

Peltzer

Co-determination Act 1976

Mitbestimmungsgesetz 1976

*German-English Text of the Co-determination Act
with an Introduction in English*

*Deutsch-englische Textausgabe des Mitbestimmungsgesetzes
mit einer englischen Einleitung*

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Co-determination Act

German-English Text
of the Co-determination Act
with an introduction in English

by

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Frankfurt

2. Edition



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Mitbestimmungsgesetz

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mit einer englischen Einleitung

von

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DER ARBEITNEHMER
(MITBESTIMMUNGSGESETZ - MitbestG)

LAW CONCERNING THE CO-DETERMINATION
OF EMPLOYEES
(CO-DETERMINATION ACT)

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1. The political scene which brought about the new Law

The new Co-Determination Law (Federal Law Gazette 1976, I, 1153) was published on May 4, 1976 and entered into force on July 1, 1976. After a transitional period which differs in length depending on when the 1976 Ordinary Shareholders' Meeting is summoned, but which shall not exceed two years, it will become fully effective.

Legislative moves to increase labour co-determination in large enterprises had been anticipated in Germany for many years. In fact as early as in the early fifties when different systems of co-determination were established for the coal-mining and iron and steel producing industry (with a stringent parity system in the Supervisory Board) on the one hand and the joint-stock companies and larger limited liability companies active in other fields (with a one-third labour participation in the Supervisory Boards) on the other hand, the question was asked by the labour unions whether this difference was warranted, and, if so, for what reason. Obviously one could also have asked the question whether the system in the coal-mining and iron and steel producing industry was not pushed too far, and what were the advantages for the employees in such industries where there was equal representation of shareholders and labour representatives.

The discussion on extending co-determination to the rest of industry was carried on all through the fifties and sixties.

When in 1969 a social democratic government was returned in the federal elections one could expect that the question would advance from the stage of hypothetical discussion to practical legislative plans. When in 1972 the social democratic liberal coalition emerged after a political crisis the extension of co-determination was firmly on the legislative agenda to be dealt

with in the course of the legislative session which lasted until the fall of 1976. The government passed a first bill in early 1974. It differed from the Law which was actually enacted about two years later mainly on two points:

- a. First, in the older version, there was to be an absolute parity system in the Supervisory Board - the German corporation law having adopted a two tier board system, and the function of the Supervisory Board being mainly to supervise - and if necessary veto - decisions of the Board of Managing Directors (Vorstand, Geschäftsführung). In the case of a tie in votes no mechanism was provided for in favour of the shareholders' representatives. Parliamentary hearings of experts on constitutional law held in the latter part of 1974 came to the conclusion that this was unconstitutional in so far as it infringed on the guarantee of safeguarding private property and ownership (Article 14 of the Constitution), which also encompasses the ownership of shares. Obviously no government advocating co-determination wanted to see a law voided on these grounds by the Federal High Court on Constitutional Matters (Bundesverfassungsgericht). Accordingly, a mechanism was instituted - as unreliable as it may be in individual cases - to resolve tie situations in favour of the shareholders' representatives by granting a double vote to the chairman of the Supervisory Board who is to be elected by the shareholders' representatives. A more careful analysis, however, shows that this prevalence of the shareholders' side is not only rather thin, but also full of pitfalls.
- b. Secondly the position of a so-called "Arbeitsdirektor" (works director) was created. In the co-determination system in the coal-mining and iron and steel producing industry co-determination is not restricted to the level of the Supervisory Board,

but extends to the Board of Managers. There, a member of the Board of Managers, who shall be a member with equal rights and powers of the Board of Managing Directors, will mainly take care of personnel and social matters. This member cannot be appointed or dismissed against the majority of the votes of the representatives of the labour side. In the negotiations, which ensued after it had become clear that in accordance with the verdict of the experts on constitutional law the bill would in any event have to be amended significantly, the labour unions pressed the idea of having co-determination extended likewise to the Board of Managing Directors. They succeeded in so far as the wording of the pertinent provision of the "Co-Determination in the Coal-Mining and Iron and Steel Producing Industry Law" was partially adopted. It was, however, a very incomplete success, as the mode of appointing and dismissing the "Arbeitsdirektor" was very conspicuously omitted - leaving his appointment and dismissal according to the general rules, that is in the case of a conflict the shareholders' side will prevail in a very tedious three step procedure (cp 5c).

It is interesting to speculate on the background to this entire development; the labour unions could hardly have scored this success, albeit incomplete, if the liberal party (without whom legislative plans could not succeed) had not insisted in the bargaining on the special status of the employee with managerial responsibility, and as a quid pro quo certain passages of the provisions concerning the "Arbeitsdirektor" in the "Co-Determination in the Coal-Mining and Iron and Steel Producing Industry Law" were adopted.

The Law was passed by the Bundestag in the spring of 1976 with an overwhelming majority comprising all three parties with very few abstentions or votes cast against it. The new Law was, therefore, also passed with the assenting votes of the Christian Democratic Party (CDU). This is less astounding than it may

appear at first glance. The CDU is by no means a monolithic party, but rather encompasses a very strong left wing, the so-called "Sozialausschüsse" for whom the new Law was not even far reaching enough. Secondly the word "co-determination" has had a special ring to the electorate for many years - did it not seem to stand for the idea that everybody could decide his own fate better and more responsibly for himself, and accordingly party conventions of the CDU had for many years also adopted resolutions which were meant to enlarge the scope of co-determination; all the more so as a committee under the chairmanship of Professor Biedenkopf had, after extensive research and hearings, recommended the institution of more significant participation by labour in the Supervisory Board.

Finally, it must not be overlooked that, with the granting of the double vote of the chairman of the Supervisory Board to be elected by the shareholders, a prevalence of the shareholders was - or seemed - assured, and the objections of the members of the CDU who had been active in the debates seemed to be taken care of.

Such was the setting of the political scene which produced the new Co-Determination Law.

2. Different forms of Co-Determination in Germany

a. Companies falling under the new Law

The basic requirements are that they are organized as corporations or like corporations (for details see 3.), and that in the company or in the group of companies more than 2,000 people are employed. Estimates are that around 650 companies⁺ will fall

⁺ see appendix p. 35 et seq.

under the new Law. Co-determination in this group of companies is accomplished through the constitution of the Supervisory Board. Depending on the number of employees the Supervisory Board will consist of 12, 16, or 20 members, half of whom will be representatives from the labour side (among the representatives from the labour side there will be - depending on the size of the Supervisory Board - two or three labour union representatives, and the balance will be employees of the company or the group of companies).

Among the members of the Executive Board one member will be the so-called "Arbeitsdirektor" (works director). A Committee of Deputies defined the task he is supposed to fulfill as "having the essence of his responsibility in personnel and social matters". His position, and especially the method of his appointment and dismissal, is disputed. The labour unions claim him to be similar to his counterpart in the Mining and Iron and Steel Producing Industry (cp. 6 for details).

The most significant facet of the new Law is a strengthening in the position of the labour unions. To fully appreciate the scope of the Law one must look at the German two tier board system. The Executive Board (Vorstand, Geschäftsführung) manages the company, and is also the policy making body. The Supervisory Board appoints the members of the Executive Board, and has the right to approve or disapprove of certain decisions. The influence of labour, which will form half of this body, can, therefore, make itself mainly felt in the area of selecting the management - or trying to block selections from the shareholders' side - and in vetoing decisions of the management.

One can safely anticipate that, in order to avoid being at loggerheads or to make constant use of the second vote of the chairman of the Supervisory Board, the shareholders' represent-

atives will go to great lengths to compromise, which will not necessarily mean that the right decisions are taken; rather, one must expect frequent bartering along the lines of "your project against my project" and "my candidate against your candidate".

b. Companies active in Mining and Iron and Steel Production

The companies falling under the "Co-Determination in the Mining and Iron and Steel Producing Industry Law" of 1951 and the "Law to amend the Co-Determination in the Mining and Iron and Steel Producing Industry Law" of 1956, have their own form of co-determination. The scope of this law includes joint-stock companies, limited liability companies and mining companies organized as "Gewerkschaft" (the shares of which are called "Kuxe"; "Gewerkschaft" is the homonym for the German word for labour union, but obviously the sense in which this word is used here is completely different).

In these companies or groups of companies there is a Supervisory Board of 11, 15 or 21 people, of whom one will be a so-called "neutral member", whilst the balance (10, 14 or 20) will be equally divided between shareholders and labour; some of the members on both sides, the so-called "further members" (weitere Mitglieder), shall not have direct ties with the company or employers' associations (on the shareholders' side) or with labour or the labour unions (on the labour side) in order to provide an objective and unbiased element on the Board. For some of the members of the labour side the labour unions have the right of nomination. Conversely to the system provided for by the new Co-Determination Law and the Labour Management Relations Act 52 (Betriebsverfassungsgesetz 52) - cp. also 2c - the labour representatives are not elected by the employees of the company in question, but their nomination by the works