE arising from the transformation of a German public limited-liability company must be maintained, in application of Article 4(4) of the SE Directive, or whether it may be dispensed with during the negotiation of the agreement on employee involvement referred to in Article 4(1) of the SE Directive.

A. Brief reminder of the rules applicable to the creation of an SE by way of transformation

32. It should be recalled that that the unanimity required for the adoption of the SE Directive meant that it was not possible to secure the harmonisation, or indeed the standardisation, of the rules on employee involvement within companies established in accordance with the law of the Member States. The SE Directive nonetheless set out a definition of employee involvement, which consists of three main parts: 'information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company'. [11] Likewise, the SE Directive defined participation as being 'the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of the right to elect … some of the members of the company's supervisory … organ …'. [12]

33. In the absence of harmonisation of the methods of employee involvement, preference is given to negotiation between the competent bodies of the company and the SNB, representing the employees of the entities concerned by the creation of the SE, in order to reach an agreement on employee involvement that has to contain a number of elements, including, in particular, if

[10] See judgment of 5 May 2011, *MSD Sharp & Dohme* (C-316/09, EU:C:2011:275, paragraphs 21 and 23 and the case-law cited).

[11] Article 2(h) of the SE Directive.

[12] Article 2(k) of the SE Directive.

employee participation takes the form of the election of representatives of those employees to the Supervisory Board, as in this case, the number of employee representatives there are to be on the board and the procedures to be followed when electing them.[13] That negotiation is nonetheless restricted by a 'before and after' principle, set out in recital 18 of the SE Directive as follows: 'employee rights in force before the establishment of SEs should provide the basis for employee rights of involvement in the SE'. That recital establishes, moreover, a principle to secure employees' acquired rights as regards involvement.

34. If no agreement is reached, an SE is to be subject to standard rules laid down in the legislation of the Member State in which it is registered[14] in accordance with the principles set out in the annex to the SE Directive. These rules include, in the case of transformation, the rule that 'if the rules of a Member State relating to employee participation in the … supervisory body applied before registration, all aspects of employee participation shall continue to apply to the SE. Point (b) shall apply *mutatis mutandis* to that end'.[15] Point (b) of Part 3 of the Annex to the SE Directive states that 'in other cases of the establishing of an SE, the employees of the SE, its subsidiaries and establishments … shall have to right to elect … a number of members of the … supervisory body of the SE equal to the highest proportion in force in the participating companies concerned before registration of the SE.'

35. In addition, it is important to note that the creation of an SE by way of transformation is protected by additional safeguards by comparison with the other three methods of creating an SE. Thus, in the first place, in the case of transformation it is not possible to decline to open or to terminate negotiations within the SNB without the standard rules being applicable.[16] Consequently, in the case of the transformation of a company subject to participation, either the negotiations result in an agreement on employee involvement that meets the requirements of Article 4(4) of the SE Directive, or the standard rules specific to the transformation apply. In the second place, in the case of transformation, it is not possible for the SNB to vote for a reduction of participation rights, a reduction being understood as meaning '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'.[17] In the third place, Regulation No 2157/2001 also provides for two forms of protection where an SE is created by way transformation: first, the registered office may not be transferred from one Member State to another at the time of the conversion (Article 37(3) of that regulation) and, second, Member States may condition a conversion to a favourable vote of a qualified majority or unanimity in the organ of the company to be converted within which employee participation is organised (Article 37(8) of that regulation).

36. It is against that background that Article 4(4) of the SE Directive must be interpreted. That interpretation concerns to two distinct elements: first, 'all elements of employee involvement' and, second, 'at least the same level … as the ones existing within the company to be transformed into an SE'. I shall begin my analysis with the second element.

13 See Article 4(2)(g) of the SE Directive.

14 See Article 7(1) of the SE Directive.

15 Point (a) of Part 3 of the Annex to the SE Directive.

16 See Article 3(6) of the SE Directive.

17 Article 3(4) of the SE Directive.

B. The interpretation of the expression 'at least the same level … as the ones existing within the company to be transformed into an SE'

37. In the first place, this second element undeniably refers to the national law applicable to employee involvement in the company to be transformed.

38. That, however, does not mean that all the rules applicable to that company will continue to apply to the SE. In fact, it is only if the standard rules are applied in the event that the negotiations fail that it will be possible to maintain unaltered the rules hitherto applicable to the company to be transformed, since, according to the standard rules in Part 3 of the Annex to the SE Directive, set out above, in the event of transformation, all the elements of employee participation are to continue to apply pursuant to point (a) of Part 3, in particular the highest proportion of employee representatives in the Supervisory Board, pursuant to point (b) of Part 3, which is applicable *mutatis mutandis*. Contrary to SAP SE's assertion, therefore, there is indeed a premium on the negotiation since the SNB will be able to depart from national law, to the extent permitted by the interpretation of the other element of Article 4(4) of the SE Directive.

39. In the second place, the same reasoning must apply with respect to the guarantee that the arrangements for employee involvement and employees' acquired rights relating to involvement will not cease to exist or be weakened and to the application of the 'before and after' principle, set out in recitals 3 and 18 of the SE Directive.

C. The interpretation of the expression 'all elements of employee involvement'

40. It might be tempting to follow SAP SE's reasoning. That company proposes that those 'elements' should be given a uniform interpretation at EU level as concerning, with respect to participation, only the proportion and the influence of employees' representatives within the Supervisory Board, without requiring a specific ballot for trade union representatives. That interpretation may be supported by various factors.

41. First, in the strict sense, the SE Directive does not protect trade unions' rights but employees' rights, since trade unions are mentioned explicitly in the SE Directive only with respect to the constitution of the SNB.[18] However, that single reference may be explained by the fact that there are, for the constitution of that body, necessarily, no national rules, and that it was necessary to make provision for the express participation of trade unions, whose role is expressly provided for in certain national laws.

42. Second, the reduction of participation rights, where it is referred to in the SE Directive, is envisaged as a reduction of the proportion of employees' representatives within the participating companies.[19] Likewise, Directive 2017/1132[20] provides that, in case of a cross-border transformation, the rules of the destination Member State on employee participation are not to apply if the law of the destination Member State does not provide for 'at least the same level of employee participation as operated in the company prior to the cross-border conversion,

[18] See Article 3(2)(b) and recital 19 of the SE Directive.

[19] See Article 3(4), *in fine*, of the SE Directive.

[20] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ 2017 L. 169, p. 46), as amended by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 (OJ 2019 L 321, p. 1) ('Directive 2017/1132').

measured by reference to the proportion of employee representatives among the members of the administrative or supervisory body'. [21] The same form of words is used for cross-border divisions [22] and for cross-border mergers. [23]

43. Thus, in those situations, the level of participation is assessed by reference to employees' representatives within the body concerned. Although it may be concluded from this that proportion is among the protected elements of participation, that is, on the contrary, not sufficient to preclude the possibility that other elements of that participation may be protected in the same way, provided that they have an impact on employees' influence on the functioning of the company.

44. In fact, in the cases referred to in Directive 2017/1132, that reference to proportion comes at a point in the process at which it is necessary to determine, in the first place, the law applicable to the transaction as regards the rights of participation and, in the second place, whether negotiations via an SNB should be initiated in order to determine those rights, which requires an objective criterion not open to discussion.

45. As regards the reference to that proportion in Article 3(4), *in fine*, of the SE Directive, that, too, is not sufficient to preclude the fact that other elements of participation may be protected, since that article concerns the other methods of creating the SE. That is perfectly consistent with the fact that the standard rules for those methods of creation protect only proportion. [24]

46. Furthermore, as the expression is couched in particularly broad terms, namely 'all elements of employee involvement', it cannot be taken to mean that only a proportion within the Supervisory Board would be protected, when the substance of the agreement on employee involvement must have regard to not only the number of employees' representatives on that board, but also the procedures as to how they may be elected. [25]

47. Although certain procedural elements must benefit from the same protection as proportion, I am, however, not convinced that all of those procedural elements have the same value: they must, in addition, have an influence on the functioning of the company.

48. The trade union applicants in the main proceedings share that viewpoint, since it is clear that they did not dispute the reduction of the Supervisory Board to 12 members, whereas under German law the number of members of that board depends on the size of the company, with no possibility for derogation. They therefore accepted that the number of members of the Supervisory Board could be the subject of negotiation, as they accepted at the hearing that several methods of allocating the seats of the employees' representatives could exist, provided

[21] Article 86l(2)(a) of Directive 2017/1132.

[22] See Article 160l(2)(a) of Directive 2017/1132.

[23] See Article 133(2)(a) of Directive 2017/1132.

[24] See Part 3(b) of the Annex to the SE Directive.

[25] See Article 4(2)(g) of the SE Directive.

that the separate ballot for the election of the trade union candidates is respected (the proportion to be applied only to the seats allocated to Germany [26] or to be applied globally allowing all the trade unions of the entities concerned to share the seats reserved for them [27]).

49. Therefore, it is necessary for the procedural element to have an influence on decision-making within the body concerned, since, as we have seen, employee participation is defined as the influence of employees' representatives in the affairs of a company. [28] Accordingly, that criterion of influence makes it possible to understand that the total number of members of the Supervisory Board may be subject to negotiation if the proportion is respected.

50. However, that criterion is more difficult to deal with when it falls to be determined whether or not the specific ballot from which the trade unions benefit is or is not to be protected, since that entails making a value-judgment of the contribution made by trade union representatives as compared to the other employees' representatives within the Supervisory Board. The referring court as well as IG Metall and ver.di assert that legal opinion in Germany is divided in that respect, although all three claim that employee participation is improved by the participation of trade union representatives. Consequently, it is not feasible that it should be a matter to be assessed on a case-by-case basis, and the only way of avoiding that value-judgment is to rely on the assessment made by national law.

51. Furthermore, the trade unions and the German Government propose using the criterion of an element characteristic of the procedure for employee participation at national level to identify the elements that cannot be the subject of negotiation. That criterion seems to me to be capable of illustrating the idea that influence, where it is linked with qualitative elements, cannot be the subject of assessment or negotiation on a case-by-case basis, but must be evaluated by reference to the choices made in domestic law, so long as harmonisation has not been attained at EU level. Indeed, the SNB should have clear indications as to what comes within its freedom of negotiation and what aspects of the national rules must be preserved.

52. It cannot be denied, therefore, that the specific ballot for trade union representatives is an element characteristic of the participation regime in Germany and that it cannot therefore be subject to negotiation.

53. It seems to me that the interpretation of Article 4(4) of the SE Directive decided on will apply – because the same wording is used – to European cooperative societies [29] and, by reference to that provision, to cross-border divisions [30] and cross-border conversions. [31]

54. Although the referring court does not directly ask the Court whether that right to a separate ballot should be extended to all employees concerned by the transformation, whether that ballot should be open to trade unions other than German trade unions and whether it should be

[26] Which would be in keeping with the logic governing the third paragraph of point (b), *in fine*, of Part 3 of the Annex to the SE Directive (Standard Rules), which states that 'each Member State may determine the allocation of the seats it is given within the administrative or supervisory authority'.

[27] Which would be more within the logic followed in the judgment of 20 June 2013, *Commission* v *Netherlands* (C-635/11, EU:C:2013:408, paragraphs 40 and 41), interpreting the 'before and after' principle as requiring the extension of those rights of involvement to all workers concerned by the creation of an SE.

[28] See Article 2(k) of the SE Directive.

[29] See Article 4(4) of Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees (OJ 2003 L 207, p. 25).

[30] See Article 160l(2)(b) of Directive 2017/1132.

[31] See Article 86l(2)(b) of Directive 2017/1132.

possible to put forward trade union candidates irrespective of whether or not they are employed in one of the entities concerned, those questions are implicit because they appear in the grounds of its decision. It therefore seems appropriate to answer them briefly, especially since the answers may be inferred from the SE Directive and from the Court's case-law.

55. First of all, the Court has already held that it was apparent from 'the SE Directive that the securing of acquired rights sought by the European Union legislature implies not only the reservation of employees' acquired rights in the companies participating in the merger, but also the extension of those rights to all the employees concerned'.[32] Thus, it seems clear to me that all workers should be able to benefit from that specific ballot, even where it is not permitted as such under national law.[33] In addition, the agreement on employee involvement may determine the precise procedures for the election of employee representatives. That might induce the SNB, in the course of the negotiations, to agree that trade unions other than German trade unions might present candidates, although it is not required to do so either pursuant to an obligation laid down in the SE Directive or, presumably, pursuant to national law. Last, in the light of the position taken in the SE Directive, which permits the participation in the SNB of representatives of trade unions who are not employed in an entity concerned by the transformation,[34] and in so far as that is the case in the national law of the company to be transformed, the trade union candidates might be candidates not employed in such an entity.

56. Thus, Article 4(4) of the SE Directive must be interpreted as meaning that the agreement on employee involvement in an SE created by way of transformation must provide for a separate ballot for the election, to employee representatives' posts within the Supervisory Board, of a certain proportion of candidates put forward by the trade unions, where that specific requirement is provided for and mandated by the national law applicable to the company to be transformed.

V. Conclusion

57. In the light of the foregoing considerations, I propose that the Court answer the question for a preliminary ruling referred by the Bundesarbeitsgericht (Federal Labour Court, Germany) as follows:

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 must be interpreted as meaning that the agreement on employee involvement in an SE created by way of transformation must provide for a separate ballot for the election, to employee representatives' posts within the Supervisory Board, of a certain proportion of candidates put forward by the trade unions, where that specific requirement is provided for and mandated by the national law applicable to the company to be transformed.

[32] Judgment of 20 June 2013, *Commission* v *Netherlands* (C-635/11, EU:C:2013:408, paragraph 41).

[33] See the facts of the case that gave rise to the judgment of 18 July 2017, *Erzberger* (C-566/15, EU:C:2017:562), where it was held that German law on participation could not be extended outside German territory.

[34] See recital 19 and Article 3(2)(b) of the SE Directive.