Employee Representation in the Federal Republic of Germany

by

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As has been described in the first article in this issue, the last International Labour Conference reached certain preliminary conclusions regarding international regulations on co-operation between employers and workers at the level of the undertaking.[1] *Machinery for such co-operation already exists in a large number of countries, but the composition, objects and functions of the various bodies (works councils, production committees, etc.) vary greatly.*[2] *In Germany, the question of* Mitbestimmungsrecht, *or the right of employees to be represented on the boards of undertakings, has been widely discussed since the war, and there has been strong pressure for equal representation instead of the minority representation of the staff which existed before 1933. This aim has to a considerable extent been achieved in an important sector of the German economy as a result of recent legislation, which is described in its historical context in the following authoritative article.*

INTRODUCTION

THE German Federal Act of 21 May 1951 on the participation of employees in the decisions of the supervisory and managerial boards of the mining and iron and steel undertakings in the Federal Republic has attracted considerable

[1] See above, pp. 150-1.

[2] For a study of the various forms of staff representation, see *International Labour Review*, Vol. LIX, No. 6, June 1949, pp. 633-67 : "Works Councils", by Jean DE GIVRY.

attention, not only because of its provisions but also because of the way in which it came into being. This Act must be viewed in its historical context before any proper appreciation of its value can be made.

The law in force under the Weimar Republic was the Works Councils Act (4 February 1920), which provided in section 70 for the appointment of members of the works council to the supervisory board *(Aufsichtsrat)* of companies, but only in general terms. Detailed statutory provision to give effect to this principle was made in the Act on the appointment of members of works councils to the supervisory boards (15 February 1922) and the election rules made under the Act (23 March 1922). Under these provisions two members of the works council were normally to be appointed to the supervisory board of joint-stock companies *(Aktiengesellschaften)*, limited partnerships with share capital *(Kommanditgesellschaften auf Aktien)*, private companies *(Gesellschaften mit beschränkter Haftung)*, registered co-operatives, etc. The appointment was made by secret ballot in the works council. On the whole, this participation by the works councils in the work of the supervisory boards was achieved without friction and was gradually taken by the persons concerned as a matter of course.

Post-War Developments

It was for this reason that workers all over the country demanded the reintroduction of the same or similar machinery immediately after the collapse of the National Socialist Government, which had repealed the earlier laws. The Works Councils Law issued by the Control Council (Control Council Law No. 22, dated 10 April 1946) took this feeling into account; in the second sentence of article VI (3), it states that an agreement between the works council and the employer may provide for the attendance of representatives of the works council, for information purposes, at meetings of the supervisory body of the enterprise.

The Works Councils Acts of the individual German *Länder* go further than this; but they need not be examined here in detail, as, firstly, the validity of these laws is to some extent doubtful and requires further study, and, secondly, no such

law has been passed in North-Rhine Westphalia, which contains by far the largest part of the basic industries in question. The following quotation of section 55 of the Hessen Works Councils Act of 31 May 1948 is merely given as an example: "In undertakings where there is a supervisory board, two members (unless some other number has been determined by agreement between the supervisory board and the works council) of the works council shall be appointed to the board to represent the interests and claims of the workers and to safeguard the works council's right of participation in decisions . . . The representatives of the works council shall be entitled to attend the meetings of the supervisory board in an advisory capacity."

Meanwhile, there were other developments in the Ruhr area outside the legislative field. The German iron and steel industry was placed under the "North German Iron and Steel Control", which acted through a Trustee Administration. This set up twenty-five joint-stock companies, which in their turn restarted certain plants belonging to the former big concerns, under contracts for use of the plant concluded with the original occupiers. By the terms of an agreement between the Control and the trade unions, the supervisory boards of the new joint-stock companies consist normally of eleven persons: four employers, four employees, two representatives of the public authorities and one representative of the Trustee Administration, who acts as chairman. The four workers' representatives include one wage-earner and one salaried employee from the plants of the undertaking, one representative of the trade union concerned, and one representative of the German Federation of Trade Unions—the central labour organisation in the Federal Republic.

The agreement was made more effective by modifying the articles of association. These now stipulate that certain important matters of management require the consent of the supervisory board.

Moreover, the managerial board *(Vorstand)* was reorganised, as well as the supervisory board. The former now includes a personnel director *(Arbeitsdirektor)* as well as a business director and a technical director. The personnel director is drawn from the ranks of the employees, though usually he is appointed from the staff of a different but similar

establishment; he enjoys equal rights with the other two directors and deals mainly with labour, staff and welfare questions.

By the end of 1950 the time for the return of the iron and steel industry to German ownership was not far off. In labour circles it was feared that this would result in the loss of the special right of participation in decisions, which had been established in this industry; the workers also felt that the time had come to demand an extension of the right in this particular form to the mining industry. The situation became so tense that there was danger of a strike in these basic industries. A vote taken among the workers showed an overwhelming majority in favour of direct action by the unions. In view of this, the Federal Chancellor instructed an expert committee, including employers and workers, to draft a set of guiding principles which would form the basis for legislation on the subject; and on 30 January 1951 the Federal Government approved a Bill. After a good deal of amendment, this was passed by both Chambers of the Federal Parliament, and issued on 21 May 1951 as the Act on employee participation in the decisions of the supervisory and managerial boards of undertakings in the mining and iron and steel production industries.

Scope of the New Act

The Act has a strictly limited scope. In the mining industry it is only applicable to undertakings engaged mainly in the production of coal, lignite or iron ore or in the separation [1], coking, carbonising or briquetting of these basic materials, where the plants are subject to supervision by the mining authorities. Thus a gasworks, for instance, is not covered. Furthermore, the Act applies to undertakings within the iron and steel producing industry to the extent specified in Law No. 27 of the Allied High Commission, in so far as these undertakings are converted into "unit companies" as defined in that law or carried on in some other form, and are not wound up. Finally, the Act covers, in certain circumstances,

[1] "Separation" *(Aufbereitung)* means the washing, breaking up or concentration of mining products by mechanical but not by chemical means.

ancillary undertakings (section 15 (2) of the Joint-Stock Companies Act) belonging to the mining or iron and steel industries.

Within these limits, the Act still applies only to undertakings which are conducted as joint-stock companies, private companies or cost-book companies duly incorporated under mining law and normally employing over 1,000 workers, or which are " unit companies " as defined in Law No. 27 ; all other undertakings remain, therefore, outside the scope of the Act.

Composition of Supervisory Boards

The chief object of the Act is to regulate the participation of the workers in the decisions of supervisory boards. Consequently, it had first to make the necessary adjustments in company law, so as to provide for the setting up of supervisory boards in all the types of undertakings falling within its scope. Previously, such boards had only been compulsory under German law in the case of joint-stock companies. The Act had, therefore, to extend this legal obligation ; and in section 3 it stipulates that every private company and every cost-book company duly incorporated under mining law must, if it falls within the scope of the Act, set up a supervisory board, to which the appropriate provisions of the law on joint-stock companies will apply. This incursion into company law will give rise to a number of difficult problems, which will have to be solved by study and experience ; it is not necessary, however, to go into further detail in an article concerned with the labour law and social policy aspects.

In companies falling under the Act, the supervisory board consists of eleven members.[1] All members of the board have equal rights and obligations, and they are not bound by any directives or instructions. Any conflicting provisions in the articles of association are without effect (section 4).

The members of the board are elected—apart from one exception which need not concern us here (section 88 of the Joint-Stock Companies Act)—by an "electoral body" designated

[1] The membership of the supervisory board may be increased by the articles of association or deed of partnership to 15 in the case of companies having a registered capital of more than 20 million marks, and to 21 in the case of companies having a registered capital of more than 50 million marks (section 9).

by law, the articles of association or the deed of partnership, according to the provisions of the articles or deed of partnership (section 5). In the case of joint-stock companies the electoral body is the general meeting of shareholders, whereas under the earlier German law the workers' representatives on the supervisory board were elected by the works council.

An important feature of the election procedure is that the eleven members of the supervisory board are divided into several groups (section 4). It would have been desirable to have three groups: shareholders' representatives, workers' representatives and independent members. This division was adopted in principle by the legislators, but the separating lines are less sharply drawn. An intermediate type (described as " additional members ") has been included, so that a supervisory board is composed as follows: *(a)* four shareholders' representatives, plus one additional member; *(b)* four employees' representatives, plus one additional member; *(c)* one additional member.

It is clear that the intention of the legislators is to have three groups of members (5+5+1), but the first two groups are subdivided: (4+1) + (4+1) + 1. The " additional members " mentioned above under *(a)* and *(b)* belong, of course, to the shareholders' or employees' group, but are nevertheless further qualified within their group. The Act requires, in particular, that all " additional members " should possess a certain a minimum of independence. They must not be connected with the undertaking as employer or employee; they must have no material financial interest in it; they must not be representatives of a trade union, employers' association or central workers' or employers' organisation, or be a permanent employee or agent of any of these; nor may they have held any such position during the year immediately preceding the election.

Naturally, this division into groups is only relevant for the purpose of elections; afterwards the supervisory board is deemed to be a single, undivided body.

With regard to the election of employees' representatives, the Act contains further provisions (section 6). The workers' members of the supervisory board must include one wage-earner and one salaried employee working in one of plants of the undertaking; contrary to former regulations, they need

not belong to the works council. Nominations for these seats are made to the electoral body by the works councils of the various plants of the undertaking after consultation with the trade unions represented in the plants and their central organisations. For the purpose of these nominations, the wage-earner and salaried employee members of the works council form two distinct colleges. Each college elects its respective member by secret ballot; and the names of the elected persons must be communicated by the works councils within two weeks to the central organisations to which the trade unions represented in the plants belong. Any such central organisation may object to the works councils within two weeks of receipt of the communication, if there are reasonable grounds for suspecting that a certain nominee cannot be relied upon to work on the supervisory board for the benefit of the undertaking and of the national economy as a whole. Should the works council reject such an objection (a simple majority vote is sufficient), the works council or the central organisation which raised the objection may appeal to the Federal Minister of Labour, whose decision is binding. If the result of the election stands, it is communicated to the electoral bodies.

Two of the employee members are nominated by the central organisations after previous consultation with the trade unions represented in the undertaking and with the works councils; these members need not belong to the undertaking and can be, for instance, trade union officials. The central organisations' right to make such nominations depends upon their membership in the undertaking; they are expected to take due account of any minorities among the staff when making nominations.

The same procedure as that mentioned in the last paragraph applies as regards the "additional member" for the employees' group.

The nominations submitted to the electoral body are more than mere recommendations since, according to the express provisions of the Act, the electoral body is bound by the nominations it receives from the works councils and central organisations. The procedure is thus not really an election, but agreement to, or confirmation of, the proposals made.

The provisions concerning the election of the eleventh member, who belongs neither to the workers' nor to the employers' group, are also rather complicated. This member is appointed by the electoral body on the nomination of the other ten members of the supervisory board. They decide on their nomination by a majority vote, but the consent of at least three members of the employers' group and three members of the workers' group is required (section 8).

If no name is submitted for the eleventh member, or if a person proposed is not elected, a committee of mediation composed of four members is to be set up. Within one month, this committee must submit the names of three candidates to the electoral body, and from these the electoral body must select the eleventh member of the board. Should all the nominees of the committee of mediation be rejected for sound reasons, especially if none of them can be relied upon to promote the interests of the undertaking, the rejection must be recorded as a formal decision. If so requested by the committee of mediation, the appropriate superior *Land* court determines whether the rejection was justified. If it so decides, the committee of mediation must make three further nominations to the electoral body; should the court declare the rejection unjustified, the electoral body must elect one of the original nominees. If subsequently the court deems rejection of such a second proposal to be justified, or should no further proposal be made, the electoral body itself elects the additional member without being bound by any nomination.

Representation on Managerial Boards

Most of the Act deals with supervisory boards; its provision for employee participation in the proceedings of the managerial boards is however equally important. A personnel director must now be appointed to the "body legally representing the undertaking" on equal footing with the other members (section 13). He cannot be appointed against the majority vote of the employees' group on the supervisory board; and a similar rule applies to termination of his appointment. The personnel director, like the other members of the managerial board, is required to carry out his duties in close co-

operation with the supervisory board. The legislators deliberately avoided defining in greater detail the particular functions of the personnel director; this matter is left to be decided by the standing orders of each board. However, although the personnel director is responsible primarily for questions of social policy, he also shares responsibility for the management of the undertaking as a whole.

The Act comes into force on 31 December 1951, or earlier, according to the progress of reorganisation of the basic industries (section 14).

In conclusion, it should be pointed out that the Act does not settle the whole question of the right of employee participation in decisions, but has singled out a very narrow sector of the field. Other provisions concerning this right which are already in existence or may be issued in future are not affected by the Act. They are, therefore, also valid for the undertakings falling within its scope.