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A core element of Europe

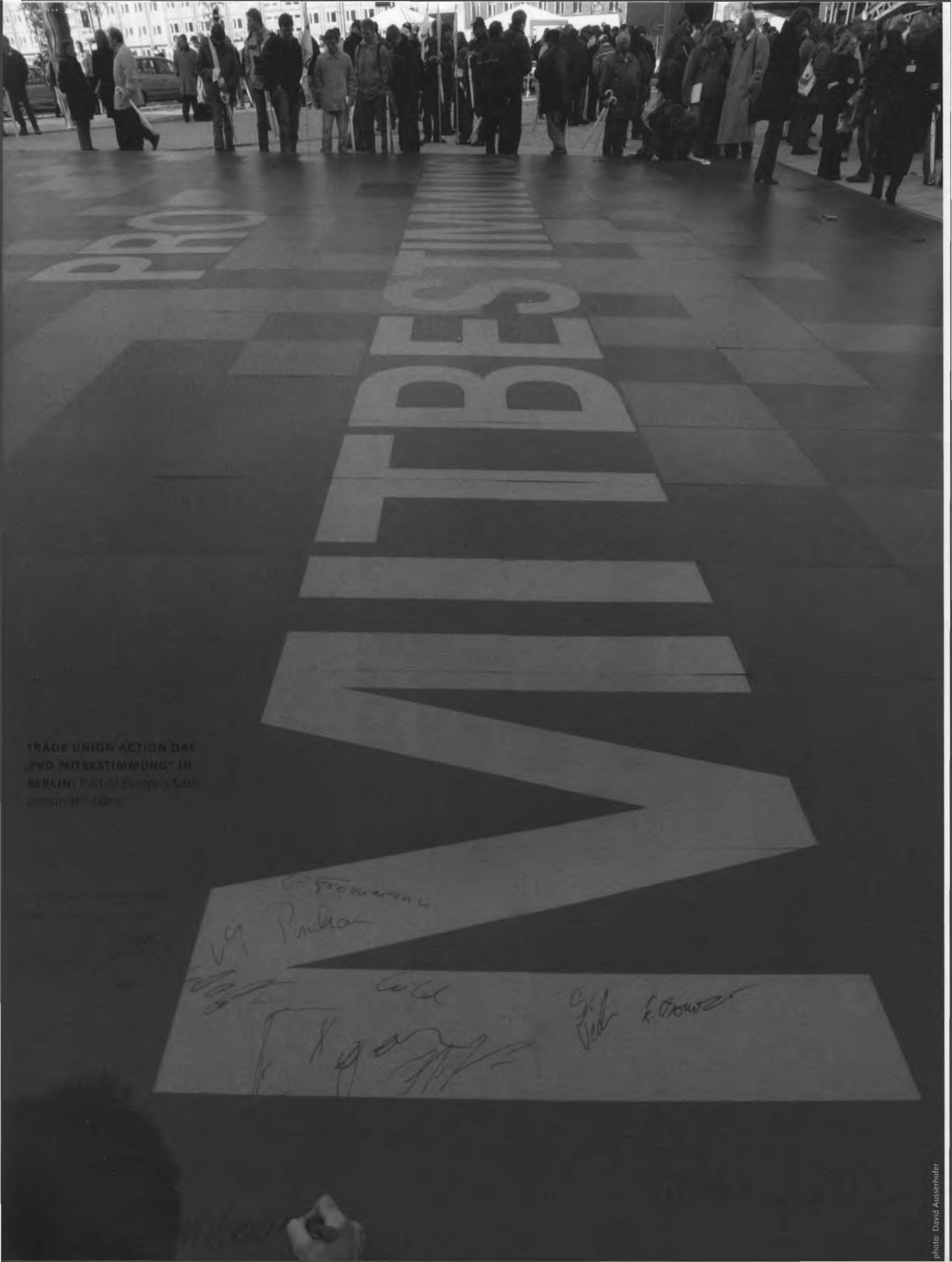
EMPLOYEE INVOLVEMENT A high-level Government Commission in Germany recently concluded that employee rights have developed in line with national traditions and are part of Europe's basic democratic fabric. For the present, the transparent attempt by employers in Germany to use Europe against board-level representation has failed.

By **KURT BIEDENKOPF, WOLFGANG STREECK** and **HELLMUT WISSMANN**. Kurt Biedenkopf is former President of Saxony; Wolfgang Streeck is Director of the Max Planck Institute for the Study of Societies and Hellmut Wissmann is the former President of the Federal Labour Court. The authors were the academic members of the Government Commission on the modernisation of employee board level representation. The text is a slightly shortened version of the chapter which compares employee board-level representation in Germany with the situation elsewhere in Europe, presented as part of the final report in December 2006.

The German system of board-level representation is one of a variety of forms of employee involvement in company decision-making processes across Europe. The arrangements which exist in this area in different countries have grown up over a long period of time and, in their basic elements, have shown themselves to be resistant to all attempts at harmonisation. In countries like the UK and Italy, whose industrial relations have traditionally been characterised by conflict, there are no legal provisions for the involvement of employees at company level; here the unions prefer to rely entirely on collective agreements, over which they can take strike action, in representing their members. In Germany, on the other hand, the economic and social

order that developed after the Second World War includes a system of employee representation on supervisory boards, giving them half the seats in companies with more than 2,000 employees.

IN A EUROPEAN CONTEXT In light of the wide-ranging opportunities for influence available to employee representatives on single-tier boards, as in the Scandinavian countries for example, it remains an open question whether and to what extent German arrangements represent a particularly far-reaching form of employee involvement at board level. It is, however, undisputed that the parity of membership of supervisory boards in large companies (where employee and shareholder representatives have an equal number of seats) exists in name only, given that a second vote can be cast by the chair (who always represents the shareholders). It also cannot be disputed that the arrangements for employee representatives to have a third of the seats ►



TRADE UNION ACTION DAY
„PRO MITBESTIMMUNG“ IN
BERLIN: Part of Europe's best
consortium fabric

Handwritten signatures on a white sign:
- 19 Pankov
- [unclear]
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- [unclear]



photo: David Ausserhofer

MICHAEL SOMMER,
President of the DGB,
the German trade union
confederation:

"From a trade union perspective, we welcome the involvement of the viewpoints and positions of foreign workforces in the supervisory board. However, we need to take care that making supervisory boards more international does not lead to the exclusion of external union representatives. This is because the results of current studies show that it is precisely the representatives of the unions who bring political and legal knowledge into the work of supervisory boards and have an important coordinating role for employee members. In a more international supervisory board this role could grow in importance. That is why the DGB proposes as a first uncontroversial step, that the law should allow employees outside Germany to stand as candidates".

Backing for board-level representation

The Commission on the modernisation of employee board-level representation in Germany presented its report to the German Chancellor Angela Merkel on 20 December last year.

In the report, the academic members of the Commission, all acknowledged experts in board-level representation, come to the conclusion that the core of the system has proved its worth and they "see no reason to propose a fundamental revision of German board-level representation to the Federal Government". Instead they recommend it should be carefully further developed and adapted to the changed economic and social circumstances. However, it did not prove possible to gain the support of both

level, which is modern and appropriate to European circumstances, taking current legislation as its starting point."

The members of the nine-strong Commission were: The academic members: Kurt Biedenkopf, former President of Saxony and the Commission Chair (after whom the Commission is sometimes known), Wolfgang Streeck, Director of the Max Planck Institute for the Study of Societies, and Hellmut Wissmann, a former president of the Federal Labour Court.

The employer representatives: Manfred Gentz, a former board member of DaimlerChrysler and head of the ICC-International Chamber of Commerce in Germany, Dieter Hundt, President of the Confederation of German Employers' Associations – BDA, and Jürgen Thumann, President of the Federation of German Industry – BDI.

The union representatives: Jürgen Peters, President of IG Metall – the metalworking union, Günter Reppien, Chair of the company works council at RWE Power AG, and Michael Sommer, President of the DGB, the Confederation of German Trade Unions.

In its deliberations the Commission was able to draw on the expertise of three research institutes: the Hans Böckler Foundation in Düsseldorf, the Cologne Institute for Economic Research (IW) and the Max Planck Institute for the Study of Societies, also based in Cologne.

It is still unclear whether and in what form the Commission's results will be taken up by the government or the parliament. If this happens, the DGB has expressed its willingness to cooperate. Chancellor Merkel has also declared her support in principle for employee board-level representation, and emphasised that "board-level representation is part of our social market economy, whose absence would be unthinkable and which has proved itself in Germany." ■



photo: bundesregierung.de

HANDING OVER THE COMMISSION REPORT TO CHANCELLOR MERKEL: The academic members Wissmann, Biedenkopf and Streeck (left to right) "see no reason to propose a fundamental revision of German board-level representation".

the employers and the unions for a common position. The unions were undoubtedly critical of some of the recommendations, but the employers rejected the report in its entirety because it did not meet their demands for a reduction in board-level representation rights.

The remit of the Government Commission – which was put in place by the then Chancellor Gerhard Schröder in March 2005 – was "to make proposals for a further development in the system of employee representation at board

► – the legal requirement in German companies with between 500 and 2,000 employees – is not unusual in a European context. It can be found in Austria, the Czech Republic, Denmark, Hungary, Luxembourg and the Netherlands. In addition it is not enough to describe the existing forms of employee board-level involvement solely in terms of the legally required percentage of seats:

■ In a range of countries, particularly in Scandinavia, the law provides for an absolute number of employee representatives, rather than a percentage. This can lead to employee representation being above a third of the seats.

■ In Scandinavia in particular, the right to employee board-level representation is essentially a trade union right. As a result, the unions, which also undertake collective bargaining, have direct access to company decision-making processes. In Germany, on the other hand, it is the workforce that has a right to employee board-level representation and legislation narrowly limits the role and influence of the unions.

■ At the same time, unions in Germany are tied into economic responsibility for companies with employee board-level representation, as the legislation reserves a number of supervisory board seats for union nominated individuals. Unions in Latin and the Anglo-Saxon countries, with a more confrontational approach, expressly reject this form of involvement as a hindrance to the independent representation of their members' interests.

■ The thresholds from which rights to board-level representation apply are very much lower in many European states than in Germany. In Sweden, employee board-level representation begins in companies with 25 employees, in Denmark with 35, in the Czech Republic with 50, in Finland with 150 and in Hungary with 200. In Austria employees can send representatives to the supervisory board as soon as there is a works council, and it can be elected when there are just five employees. Overall there is a link between minimum size and the proportion of employee seats; in general, if the proportion of seats is low then the minimum number of employees required for board-level representation will also be relatively low.

Taking all of these issues into account, the outstanding features of the German system of board-level representation are the numerically equal number of seats in companies with more than 2,000 employees and the very high thresholds – not the fact of employee involvement in itself. This has been confirmed by recent developments in other European countries, as well as in European Community law. It is noteworthy, for example, that countries like the Czech Republic, Hungary, Slovakia and Slovenia also introduced wide-ranging employee rights to board-level representation in the 1990s. From this perspective, it cannot be claimed that employee board-level representation in Germany is a unique phenomenon.

In any case any form of employee representation at board level can only be evaluated within the context of industrial relations in society as a whole. It is noticeable that where there is board-level representation, there are frequently also various forms of involvement in plant-level decision making and rights which result from



HUBERTUS SCHMOLDT,
President of IG BCE,
the mining, chemicals
and energy union:

"If employee board-level representation is to be further developed, this means making it European and international. We can clearly see that companies have become more international, and, of course, we need to take account of this in our own deliberations. Until now employees outside Germany have not been involved at supervisory board level. The IG BCE believes the employee representatives on the supervisory board should reflect a company's international employees."

free collective bargaining, which employees can use alongside their board-level rights. These are complementary systems for collectively reconciling different interests, which are organised differently in different countries, and the importance of each element often varies from country to country.

So, a level of institutional employee involvement at workplace and company level, which is weaker than that in Germany, may be compensated for by possibilities of influence through collective union bargaining which exceed those in Germany. Looking at board-level representation in isolation, therefore, only provides a limited indication of the extent and intensity of employee influence on company decisions.

IN LINE WITH GERMAN PRACTICE

European Union legislation has accepted the German dual system of plant-level and board-level representation as fit for purpose. This is shown in the European Company (SE), where the structure consists of an SE works council on the one hand and employee representation in the managing or administrative body of the company on the other. In this sense European legal developments have been in line with German practice. This is also reflected in the fact that Community law has given company board-level representation rights to the workforce and not to the unions. At the same time European legislation has respected the diversity of the national traditions that exist in the area of employee board-level representation. So, steps have been taken to prevent companies using the move to a European legal form to escape from their national obligations relating to employee involvement in company decisions.

It is true that European law, while in principle recognising the right of employees to be involved in company decisions, has refrained from cre- ►

TRIED AND TESTED

Law on the involvement of employees at board level: in effect since 1 July 1976

Shareholder representatives

Employee representatives from the workforce

Seats nominated by the unions

Senior manager



STARTING POINT

- Covers around 730 companies with 2,000 employees or more
- Size of the supervisory board – 12 to 20 members, depending on the number of employees
- Same number of seats for the employees (including the senior manager) as for the shareholders; shareholders have an advantage because the chair of the supervisory board has a second vote
- Trade unions can nominate two seats (three in 20-strong supervisory boards); their candidates have to stand for election like the representatives from the workforce
- Direct election – from 8,000 employees, indirect election through delegates

BIEDENKOPF COMMISSION PROPOSALS

Companies should be able to adapt the model of employee involvement they use, provided the two sides – the management board and an employee body – wish to do so. It should be possible to negotiate:

- **the degree of employee involvement** in companies that are tightly controlled by the group parent company, through either an increase (up from one third to 50 per cent) or a decrease (down from 50 per cent to one third) in the number of employee seats on supervisory boards;
- **the size of the supervisory board** – it should be possible for it to be both larger and smaller;
- **the mechanism for including employees** from outside Germany on the supervisory board and in the elections to the supervisory board.

The negotiating body for the employees should be made up of representatives of the works council, the union and senior managers, in line with the number of seats they have in the supervisory board. In principle, decisions should be taken on the basis of a three-quarters majority.

▶ ating a single unified model of employee representation at board level. In essence European legislation has limited itself to building bridges between the diversity of national arrangements so as to allow cross-border cooperation while maintaining the independence of national legal and social structures. It has done this, above all, by giving European Companies space to shape board-level representation in line with their individual circumstances – to a large extent the legislation is permissive. Community

law also provides for the involvement of workforces from sites in different member states in employee representation at board level – something which so far has not been possible in national regulations.

THE INTERFACE WITH COMPANY LAW – As far as the details of the development of European company law are concerned, the diversity of existing forms and traditions of employee involvement in Europe had for decades frustrated all attempts to introduce the European Company (SE) through EU legislation. The original intention to equip the SE with a single unified set of board-level



photo: Werner Bachmeier

JÜRGEN PETERS,
President of IG Metall,
the metalworkers union:

"We explicitly welcome the fact that German board-level representation has been placed in a European context. This is particularly in view of the fact that the involvement of employees and unions will become increasingly important in shaping social Europe in the future."

representation rights could not be realised. As a result a new solution for employee involvement in the SE was chosen in European legislation – one that was fundamentally different from the existing statutory models in individual member states.

In this arrangement, unlike in the German system, there is no pre-determined employee involvement depending on the objective characteristics of the company such as the number of employees. Instead, in the first instance, employee representation at board level is to be agreed through open negotiations between company management and a special negotiating body of the employees. If negotiations fail, statutory fallback regulations apply, which, as well as information and consultation rights, also contain a right for employees to be represented at board level.

In this, Community legislation provides for a "before and after approach". In order broadly to secure the existing extent of employee involvement rights, board-level representation in the SE is based on the situation that applied in this regard in the founding companies. Employee involvement is dealt with in the same way in the newly created legal form for the European Cooperative Society (SCE). Similarly, in European legislation on cross-border company mergers, the SE model for employee involvement has been used with slight changes for the companies which emerge from the fusion of firms with differing national identities.

A GROWING PROBLEM OF LEGITIMACY_ Under German law on board-level representation, both the right to vote and the right to stand for the workforce seats on the supervisory board is limited to employees in sites of the company or its subsidiaries located in Germany. However, most of the companies affected, either directly or through their subsidiaries, have foreign sites. Their workforces are as affected by the supervisory board's decisions as the employees in Germany. However, the employee representatives in supervisory boards have no mandate from the employees outside Germany. In this respect, German legislation on board-level representation does not differ from regulations on employee involvement in other countries. Only European legislation provides for cross-border employee representation, and then only for the bodies covered by its own legislation – SEs, European Cooperative Societies and companies resulting from cross-border mergers. The problem of legitimacy grows in significance as companies and groups based in Germany become increasingly internationalised and, as a result, include more and more employees outside Germany, who make the demand to influence decisions that affect them.

These problems can only be comprehensively resolved by providing a procedure for the appointment of employee members of the supervisory board which includes all the sites of a company or a group irrespective of whether they are inside or outside Germany. This requires regulations that are binding in all the states affected. As national law cannot have this effect on a foreign territory, only European Community law is relevant, at least for the EU area. However, there are no signs that a harmonisation of employee rep-

resentation at board-level can be expected in the foreseeable future. As long as this is the case, then at least measures should be taken by German legislators, which, while not removing the legitimacy problem, could reduce its severity. It is therefore recommended that there should be a legal option allowing for agreements, on the basis of which the employees outside Germany of companies and subsidiaries of groups with board-level involvement could be included in representation on the supervisory board. ■

FURTHER INFORMATION



A summary and assessment of the results of the Government Commission on the modernisation of employee board-level representation in Germany by the Hans Böckler Foundation is available in German, English, French and Italian. Download it from

www.boeckler-boxen.de
under the heading "Mitbestimmung in Deutschland".

The full final report of the academic members of Government Commission (also known as the Biedenkopf Commission), together with the positions of both the employee and employer members, is available as a PDF in German on this website, too.