

# Employee Representation at the Enterprise in Germany

Bernd Waas\*

## A. Introduction

The essential feature of the German employee representation system is the dualism of the representation of workers' interests by trade unions, on the one hand, and of works councils, on the other.<sup>1</sup>

Under German law works councils are independent legal bodies with the specific task of representing workers in the respective unit (the establishment in the case of a works council, the enterprise in the case of a so-called joint works council or *Gesamtbetriebsrat*, or a group of companies in the case of a so-called (company) group works council or *Konzernbetriebsrat*). Trade unions, on the other hand, have a more comprehensive task, namely to represent workers' interests at the bargaining table.

This paper seeks to elucidate the employee representation system under German law and to thereby shed light on the role trade unions play within this system (B.). Subsequently, the relationship between works councils and trade unions (as well as their respective powers to bargain collectively) will be examined (C.). Finally, the system's functions (and dysfunctions) will be explored (D.).

## B. Description of the employee representation system

In Germany the interests of workers are represented on two levels: At plant level (by works councils) within the system of what is referred to as the 'works constitution', and on the corporate level within corporate boards.

### I. Employee representation at plant level

The so-called works constitution currently in force (on the legal basis of the so-called Works Constitution Act or *Betriebsverfassungsgesetz*) is the outcome of a rather long development and is worth a brief historical overview.

#### 1. Historical development

By the early 1950s, so-called "factory committees" (*Fabrikausschuss*) had already been established in Germany. The Workers Protection Act (*Arbeiterschutzgesetz*) of 1891 provided for "workers committees" (*Arbeiterausschuss*) to be instituted voluntarily. The idea met with

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\* Professor, Faculty of Law, Goethe University, Frankfurt, Germany

<sup>1</sup> It should be noted that executive staff in Germany is not represented by works councils but by a separate body called executive committee (*Sprecherausschuss*), whose legal basis is the Act on Executive Committees (*Sprecherausschussgesetz*) of 12/20/1988.

considerable resistance at that time due to concern that such bodies could lead to a split in the workers' movement, weakening trade unions in the process. In 1916, the establishment of workers committees became mandatory in undertakings with 50 or more employees. Later, such committees were granted certain participation rights, their legal basis being the Act on Works Councils (*Betriebsrätegesetz*) of 9 February 1920. During the Nazi regime and dictatorship (1933-1945) works councils were completely abolished. An Act that was issued in 1934 introduced the categories "leader of the establishment" (*Betriebsführer*) and "followers" (*Gefolgschaft*) instead, clearly indicating that employees' participation in decision-making was completely out of the question. After World War II, the Council of the Allied Forces established the possibility to re-introduce works councils. In 1952, the Works Constitution Act (*Betriebsverfassungsgesetz* 1952), the forerunner of current legislation, came into force. Twenty years later the Works Constitution Act 1972 (WCA) substantially modified the provisions of the Act. Initially, the government's intention (which was led by the Social Democrats at that time) was to make works councils extensions of trade unions. Ultimately, however, trade unions' influence on works councils remained limited. The most recent significant amendment of the WCA<sup>2</sup> occurred in 2001 without changing the structure of workers' co-determination.

## 2. Basic features of employee representation

Two basic features distinguish the German system of employee representation: Independence of works councils (which comes with a restricted role of trade unions within the works constitution) and a legal imperative for both employers and works councils to collaborate in a spirit of trust and to abstain from industrial conflict.

### a) Independence of works councils and limited role of trade unions

Works councils form autonomous legal bodies which represent workers' interests independently. Workers' representatives at plant level are not necessarily members of a trade union. Nor are they simply nominated by a trade union. Instead, they are essentially elected by all employees who work in a given establishment, independent of whether they are members of a trade union or not.

This is not to say that trade unions (or employers' associations for that matter) would not play a role in employee representation. Instead, the legislator granted trade unions specific rights within the context of the works constitution: Section 2(1) WCA not only requires employers and works councils to cooperate "in a spirit of mutual trust", but also asserts that they have "to abide by collective agreements that are applicable to them and must co-operate with the trade unions and employers' associations represented in the establishment". Moreover, section 2(2) WCA explicitly establishes the right of trade union representatives to be granted access to the undertaking with the aim of permitting trade unions represented in the undertaking to exercise the powers and duties stipulated in the Act.<sup>3</sup> One thing is perfectly

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<sup>2</sup> Act Reforming the Works Constitution Act (*Betriebsverfassungs-Reformgesetz*) of 07/23/2001, Federal Gazette, Part I, p. 1852.

<sup>3</sup> Another example is section 31 WCA according to which the delegates of a trade union represented on the works council may be invited to attend work council meetings in an advisory capacity. Apart from that, the Federal Labour Court has elaborated certain rights of trade union representatives to be granted access to works councils (in a broad sense) on the basis of freedom of association as enshrined in Article 9(3) of the German Constitution; see, for instance, Federal Labour Court of 01/20/2009 – 1 AZR 515/08 and of 06/22/2010 – 1 AZR 179/09.

clear, however: Trade unions are in no position to control works councils, even less to push them aside and take their place.<sup>4</sup>

Apart from the legal set up of dual worker representation (by works councils and trade unions), it should be noted that in practice a clear majority of works council members might also belong to one or the other trade union.<sup>5</sup> It should furthermore be noted that many establishments have so-called union workplace representatives (*gewerkschaftliche Vertrauensleute*) who exclusively represent trade union members and who form a sort of transmission belt between the trade union and the workplace.<sup>6</sup>

## b) Trustful cooperation and peace duty

The relationship between the employer, on the one hand, and the works council, on the other represent the core of the rules on employee representation. Two important features characterise this relationship: Trustful cooperation (*vertrauensvolle Zusammenarbeit*) and the prohibition of, in particular, any strike action by a works council.

The principle of trustful cooperation between the works council and management is enshrined in section 2(1) WCA according to which “the employer and the works council shall co-operate in a spirit of mutual trust having regard to the applicable collective agreements and in co-operation with the trade unions and employers’ associations represented in the establishment for the good of the employees and of the establishment”. Though containing a general clause, section 2(1) WCA is considered legally binding for both the employer and the works council.<sup>7</sup> It is the *Leitmotif* and the central principle of the works constitution.

According to section 74(2) sentence 1 WCA “industrial action between the employer and the works council shall be unlawful”.<sup>8</sup> Section 74 WCA sets down an absolute peace duty in the sense that even if one of the parties does not obey the legal duties specified in the WCA, there is no way of having recourse to industrial action. What all this boils down to is that if differences of opinion exist between the works council and management, they need to be resolved by entering into negotiations. If negotiations fail, one of the parties may decide to either have recourse to conciliation<sup>9</sup> or take the counterpart to court. In any event, differences of opinion must “unravel in a peaceful way”, to put it in the words of the Federal Labour Court.<sup>10</sup> It should be noted, however, that the exclusive aim of the peace duty is to ensure that industrial action is not used as a means to shift influence from the employer to the works

<sup>4</sup> See, for instance, *Krause*, Gewerkschaften und Betriebsräte zwischen Kooperation und Konfrontation, in: *Recht der Arbeit (RdA)* 2009, p. 129.

<sup>5</sup> Around 70 per cent according to the Federal Confederation of Trade Unions (*Deutscher Gewerkschaftsbund*); see also *Goerke/Pannenberg*, Trade Union Membership and Works Councils in West Germany, Institute for the Study of Labor Discussion Paper No. 2635, 2007.

<sup>6</sup> In some respects it is not entirely clear what rights these representatives enjoy. For instance, there are doubts in some quarters as to whether it is admissible to provide for specific dismissal protection on the basis of collective agreements, which is quite often the case in practice; see, for instance, *v. Hoyningen-Huene*, in: Richardi a.o. (ed.), *Münchener Handbuch des Arbeitsrechts*, 2009, vol. 2, No. 215 note 19.

<sup>7</sup> The consequences are exemplified by a more recent ruling of the Federal Labour Court (of 05/18/2010 – 1 ABR 6/09) in which the court held that “trustful cooperation” translates into an obligation of the employer to abstain from all actions which may interfere with the co-determination rights of the works council.

<sup>8</sup> See also section 74(2) sentence 2 WCA according to which “the employer and the works council shall refrain from activities that interfere with operations or endanger peace in the establishment”. Moreover, section 74(2) sentence 3 WCA states that the employer as well as the works council must “refrain from any activity within the establishment in promotion of a political party”. Recently it was ruled, however, that no injunctive relief is available in this regard. Apart from that it should be noted that section 74(2) sentence 3 WCA does not encompass expressions of opinions that are of a general political nature; see Federal Labour Court of 03/17/2010 – 7 ABR 95/08.

<sup>9</sup> In cases where the award of the conciliation committee substitutes an agreement between the employer and the works council, the conciliation committee shall act at the request of either side (section 76(5) sentence 1 WCA).

<sup>10</sup> Federal Labour Court of 12/17/1976 - 1 AZR 772/75.

council (or the other way round). Members of a works council are not prevented from participating in a strike that was called by their union with the aim of pressuring the employer to conclude a collective bargaining agreement as demanded by the union: Though section 74(2) sentence 1 WCA declares industrial action between the employer and the works council to be unlawful, it explicitly states that such is not the case with “industrial action between collective bargaining parties”. Moreover, section 74(3) WCA asserts that “the fact that an employee has assumed duties under this Act shall not restrict him in his trade union activities even in the case that such activities are carried out in the establishment”. During times of industrial strife between trade unions and employers’ associations (or individual employers), certain co-determination rights of the works council may, however, be temporarily suspended.<sup>11</sup>

### 3. Unit of representation

Works councils represent the workers of a specific establishment (*Betrieb*). In establishments that have at least five employees who are employed on a regular basis, works councils are to be elected.<sup>12</sup> If several works councils exist in a given enterprise, a so-called joint works council (*Gesamtbetriebsrat*) has to be established.<sup>13</sup> In a group of companies, a so-called (company) group works council (*Konzernbetriebsrat*) can be established at the parent company<sup>14</sup> on the basis of a decision by the joint works councils that represent the majority of employees in the given group.<sup>15</sup>

The legislator acknowledged some time ago that more flexible structures of employee representation may be necessary in some cases. A wide range of options to establish structures that deviate from the statutory model have been introduced since 2001. For instance, enterprises or groups of companies may be established, which are organised based on different products or branches. In such cases the relevant players may find it useful to establish works councils that are organised along the same lines. The law has opened the door for the conclusion of corresponding agreements, with the power to conclude such agreements accorded primarily to the parties to collective agreements (individual employers, employers’ associations, trade unions)<sup>16</sup>. Only if no collective agreements exist may different structures of employee representation be established based on the conclusion of an agreement between the employer and the works council.<sup>17</sup>

### 4. Bodies of representation

Works councils may exist at different levels: Establishment, enterprise and group of companies. Works councils are not, however, the only form of employee representation. Another important body of employee representation is the co-called workers’ assembly (*Betriebsversammlung*) which comprises all workers<sup>18</sup> and essentially has the right to be

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<sup>11</sup> See Federal Labour Court of 12/13/2011 – 1 ABR 2/10 according to which the works council’s consent is not required if an employer wants to transfer employees (as strikebreakers) from an establishment that is not the subject of a strike to an establishment that is the subject of a strike.

<sup>12</sup> Section 1(1) WCA.

<sup>13</sup> Section 47(1) WCA.

<sup>14</sup> See Federal Labour Court of 02/09/2011 – 7 ABR 11/10.

<sup>15</sup> Section 54 WCA.

<sup>16</sup> Problems arise if there is more than one trade union representing workers at a given establishment; see Federal Labour Court of 07/29/2009 – 7 ABR 27/08 according to which these trade unions are not obliged to join forces.

<sup>17</sup> Section 3(1) and (2) WCA.

<sup>18</sup> See section 32(1) sentence 1 WCA. The assembly is headed by the chairman of the works council.

informed by the employer.<sup>19</sup> Workers' assemblies may submit recommendations to the works council and take a stand on its decisions.<sup>20</sup> It should be noted, however, that the assembly of workers, albeit important, has no overriding authority over a works council.

Another body of representation that plays an even more significant role is the so-called economic committee (*Wirtschaftsausschuss*). The economic committee is a body that must be established in enterprises<sup>21</sup> consisting of at least 100 employees. The economic committee has the right to be regularly informed and consulted by the employer on business matters and is obliged to report back to the works council (sections 106 et seq. WCA).

## 5. Election and formation of a works council

### a) Election

Section 1 WCA states that “works councils shall be elected in all establishments that normally have five or more permanent employees with voting rights”. This does not imply that employees are obliged to elect a works council. Electing a works council is only an obligation in the sense that *not* holding an election results in the rights to participation becoming ineffective, because in nearly all cases the existence of a works council is required.

Works Councils are elected by the staff of an undertaking. All employees who belong to the establishment and are at least 18 years old enjoy the right to vote.<sup>22</sup> Temporary agency workers, who were hired-out for work, are entitled to vote if they have been working in the establishment for more than three months.<sup>23</sup> To enjoy the right to be elected, a worker must have worked for the establishment for at least six months.<sup>24</sup>

Elections are initiated by the works council if one already exists in the given undertaking.<sup>25</sup> In case no works council has been established yet, elections may be initiated upon initiative of either a joint works council or a (company) group works council.<sup>26</sup> But what if no such bodies exist either? In that case an election commission may be nominated during a meeting of employees. Such a meeting must take place if either a group consisting of three employees or a trade union with at least one member<sup>27</sup> from the establishment has issued such an invitation.<sup>28</sup> If a called meeting does not take place or if the participants of such a meeting fail to elect an election commission, such a commission will be appointed by the labour court upon application by three or more persons with voting rights or a trade union represented in the establishment.<sup>29</sup> In other words, the legal obstacles for initiating election procedures are

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<sup>19</sup> According to section 43(1) WCA the employer has to inform the assembly of workers about issues of interest every three months. Section 45 WCA further states that “workers' assemblies (...) may deal with matters of direct concern to the establishment or to the workers, including issues relating to bargaining policies, social policy, environmental and financial matters, issues concerning the promotion of equality between women and men and the reconciliation of family and employment as well as the integration of the foreign employees working in the establishment (...)”.

<sup>20</sup> Section 45 sentence 2 WCA.

<sup>21</sup> Not establishments.

<sup>22</sup> Section 7 sentence 1 WCA. Employees who are younger than 18 may elect a representative body of youths and apprentices (*Jugend- und Auszubildendenvertretung*), which is a body that represents the specific interests of younger persons.

<sup>23</sup> Section 7 sentence 2 WCA. On the other hand, according to section 14(2) sentence 1 of the Act on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz*) temps are not eligible for election in the establishment of the hirer-out; see also Federal Labour Court of 02/17/2010 – 7 ABR 51/08.

<sup>24</sup> Section 8 WCA.

<sup>25</sup> Section 16(1) WCA.

<sup>26</sup> Section 17(1) WCA. The joint works council is not allowed to campaign for the establishment of a works council, however; see Federal Labour Court of 11/16/2011 – 7 ABR 28/10.

<sup>27</sup> See Federal Labour Court of 11/10/2004 – 7 ABR 19/04.

<sup>28</sup> Section 17(3) WCA.

<sup>29</sup> Section 17(4) WCA.

minor, a fact which has met with criticism from some quarters on the grounds that a works council can be easily established against the will of what may be a clear majority of workers in an individual undertaking.<sup>30</sup>

Works councils are elected directly by secret ballot. Elections must be held according to the principles of proportional representation if more than one list of candidates is submitted. Lists of candidates for works council elections may be submitted by employees with voting rights as well as by trade unions represented in the establishment. Each list of candidates which is submitted by employees shall be signed by at least one twentieth of the employees entitled to vote, but by no less than three employees with voting rights.<sup>31</sup> In the year 2001, the legislator introduced a simplified electoral procedure for small establishments. This procedure aims to make the election process more straightforward by establishing tighter time limits, by eliminating certain organisational burdens and, finally, by establishing the principle of majority voting for these elections.<sup>32</sup> The underlying purpose of these amendments was to reduce the “white spots” in the German landscape of co-determination.

Under section 119(1) No. 1 WCA, interfering with an election to the works council or influencing such elections by inflicting or threatening reprisals or promising or even granting incentives is a criminal offence punishable by a term of imprisonment not exceeding one year or a fine, or both.<sup>33</sup> Moreover, candidates enjoy far-reaching dismissal protection under section 15(3) sentence 1 of the Act on Dismissal Protection (*Kündigungsschutzgesetz*).<sup>34</sup>

## **b) Formation**

The size of a works council essentially depends on the number of employees to be represented. If the number of employees with voting rights who are employed in the establishment on a regular basis ranges from 5 to 20 employees, the works council consists of one member only. If that number ranges from 21 to 50, 51 to 100, 101 to 200, 201 to 400, 401 to 700, 701 to 1000, 1001 to 1500, 1501 to 2000, 2011 to 2500, 2501 to 3000, the works council consists of 3, 5, 7, 9, 11, 13, 15, 17, 19 or 21 members, respectively. In establishments that employ more than 9,000 employees the statutory minimum number of works council members must be increased by two members for every additional fraction of 3,000 employees.<sup>35</sup> As far as the composition of works councils is concerned, the law requires them to be composed “to the extent possible” of employees of the various units and of different employment categories of workers (for instance, craftsmen, clerical workers, etc.) employed in the establishment. In addition, the law states that the gender which represents the minority of staff shall at least be represented according to its relative numerical strength whenever the works council consists of three or more members.<sup>36</sup>

The regular term of office of a works council is four years.<sup>37</sup> Regular elections to the works council are held every four years sometime between 1 March and 31 May.<sup>38</sup>

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<sup>30</sup> See *Löwisch*, Betriebsrat wider den Willen der Belegschaft, in: Betriebs-Berater 2006, p. 664 (“works council against the will of staff”). Employers have been urging the legislator to set a quorum of at least one third of eligible voters; see *BDA/BDI*, Mitbestimmung modernisieren – Bericht der Kommission Mitbestimmung, 2004, p. 47.

<sup>31</sup> See section 14(4) WCA.

<sup>32</sup> See section 14a WCA.

<sup>33</sup> See Federal Civil Court of 09/13/2010 – 1 StR 220/09 (financial support for candidates by employer).

<sup>34</sup> Which is interpreted extensively by the courts; see Federal Labour Court of 07/07/2011 – 2 AZR 377/10.

<sup>35</sup> Section 9 WCA.

<sup>36</sup> Section 15(1) and (2) WCA. The latter provision was changed from a (non-binding) request into a legal obligation in 2001.

<sup>37</sup> Section 21 WCA.

<sup>38</sup> Section 13(1) WCA.

## 6. Conduct of business of works councils

A works council has to elect a chairman and vice-chairman from among its members. The chairman of the works council represents the works council and the decisions adopted by it. In addition, the chairman can receive statements to be submitted to the works council.<sup>39</sup> If a works council consists of nine or more members, it shall set up a works committee (*Betriebsausschuss*) which is tasked to deal with the works council's day-to-day business. The works committee consists of the chairman of the works council, the vice-chairman, as well as additional committee members whose number depends on the size of the works council.<sup>40</sup> In establishments with more than 100 employees, the works council may have the right to establish additional committees and assign them specific tasks.<sup>41</sup>

Normally, the works council meets during working hours. When scheduling the meetings, the works council shall take account of the operational needs of the establishment. The employer shall be notified of the date of the meeting in advance. Meetings of the works council shall not be public.<sup>42</sup> If one-fourth of the works council members so request, a delegate of a trade union that is represented on the works council may be invited to attend the meetings in an advisory capacity.<sup>43</sup>

In principle, decisions of the works council require a majority of votes by the members present.<sup>44</sup> Minutes of all proceedings of the works council shall be taken, covering at least the text of all decisions taken and the majority by which these were adopted. The minutes shall be signed by the chairman and one additional member. They shall be accompanied by a list of the members present, in which each member shall personally enter his name.<sup>45</sup>

Work council members carry out their duties in an honorary capacity. Section 37(1) WCA expressly states that "the post of member of the works council shall be unpaid". Works council members must be released from their work duties, however, without loss of pay as far as such is necessary for the proper performance of their functions, having regard to the size and nature of the establishment.<sup>46</sup> During his term of office and for one year thereafter, the remuneration of a member of a works council may not be set at a lower rate than the remuneration paid to workers in a comparable position and who have followed the career that is customary in the establishment.<sup>47</sup> The honorary nature of works council membership has been criticised by many observers. They argue that workers' representation comes with a lot of responsibilities which require adequate remuneration. It is further argued that increased pay may result in an increase of professionalism. Finally, it is argued that the remuneration of

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<sup>39</sup> Section 26 WCA.

<sup>40</sup> Section 27 WCA.

<sup>41</sup> Section 28 WCA.

<sup>42</sup> Section 30 WCA.

<sup>43</sup> Section 31 WCA. The same applies to meetings of the economic committee, for section 31 is to be applied analogously in this regard. The works council may even include a general right of trade union representatives to attend meetings of the works council in its by-laws; see Federal Labour Court of 28.02.1990 – 7 ABR 22/89.

<sup>44</sup> In case of a tie, the motion shall be deemed defeated (section 33 WCA).

<sup>45</sup> Section 34(1) WCA.

<sup>46</sup> Section 37(2) WCA. The same holds true for attendance of training and educational courses in so far as the knowledge imparted is necessary for the activities of the works council. With regard to scheduling the time for attending such courses, the works council is obliged to take the operational requirements of the establishment into consideration. If the employer is of the opinion that the operational requirements of the establishment have not sufficiently been taken into account, he may submit the case to the conciliation committee (section 37(6) WCA). Whether or not training is "necessary" within the meaning of section 37(2) WCA is often controversial. In a recent ruling, the Federal Labour Court (of 01/12/2011 – 7 ABR 94/09) held that depending on the circumstances, even the teaching of oratory skills may be regarded as necessary.

<sup>47</sup> Section 37(4) WCA.

works council members should reflect the pay of their counterparts. Others, however, contend that amending the rules on pay would result in the works constitution being distorted.<sup>48</sup>

As soon as an establishment reaches a certain size, a minimum number of works council members must be fully released from their work duties. The exact number of works council members to be released depends on the number of employees normally employed in the establishment. If 200 to 500 employees are employed in a given establishment, at least one member of the works council must be released from his work duties.<sup>49</sup> If 501 to 900, 901 to 1500, 1501 to 2000, 2001 to 3000, 3001 to 4000, etc. employees are employed in an establishment, the respective minimum number of works council members to be released is 2, 3, 4 and 6, etc.<sup>50</sup> In determining the relevant number of employees a head count is decisive, which means that no pro-rata principle applies to part-time employees.

## 7. Bearer of the cost

The cost of having a works council falls on the employer. According to 40(1) WCA, any expenses arising out of the activities of the works council must be paid by the employer. This may even entail the right of a works council member to request a (partial) reimbursement of expenses for home care of minor children, if such home care is necessary to solve a conflict between the duties as a works council member and the parental duty of taking care of one's children.<sup>51</sup>

In addition to bearing the costs, the employer is bound to provide the necessary premises, material facilities, means of information and communication<sup>52</sup> as well as office staff required for the meetings, consultations and day-to-day operation of the works council.<sup>53</sup> Employees' contributions towards the works council are explicitly prohibited. The same applies to the collection of such contributions.<sup>54</sup>

Empirical studies on the costs of employee representation differ significantly. According to some estimates workers' co-determination comes at a (direct) cost of EUR 650 per worker and year.<sup>55</sup> According to other studies, the (direct) costs are lower by far, but even so, may roughly amount to EUR 270 per worker and year in establishments which regularly employ between 100 and 200 workers.<sup>56</sup> Apart from the difficulties of measuring the costs, there is no agreement on whether or not the positive effects of co-determination outweigh the costs incurred.

## 8. Protection of activities of works council members

Works council members act in an honorary capacity. They receive no pay. Moreover, the law expressly prohibits either prejudice or favouritism of works council members by reason of their office. Employers may neither interfere with works council members nor obstruct

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<sup>48</sup> See, for instance, *Fischer*, Das Ehrenamtsprinzip der Betriebsverfassung "post Hartzem" – antiquiert oder Systemerfordernis?, in: *Neue Zeitschrift für Arbeitsrecht* 2007, p. 484.

<sup>49</sup> The threshold was lowered from 300 to 200 in 2001. At the same time it was provided that releases may also take the form of partial releases.

<sup>50</sup> Section 38(1) WCA.

<sup>51</sup> See Federal Labor Court 06/23/2010 – 7 ABR 103/08 interpreting section 40(1) WCA in the light of Article 6 of the Basic Law ("marriage and the family shall enjoy the special protection of the state").

<sup>52</sup> Including, for instance, providing internet access and setting up e-mail addresses for the individual council members; see Federal Labour Court of 07/17/2010 – 7 ABR 80/08.

<sup>53</sup> Section 40(2) WCA.

<sup>54</sup> Section 41 WCA.

<sup>55</sup> According to a study conducted by the Institut der deutschen Wirtschaft (IW), see: <http://www.iwkoeln.de>.

<sup>56</sup> *Bierbaum*, Nutzen und Kosten der Mitbestimmung, 2003.



them in carrying out their duties. No prejudice or favouritism may be expressed by reason of their office (section 78 WCA). Prejudice or favouritism of a member of the works council is a crime that is punishable by a term of imprisonment not exceeding one year, or a fine, or both.<sup>57</sup>

Furthermore, works council members enjoy extensive dismissal protection. According to section 15(1) of the Act on Dismissal Protection (*Kündigungsschutzgesetz*), the dismissal of a works council member is in principle prohibited. Works council members can only be dismissed if the (stringent) requirements of an extraordinary dismissal (without notice)<sup>58</sup> are met in an individual case.<sup>59</sup> In addition, dismissal of a works council member requires the consent of the works council. If the works council does not give its consent, the employer can turn to the labour court for a decision substituting the missing consent.<sup>60</sup>

## 9. Role and powers of the works council

Section 80 WCA defines the works council's general tasks. Generally speaking, it can be said that works councils must ensure that employers abide by the duties arising from labour law.<sup>61</sup> The extensive rights that derive from specific provisions of the WCA, however, play a far more important role. In addition, works councils in principle enjoy the right to bargain collectively with the employer.

### a) Rights of the works council

The rights of work councils range from rights to information and consultation to true co-determination rights in the sense that an agreement with the works council is necessary. In order to enable the works council to fulfil its duties, the employer is obliged to inform the works council in depth and in good time. The works council must, if it so requests, be granted access to any documentation at any time, which it may require to fulfil its duties.<sup>62</sup>

#### aa) Information and consultation

Works councils enjoy far-reaching rights to be informed, to be heard and to be consulted.<sup>63</sup> Section 99(1) WCA represents an example of a specific right to information.<sup>64</sup> According to this provision the employer is obliged to notify the works council in advance of any recruitment<sup>65</sup> or transfer of an employee, must submit the appropriate documents to the works council and, among other things, inform it of the implications of the measure envisaged. The right of a works council to be heard arises from various provisions of the WCA. For instance, the works council must be heard before every dismissal, be it individual or collective.

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<sup>57</sup> Section 119(1) No. 3 WCA; see, in this regard, Federal Civil Court of 09/17/2009 – 5 StR 521/08 (bribing of works council members of *Volkswagen*).

<sup>58</sup> As stipulated in section 626 of the Civil Code (*Bürgerliches Gesetzbuch*).

<sup>59</sup> If an extraordinary dismissal is linked to a certain behaviour that is related to the employee's position as a works council member, it can only be justified if the behaviour is (also) in breach of duties arising from the employment contract; see Federal Labour Law of 05/12/2010 – 2 AZR 587/08.

<sup>60</sup> Section 103 WCA.

<sup>61</sup> According to section 80(1) No 1 WCA, the works council must “guard the effectiveness of Acts, ordinances, safety regulations, collective agreements and works agreements that are in force for the benefit of the employees”.

<sup>62</sup> Section 80(2) WCA.

<sup>63</sup> Section 79 WCA subjects works council members to a duty to observe secrecy.

<sup>64</sup> The provision applies in companies which normally employ more than 20 employees.

<sup>65</sup> Recruitment in that sense encompasses the hiring-out of agency workers. Even so, the influential Metal Workers Union *IG Metall* is not satisfied with the legal situation. The trade union recently made it clear that it demands even more far-reaching co-determination rights for hirers-out on the part of the works councils and will make this demand one of the main issues of collective bargaining in the year 2012.

Any notice of dismissal that is given without consulting the works council is null and void.<sup>66</sup> Apart from that, the general right to be heard exists on issues listed in section 80(1) WCA. A general right to be consulted arises from section 74(1) WCA according to which the employer and the works council shall meet at least once a month and discuss the matters at hand “with an earnest desire to reach agreement”. In addition, specific rights to consultation have been elaborated. According to section 111 sentence 1 WCA, in establishments which normally employ more than 20 employees with voting rights,<sup>67</sup> employers are obliged to inform the works council in depth and in good time of any proposed change in business operations (for instance, the closing down of an establishment or parts of an establishment, a transfer of the entire establishment or important parts thereof, etc.) that may entail substantial prejudice to staff, and consult the works council on the proposed changes. According to section 106(1) WCA the employer is obliged to consult with the economic committee on economic matters.<sup>68</sup>

### **bb) Power to raise objections**

Furthermore, works councils may enjoy a so-called power to object to certain decisions taken by the employer. Section 102(3) WCA, in particular, specifies situations in which works councils have the right to object to an employer’s decision to dismiss an employee by giving notice. If, for instance, the employer did not sufficiently take into account the “social aspects” of his decision, the works council may object to the dismissal. Though such objection does not influence the lawfulness of the dismissal, it does have consequences, for the employer will be obliged to continue employing the employee at the latter’s request until a final decision is taken by the court, if the employee has brought a claim of unlawful dismissal under the Act on Dismissal Protection.

### **cc) Power to refuse consent**

In some cases, the consent of the works council is required for fundamental decisions by the employer. Under section 99(2) WCA, for instance, a works council may (under certain circumstances) refuse to consent to the recruitment or transfer of an employee. In such cases the employer will not be able to implement his decision and must apply to the labour court for a decision substituting the lack of consent. Only if the employer is urgently required for reasons based on facts to recruit or transfer the employee before giving the works council the opportunity to take a position, is he permitted to make a decision on a temporary basis.<sup>69</sup>

### **dd) Co-determination rights**

The most far-reaching rights enjoyed by works councils are the so-called true co-determination rights (*echte Mitbestimmung*). Co-determination rights place the works council and the employer on an equal footing, with the works council enjoying discretionary power to consent to a decision taken by the employer. If no agreement between the parties can be reached, the matter is referred to and decided by a so-called conciliation committee

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<sup>66</sup> Section 102(1) WCA.

<sup>67</sup> In determining whether the requirements of that threshold are met, temporary agency workers must be taken into account, if they have been working in the establishment for more than three months; see Federal Labour Court of 10/18/2011 – 1 AZR 335/10.

<sup>68</sup> As further substantiated by section 106(3) WCA. According to section 106(3) No. 9a WCA, which was introduced in 2008, the take-over of a company by another company constitutes an “economic matter” as well.

<sup>69</sup> Section 100 WCA.

(*Einigungsstelle*)<sup>70</sup> with the pronouncement of the committee substituting the lack of agreement between the employer and the works council.<sup>71</sup>

The cornerstone of what in Germany is referred to as “co-determination that can be enforced upon the employer” (*erzwingbare Mitbestimmung*) is section 87(1) WCA. The matters stipulated in this provision are, for instance, “rules of operation of the establishment and the conduct of employees in the establishment” (no. 1); “beginning and end of the daily working hours including breaks and the spreading of working hours over the days of the week” (no. 2); any temporary reduction or extension of the hours normally worked in the establishment (no. 3); “the time and place for and the form of payment of remuneration” (no. 4); “the establishment of general principles for holiday arrangements and the preparation of the holiday schedule as well as fixing the time at which the leave is to be taken by individual employees, if no agreement is reached between the employer and the employees concerned” (no. 5); “the introduction and use of technical devices designed to monitor the behaviour or performance of the employees” (no. 6), as well as many others. Works councils have a right of co-determination on all the issues outlined above. Moreover, the courts<sup>72</sup> regularly grant them a corresponding so-called “right of initiative” (*Initiativrecht*), meaning that the works council does not need to wait for the employer to approach it, but may take the initiative even if the employer feels there is no need to regulate a given matter.

The rights of works councils are particularly strong in the area of “social” matters (see, in particular, section 87 WCA) and in the area of “personal” matters (such as recruitment, transfer or dismissal, sections 99 and 102 WCA). This is not to say, however, that works councils do not play a role when it comes to entrepreneurial issues. Though the rights of the works council are limited in this regard (not least because entrepreneurial freedom is guaranteed by the Constitution<sup>73</sup>), works councils do enjoy certain rights in this context. In particular, if an employer plans staff cutbacks or other so-called business-related changes affecting staff he may be obliged to arrive at a so-called “reconciliation of interests” (*Interessenausgleich*) as well as to reach an agreement to (fully or partly) compensate employees for any financial harm sustained as a result of the proposed changes (social compensation plan or *Sozialplan*).<sup>74</sup>

## b) Works agreements

Works councils are powerful because they enjoy far-reaching rights (especially within the realm of “social” and “personal” issues) and because of their ability to conclude collective agreements with the employer, which take normative effect.

Works agreements (*Betriebsvereinbarung*) may be concluded between the works council and the employer on a voluntary basis.<sup>75</sup> What is more, they are the means of choice for exerting a co-determination right. A legal definition of works agreements can be found in section 77 WCA. According to section 77(2) sentence 1 WCA, works agreements shall be negotiated by the works council and the employer and recorded in writing. According to section 77(3) sentence 1 WCA, works agreements shall be mandatory and directly

<sup>70</sup> Whose costs are also borne by the employer (section 76a(1) WCA).

<sup>71</sup> Section 87(2) WCA. It should be noted that a pronouncement of the conciliation committee does not preclude court proceedings (section 76(7) WCA).

<sup>72</sup> See, for instance, Federal Labour Court of 11/29/1989 – 1 ABR 57/88.

<sup>73</sup> Article 12 of the Basic Law (Grundgesetz).

<sup>74</sup> See sections 112 and 112a WCA.

<sup>75</sup> Section 88 WCA, in particular, deals with such agreements.

applicable.<sup>76</sup> Consequently, works agreements have the same legal effects as statutory provisions and the same effects as collective bargaining agreements which, according to section 4(1) sentence 1 of the Act on Collective Bargaining Agreements (*Tarifvertragsgesetz*), also take direct and mandatory effect.

## 10. Number of works councils

Empirical studies show that often no works councils have been established, even if the statutory requirements are met. This applies in particular to small and medium-sized establishments. According to a survey carried out in 2009, only about 45 per cent of workers in the private sector were represented by a works council. On the other hand, in about 90 per cent of large establishments (with more than 500 employees), works councils are likely to exist.<sup>77</sup>

## II. Employee representation at board level

In addition to employee representation at plant level, there is also a system of employee representation on corporate boards in Germany.

### 1. Works constitution and representation at board level: Similarities and differences

The purpose of both systems is to give workers a say in the employer's decision-making process, but the means used differ. As regards co-determination at plant level, the legislator has established distinct institutions referred to as the organs of workers' representation in Germany, in particular, the works council. As regards co-determination at the corporate level, the means employed are to reserve seats for employee representatives in corporate boards. While co-determination by works councils takes place at the level of the individual plant or establishment, the level of "entrepreneurial co-determination" (*unternehmerische Mitbestimmung*), as it is called in Germany, is the enterprise level, if not the level of a group of companies. This corresponds with the fact that the works council's entitlements seek to restrict the powers of the employer in relation to (organising and running) the establishment. In contrast, "entrepreneurial co-determination" aims to allow employees (or their representatives) to participate in decisions that are taken in corporate boards.

### 2. Levels of co-determination at board level

The extent of co-determination at board level depends on the provisions that apply in a given case.

The form of co-determination established in the so-called One-Third Participation Act 2004 (*Drittelbeteiligungsgesetz*)<sup>78</sup> is the least far-reaching. Under this Act workers' representatives enjoy the right to occupy one-third of the seats in a company's supervisory board (*Aufsichtsrat*). The most far-reaching form of co-determination, on the other hand, is established in the Coal, Iron and Steel Industry Co-determination Act 1951 (*Montan-*

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<sup>76</sup> Any rights granted to employees under a works agreement cannot be waived except with the agreement of the works council. In addition, such rights cannot be forfeited (section 77(3) sentences 2 and 3 WCA).

<sup>77</sup> By the Institute for Employment Research, the research institute of the Federal Employment Agency.

<sup>78</sup> Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat of 05/18/2004.

*Mitbestimmungsgesetz*).<sup>79</sup> In these industries supervisory boards consist of shareholders and workers' representatives in equal numbers with additional "neutral board" members as well.

In between the two models lies the form of co-determination established in the Co-determination Act 1976 (*Mitbestimmungsgesetz*).<sup>80</sup> As is the case with co-determination in the coal, iron and steel industries the seats on supervisory boards are equally split between shareholders and workers' representatives. In contrast to the former models, however, there are no "neutral" board members. The Co-determination Act 1976 is applicable to, among others, stock corporations (*Aktiengesellschaft, AG*) and limited liability companies (*Gesellschaft mit beschränkter Haftung, GmbH*). There is, however, a requirement for such companies to employ more than 2000 employees on a regular basis.<sup>81</sup> The supervisory board elects a chairman and a deputy from its ranks with a majority of two-thirds of the total members of which it is to consist.<sup>82</sup> In the (not unlikely) case that this majority is not reached, a second ballot must be held. In this ballot, the board members of the shareholders shall elect the chairman of the board with a majority vote and the board members of the employees shall elect a deputy with the majority of votes.<sup>83</sup> In other words, if a second ballot is needed a simple majority of votes of the shareholders suffices to elect the chairman of the board.

Section 29 represents the key provision of the Co-determination Act. According to section 29(1) resolutions of the supervisory board require the majority of votes cast unless otherwise provided in the Act. Where the votes cast in the supervisory board result in a tie, a new ballot shall be cast on the same subject.<sup>84</sup> If this ballot again results in a tie, the chairman of the board shall have two votes.<sup>85</sup> With this provision the legislator sought to ensure that an impasse resulting from the parity between shareholders and employees can be resolved and that the operability of the supervisory board can be ensured. At the same time, the Act guarantees shareholders predominance, because shareholders are in the position to ensure that one of their own is elected as chairman of the board.<sup>86</sup>

### 3. Legal doubts and criticism

Whether or not co-determination on the basis of an equal representation of employees and shareholders conforms to the Constitution was the subject of an intense debate as soon as the Co-determination Act entered into force. In a judgement issued by the Constitutional Court (*Bundesverfassungsgericht*) in 1979 the court held, however, that the Co-determination Act was constitutional and did not violate the constitutional guarantee of property as enshrined in Article 14 of the Basic Law (*Grundgesetz*).<sup>87</sup>

Over the last couple of years the debate on co-determination on corporate boards has been intensifying, nevertheless, not least against the background of the fact that the "German model" is rather unique and may eventually be eroded by developments at the European

<sup>79</sup> Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie of 05/21/1951.

<sup>80</sup> Gesetz über die Mitbestimmung der Arbeitnehmer of 05/04/1976.

<sup>81</sup> Art. 2(1) of Co-determination Act.

<sup>82</sup> Section 27(1) Co-determination Act.

<sup>83</sup> Section 27(2) Co-determination Act.

<sup>84</sup> Section 29(2) sentence 1 Co-determination Act.

<sup>85</sup> Section 29(2) sentence 2 Co-determination Act

<sup>86</sup> For more details, see *Waas*, Co-determination on board-level in Germany, in: *European Company Law 2009*, p. 62.

<sup>87</sup> Federal Constitutional Court of 03/01/1979, Official Collection of Judgements of the Court, vol. 50, p. 90.

level.<sup>88</sup> One of the arguments that have been put forward by critics is that co-determination at plant level and at the board level is detrimental because it leads to an accumulation of co-determination rights and a shift in the balance of power too far into the direction of workers.<sup>89</sup> Due to the resistance of the trade unions it is difficult to imagine, however, that the legislator will amend the existing system in the foreseeable future. This holds true, in particular, with regard to a comprehensive legal package, demanded by some, that would put together the works constitution and co-determination at company level and address them as two “sub-systems” of workers’ co-determination.<sup>90</sup>

## C. Relationship between employee representation and collective bargaining

As described earlier, works councils, in principle, enjoy the right to conclude normative agreements with the employer. The same is also true for trade unions. In fact, the power to conclude collective agreements is considered part and parcel of the freedom of association (*Koalitionsfreiheit*) as enshrined in Article 9(3) of the German Constitution. Against this background, the question must be addressed what line is to be drawn between the respective powers of works councils and trade unions.

### I. Unionisation and collective bargaining

Trade unions have a long history in Germany and continue to play an important role. The most important labour organisation is the German Confederation of Trade Unions (*Deutscher Gewerkschaftsbund*) which is an umbrella organisation of several individual trade unions for specific sectors of the economy. The member unions of DGB organise around 6.2 million workers or approximately 20 per cent of all employees in the country.<sup>91</sup> The largest single trade union is the Metal Workers Union *IG Metall* which has about 2,245,000 members. Traditionally, trade unions are organised along the lines of specific sectors or branches. Over the last couple of years, however, trade unions representing specific professions (for instance, train drivers or doctors) instead of workers in a given area have been on the rise. There are several reasons for this, one of them being that the Federal Labour Court, which applied the so-called principle of unity of collective agreements (*Grundsatz der Tarifeinheit*) for a long time, has recently changed course and now allows different collective agreements to be applied in one single establishment.<sup>92</sup>

The set-up of collective bargaining in Germany is far more stable than many observers would expect. In particular, rumours of the demise of collective agreements have proved to be greatly exaggerated. Apart from a steady decline of union membership rates, severe pressure is being exerted on the system, which has led to certain disruptions. For instance, a considerable number of employers have either left employers’ associations altogether over the last couple of years or changed to memberships that do not require commitments to collective bargaining (so-called *OT-Mitgliedschaft*). This has created problems for trade unions which

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<sup>88</sup> In particular, the fact that the European Court of Justice tends to decide in favour of the freedom of establishment, finding that rules submitting foreign companies to the company law of the host state were inadmissible; see, in particular, ECJ of 09/30/2002 – Case C-167/01 (*Inspire Art*).

<sup>89</sup> See, for instance, *Wiese*, in: *Wiese e.o. (ed.)*, *Gemeinschaftskommentar Betriebsverfassungsgesetz*, Introduction note 45.

<sup>90</sup> For more details, see *Waas*, *Co-determination on board-level in Germany*, in: *European Company Law*, p. 62.

<sup>91</sup> At the end of 2011, according to the latest figures available from the DGB.

<sup>92</sup> See Federal Labour Court of 07/07/2010 – 4 AZR 549/08.

may not have the bargaining power to force these employers to sign collective agreements individually and as a result are moving out of their reach. Against this background we can observe that increasing use has been made in the more recent past of collective bargaining agreements being extended by the state. The most recent example of this practice was the establishment of statutory minimum pay (derived from a collective agreement) for temporary agency workers, which entered into force on 1 January 2012.<sup>93</sup>

## II. Demarcation of powers

It can easily be claimed that the relationship between works councils and employers, on the one hand, and the parties to collective agreements, on the other, represents one of the key problems of German labour law. Specifically, both works councils and trade unions have the power to arrive at agreements that take normative effect: Works councils enjoy the right to conclude collective agreements, so-called works agreements, with the employer. Similarly, the right to conclude collective agreements (so-called collective bargaining capacity, *Tariffähigkeit*<sup>94</sup>) is enjoyed by trade unions and employers' associations as well as by individual employers.<sup>95</sup> Because works councils and trade unions are able to conclude collective agreements, the question arises which collective agreements should take precedence in case of a (possible) conflict.

This question is essentially addressed by section 77(3) sentence 1 WCA.<sup>96</sup> It states that “works agreements shall not deal with remuneration and other conditions of employment that have been fixed or are usually fixed by collective agreement”. This means that even if a works agreement is more beneficial for an employer<sup>97</sup> than an applicable collective agreement, the latter agreement prevents the works agreement from becoming effective. Section 77(3) WCA makes it clear that there should be no rivalry between works councils and trade unions with reference to collective bargaining. In particular, the legislator sought to ensure that works councils do not become “substitutes” for trade unions. Against the background of works agreements possibly fixing more beneficial terms and conditions of employment than collective agreements, workers could lose interest in joining trade unions and endanger the entire bargaining structure by abstaining.<sup>98</sup>

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<sup>93</sup> Even so there are demands to lend state support to collective bargaining. For instance, the parliamentary group of the Social Democrats recently asked the Federal Government to introduce legislation with the aim of making it easier in the future to declare collective agreements generally binding. At present such declaration requires at least 50 per cent of all workers in the area of application of a collective agreement to be bound to that agreement (section 5(1) sentence 1 No. 1 of the Act on Collective Bargaining Agreements). The Social Democrats would like to see this requirement replaced by the requirement of a collective agreement being “representative” only. In this context, they point to the fact that there has been a steady decline in the number of employers and workers who are covered by collective bargaining in the first place.

<sup>94</sup> The requirements of collective bargaining capacity are set out in some detail in *Waas*, Who is allowed to represent employees? The capacity to bargain collectively of trade unions in German law, in: Davulis/Petrylaite (ed.), *Labour Market of 21<sup>st</sup> century: Looking for flexibility and security*, Vilnius, 2011, p. 164.

<sup>95</sup> In addition to trade unions and employers' associations, individual employers also enjoy collective bargaining capacity, the reason being that trade unions may otherwise face difficulties in finding a partner, if employers abstain from becoming members of employers' associations. Though there are some collective agreements between trade unions and individual employers most collective agreements are still concluded by employers' associations.

<sup>96</sup> See also section 4(3) of the Act on Collective Bargaining Agreements.

<sup>97</sup> It should be noted that it is often difficult, if not impossible, to determine which agreement is more beneficial than the other; in this regard, see for instance, Federal Labour Court of 04/20/1999 – 1 ABR 72/98 (waiver of the right to dismiss, on the one hand, and a reduction of pay on the other amounts to an impossible comparison of “apples and oranges”).

<sup>98</sup> See also *Waas* in: Blanpain (ed.), *Decentralizing Industrial Relations and the Role of Labor Unions and Employee Representatives*, The Hague/London/New York, 2007, p. 17.

Given all these facts it may not come as a surprise that section 77(3) WCA has been interpreted extensively by the courts: First, section 77(3) WCA deals with all conditions of employment independent of their quality or nature. Second, it is not required for the employer to actually be bound to a collective agreement (by being a member of the employers' association which entered into such an agreement) to legally block the conclusion of a works agreement. Instead, it suffices for the employer to fall within the area of application of the collective agreement. If, for instance, a collective agreement exists for the metalworking industry, the employer who does business in this sector is prevented from concluding a works agreement with the works council, even if he is not a member of the employers' association which concluded the agreement and, as a result, is not bound to that agreement.<sup>99</sup> Third, it is not required for a collective agreement to actually be in force. According to the wording of section 77(3) WCA, it is sufficient when a certain subject matter is "usually fixed by collective agreement", which is the case if, first, the matter was once the subject of collective bargaining and if, second, it is reasonable to believe that it will again become the subject of collective bargaining in the foreseeable future.<sup>100</sup>

In practice, some employers and some works councils have been trying to circumvent the legal restrictions of their power to conclude collective agreements by entering into agreements that do not have normative effect, but are only binding for the parties to the agreement. The parties often may have reckoned that in practice the results could be the same at the end of the day if the works councils were to succeed in "convincing" staff that their contracts should be modified according to the content of the agreement reached with the employer. The Federal Labour Court, however, did not approve such practice and granted the trade unions, in principle, a right to injunctive relief.<sup>101</sup>

## **D. Function and dysfunction of the employee representation system**

Employee representation essentially refers to co-determination by workers' representatives, intense communication between management and labour and the resolution of conflicts arising between them. In addition, the system enables works councils and employers to establish general terms and conditions of employment as far as the corresponding issues have not yet been dealt with by means of collective bargaining. In the German system of employee representation, works councils and employers are essentially equal, the former being able to participate in the decision-making process of the latter on an equal footing.

A clear advantage of the system from an employers' view lies in the fact that the works council has to observe a comprehensive peace duty, a fact which is clearly reflected in the statistics on strikes and lock-outs in Germany. Moreover, employee representation by works councils is a means of tapping into the specific know-how workers' representatives may have in many areas. By making use of this know-how, it might be possible to improve the decision-making process. Finally, another important element is the fact that workers' representation improves the chance of workers accepting the decisions taken by management.

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<sup>99</sup> See section 3(1) of the Act on Collective Bargaining Agreements.

<sup>100</sup> With regard to works agreements which aim to regulate issues enumerated in section 87 WCA, only existing collective agreements have to be taken into account, however; see Federal Labour Court of 02/24/1987 – 1 ABR 18/85. It suffices, however, for the employer to be bound to these agreements; see, for instance, Federal Labour Court of 10/18/2011 – 1 ABR 25/10.

<sup>101</sup> See Federal Labour Court of 04/20/1999 – 1 ABR 72/98 in case the works agreement aims at "displacing the collective agreement as a collective legal order and thus depriving it of its main function"; see also Federal Labour Court of 05/17/2011 – 1 AZR 473/09.



The dualism of workers' representation in Germany has clear advantages as well as drawbacks. On the one hand, works councils are not subjected to orders from union leadership. Instead, they are only bound to comply with the law. As they are independent, works councils are well equipped to protect the interests of minorities and, in particular, of workers who are not members of a trade union. For the very reason that they enjoy far-reaching co-determination rights, they are forced to deal with problems in depth and to make proposals of their own. On the other hand, some works councils may in some cases develop an "egoistic" stance, putting aside the overall interests of workers.

Critics of the existing works constitution tend to argue that the legal system is too rigid. They are of the opinion that more flexibility is needed, in particular with regard to the possibilities of establishing structures of co-determination that deviate from the statutory model. Though it is acknowledged that the legislator allowed for a bit more room when amending the Works Constitution Act in 2001, the fact that the legislator failed to achieve the goal of rendering "tailor made" solutions possible continues to be criticised. In addition, some observers criticise that the WCA, especially since its amendment in 2001, delays entrepreneurial decision-making and contributes to red tape.<sup>102</sup> And though co-determination rights may promote a spirit of co-responsibility on the part of workers' representatives, there is also a danger of such rights giving rise to inappropriate "package deals" with management.

Trade unions<sup>103</sup> argue that the works constitution should more clearly address the danger of a possible split between regular and irregular staff (temporary agency workers, contract workers).<sup>104</sup> Additionally, there are demands to make it easier to adapt works council structures to the organisation of (transnational) groups of companies and to expand co-determination in the area of entrepreneurial decision-making.

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<sup>102</sup> *BDA/BDI, Mitbestimmung modernisieren – Bericht der Kommission Mitbestimmung, 2004.*

<sup>103</sup> See, for instance, *Deutscher Gewerkschaftsbund, Betriebsverfassung im 21. Jahrhundert – Rechtspolitische Empfehlungen zur Mitbestimmung im Betrieb, 2009.*

<sup>104</sup> By further extending the respective co-determination rights.