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## Co-Determination in Germany: Labor's Participation in Management

Richard Meissel

Michael Fogel

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# Co-Determination in Germany: Labor's Participation in Management

## I. Introduction

A society which seeks economic and social progress would be unthinkable without co-determination in conjunction with co-responsibility for employees. . . .

At present we must install co-determination for employees in the supervisory bodies of business enterprises. We wish to create opportunities and rights through co-determination for the employees, so that they have greater influence in the formation and realization of policies which affect their work and lives. Employees should have the opportunity to contribute their experience, and suggestions. I am convinced that at the beginning of 1975 this important law shall be put into effect.

These remarks were made in the inaugural address of the new Chancellor of the Federal Republic of Germany, Helmut Schmidt, on May 17, 1974, addressed to the Bundestag.<sup>1</sup>

Apart from the controversy surrounding the changing of the Abortion Law, no other law in recent years has had such an explosive effect on public discussion as the proposed plan of co-determination for employees. The present government of the Federal Republic of Germany in which a secure majority was formed by the coalition of the Socialist Democratic Party (SPD) and the Free Democratic Party (FDP) reached an agreement upon a draft proposal of a co-determination plan on February 20, 1974. Previously there had been various proposals submitted by a number of parties, all of which sought to expand the rights of employees; the submission of the coalition's draft served to center a discussion around a singular, concrete proposal.

According to the comments of the official spokesmen of the two parties which comprised the coalition government, the draft bill is expected to become law, either in this form or with slight alterations, perhaps by the beginning of 1975. The business communities of the nations in the western hemisphere do not appear to have sufficient familiarity with the several and different models for co-determination. Now that the draft proposal is likely to become law in the

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\*New York University (J.D., 1973), Queen's College (B.A., 1968; M.A., 1971); Associate, law firm of Walter Schürmann & Partners, Frankfurt am Main.

†Johann-Wolfgang-Goethe-University (Law, 1970), assessor (1973); Associate law firm of Walter Schürmann & Partners, Frankfurt am Main.

<sup>1</sup>Wortlaut der Regierungserklärung, SÜDDEUTSCHE ZEITUNG (May 18/19, 1974).

near future, every businessman who is considering investing in Germany or considering the expansion of an already existing enterprise should take account of the planned changes within the Corporation Law and Labor Law, as brought about by co-determination.

In the same context, a foreign lawyer must be familiar with this new law insofar as he counsels those about to invest or those engaging in business in Germany. To the general public, the theme of co-determination is also of interest because it may signal a trend in other countries which will seriously affect the economic structures within the individual countries and in the international business community.

## II. History

The main thrust of the co-determination bill is to introduce the concept of parity co-determination for employees in the directing of large corporations. Parity is to be understood as equal voting rights and privileges among, on the one hand, capital investors, and on the other hand, employees. It will allow employees to take part in the decision-making processes of companies. Parity co-determination by the employees is the final result of the development of a trend which can be traced back to the end of the 19th century.

After the second World War it was the large industries themselves which made proposals to widen the rights of employees. It was believed that a reordering and reconstruction of industry could be achieved only by cooperation of workers and employers. Secondly, the industrialists hoped to avert the dismantling of their large entities by the allied occupying forces. The British, especially, in 1947 and 1948 were interested in creating employee staffed supervisory boards in the large German industries, and mandated their implementation. The intention was that with fifty percent labor representation the families behind the great enterprises would be prevented from amassing the power that had previously contributed to German militarism.

In 1890 a law was passed which enabled employees to select worker councils which were to take part in decisions relating to working conditions and policies. At first the companies were not obligated to have such councils. Later, however, in the mining industry, and during the course of World War I in the entire armament industry, these worker councils did become obligatory. Such councils found their legal foundation in the Works Councils Law of 1920.<sup>2</sup>

By 1950, however, it was the concrete threat of strikes of 200,000 steel workers and 500,000 mine workers which forced the Bundestag to pass the (1951) Co-Determination Law.<sup>3</sup> This law, which is applicable only to the mining, iron

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<sup>2</sup>Act of Feb. 4, 1920, Betriebsratengesetz, Reichsgesetzblatt (1920).

<sup>3</sup>Act of May 21, 1951, *Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der eisen- und stahlerzeugenden Industrie*, I Bundesgesetzblatt (hereinafter BGB1.) 347.

and steel industries, and which is still in effect today and not affected by the new draft proposal, provides that the supervisory boards in companies are to be filled with an equal number of members from the employees' side and the investors' side, usually five from each side. Additionally, one neutral member participates, who is forbidden to be associated with either side. Also protective of labor's interest is the office of the personnel director. As an employee representative, he has a seat not on the supervisory board, but on the management board.<sup>4</sup>

By the Co-Determination Law of 1956, the concerns and holding companies of the mining, iron and steel works were compelled to introduce the same scheme.<sup>5</sup>

In 1952, a separate co-determination system was implemented for other industries. All stock corporations in the rest of the German economy were subjected to a requirement that there be a one-third employee supervisory board.<sup>6</sup> This statute also applied to companies of limited liability with more than 500 employees. If the new draft proposal is passed, this law will still be effective, for the draft covers only those enterprises with more than 2,000 employees.

After a long legislative hiatus, the government of the Federal Republic of Germany in 1968 created a commission of experts to evaluate and report on co-determination.<sup>7</sup> The report of this commission, which was delivered in the beginning of 1970, recommended that the rights of employees should be generally enlarged and widened. The committee could not however see its way through to giving a recommendation for full parity, *i.e.*, fifty percent employee participation.

Between the time of authorization of the commission and the delivery of its report, the political structure of Germany drastically changed. For the first time since the beginning of the Federal Republic of Germany, the Christian Democratic Union (CDU) was excluded from the government. Thus, the draft proposal is not directly based on the findings of the commission headed by a CDU member,<sup>8</sup> but rather upon a politically expedient compromise resulting from the party conventions of the coalition now in power, the Social Democratic Party (SPD) and Free Democratic Party (FDP).<sup>9</sup> Both parties supported parity

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<sup>4</sup>*Id.* §§ 4, 8.

<sup>5</sup>Act of August 7, 1956. *Gesetz zur Ergänzung des Gesetzes über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der eisen- und stahlerzeugenden Industrie*, 1 BGBI. 707.

<sup>6</sup>Act of Oct. 11, 1952. *Betriebsverfassungsgesetz*, § BGBI 681.

<sup>7</sup>Biedenkopf Commission Report, VI DRUCKSACHE DES DEUTSCHEN BUNDESTAGES 334.

<sup>8</sup>*Id.*, *i.e.*, Herr Biedenkopf.

<sup>9</sup>Seiffert, *Der Aufsichtsrat der Aktiengesellschaft nach dem Regierungsentwurf für eine Mitbestimmung*, DIE AKTIENGESELLSCHAFT 129 (May 1974).

co-determination, but with different approaches and different detailed regulations. The current bill has a character of true compromise.

### III. Operation

#### A. Note on Terminology Used Herein

In the United States only a generalized distinction is made between blue and white collar workers; perhaps partially falling into the white collar group there can also be found an executive category. In the Federal Republic, however, there is a statutorily delineated trichotomy among employees.<sup>10</sup>

This article will use the related English terms pertaining to the color of collars and to executives, but the reader is urged to keep in mind the contrast between the systems.

Regarding in particular the third category, the term "executives," does not include high echelon corporate management, but rather "inferior" executives who have hiring/firing power, have a limited power of representation of the company, work under their own responsibility on important duties with their particular experience and knowledge, or work on entrepreneurial tasks which are of decisive importance for the existence and development of the enterprise as an entity.<sup>11</sup>

The term called "blue collar workers" will be used to include skilled, semi-skilled and unskilled workers and laborers who deal with manual work. Office workers and salaried professionals comprise the white collar categories.

#### B. Scope

The types of business organization to which co-determination may be applied are the public stock corporation (*Aktiengesellschaft* or *AG*), the partnership limited by shares (*Kommanditgesellschaft auf Aktien* or *KGaA*), and the private limited liability companies (*Gesellschaft mit beschränkter Haftung* or *GmbH*).<sup>12</sup> A private limited liability company is somewhat akin to what is called in the United States a close corporation, in that it can serve the business purposes of a small number of persons by dispensing with certain formalities, while still affording limited liability. It is, however, regulated by its own statute, entirely separate from the statute which regulates the public stock corporation.<sup>13</sup> Only those companies in this category which have more than

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<sup>10</sup>Act of Jan. 15, 1972. *Betriebsverfassungsgesetz*, I BGBI. 13, § 5.

<sup>11</sup>Judgment of March 5, 1974, I A.B.R. 19/73 *Bundesarbeitsgericht*.

<sup>12</sup>Not affected by the new co-determination draft are the common forms of business in Germany known as the Open Commercial Partnership (*Ovvene handlungsgesellschaft*, or *OGH*), the Silent Partnership (*Stille Gesellschaft*) or the sole proprietorship.

<sup>13</sup>Act of April 20, 1892, amended May 20, 1898. *Gesetz betreffend die Gesellschaften mit beschränkter Haftung*, I *Reichsgesetzblatt* 477, 846. There is a current legislative movement to update this statute to conform it to the more recent stock corporation law. See n. 14.

2000 employees are affected by co-determination. The actual number of all companies covered by the proposal is estimated to be six hundred and fifty.

The partnership limited by shares can be analogized to that structure which many states in the United States statutorily recognize as a limited partnership. Each general partner has unlimited liability, while the limited partners' liabilities are determined by their respective participation in the share capital. The statutory authorization for this form of commercial enterprise lies within the Stock Corporation Law.<sup>14</sup> But there is a major distinction between this form of enterprise and its U.S. counterpart, in that there is no statute prohibiting the limited partner from taking part in the control of partnership business.

The draft bill incorporates a scheme which expands coverage to some companies, which because of their organizational form, might otherwise be able to avert inclusion. Thus, for example, where a small limited partnership has as its general partner an includible company, the employees of the partnership are also to be considered includible in the co-determination plan of the general partner company. The statute covers interlocking management patterns, and looks not to individual organizations, but rather to actual control.<sup>15</sup>

### *C. The Supervisory Board*

The supervisory board of a company with more than 20,000 employees is to consist of twenty members including ten who represent the shareholders. Of the ten who are allocated to representing the labor side, seven must have worked in the company for at least one year. The other three electors are to be members of labor unions which are represented in the company (or in a second company whose members participate in the election of the board members of the subject company under provisions of the co-determination statute).<sup>16</sup>

However, in companies with fewer than 10,000 employees, the supervisory board will have a six:four:two proportion, that is, six representing shareholders, four representing labor from within the company, and two representing the trade unions. If the total employees number between 10,000 and 20,000 then the ratio will be eight:six:two.<sup>17</sup>

The chairman and deputy chairman of the supervisory board cannot represent both stockholders and labor; the deputy must be elected from among the labor board members if the chairman is a board member who comes from the shareholder slates, and vice-versa.<sup>18</sup>

The method of electing the chairman is based on multiple ballots. A

<sup>14</sup>Act of Sept. 6, 1965, amended 1965. *Aktiengesetz* §§ 278 ff. 1 BGB1. 1089.

<sup>15</sup>*Mitbestimmung Regierungsentwurf* 1974, Co-Determination Bill of the Government. Translation into English by Dr. Martin Peltzer (Ott Schmidt, Köln). (Hereinafter: Bill).

<sup>16</sup>Bill, § 7.

<sup>17</sup>Bill, § 22.

<sup>18</sup>Bill, § 24.

two-thirds majority on the first ballot will suffice, but if none is attained, then the second ballot will succeed with merely a simple majority. According to the number of votes, the frontrunner is elected as chairman for two years, and then he rotates into the deputyship for another two years. But if there has still been no simple majority attained in the second ballot, then the shareholder-backed members and the labor-backed members each vote one of their rank, and the two electees rotate in the two positions every two years. The order of rotation is determined by a simple majority vote of the whole board or by the drawing of lots.<sup>19</sup>

Quorums consist of half the members of the supervisory board, and are competent to pass resolutions, which are effectuated with majority votes. The tie breaking method is theoretically simple: when a tie results, the board can resolve that the chairman will have the determining vote in a new ballot on the resolution; however, this resolution cannot be passed if a majority of the members of either side, *i.e.*, of the members representing the shareholders or those representing labor, oppose the resolution. Thus, in partisan voting, the resolution can be blocked completely, regardless of the position of the chairman.<sup>20</sup>

Theoretically, the stalemate can be overcome if the managing board is behind the resolution; it can request the shareholders meeting to vote the resolution by a three-quarters percentage.<sup>21</sup>

Whether this method is feasible is open to question, however, considering the nature of shareholders' meetings and the dependence of management on labor representatives for tenancy in office.

#### *D. Managing Board*

The legal entity acting on behalf of the company or management board, is controlled by, and responsible to, the supervisory board.<sup>22</sup> This entity can be composed of one or more natural persons who are entrusted with the management of the company. Except for those partnerships which are limited by shares, company supervisory boards will appoint and remove members of the managing boards. Appointments must be sanctioned by a majority of votes among at least two-thirds of the members of the supervisory board. If such a number cannot be achieved, then a committee of four board members—two each from both the shareholder and the labor sides—will submit proposals for appointments. A simple majority of the board can then ratify the appointment.<sup>23</sup> Where the appointment process is still stymied, the

<sup>19</sup>Bill, § 24 (2), (3).

<sup>20</sup>Bill, §§ 25, 26.

<sup>21</sup>Act of Sept. 6, 1965, *supra* n. 14, §§ 111 (4) and 119 (2).

<sup>22</sup>*Id.*, § 11.

<sup>23</sup>Bill, §§ 27, 28.

presently existent managing organ will submit a proposal for the majority vote. Failing this, a fourth procedure is implemented: the chairman and the deputy submit either a joint proposal or separate proposals, which then again require a majority from among at least two-thirds of the voting members.

Removal of persons exercising representative powers is based upon the same procedure as that of appointment.

In contrast to the 1951 and 1952 laws providing co-determination, no employee has a position on the managing board under the proposed bill.

### *E. Electoral System*

The members of the supervisory board are not all elected to office by a direct method. Those from the shareholders' side are so elected, but those representing employees are chosen in a fashion not unlike the United States Electoral College method. Employees eligible to vote will elect jointly, via secret ballot, a set of electors, who will, in turn, vote on supervisors from among nominees selected by the entire body of employees and by certain eligible labor union representatives, who come from outside the company.<sup>24</sup>

The number of electoral votes comprising the "college" is determined on the basis of a "key factor." In firms of 30,000 or fewer employees, the factor is a single electoral vote for every sixty employees entitled to vote, *i.e.*, all employees who have reached their eighteenth birthday. Every additional set of 2,000 employees is entitled to another electoral vote beyond the 500 allowed from the first 30,000.<sup>25</sup>

In order to curb the size of the electoral college, votes are doubled or trebled. That is, where a particular plant within a company would be entitled to more than thirty electors, the allotment number is halved and that number of electors take office, each being empowered with two votes. If the plant is entitled to more than 120 electoral votes, then one-third of the seats are fulfilled with an empowerment of three votes per elector.<sup>26</sup>

The three employees groups must each be represented according to the proportion within their original plant. Because it is possible that there may be no mathematical entitlement to a vote in a particular plant, it is mandated that so long as there will be nine electors in one works, each employee group having at least five members is entitled to be represented by a voter from among these.<sup>27</sup>

It is prescribed that every plant within the company shall have at least one

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<sup>24</sup>Bill, §§ 9-16.

<sup>25</sup>Bill, § 11.

<sup>26</sup>Where fractional results would occur, the computation will be adjusted to the nearest whole number.

<sup>27</sup>Bill, § 11 (2) - (5).



elector. However, in another respect, a misrepresentation can occur, for the law provides that an elector who changes from one employee group to another will continue to represent his former group. Conflicts of loyalties and interests are foreseeable from this provision's effect.

Nominations of candidates for elector positions in each group will come from slates submitted by one-tenth or 100 members of the group. The statute encourages the group to submit enough names so that the amount in each list is at least twofold the number of slots.<sup>28</sup>

Generally, the electors term of office will coincide with the terms of the members of the works council. Under certain conditions, however, an independent election will be held, especially where no substitute electors are available to fill any vacancies in the college, or where the numerical proportion of group representatives is upset by virtue of a substitution of electors.<sup>29</sup> Substitutes are selected for open slots according to priority on the list of candidates previously submitted by the group which is entitled to fill the vacancy.<sup>30</sup>

The function of the electoral college, to elect the company's employee board members, is carried out on an individual basis for each vacancy. Board members from within the company must be elected in proportion to the numerical ratios of groups in the company which they represent, as long as there is at least one member representing each group. The candidates from among which the electors choose are taken from lists submitted by one-fifth or 100 of the respective group employees, with each candidate's name being clearly labelled with his category.

At least two candidates must be offered for every vacant slot. Board members to be elected from labor unions are chosen from lists of candidates submitted by unions which are represented in the company itself, or in another company whose employees are allied and entitled to vote in the subject company's elections.<sup>31</sup>

The costs of all elections are to be borne by the company. The loss of working time is not to result in any reductions in wages.<sup>32</sup>

#### **IV. Criticism and Evaluation**

The co-determination proposal put forth in 1974 aroused a great deal of criticism, most of it negative. It was covered in the newspapers very carefully, and many legal, political and economic journals contained articles about this subject. Some of the major points of criticism are described in this section.

From a legal viewpoint, one main objection arises. It is that the introduction

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<sup>28</sup>Bill, § 12.

<sup>29</sup>Bill, § 13.

<sup>30</sup>Bill, § 14.

<sup>31</sup>Bill, § 26 (2).

<sup>32</sup>Bill, § 18.

of parity co-determination contravenes articles 9 and 14 of the German Constitution.<sup>33</sup> Article 9 section 3 of the Constitution is a guarantee of certain freedoms to the labor system. The guarantee is the freedom of coalition for both sides, allowing employees to unionize and allowing employers to form associations. It is in this article that the legitimacy of certain powers of both parties is recognized, including strikes, lockouts, and collective bargaining. The whole fabric of the labor management system is based on this two-fold division between the two groups. Thus, the introduction of co-determination into the system causes management to be infused by employees, thereby breaking down the division that exists between the two groups. Furthermore, the right of members of the management group to coalesce with each other in the form of associations, is undermined by the introduction of co-determination because labor is allowed to "infiltrate" into the associations. The ability of any of the associations to act in a unified fashion is consequently emasculated by the introduction of labor whose goals are surely divergent and whose interests are not necessarily in common.

Additionally, the strike weapon available to employees loses its strength when the consideration that employees constitute part of management becomes a factor to reckon with. In essence, the employees would be striking against their own interests. In fairness, it is said by some<sup>34</sup> that this is not a problem of interfering with the constitutional provision of article 9 section 3, but rather necessitates a realigning of other laws in order to fit in this new system.

Article 14 of the Constitution grants the right to own property. The use of property is not without restriction, of course; certain social limitations exist. But in every case there must be just compensation for property when it is expropriated. In terms of co-determination, it is alleged that the value of the property of the shareholder, *i.e.*, his shares, is diminished. The Supreme Court for Constitutional Matters has not yet ruled on co-determination, even though the situation has already arisen before through the earlier forms which are already in existence.<sup>35</sup>

It is not yet clear at this time how the court can be expected to rule.<sup>36</sup> The co-determination matter also raises a problem involving a separation of powers between the two Houses of the German Parliament. According to the

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<sup>33</sup>Grundgesetz (1949).

<sup>34</sup>Raiser, *Paritätische Mitbestimmung in einer freiheitlichen Wirtschaftsordnung*, JURISTENZEITUNG 273 (May, 1974). A contrary opinion, finding absolute inconsistency of co-determination with the Constitution, can be found in Kindermann, *Verfassungswidrigkeit des Koalitionsentwurfs zur paritätischen Mitbestimmung*, DER BETRIEB 1159 (June 14, 1974).

<sup>35</sup>In a case concerning the 1956 law, supplementing the 1951 law, the *Bundesverfassungsgericht* had the opportunity to pass upon the constitutionality of the system, but the Court was able to avoid a ruling by negatively deciding a preliminary question, thereby not reaching the main issue. Judgment of May 7, 1969, 25 BUNDESVERFASSUNGSGERICHT 407.

<sup>36</sup>RAISER, MARKTWIRTSCHAFT UND PARITÄTISCHE MITBESTIMMUNG 53, 57 (Heidelberg 1973).

Constitution, there are some bills which have to be assented to by the Bundesrat (lower house). When the Stock Corporation Law was passed, the Bundesrat assented to it. Now, however, changes in the co-determination system will expressly alter some provisions of this Stock Corporation Law, and the two must be then made consistent.

The politics of the situation is that the majority in the Bundesrat is of the Christian Democratic Union Party; but it is the coalition which holds the majority in the Bundestag, which is sponsoring the bill. The majority coalition will try to avoid having the Bundesrat pass upon the co-determination law, and it is precisely here where the problem arises. It is unlikely that the Bundesrat will grant its assent to the bill, and consequently if cheated of such an opportunity, it will challenge the process in the Supreme Court for Constitutional Matters.

The greater parts of criticism attach to the economic and socio-legal aspects of co-determination. For one thing, objection has of course been made to the cost factor, in which expenses are augmented for administration, shareholders' meetings, executive time, and legal counsel.<sup>37</sup>

Initially anticipated among the costs projected was the related problem of how to recompense the employee-directors. Board meeting compensation based upon present, high level scales might arouse economically inspired jealousy of fellow-employees, and perhaps even undermine the system's value by adding a potential element of pecuniary motivation. The problem has been easily avoided in the Swedish version, however, by paying the employee-director for his time based on his nominal salary scale.<sup>38</sup>

One of the rationalizations that has been raised in defense of parity co-determination is that "[t]he worker's ample representation on supervisory boards may mean less than at first appears. For although the supervisory board sets policy and appoints the members of the management board, it is the lower board which actually runs a company, and the labor representation there is scant, indeed."<sup>39</sup> But one attorney experienced in the field has voiced an opposite view, noting that the supervisory board has other roles besides formal control: "In reality, it is an advisory board to the [management board]; with confrontation in the supervisory board, cooperation [in the company] will be undermined."<sup>40</sup>

Another potential problem area is that confrontation on supervisory boards, arising from equally powerful, self-cancelling factions, theoretically leads to

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<sup>37</sup>Dr. Dieter Just, Panel Discussion on Co-determination, American Chamber of Commerce Annual Meeting, Berlin (March 29, 1974). (Hereinafter: Panel). Dr. Just is a member of the Management Board of Wasag Chemical Company, AG.

<sup>38</sup>*Management: When Workers Become Directors*, BUSINESS WEEK 194 (September 15, 1973).

<sup>39</sup>*Id.* THE GERMAN EXPERIMENT: A MIXED BLESSING 188.

<sup>40</sup>Seiffert, *supra* n. 9.

stalemates, according to a management board member of Daimler-Benz.<sup>41</sup> The bill's mechanism for stalemate resolutions, *i. e.*, allowing shareholders' meetings to resolve ties, is viewed as impractical because of the considerable expense involved in calling such meetings, and the general absence of expertise on the part of those called upon to judge.

An unresolved conflict could be of amplified significance to companies which are foreign based. Therein, the interest of the national workers and mother-company oriented executives may be widely divergent, contributing to differing opinions and judgements as to which policies are beneficial to the company.

Labor's refutation to the stalemate argument is that "(s)uch ties rarely occur, . . . and if a plan does create a solid front of labor opposition, it probably should not have been approved in any case."<sup>42</sup>

Co-determination has been criticized as destructive of the entrepreneurial spirit, because it deprives shareholders of decisional power.<sup>43</sup> Compounding the shareholder's reluctance is the fear of losing top quality management personnel. For one thing, those managers who take a hard line with employees but are otherwise superior in ability will have difficulty in attaining sufficient votes to earn positions on management boards. Also, top executives may be unwilling to submit themselves to a series of elections, the last of which is even publicly disclosed.<sup>44</sup>

Germany's labor unions are generally opposed to the coalition's draft. Primarily, they do not view the proposed system as one which offers parity in that the employees' fifty percent membership must include executives. These high level employees, according to a union official speaking on the co-determination concept, would become a group with special rights, resulting in an emasculation of the union oriented employees' opportunity to have their influence felt.<sup>45</sup>

The legal advisor to the Biedenkopf Commission, also an opponent of the bill but for other reasons, believes that, in fact, the executives who ultimately sit on the board would be only those of whom the unions approve, because of the sieve-like effect of the electoral college. Therefore, those executives who are on the board must be deemed to be more representative of labor, thus affording full parity.<sup>46</sup>

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<sup>41</sup>BUSINESS WEEK, *supra* n. 38, at 188.

<sup>42</sup>*Id.*, Dr. Detlef Hensche of the Federation of German Unions, Socio-Political Department.

<sup>43</sup>Panel: Dr. Rolf Thusing, Manager of the Confederation of German Employer's Associations.

<sup>44</sup>Peltzer, *Der Regierungsentwurf zum Mitbestimmungsgesetz und die Verfassung der deutschen Kapitalgesellschaft*, BETRIEBSBERATER 440 (April, 1974). Seiffert, *supra* n. 9.

<sup>45</sup>Panel: Dr. Albert Schunk, Industrial Union of Metalworkers.

<sup>46</sup>Panel: Dr. Wolfgang Heintzler, prominent Member of the CDU and former advisor to the Biedenkopf Commission.

One aspect of co-determination which may cause alarm among shareholders is whether enough competent employee representatives can be found. The plans' defenders offer a number of assurances. For one thing, employee board members will not be expected to be responsible for sales, for exports, for technical aspects of production, or for finances. Such roles can be filled by the shareholders' fifty percent. What the unions and employees can offer is directors who understand and have access to the internal side of personnel matters, who are intimately familiar with labor needs and positions.<sup>47</sup>

In order to introduce workers to management skills, a union represented at a large electronics corporation has been financing special courses.<sup>48</sup> Additionally preparatory for director roles are management contracts which have been experienced by those employees who have dealt with management as union leaders.

Some concern has been expressed by critics as to whether employees who are directors will continue to truly represent the workers' interests.<sup>49</sup> Even if the pay rates are not increased so as to change the economic life style of the director, a conscientious effort must be maintained to preserve the ties and loyalties to the employees. Care must be taken not to straddle the gap so perfectly that the worker-director is not disowned by both management and labor.

Of all the anticipated effects of co-determination, the one which has received the strongest bombardment has been the altered power status of the labor union. For one thing, it has been charged that the electoral college system with its candidates lists works heavily toward the favor of the unions. Non-unionized employees, who number two-thirds of Germany's labor force, are usually not union members precisely because they choose not to be active in employee or company affairs; they are willing to relegate such affairs to unions. With union resources—organized manpower, financial support and media access—the unions can popularize their candidates and compose slates designed to maximize the vote potential among the voting groups. Also, unions per se in many companies will comprise the "in-group," *i.e.*, the focal point of the employees, since these are normally the only identifiable collective bodies which are employee oriented. Thus, even without majority membership, unions are expected to fill the positions in the new power structure just by virtue of these characteristics and tendencies.<sup>50</sup>

The aspect of this power which seems to be most troubling to the trade associations and management groups is the collective effect. Union leadership

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<sup>47</sup>Hensche, *supra* n. 42. Interview by COMMERCE IN GERMANY 9 (May 1974).

<sup>48</sup>Siemens, AG.

<sup>49</sup>Mestmäcker, *Durch Mitbestimmung zum Nachtwächter-Staat*, *Frankfurter Allgemeine Zeitung* (March 9, 1974).

<sup>50</sup>Wöhe, *Die Interdependenzen zwischen Vermögensbildung, Gewinnbeteiligung und Mitbestimmung*, *DIE AKTIENGESELLSCHAFT* 97 (April 1974).

will be disbursed among supervisory boards in various companies. The temptation and opportunity will exist to unite in policy direction so as to exert force in each supervisory board. The unions will thereby develop unity similar to that of trade associations and groups, but without necessarily having the profit motive as the prime mover. Even with only partial success, the four or five large unions with national, consolidated power can bring whole industries, company by company, into their policy direction. It is not necessary that the same union official sit on three or four boards; the commonalities are strong enough to foster close cooperation even among large numbers of union board-members.

Yet, after this significant increase of union power, this is still only the first half of it, the employees' fifty percent share of supervisory board seats. A second draft proposal of the coalition government will, if enacted, give employees a continually expanding largess in the other fifty percent. The program introduces a profit sharing levy to be distributed from the earnings of companies with annual gross profits of 400,000 DM. Theoretically, this levy will serve to redistribute economic wealth among the population, giving working people and their families participation in the growth and development of the German economy. Its practical effect, vis-à-vis co-determination, will tip the power scale even more substantially toward union control. The *modus operandi* is to create special companies which somewhat resemble mutual funds. They will collect the levy primarily in the form of shares, since businesses which choose to be assessed in cash must pay a higher rate. These capital investment companies thus become shareholders of German corporations, and, as such, will naturally be entitled to participate in the supervisory board election process.

Thus, the employees, through their shares as held by investment companies, become full voting shareholders. As the years pass, the present structure of corporate ownership will be drastically altered. Under the considerations mentioned above relating to employee tendencies to rely on unions for exercising employee powers, the connection becomes lucid: union officials and members are likely to take an active role in operating the capital investment companies and representing them at shareholder elections, including the elections of supervisory board members. And this aspect of union participation is to be from within the "other fifty percent."

## V. Foreign Implication

When taken together with the profit sharing levy, some questions may be raised about the legitimacy of co-determination vis-à-vis Germany's international obligation.<sup>51</sup> A primary problem area will surface via the control

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<sup>51</sup>The German branch of the American Chamber of Commerce has even commissioned a legal opinion on possible treaty violations of the co-determination plan. *COMMERCE IN GERMANY* 4 (April 1974).

of companies by labor, which has gained shareholders status from the profit sharing levy and automatic fifty percent voting status through co-determination. Wherever labor can be unified in voting policy, there will then be majority control.

This situation may be construed as violative of the U.S.-German Treaty of Friendship, Commerce and Navigation,<sup>52</sup> which provides:

Nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment with respect to engaging in all types of commercial, industrial, financial and other activity for gain, whether in a dependent or an independent capacity, and whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies will be permitted within such territories: 3. (b) to organize companies under the general company laws of such other Party, and to *acquire majority interests* in companies of other such Party; and (c) to *control and manage* enterprises which they have established or acquired. 4.

It would seem that this section of the treaty could be directly contravened, although, admittedly, the main thrust of this section is merely to provide parity ("national treatment") with wholly national companies, which under the two programs would be equally effected.

Less obviously contradictory, but nevertheless a valid legal question, is whether the amalgam of the programs will produce what can be considered acts of expropriation. Shares and voting rights are, of course, forms of incorporeal personal property. In the sense that shares and votes are mandatorily "seized" from shareholders, the acts may be violative of the section of the Friendship, Commerce and Navigation treaty which prohibits property from being taken without just compensation.<sup>53</sup> The act of ordering co-determination and profit sharing is not one of nationalization, but it nevertheless is a state-authorized act forcing a forfeiture.

With respect to the Common Market, Germany's co-determination plan may present another point of conflict. The European commission issued a draft directive in 1972 calling for one-third employee supervisory boards. The German one-half system may cause prospective investors to play off one nation against another with consideration for the aspect whichever has the more suitable co-determination. This kind of strategizing represents a subversion of the Common Market unity/equality concepts. And, in this same direction, is the criticism that more generally, the community's attempt at uniform corporation codes will be undermined by the German system.<sup>54</sup>

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<sup>52</sup>Treaty of Friendship, Commerce and Navigation (with Protocol and Exchange of Notes) Between the Federal Republic of Germany and the United States, October 29, 1954, II BGBI. 487 (1956); also in U.N.T.S. No. 3943 (1957).

<sup>53</sup>*Id.* Art. V. (4).

<sup>54</sup>*Amtsblatt der E.G.*, no. C. 124 (Oct. 10, 1970); *Kommission der E.G.* 887 (Sept. 27, 1972); Seiffert, *supra*, n. 9 at 129.

## VI. Conclusion

For the foreign investor, the co-determination concept is likely to appear as a somewhat awesome obstacle. In its most favorable light, it represents a diminution of control and a costly program. Its legal shadows are not impenetrable, in that operation of the program will not necessarily be impeded by them, but legal challenges will no doubt be raised. Also, unions cannot but become a more powerful factor for investors to reckon with. And, if the profit sharing levy comes into effect, prospects for investment will become even more pessimistic.<sup>55</sup>

The bill was discussed in open session of the Bundestag on June 20, 1974. The Minister of Labor and Social Affairs, who is the coalition "overseer" of the bill expressed his opinion that there is room for adjusting some provisions, especially regarding the definition of "executive," the voting system, and the methods for handling stalemates. Now being discussed in committees, the bill is expected to become law by the first of January, 1975.<sup>56</sup>

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<sup>55</sup>Regardless of the legal effects of Germany's implementation of such programs, political and economic repercussions are foreseeable. It is feared that investments into Germany will be curbed because of the unwillingness to yield fifty percent control to labor.

The outgoing president of the German branch of the American Chamber of Commerce expects at least partial curtailment of the anticipated 1974 capital investment of 1.7 billion dollars from U.S. companies as a result of co-determination. Over fifty United States companies already located in Germany will be affected, perhaps curbing further investment into their operations; doubtlessly many others, including non-United States companies, will decide not to invest at all. Also, it is conceivable that the U.S. government will react to co-determination. Concern was voiced about the possibility of Congressional retaliation, in view of ever present isolationist sentiments. Dr. Milan F. Ondrus, Speech delivered at General Meeting, Berlin (March 28, 1974).

<sup>56</sup>*Unternehmer drohen mit Verfassungsklage*, FRANKFURTER RUNDSCHAU 1 (June 21, 1974).