

## THE GERMAN CODETERMINATION ACT OF 1976

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On July 1, 1978 about 650 enterprises in the Federal Republic of Germany made the transition to the requirements of *Mitbestimmung* under the Codetermination Act of 1976 (*Mitbestimmungsgesetz* 1976, hereinafter called "the Act") [1]. These enterprises represent the bulk of Germany's largest firms in all sectors of the economy. The 1976 Act extended labor's vote to a "formal" fifty:fifty parity [2] on the supervisory councils of enterprises with 2,000 or more employees organized in the various forms of corporate organization available under the German corporation law [3]. These forms are mainly the public corporation (*Aktiengesellschaft* = AG), the partnership limited by shares (*Kommanditgesellschaft auf Aktien* = KGaA), and the limited liability company (*Gesellschaft mit beschränkter Haftung* = GmbH).

### 1. Background of the Act

For an observer who is not familiar with the tradition of German industrial relations, the enactment of the 1976 law is likely to be perplexing. He might be surprised to learn that the Act was ultimately adopted by an overwhelming majority of the legislature: only twenty-two members of the *Bundestag* (five per cent of the total) voted against the Act; one member abstained [4]. On the other hand the Act was not received with enthusiasm by workers and unions, since it was regarded as a compromise by all sides.

Labor, particularly as represented by the powerful German Trade Union, which is the head union of the principal branch unions, has always insisted on a "full" fifty:fifty parity, according to the codetermination model which has been appli-

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cable since 1951 for the coal and steel industry (*Montanindustrie*) [5]. The Act does not provide such parity. It is a compromise in the following respects: (i) a special group of managerial employees is given a vote within the labor block on the supervisory council, and (ii) the chairman, who as a rule would come from the shareholders' side, is given the deciding vote in the event of a deadlock on the council. These items will be treated in more detail following an outline of the framework of industrial relations and corporate organization that has emerged in Germany since the beginning of this century.

The concept of *Mitbestimmung*, as embodied in the Act, is part of an alternative strategy for increasing labor's influence in industrial relations [6]. Although there is a long and substantial tradition of free collective bargaining in Germany, the German union movement has insisted from the beginning of the century (and particularly during the nineteen-twenties) on specific forms of institutionalized participation in the decision-making processes of enterprises. The unions repeatedly appealed to the legislature to install participatory institutions at the various levels of control in industry and business. The first efforts pertained mainly to the plant level. In 1920, the Works Councils Act [7] provided for participation by labor representatives with respect to a defined set of issues having primarily a personnel/social significance [8]. This participatory body was abolished in the Hitler era and replaced by a plant organization according to the "Führer" principle. In postwar Germany the institution of works councils was reinstated by Statute 22 of the Allied Control Commission and subsequent legislation in the various federal states [9]. The Works Constitution Act of 1952 [10] introduced this scheme on the federal level.

The emergence of codetermination on the enterprise level through worker representation on the board stems from two decisive factors, one relating to corporate law, the other to political aspects of German trade unionism. The legal factor is the so-called "two-tier" system of management under German corporation law, which provides for a supervisory council, overseeing an executive board, as the representative organ of the shareholders. The political factor is unionism's specific ideological bent, a peculiarity of the German trade union movement.

German unions have been traditionally much less pragmatic than their British or American counterparts, and thus the local (plant) level has been less important [11]. The emphasis on ideology in trade unionism is a consequence of a high degree of organization on the national level. In the nineteen-twenties the ideological orientation of the principal national organization was socialist; it adopted a strategy of social reform, dropping plans for expropriation and turning towards an "integrative" approach. At this time F. Naphtali, one of the ideological heads of the union movement, formulated the concept of "industrial democracy". He proposed the shared commitment of capital and labor through institutional representation of labor [12]. These postwar objectives, which were still abstract in their formulation, never materialized, since the union movement was abolished in the Hitler era.

After the Second World War the British military administration, backed by the

Attlee government, encouraged the re-established unions to realize their participatory plans for equal board representation in the coal and steel industry. The subsequent Codetermination Act of 1951 for this industry (the *Montanindustrie*) [13] was adopted by the conservative legislature of the newly established Federal Republic of Germany after threats of collective action were made by the unions. In this context it should be mentioned that throughout Europe the basic industries are frequently not organized in strictly free enterprise form, but involve a high degree of public control through their administrative organs [14]. Thus, the German model of *Montanmitbestimmung* was regarded by many as a general exception from normal governance arrangements. As for the other branches of economy in the Works Constitution Act of 1952 [15] the Adenauer government introduced the legal requirement of a formal participation by workers on the supervisory councils of all enterprises organized in the corporate form with more than 500 employees [16]. The legislation provided for workers' representatives to hold one-third of the seats in each council.

## 2. The debate about a higher degree of codetermination

The German experience with the various forms of codetermination established by the coal and steel legislation and the Works Constitution Act was fairly satisfactory. Empirical studies by prominent scholars stressed the integrative benefits of the codetermination pattern [17]. The stability and the smooth functioning of German industrial relations were attributed to the integrative institutionalized approach of both labor and management. On the other hand there were signs of increasing bureaucratization and inflexibility with respect to managerial decisions. Although the total amount of upstream information relevant to managerial decisions is likely to be increased by additional labor representation on the managerial organs of the corporation, the decision-making procedures tend to be slowed down and to lose their clear entrepreneurial orientation. Moreover, it seems obvious that one of the key functions of corporate organization, the raising of working capital, is impaired by reducing the shareholders' right to determine the corporate future fully. Some commentators warned that the existing system of collective bargaining would be impaired through a mode of codetermination in which labor would be acting as its own counterpart in the struggle for wages and labor conditions [18]. Also, a number of commentators argued that the present scheme of equal representation on the supervisory council would be an uncompensated expropriation of shareholder rights [19]. These arguments against the constitutionality of the Act have recently been foreclosed by the decision of March 1, 1979 of the Constitutional Court [20]. In one of the most important decisions in the Court's history relating to economic regulation the Constitutional Judges declared the Act to be consonant with a number of clauses of the Federal Constitution. They stated that the shift of controlling powers in the corporation were within the limits of parlia-

mentary discretion. Counsel for the complaining parties had argued that the Act would have disastrous consequences. In rejecting this argument the Court pointed out that the evaluation of the consequences of the Act is so complex that the legislature should have a right to be wrong in its prognosis as long as it has followed proper modes of evaluation. The justification for reducing the property position of the individual shareholder through codetermination rights of labor is based on the premise that a capital share of a corporation represents a less intensive kind of ownership than the title to personal tangible property "as an element of the guarantee for personal freedom of the individual" [21].

### 3. The Act of 1976: no full parity

A close look at the Act shows that a genuine parity between capital and labor has not been reached.

The functions of the supervisory council [22] are limited. The central functions of the council consist of appointing and removing the executive board [23] and continuously supervising the board's actions [24]. However, the council may not interfere with the active management of corporate affairs [25]. The executive board must report to the supervisory council on the affairs of the corporation [26]. The council as a whole and its individual members (the latter only by special delegation) are entitled to examine the corporate books and records [27]. The charter may provide for council approval of specific types of transactions [28]. In addition, the law allows the council itself to require that specific types of transactions be submitted for its approval [29], although in practical effect this right is limited as a matter of the council's factual competence and capacity.

Although the Act provides for a formal fifty:fifty parity in the council [30], the group of employee representatives is in fact split into three factions: workers' representatives, union representatives, and managerial employees' representatives [31]. The difference between the workers' and the union representatives is that the latter need not be company employees. While workers' candidates must have been company employees for a minimum of one year [32], union candidates are eligible if they are officials of trade unions that are "represented within the company" [33], *i.e.* they need only be active within the concern as representatives of union members.

The third group, managerial employees, was introduced into the legislation mainly by the Liberal Party. The underlying concept was spelled out in Thesis 1 of the Freiburg Theses of 1971 referring to codetermination [34]. The distinction between these employees and those more usually designated as "workers" takes account of the notion that in the modern corporation, in addition to the traditional factors of capital (shareholders) and labor (workers), the disposition factor (managerial personnel) plays an increasingly important role. The Liberal Party argued that this third factor required separate representation on the supervisory council *within*

*the employee group.* However, it is frequently assumed that the representative of the managerial personnel, although a member of the employee side, will identify his interest with that of the shareholders and will thus break up the format of equal representation of capital and labor. Furthermore, the identification of "managerial employees" under the Act posed serious problems prior to the holding of elections, since this group was not defined by the Act [35]. Although this quandary produced numerous comments in the legal literature, elections were carried out on the basis of a decision of March 5, 1974 by the Federal Labor Court (BAG) [36]. The court listed a number of criteria to aid in identifying the managerial employee: the employee must, in part, exercise the duties of the entrepreneur; he must have substantially free managerial discretion; he must hold a key position; and there must be at least a hypothetical polarity of interests between the managerial employee and the employees who carry out his directives [37].

Probably the strongest inroad into the parity concept was the adoption of the *double vote* of the chairman of the supervisory council in case of a deadlock. Section 29 of the Act provides that decisions of the supervisory council require a simple majority of all votes cast. If a vote ends in a tie, and if the stalemate continues after a second vote, the chairman then has the decisive vote. The chairman is elected by a special procedure [38], which normally leads to the result that, if all of the shareholder representatives vote in his favor, these votes are sufficient for his election. Thus, the procedure for resolving a deadlock favors shareholder interests. The introduction of this procedure was one of the most disputed points at a late stage in the deliberations on the bill. The Social Democrats, along with the trade unions, preferred the Eleventh Man Procedure practiced in the coal and steel codetermination model of 1951 [39]. Therein, the supervisory council is composed of an equal number of labor and capital representatives, with a "neutral" member co-opted. However, strong criticism was voiced by politicians and constitutional lawyers alike against the introduction of such a procedure. They argued that leaving the "tie-breaking" vote with the shareholders' side of board membership would reduce the threat of the Act's being held unconstitutional on the grounds of uncompensated expropriation of shareholder property or a violation of the principle of free collective bargaining [40]. In response to this the coalition introduced the present solution which secured a broad consent of all political parties [41].

#### 4. Expansion of the supervisory council and complicated voting procedures

The representation of the various groups in the supervisory council has led to a massive inflation of the number of seats in the councils. Section 7 of the Act provides that an enterprise employing less than 5,000 employees will have a council of six shareholders plus six labor members; up to 20,000 employees the number is raised to eight plus eight; and above 20,000 employees a ten plus ten scheme is required. The increased size of the board alone will inevitably lead to a higher

degree of formalization of the various flows of information that are indispensable for proper decision-making by all members of the board. We will come back to the question whether the codetermined council will assume the same powers held by the traditional shareholder-determined institution.

Another feature that interferes somewhat with the general policy of the Act is the complication of the voting procedures. The various groups on the supervisory council are determined by different procedures. These procedures may even differ from enterprise to enterprise for the same group. It was necessary to promulgate three extensive election regulations [42], each more than one hundred sections long. The first regulation applies to the case of a single enterprise with one work unit, the second to enterprises with more than one work unit, and the third to enterprises that are the parents or dominant shareholders of another codetermined enterprise.

As a rule in companies with less than 8,000 employees, representatives are elected directly, while in enterprises with more than 8,000 employees the vote is cast by electors. However, the schemes may be reversed by special vote of the employees. Thus, for example, similarly structured large enterprises such as the BASF AG and the Farbwerke Hoechst AG employed different voting procedures for their first election.

On the shareholders' side the voting procedure, as in the past, is carried out in the general meeting. The majority may elect *all* its own supervisory council members. Hence, the argument that an employee or a group of employees already represented on the council could break the parity through buying shares is unrealistic; their influence could be extended only in the unlikely circumstance that they had acquired a statutory majority of shares. This problem is particularly relevant to the ongoing discussion of the future of employee stock option plans which are now operating in a number of codetermined enterprises and will eventually play an increasingly significant role [43].

##### 5. The codetermined corporation versus the shareholder-determined corporation: a new version of "Our Two Corporation Systems"?

In his seminal article, "Our Two Corporation Systems", H.G. Manne has presented an analysis of the different worlds of the large and the small, closely-held corporation [44]. He draws economic distinctions among three *markets* that have influenced the legal structures of the large corporation [45]: the market for investment capital, the market for existing securities, and the market for corporate control. In this scheme, codetermination could be classified as a mode of legal intervention in the market for corporate control. Before we turn to the question of how the codetermination system will affect flows of *control*, which are traditionally exercised through the shareholders' decision to buy or sell shares on the market, some additional features of the Codetermination Act must be considered [46].

The Act does not cover *all* enterprises that have reached a specific size. Besides the exemption for so-called "enterprises working for a specific tendency" (*Tendenzbetrieb*) [47] the Act does not apply to enterprises that are not organized according to the specific forms of organization provided by the law. While most large corporations are organized as one of the three main forms (AG, KGaA, and GmbH), a number of avenues of escape remain open to other enterprises cast in other forms of legal organization [48]. German corporation law rests on the principle of freedom of choice from among a number of different legal forms of organization. If specific forms or specific size characteristics are present, the firm remains outside the reach of codetermination. For instance, commercial partnerships (OHG), genuine limited partnerships (KG), the so-called "*wirtschaftliche Verein*" (club with economic objectives), and the mutual insurance company are not covered by the Act. Foreign corporations are *per se* not affected since one of the objectives of the Act is non-interference with foreign corporation law [49]. The size criterion of 2,000 employees may be circumvented by a split into two or more "local" corporations, although all employees of affiliates of a group (*Konzern*) [50] are construed as belonging to the parent corporation [51]. Thus, only affiliates on the same level that are controlled by a firm not bound to codetermination are outside the reach of the Act [52]. Since, according to German law, legal persons (e.g., a GmbH) may be partners of a commercial partnership, it is possible for a "double corporation" to construct such a partnership and thus avoid application of the Act [53].

The codetermination pattern described above refers essentially to the "normal" case of the stock corporation (AG). The Act does not have identical effects on the other forms of incorporated enterprises to which it applies [54].

#### *A. The limited liability company (GmbH)*

In the case of the GmbH the supervisory council (which is not a statutory but an optional organ of this legal form) has less controlling power than in the stock corporation. The rights of the council sometimes conflict with the rights of the general meeting. The supervisory council, for example, may review the annual statement but is not given the power of final approval; that decision remains within the power of the general meeting [55]. Furthermore the GmbH law and the Codetermination Act are not synchronized in another respect: the director of the GmbH is appointed and removed by the supervisory council, and must accept its directives with respect to transactions defined by the charter; however, the general meeting is also entitled to give binding directives [56]. Also, in the common case of a majority shareholder-director, the charter may provide for a lifetime appointment, which necessarily conflicts with the statutory right of the supervisory council to remove the director [57].

#### *B. Partnership limited by shares (KGaA)*

In the case of the KGaA [58] (a limited partnership where the limited partner is a group of shareholders) a conflict may arise between the general partner, who is

fully responsible for the corporate debts, and the vote of the codetermined supervisory council. The powers of the KGaA council are again less broad than those of the council of the stock corporation; the Act does not remove these limits even in the case of a codetermined council. The council does not have the right to appoint and to remove the general partner-director; thus, in controversial situations he cannot be threatened with removal when his term expires. The charter may also provide for binding directives by the general meeting which eventually may conflict with the ability of the codetermined supervisory council to intervene in a particular transaction.

### *C. Amendment of the charter*

The amendment of the charter and the bylaws [59] has been frequently regarded as an important device to place limits on codetermination [60]. A 1977 study [61] of fifty-eight proposals by stock corporations for charter amendments indicates that a large number of corporations have recently amended their charters. In most cases amendments have involved a clearer definition of the competences of the various organs [62]. They have also included the possibility of appointing emergency members to the council, so that the outcome of a vote will not be determined by the absence of a member from one side [63]; the possibility of the chairman's adjourning the meeting [64]; the requirement of a quorum [65]; the possibility of employing absentee voting [66]; the creation of committees for the performance of specific tasks which are normally vested in the council [67]; and a substantial number of new definitions of the competence of the council with respect to specific acts to be carried out by the management [68].

By and large these alterations are not contrary to the substance of the Act. Although the 1977 empirical study dealt only with the stock corporation, amendments of the company statutes will likely play a more substantial part in the private forms of corporate organization, such as the GmbH and KGaA.

### *D. A "fourth" market?*

The fact that the Act leaves all these avenues open to opt for softer forms of codetermination indicates that Germany will not only have a "two corporation system" as a matter of size but also a new "two corporation system" at the large enterprise level as a matter of codetermination. The avowed adversaries of codetermination may prefer to choose a form of legal organization that permits no codetermination (or limited codetermination), even though that form may expose investors to greater personal risks. The newly established *competing systems* might eventually (as soon as proper empirical data are available) lead to a "fourth" market (in addition to Manne's three markets), *i.e.* a market in which different organizational forms of large enterprises will compete. Such a market will provide for a more rational choice between the codetermined and the non-codetermined enterprise than can

presently be made. First, both will require capital and bid for it in the market place. Secondly, they will need labor. As yet the transaction costs of the two systems of enterprise organization have neither been evaluated nor adequately defined and debate about choices between the two systems presently remains in the lofty heights of general assumptions about organizational models of enterprise and labor [69].

## 6. Legitimizing the business corporation

It is widely assumed that codetermination is synonymous with legitimizing the large enterprise as a political unit. The quest for industrial democracy has been evident from the outset of the debate on *Mitbestimmung* in Germany. Whether institutionalized codetermination will be able to meet the needs of enterprise organization in the post-industrial society remains an open question. It has been argued that, in the long run, the pattern of codetermination will create a higher degree of efficiency in the macroeconomic process [70]. The increase of participatory energies within the enterprise, it is argued, will eventually lead to more highly qualified individual workers, with greater potential, *i.e.*, qualities that are prerequisite to the proper allocation of scarce human and natural resources in a functioning competitive process.

Even if this be true, a problem with the institutional approach to worker participation remains. Giving legitimacy to the single large enterprise through internal participatory institutions will effect a transfer of power from the general body politic to the firm, and will eventually add to the autonomous power of the managerial level. The codetermined supervisory council as an institutionalized battlefield of interests may tend to lose the few control mechanisms with which it was endowed when it was created as an assembly of shareholders' representatives. Hence, it is not unlikely that the battle in the supervisory council between shareholders and employees may be decided in favor, not of the interests of either group, but in favor of the policies and interests of management. This outcome would introduce managerial autonomy anew into the structure of the corporation.

As for the small shareholder who is traditionally the subject of frustrated corporate reforms, the codetermination format will probably mean no serious change in position. The single share will increasingly become a kind of qualified loan to a large risk-avoiding institution [71]. The involvement of labor in the decision-making processes of large enterprises may even have the political effect of strengthening the existing *de facto* governmental guaranties against the risks of corporate breakdowns.

Aggregate minorities, if well organized, may gain power by trading in their rights to nominate a council seat. This might eventually create a new version of the market for corporate control. The codetermination pattern is likely to be of more relevance to the organization of groups of enterprises under the common direction

of a parent. Here, shareholdership has long been transformed into a mode of exercising control that is only indirectly affected by decisions of the market place. In the international group, codetermination may result in a higher degree of local control. The large private shareholders will have to choose whether or not to invest in codetermined enterprises. At the moment this remains a question only of business philosophy; after ten years' time and experience with the codetermination model, more rational choices may be made.

## Notes

[1] Gesetz über die Mitbestimmung der Arbeitnehmer (Mitbestimmungsgesetz), Act of May 4, 1976, Bundesgesetzblatt I, p. 1153. The German legal literature concerning codetermination is abundant; much of it is collected in the leading commentaries on the Act: *Mitbestimmungsgesetz* (Fabricius ed., 1976 *et seq.* – looseleaf); Fitting, Wlotzke and Wissmann, *Mitbestimmungsgesetz* (1976); Raiser, *Mitbestimmungsgesetz nebst Wahlordnungen* (1977). English translations of the Act include: Hoffman (1976); Peltzer (1976); Schneider and Kingsman (1976). For a short comparative account of the various solutions in Europe, see Kolvenbach, *Workers Participation in Europe* (1977).

[2] The “parity” provided by the Act is described here as “formal” for the reasons stated in the text in Parts 1 and 3 *infra*.

[3] Gesellschaftsrecht, *i.e.*, the various laws concerning the forms of business associations.

[4] See Fitting, Wlotzke and Wissmann, *op. cit. supra* n. 1, intro. to annot. 76.

[5] Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie (Montanmitbestimmungsgesetz), Act of May 21, 1951, Bundesgesetzblatt I, p. 1185.

[6] The point that codetermination is only *one* alternative strategy is particularly made in Simitis, *Workers' Participation in the Enterprise – Transcending Company Law?* 38 Mod. L. Rev. 1 (1975); Simitis, *Von der institutionalisierten zur problembezogenen Mitbestimmung*, 1975 Arbeit und Recht 31; see also Kahn-Freund, *Rapport général, in La Participation – Quelques expériences étrangères*, 28 Revue Internationale de Droit Comparé 681 (1976).

[7] Betriebsrätegesetz 1920. Act of Feb. 4, 1920, Reichsgesetzblatt I, p. 147.

[8] The Betriebsrätegesetz 1920 was revised in 1922 by the Gesetz über die Entsendung von Betriebsratsmitgliedern in den Aufsichtsrat, Act of Feb. 15, 1922, which introduced the first format of labor representation on the supervisory council.

[9] For a useful account in English of the history of codetermination, see Woolridge, *The System of Co-determination in Western Germany and its proposed reform*, 5 Anglo-Am. L. Rev. 19, 20 (1976); see also Fabricius, *The New German Codetermination Law*, 1977 Journal of Business Law 101; Steuer, *Employee Representation on the Board: Industrial Democracy or Interlocking Directorate?*, 16 Col. J. Transnat. L. 255 (1977).

[10] Betriebsverfassungsgesetz, Act of Oct. 11, 1952, Bundesgesetzblatt I, S. 681. The act was amended in 1972.

[11] The importance of the plant level in the U.S. was stressed in a lecture on *Free Collective Bargaining: Facts, Law, Philosophy*, by Professor Clyde Summers, delivered at the University of Frankfurt, Faculty of Law, on Jan. 30, 1978; for the situation in Britain see Kahn-Freund, *op. cit. supra* n. 6, at 699.

[12] Naphtali, *Wirtschaftsdemokratie – Ihr Wesen, Weg und Ziel* (1928).

[13] Act of 1951, *supra* n. 5.

[14] Friedmann, *Governmental (Public) Enterprises*, in XIII International Encyclopedia of Comparative Law, chap. 13 (Conard ed., 1972).

[15] Act of 1952, *supra* n. 10.

[16] The Act also covers family corporations and one-man corporations if the “one-man” is a physical person. Act of 1952, § 76.

[17] Pirker *et al.*, *Arbeiter, Management, Mitbestimmung* (1955); Voigt and Weddingen, *Zur Theorie und Praxis der Mitbestimmung* (1962); Dahrendorf, *Das Mitbestimmungsproblem in der deutschen Sozialforschung* (1963); Neuloh, *Der neue Betriebsstil* (1960); Mitbestimmungskommission, *Mitbestimmung im Unternehmen: Bericht der Sachverständigen-Kommission zur Auswertung der bisherigen Erfahrungen bei der Mitbestimmung*, Deutscher Bundestag, Doc. VI/334 (Biedenkopf chmn., 1970); Hondrich, *Demokratisierung und Leistungsgesellschaft* (1972); Brinkmann-Herz, *Entscheidungsprozesse in den Aufsichtsräten* (1972); for a survey on

codetermination in the light of empirical research, see Hartmann, *Soziologische Ergebnisse zur Mitbestimmung – und die Reaktion der Praxis*, 1977 *Kölner Zeitschrift* 331.

[18] Zöllner and Seiter, *Paritätische Mitbestimmung und Art. 9 Abs. 3 GG (1970)*; Biedenkopf, *Auswirkungen der Unternehmensverfassung auf die Grenzen der Tarifautonomie*, in Festgabe Kronstein 79 (1967); cf. Raiser, *op. cit. supra* n. 1, intro. to annot. 48–52; see also n. 19 *infra*.

[19] See, e.g., Huber, *Grundgesetz und wirtschaftliche Mitbestimmung (1970)*; Pernthaler, *Qualifizierte Mitbestimmung und Verfassungsrecht (1972)*. A number of prominent legal scholars expressed this opinion in a hearing before the parliamentary Committee for Labor and Social Order on Dec. 19, 1974; cf. Raiser, *op. cit. supra* n. 1, intro. to annot. 43–46. A comprehensive statement of the arguments against the present form of codetermination is found in Badura, Rittner and Rütters, *Mitbestimmungsgesetz und Grundgesetz, Gemeinschaftsgutachten (1977)*. This “Cologne brief” in favor of the plaintiffs on the Constitutional proceedings was in most points successfully challenged by the “Frankfurt brief” by Kübler, W. Schmidt and Simitis, *Zur Verfassungsmässigkeit des Mitbestimmungsgesetzes (1978)* which was introduced by the defendants; see *infra* n. 20.

[20] Bundesverfassungsgericht, decision of March 1, 1979, 50 Bundesverfassungsgericht Entscheidungen 290.

[21] See part III., ch. 1 of the decision *supra* n. 20.

[22] See Grossfeld, *Management and Control of Marketable Share Companies*, in XIII International Encyclopedia of Comparative Law, ch. 4 at 4-4 (Conard ed., 1973); Vagts, *Reforming the “Modern” Corporation: Perspectives from the German*, 80 Harv. L. Rev. 23 (1966); Mertens, *Aufsichtsrats- oder board-System*, 51 *Wirtschaftswoche* 31 (1971); Mertens, *Kölner Kommentar zum Aktiengesetz*, intro. to § 95, annot. 3; for the codetermined board, see Immenga and Mertens, *Zuständigkeiten des mitbestimmten Aufsichtsrats*, 6 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 249 *et seq.*, 270 *et seq.* (1977).

[23] Aktiengesetz § 84 (1965) [hereinafter cited as AktG].

[24] AktG § 111.

[25] AktG §§ 76, 111(4), 119(2).

[26] AktG § 90.

[27] AktG § 111(2).

[28] AktG § 111(4).

[29] *Id.*

[30] The Act, *supra* n. 1, at § 7.

[31] *Id.* at §§ 7, 15, 16.

[32] *Id.* at § 7(2) and (3).

[33] *Id.* at § 7(4).

[34] See Fitting, Wlotzke and Wissmann, *op. cit. supra* n. 1, introduction, annot. 51, 52, 58.

[35] For references see Raiser, *op. cit. supra* n. 1, at § 3, annot. 22–54.

[36] BAG [Federal Labor Court] *Arbeitsrechtliche Praxis* § 5 BetrVG 1972 No. 1.

[37] Raiser, *op. cit. supra* n. 1, at § 3, annot. 30–34.

[38] The Act, *supra* n. 1, at § 27.

[39] Act of 1951, *supra* n. 5.

[40] See n. 18 and 19 *supra*.

[41] In its decision of March 1, 1979 the Constitutional Court followed this line; see *supra* n. 20.

[42] See Raiser, *op. cit. supra* n. 1, annex at 455–569.

[43] See Mertens, Kirchner and Schanze, *Wirtschaftsrecht* 241 (1978).

[44] Manne, *Our Two Corporation Systems: Law and Economics*, 53 Va. L. Rev. 259 (1967).

[45] *Id.*, at 265.

[46] For an instructive analysis of details of the modes of codetermination which also includes economic considerations, see Chmielewicz, Grossmann, Inhoffen and Lutter, *Die Mitbestimmung im Aufsichtsrat und Vorstand – Darstellung, Vergleich und Kritik der rechtlichen Regelungen aus juristischer und betriebswirtschaftlicher Sicht*, 37 *Betriebswirtschaft* 105 (1977).

[47] The Act, *supra* n. 1, at § 1(4). “Enterprises working for a specific tendency” (Tendenzbetrieb) include ventures which are primarily non-business oriented but pursue political, religious, educational, scientific, charitable, or artistic objectives, and thus require a specific personal commitment of the employees (e.g. union press).

[48] For a discussion of the problem of freedom of corporate organization as it relates to regulation through the codetermination laws, see Naendrup, *Mitbestimmung und Organisationsfreiheit*, 1977 *Arbeit und Recht* 225, 268.

[49] However, in Wengler, *Die Mitbestimmung und das Völkerrecht* (1975), a prominent international lawyer has argued that the Act is not consistent with the Treaty of Friendship, Commerce and Navigation of Oct. 29, 1954 between the United States of America and the Federal Republic of Germany, and thus effects a breach of international law.

[50] See AktG § 18.

[51] The Act, *supra* n. 1, at § 5(1).

[52] See Lutter, *Der Anwendungsbereich des Mitbestimmungsgesetzes*, 6 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 195, 199 *et seq.* (1977); see also Gruson and Meilicke, *The New Co-Determination Law in Germany*, 32 *Bus. Law* 571, 587 (1977). We do not deal with the specific problems arising out of parent-subsidiary relations (Konzernrecht) in the present article. Basic information is given by Gruson and Meilicke, *op. cit. supra*, including an example at 584. For a description of highly technical problems that exist in the multilevel group, see Lutter and Schneider, *Mitbestimmung im mehrstufigen Konzern*, 1977 *Betriebs-Berater* 553 and Gessler, *Mitbestimmung im mehrstufigen Konzern*, 1977 *Betriebs-Berater* 1313.

[53] See Lutter, *op. cit. supra* n. 52, at 199.

[54] This problem is examined closely in the various contributions to the Bad Homburger Mitbestimmungs-Symposium, *Das Mitbestimmungsgesetz in Recht und Praxis*, 6 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 133–444 (1977).

[55] The Act, *supra* n. 1, at § 25(1), para. 2.

[56] For details, see Hommelhoff, *Unternehmensführung in der mitbestimmten GmbH*, 7 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 119 (1978).

[57] According to the Act, *supra* n. 1, at §§ 31, 37(3), the privilege of lifetime appointment ceases in five years. There is no compensation provided. For a discussion of the constitutional questions raised by this, see Ballerstedt, *Das Mitbestimmungsgesetz zwischen Gesellschafts-, Arbeits- und Unternehmensrecht*, 6 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 134, 157 *et seq.* (1977). *But see* the decision of the Constitutional Court, *supra* n. 20.

[58] See Chmielewicz *et al.*, *op. cit. supra* n. 46, at 134 *et seq.*; see also Mertens, *Zur Existenzberechtigung der Kommanditgesellschaft auf Aktien*, in *Festschrift Barz* 253 (1974).

[59] Comprehensive treatment of this subject is found in Säcker, *Anpassung von Satzungen und Geschäftsordnungen an das Mitbestimmungsgesetz 1976* (1977).

[60] E.g., Gruson and Meilicke, *op. cit. supra* n. 52, at 588.

[61] Ulmer, *Die Anpassung von AG-Satzungen an das Mitbestimmungsgesetz – eine Zwischenbilanz*, 141 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 490 (1977). Charter amendment proposals are available for public study, since they must be published in the Federal Gazette (*Bundesanzeiger*).

[62] *Id.* at 494 *et seq.*

[63] *Id.* at 500 *et seq.*

[64] *Id.* at 501, 509.

[65] *Id.* at 503 *et seq.*

[66] *Id.* at 506 *et seq.*

[67] *Id.* at 511 *et seq.*

[68] *Id.* at 515 *et seq.*

[69] See also Mertens, Kirchner and Schanze, *op. cit. supra* n. 43 at 240 *et seq.*

[70] Fleischmann, *Mitbestimmung und volkswirtschaftliche Leistungsfähigkeit*, in *Mitbestimmung, Wirtschaftsordnung, Grundgesetz 92*, at 97 *et seq.* (Vetter ed., 1976).

[71] It is not unlikely that there will be shifts in corporate financing. The present high degree of bank loan financing in Germany may be the result of the fact that the major banks have had an undisputed ruling role in the supervisory councils. If the argument of "easy" and discrete bank loans is challenged in the codetermined councils there may be new hope for a revival of increased financing through the stock market. New risk-averse forms of stock investment, such as index funds, could encourage this trend.

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