

Fulton, Lionel

Research Report

Codetermination in Germany: A beginner's guide

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CODETERMINATION IN GERMANY

A Beginner's Guide

Lionel Fulton



AUTHOR

Lionel Fulton

is secretary of the Labour Research Department in London, an independent research institute with close ties to the trade unions. He has published extensively on workers' representation in Europe and prepared much of the material on UK labour relations for the European Trade Union Institute website.

www.worker-participation.eu

lfulton@lrd.org.uk

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Georg-Glock-Str. 18, 40474 Düsseldorf

Telephone +49 (211) 77 78-172

www.mitbestimmung.de

Press contact: Rainer Jung, +49 (211) 77 78-150
rainer-jung@boeckler.de

Layout: Yuko Stier

Editorial

Dr. Manuela Maschke, Head of Unit Work and Codetermination
Hans-Böckler-Stiftung, Telephone: +49 (211) 77 78-224
manuela-maschke@boeckler.de

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CODETERMINATION IN GERMANY

A Beginner's Guide

Lionel Fulton

ABSTRACT

This guide is intended to help people unfamiliar with the German system of labour relations to understand one of its key aspects, the system of employee involvement known as 'codetermination' (*Mitbestimmung* in German).

Codetermination is governed by a series of rules set out in legislation and provides employee representatives with clear rights to act in ways that benefit the employees who elected them. Codetermination also requires employee representatives to consider the interests of the business where they work and there is evidence that codetermination brings benefits to the companies in which it is exercised.

Codetermination affects decisions at all levels and plays a role in German companies and those who work in them, making it an important element not just of German industrial relations, but also of the German economy and German society.

Anyone who wishes to understand the German economy and society better would be well advised also to take time to learn a little about codetermination.

The guide is intended for non-Germans encountering the codetermination for the first time. Whether they are managers or investors, trade union officials or elected employee representatives, they are likely to find initially that parts of the system seem unfamiliar and perhaps uniquely German. But on closer examination, it is clear that codetermination has many features in common with other systems of employee involvement elsewhere in Europe. The rules and the structures may differ but the concerns and needs are the same.

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1 A QUICK OVERVIEW

Codetermination operates at two levels:

- workplace level and
- board level.

Workplace level codetermination (*betriebliche Mitbestimmung*) is provided through the works council (*Betriebsrat*), a body directly elected by and made up of those working in the organisation. Works councils can be set up in all companies with five or more employees. The works council has extensive and clearly defined legal rights, which in some cases mean that the employer cannot act without the work council's agreement.¹

Board-level codetermination (*Unternehmensmitbestimmung*) is provided through the presence of elected employee representatives in a company's supervisory board, the body which sets the company's strategy and monitors its progress. It is more limited in scope, only affecting companies with 500 or more employees. But these employee representatives have the same rights and duties as the board members representing the shareholders, although they can always be outvoted by the shareholders' representatives (except in a small number of companies in the coal, iron and steel industries).²

The two levels are linked as the employee representatives in the supervisory board are normally works council members.

Neither works councils nor employee representatives on supervisory boards are direct trade union bodies. There are clear links to the unions, however. The majority of works council members are union members; unions have nomination rights; and the work council chairs in Germany's biggest companies are often influential figures in their own unions. They are also the individuals who are likely to be on supervisory boards, and, in companies with more than 2,000 employees, full-time trade union officials also sit on the boards as employee representatives.

2 BOARD-LEVEL CODETERMINATION

2.1 Establishment, composition and structure

Key points

- Companies with more than 500 employees in Germany must, in most cases, have some employee representatives on their supervisory board. (The other members are chosen by the shareholders.) The proportion of employ-

ee representatives depends on the number of employees and whether they are coal or iron and steel companies.

- In the approximately 1,500 companies with between 500 and 2,000 employees (other than coal or iron and steel companies) one-third of the supervisory board are employee representatives, directly elected by the workforce.
- In the around 640 companies with more than 2,000 employees (other than coal or iron and steel companies) half of the supervisory board members are employee representatives. They are elected by the workforce, but some are full-time union officials nominated by the union, and at least one must be an executive employee.
- In the approximately 30 coal or iron and steel companies with more than 1,000 employees there are equal numbers of employee and shareholder representatives on the supervisory board plus a neutral chair. The employee representatives, some of whom are nominated by the union, are formally elected at the annual general meeting, but the shareholders must accept the works council's proposals.

Which companies have to have employee representation at board level and how many employee representatives must they have?

Employees in larger share-based companies (500 employees or more) have a right to representation on the supervisory board (*Aufsichtsrat*) to which the day-to-day management of the company reports. This right applies both in a public limited company (AG) and a limited company (GmbH), as well as in some other company forms, although not in all. It does not apply in 'ideological companies', companies whose purposes are primarily political, religious, educational or artistic, or that produce news or comment.

The proportion of worker representatives varies from one-third, in companies with between 500 and 2,000 employees, to 50 per cent, in companies with more than 2,000 workers. The remaining members of the supervisory board represent the shareholders and are chosen at the annual general meeting. In all cases the employee numbers relate to the number of company employees in Germany.

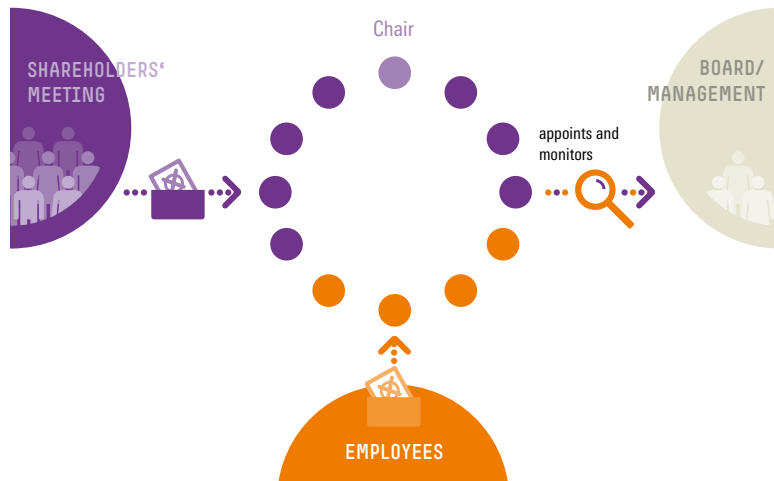
Even in these larger companies, however, the shareholders can win any contested votes on the supervisory board, as the chair represents the shareholders and can cast a second vote in the event that a vote is tied. The one exception is the larger coal or iron and steel companies, in which there is a neutral member of the supervisory board, in addition to equal numbers of employee and shareholder representatives.³ The precise number of supervisory board members and employee representatives varies ac-

Figure 1

One-third Participation Act 2004

It applies to all corporations with between 500 and 2,000 employees.

The supervisory board is one-third composed of **employee representatives** and two-thirds of **shareholder representatives**.



Source: own illustration @ I.M.U. 2020, <https://www.imu-boeckler.de/en/the-supervisory-boards-in-germany-19329.htm>

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according to the number of employees and the legislation being applied.

Companies that regularly employ between 501 and 2,000 employees and are neither 'ideological companies' nor coal or iron and steel companies, where special rules apply, are covered by the One-Third Participation Act (*Drittelbeteiligungsgesetz*), as well as by more general company law, particularly the Stock Corporation Act (*Aktiengesetz*). Company law sets three members as the minimum size of the supervisory board and precisely prescribes a maximum, linked to the company's share capital. A company with share capital of up to €1.5 million has a maximum nine-strong supervisory board, going up to 15 for a company with share capital of between €1.5 and €10 million, and 21 for a company with share capital above €10 million. As employee representatives take one-third of the seats, the total number must be divisible by three (see Figure 1).

A recent study found that there were 1,477 companies with between 500 and 2,000 employees in 2009 (Bayer, 2009).

Companies that employ more than 2,000 employees and do not fall into other categories (ideological or coal or iron and steel) are covered by the Codetermination Act (*Mitbestimmungsgesetz*). This links the size of the supervisory board not to the share capital, as in smaller companies, but to the number of employees. In companies with 2,001 to 10,000 employees, there is a 12-strong supervisory board, in those with 10,001 to 20,000, the size of the supervisory board goes up to 16, and in those with more than 20,000, it increases to 20. In all cases half the supervisory board members are employee representatives (see Figure 2).

In 2016 there were 641 companies in Germany with more than 2,000 employees, in which employee representatives made up half the supervisory board. This number comprises 234 public limited companies (AGs), 354 private limited companies (GmbHs), 14 European Companies (SEs) and 39 companies and cooperatives with other legal forms (see Figure 3).

Companies primarily producing coal and iron and steel and with more than 1,000 employees are covered by a special form of codetermination, set out in the Coal and Iron and Steel Codetermination Act (*Montanmitbestimmungsgesetz*). In its standard form, this fixes the size of the supervisory board at 11, with four employee representatives and four representatives of the shareholders, plus one additional member from each side, making a total of 10. On the employees' side this additional member may not be from a union or work in the company, while the shareholders' additional member may not be a member of the employers' association or a large shareholder. The final (eleventh) member of the supervisory is neutral, and must be nominated by a majority of both sides. It is also possible to have 15-strong or 21-strong supervisory boards with parallel composition (see Figure 4).

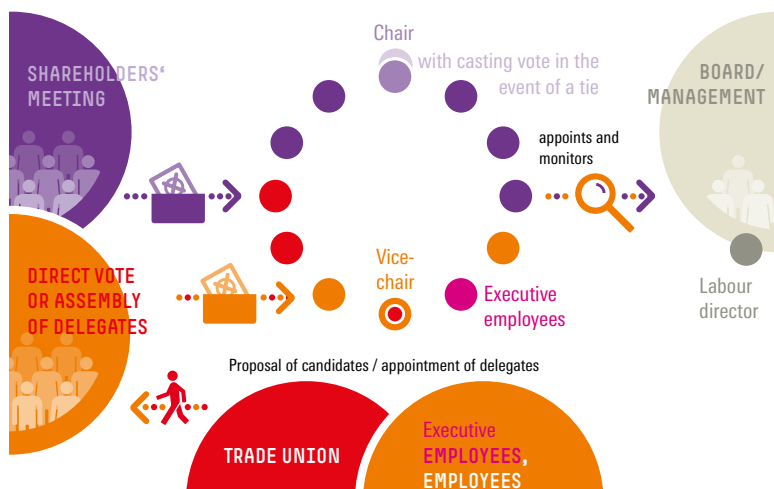
Companies covered by this legislation must also appoint a Labour director to the management board, responsible for personnel and employment issues. He

Figure 2

Codetermination Act 1976

It applies to corporations with over 2,000 employees.

The supervisory board is composed of **shareholder** and **employee** representatives ...



Source: own illustration @ I.M.U. 2020, <https://www.imu-boeckler.de/en/the-supervisory-boards-in-germany-19329.htm>

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or she cannot be appointed or dismissed against the wishes of the employee representatives in the supervisory board.

Probably only around 30 companies are covered by the legislation on coal and iron and steel companies. The Labour directors are often former trade union officials.

Who are the employee representatives on the supervisory board and how are they chosen?

In all cases, employee representatives on German supervisory boards are elected by the workforce of the companies concerned, but the precise methods vary, depending on the size and type of the company, as does the type of individual who is entitled to be elected.

In companies covered by one-third codetermination (those with between 501 and 2,000 employees), the employee representatives are elected directly by the workforce in a secret ballot. (The election procedure itself is complex.) If there are only one or two seats, all the employee representatives must be employed in the company. If there are three or more, at least two of them must be employed in the company.

In larger companies, above 2,000 employees, where the employee representatives take half the seats, some of the employee representatives are nominated directly by the union or unions with members in the company, and are usually union officials. The others must work for the company, although one of them must be an executive employee. The normal

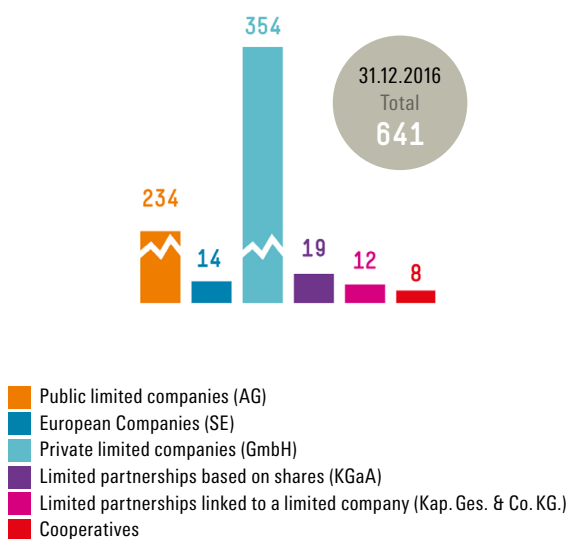
(non-executive employee) employee representatives are nominated by the normal employees and the candidates for the executive employee position (there must be two) are chosen by the executive employees, meeting separately. All three groups, union officials, employees and executive employees, are elected by the whole workforce, either directly or, in larger companies with more than 8,000 employees, indirectly through workforce delegates elected for this purpose.

The legislation sets out precisely the split between the three groups of employee representatives, with the executive employees being counted as employees. In companies with between 2,000 and 10,000 employees, there are six employee representatives – two external union members, one executive employee and three normal employees; in companies with 10,000 to 20,000, there are eight – two external union members, one executive employee and five normal employees; and in companies with more than 20,000 there are 10 – three external union members, one executive employee and six normal employees.

Under legislation for the coal and iron and steel companies, in an 11-strong supervisory board there are employees (two) and union officials (two) plus an additional member as part of the five-member employee group. The employees are nominated by the works council and the union officials by the union. The whole employee group is formally elected by the annual general meeting of the shareholders. This meeting must accept the works council's proposals, however.

Figure 3

Companies in which employee representatives make up half the supervisory



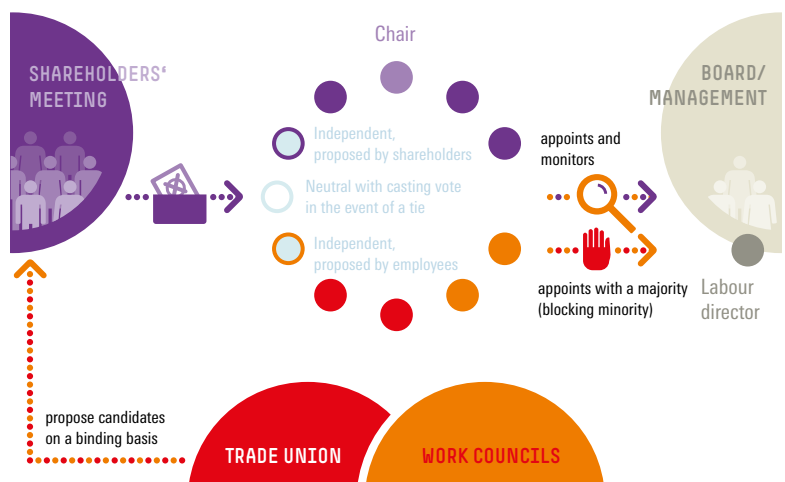
Source: Department for the Promotion of Codetermination (2017), own translation, <https://www.imu-boeckler.de/de/19328.htm>

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Figure 4

Coal and Iron and Steel Codetermination Act 1951

It applies in the mining and iron and steel industries to companies with over 1,000 employees. The **supervisory board** is composed on a parity basis of an equal number of **shareholder** and **employee** representatives.



Source: own illustration @ I.M.U. 2020, <https://www.imu-boeckler.de/en/the-supervisory-boards-in-germany-19329.htm>

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In practice, the employee representatives on supervisory boards, who are also employees of the company, are normally the key figures on the works council (the chairs or vice-chairs). The representatives who are nominated by the union (in companies with 50 per cent employee representation and coal and iron and steel companies) are typically full-time officials of the union concerned or its senior employees.

Pressure for increased gender equality resulted in 2015 in legislation to increase the proportion of women in leading positions in companies and public sector organisations, particularly in the supervisory boards in major companies. This required companies quoted on Germany's main stock exchanges and companies whose supervisory boards included employee representatives, both those with one-third and those with 50 per cent representation, to set binding targets for increasing the number of women (formally the under-represented sex, whichever it may be, but in practice women) in leading positions. Since 2016, companies that are both quoted on the stock exchanges and 50 per cent of whose supervisory board members are employee representatives, have in addition to ensure that 30 per cent of the supervisory board members are women.

In calculating this 30 per cent ratio it is possible to take the employee representatives and the shareholder representatives together. For example, in a 20-member board, where there must be six women, they could in theory all come from the employee side. However, if either side objects the ratios must be calculated separately, meaning that in this case each side must have at least three women.

The requirement to have more women in supervisory boards has had an impact on the companies in which the 30 per cent quota has been imposed. At the end of 2018, among the 107 companies in this position (including one covered by the legislation for coal and iron and steel companies) there were 38 that had more than 30 per cent women, but 28 that had below that. This is an improvement on the position before the legislation, but only in companies directly affected. The requirement to set targets for women in other companies and at other levels has had much less impact (Weckes, 2019).

2.2 What are the rights and duties of employee representatives on the supervisory board?

Key points

- Supervisory boards set the general direction of the company and monitor its progress. The day-to-day operation of the company is in the hands of the management board.
- Employee representatives have the same rights and duties as the supervisory board members representing the shareholders.

- In no case can the employee representatives outvote the shareholder representatives, even where they have an equal number of seats. In companies with more than 2,000 employees, the chair, who always represents the shareholders, has a second, casting vote in the case of a tie. And in coal and iron and steel companies there is a neutral chair.

Rights and duties

German company law sets out the role of the supervisory board and its tasks and duties, which include:

- monitoring the management board (*Vorstand*), which is responsible for the day-to-day operations of the company;
- dealing with issues which have been reserved to the supervisory board – these are likely to relate to particularly far-reaching decisions, such as major investments, moving into new areas of business or out of old ones, closing factories and taking on large loans;
- receiving regular reports from the management board; and
- appointing the management board and being involved in setting its pay.

Supervisory board members can be held personally responsible for damages that occur, if they are found to be at fault or to have acted carelessly. (They are therefore normally insured against this.)

Employee representatives have the same rights, tasks, duties and responsibilities as other supervisory board members. Like the others they must act in the best interests of the company. They must not be discriminated against as a result of their membership of the board, and they must not be restricted in their work as supervisory board members. They are paid the same as other supervisory board members and are also entitled to reimbursement of their expenses and adequate training. (The unions encourage supervisory board members representing the employees to donate the bulk of their pay to union-linked bodies, including the Hans-Böckler-Stiftung; this is sometimes a direct obligation.)

The period of office of employee representatives on supervisory boards is the same as that of other supervisory board members, typically four years.

Employee representatives are able to influence the supervisory board through their arguments but alone they can never have a majority of votes on the board. This is obvious in boards where they only have one-third of the seats, but it is also the case in boards where half the seats are held by employee representatives. This is because, in these companies, in the event of a tied vote, the chair, who almost always represents the shareholders, has a second vote to determine the outcome. (The situation is slightly different

in companies in the coal and iron and steel industries, where there is an eleventh member, who is neutral.)

Although the chair of the supervisory board comes from among the shareholders, the vice-chair comes from the employee representatives and is an influential figure.

In practice, it is difficult to assess how employee representatives in supervisory boards use the powers that they have, as the work of the boards is essentially confidential.

One noteworthy element is that the employees' and shareholders' groups often meet separately, before the supervisory board meeting. The employee representatives use this opportunity to develop a common approach towards the company's strategy and the information that is needed from the management board. They also need to have a mechanism for transferring the knowledge they have gained from their position in the supervisory board, without breaching their confidentiality obligations.

2.3 The impact of board-level codetermination

The most recent official study of the impact of board-level codetermination was set out in the so-called 'Biedenkopf report'. This was the final document of a government commission into modernising board-level codetermination, chaired by the centre-right politician Kurt Biedenkopf, which was presented to the German government in December 2006.⁴

At its core was a report by the academic members of the commission, which, among other things, examined the economic impact of board-level representation. It concluded that there were general methodological difficulties in making comparisons, but went on to say that: 'After lengthy discussion of the observable economic effects of employee representation at board level, the academic members see overall no reason to place in doubt the positive forecast of the legislators of 1976 [the date the legislation on 50 per cent board-level representation was introduced], and to propose a fundamental revision of the legislation, let alone its repeal'. They considered that there was no evidence of negative effects of board-level representation, and that, while no clear conclusions could be reached, the results of the then current research tended more towards a positive evaluation of the economic impact of board-level representation.

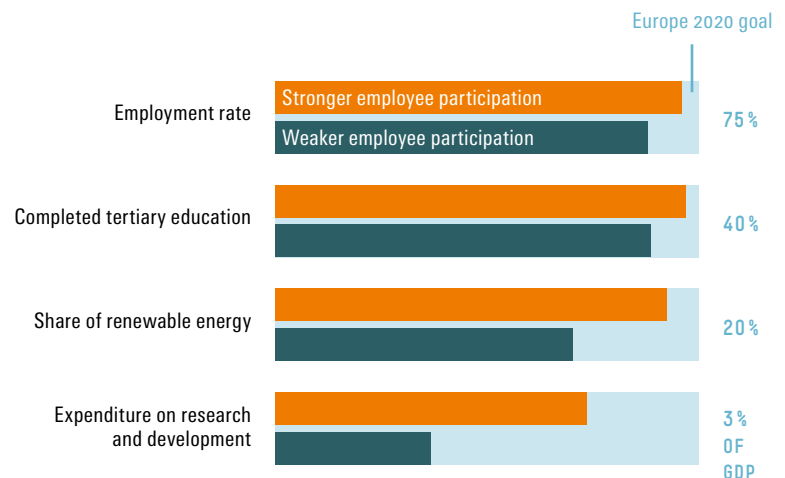
Since then, there has been further analysis, some of which confirms the positive impact of board-level employee representation. This includes:

- a study that divided EU states into two groups and found that the group with higher levels of codetermination scored better in all the areas seen as key for the EU's future development: the employment rate, the proportion of those leaving education early, the numbers who have completed higher education, the percentage of the population at risk

Figure 5

Doing better with employee participation

Progress of EU states with ...



Source: Böckler Impuls 05 / 2016, own translation, <https://www.boeckler.de/de/boeckler-impuls-mitbestimmung-bringt-europa-voran-7355.htm>. Download graphic: bit.do/impulso300. Download data: bit.do/impulso301

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of poverty and the share of renewable energy (see Figure 5) (Vitols, 2016);

- a study that found that having employee representatives on boards or supervisory boards helped to limit top pay, with the highest management pay in the 100 largest companies in Europe averaging \$7.89 million in companies without employee board-level representatives and €4.07 million in companies where employee representatives sat on the board (Hassel/Helmerich, 2017);
- another finding from the same study that companies with board-level employee representation and collective agreements have performed better than those without; and
- a study of 560 European companies that found that those with employee representatives on their supervisory boards performed better during and after the 2008 financial crisis than those without any employee participation at this level, with positive effects on both employment and profits (Rapp/Wolff, 2019) (see Figure 5).

2.4 Codetermination: part of a bigger whole

Codetermination at workplace level (through the works council) and at board level (through employee representation in supervisory boards) are two crucial parts of the German system of industrial relations, but there is also a third, collective bargaining, particular-

ly at industry level, which forms a crucial part of the overall framework.

The position has changed over time, with a fall in the coverage of collective agreements, but collective bargaining at industry level between individual trade unions and employers' organisations is still the central arena for negotiating pay and conditions in Germany. In western Germany, almost half (49 per cent) and in eastern Germany over a third (35 per cent) of all employees in workplaces with at least five employees are covered by industry-level agreements, like that for the metalworking industry (the largest), the chemical industry, or construction (Ellguth/Kohaut, 2019). These agreements set broadly the same pay increases and pay rates across the whole country.

In these circumstances, pay negotiations are not conducted at workplace level, and the works council, which generally is prohibited from negotiating on pay, can deal with other issues. This system has, in the view of its supporters, the benefit of providing a level playing field to competing businesses, which cannot try to gain an advantage by driving down wages. It may also mean that, with pay negotiations taking place elsewhere, the works council is able to develop a more constructive relationship with the employer in dealing with other problems.

In recent years, greater room for company-level flexibility on pay has emerged within the system. Some agreements now permit changes to the terms to be negotiated locally, perhaps delaying an agreed increase or forgoing it completely through so-called 'opening clauses'. Figures from the IAB show that, in 2011, 23 per cent of workplaces covered by collective agreements said that there were opening clauses in the agreements that applied to them (Ellguth, 2013).

Trade unions operate in this changing landscape, and, like the system as a whole, they face clear challenges. The number of trade unionists has fallen, although only slightly in recent years.

Despite this, trade unions can be seen as the glue that holds the system together. Most works council member are trade unionists, and trade unions have

particular rights in terms of their nomination. It is normally trade unionists who sit on supervisory boards, and in larger companies union officials are present as of right. In collective bargaining, only unions can represent the interest of employees and sign agreements.

As a research body close to the employers itself noted in 2018, 'the bargaining parties [unions and employers' associations] still exercise a pretty major influence on working conditions in the country' (Schneider/Vogel, 2018)

3 WORKPLACE CODETERMINATION

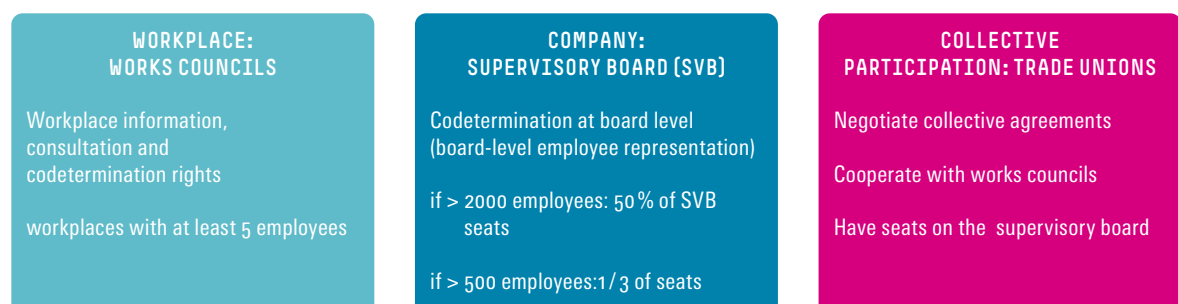
3.1 Establishment, composition and structure

Key points

- Workplaces with five employees or more have a right to set up a works council, but they are more common in larger workplaces.
- Works councils, which are purely employee bodies, are set up at workplace rather than company level and their size depends on the number of employees.
- Both unions and groups of employees can nominate works council members, who, in practice, are likely to be union members.
- Elections take place every four years through a secret workplace ballot.
- Works councils must have a chair and, in larger workplaces, a committee to deal with the day-to-day business. There are no rules on how often it should meet, but weekly meetings are common.

Figure 6

Codetermination in Germany: 'Communicating vessels'



Which companies have to have a works council and how big must it be?

Workplace level codetermination is provided through local works councils and they can be set up in workplaces with five or more permanent employees, provided there are also three individuals with the right to stand for election (see below). The law states that works councils 'shall be elected' in these circumstances, which means that there is no obligation on the employer to set up a works council. On the other hand, the employer is acting unlawfully if they hinder a works council being set up.

In practice, these rights are not used in many smaller workplaces and in total only 9 per cent of all private sector workplaces with five or more employees have a works council. Works councils are found much more frequently in larger workplaces, however: 87 per cent of them with more than 500 employees have a works council (Ellguth/Kohaut, 2019).

Works councils are set up at workplace (establishment) level rather than at company (enterprise) level. In companies with a single workplace there will be no difference between the two and there will be a single works council. In companies where there are several workplaces, however, for example a retail chain with shops in several towns, there may be several works councils. Separate departments of the same workplace will normally be considered to be part of a single workplace, unless they are geographically remote from the main workplace or operate independently. Small departments without a works council can be included in the works council of the main workplace, however. Sites can also be grouped together on

the basis of a collective agreement or other form of agreement to allow a works council to be set up.

The size of the works council is linked to the number of employees (see). For example, a workplace with 150 employees has a works council with seven members, while there are 11 members in a workplace with 500 employees, and 19 in a workplace with 2,500.

The law uses a fairly wide definition of the workers to be included in calculating the thresholds set out above. With a few exceptions (see below), all employees, including trainees, aged over 18 count towards the total, which is based on head-count, not full-time-equivalent. (There is no distinction between part-time and full-time workers.) Agency staff are also included, provided they have been in the workplace for at least three months, as are homeworkers, if they work principally for a single business.

Not included are the owners of the business and executive employees (*Leitender Angestellte*), defined as staff who have significant personal authority, such as being able to hire or dismiss staff.

Who are the works council members?

Works councils are entirely employee bodies. Unlike in some other countries (such as France or Belgium), they are not joint bodies with the employer.

All employees who have a right to vote (those over 18, apart from the executive employees and other excluded groups have the right to stand as candidates provided they have been employed in the workplace for at least six months (less if the workplace has not been in existence for that long). Agency workers with

Table 1

Number of works council members and size of workplace

Number employed	Number of works council members
5–20	1
21–50	3
51–100	5
101–200	7
201–400	9
401–700	11
701–1,000	13
1,001–1,500	15

Note: From 1,501 to 5,000 employees the number of works council representatives increases by two for every 500 employees or part thereof; from 5,001 to 7,000 by two for every additional 1,000. Workplaces with between 7,001 and 9,000 have 35 members on the works council, and above 9,000 workplaces they have two additional works council members for each additional 3,000 employees.

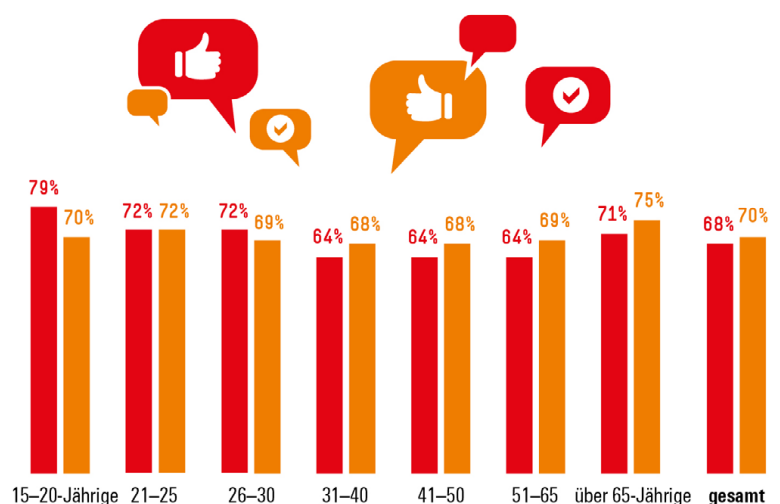
Source: own table © I.M.U. 2020

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Figure 7

Over all age groups codetermination is highly appreciated

Percentage of people relating something positive to **codetermination** or **works councils**



Source: Böckler Impuls 10 / 2016, <https://www.boeckler.de/de/boeckler-impuls-junge-leute-wollen-mitreden-8442.htm>. Download graphic: bit.do/impuls0399

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at least three months' service are able to vote in the workplaces they have been sent to, but they are not able to stand as candidates.

Generally, participation is high. In the election in 2018, turnout was around 75 per cent (Funder et al., 2018⁵; and Kestermann et al., 2018⁶).

Candidates are nominated either by a union, provided it is represented in the workplace, or by a group of employees with voting rights. Where the nomination comes from a group of employees they must number at least three (two in workplaces with up to 20 employees) and make up at least 5 per cent of the total number of employees entitled to vote, although, in any case 50 employees are sufficient to nominate a list of candidates, irrespective of the number of employees.

Works council members are much more likely to be union members: surveys vary, but they indicate that between 59 and 75 per cent of works council members belong to a union. (Greifenstein et al., 2014)⁷

The legislation states that the works council should 'as far as possible' be made up of employees from the various organisational units within the workplace, as well as the different employment categories, for example, manual and non-manual.⁸ The law is more prescriptive on gender balance, stating that where a works council has three or more members, the minority gender 'shall at least' be represented in line with the proportion of that gender in the workforce.

Women made up around 30 per cent of works council members elected in 2018, but this is still leaves women underrepresented in relation to the workforce as a whole (Funder et al., 2018).

The procedures for elections are set out in the legislation. Elections are run by an electoral board, made up of employees. Depending on the number of employees, the works council is elected using either the so-called standard procedure or a simplified procedure. The standard procedure, used in larger workplaces, is based on competing lists of candidates and takes six weeks to complete. The simplified procedure, used in smaller workplaces, allocates seats on the basis of votes for individual candidates, and can be completed within a week. Where there are competing lists, seats are allocated in proportion to the number of votes cast for each list (using the d'Hondt system), subject to the gender requirements. Where there are individual candidates, those with the highest number of votes are elected, again subject to the gender requirements.

Voting is in writing and in secret and takes place at the workplace, although those not at work when the voting takes place must be sent a postal vote.

The electoral board announces the results of the works council elections to all employees and must also send a copy to the employer and to unions represented in the workplace.

Works council members are elected for four years, and there is no limit on the number of times they can be re-elected.

In practice, although a new works council can be established at any point when the conditions are met,

most work council elections take place between the start of March and the end of May in the same year, on a four-yearly basis. In 2018, more than four out of 10 works council members (41.3 per cent) were elected for the first time, but a quarter (25.7 per cent) were entering their second period of office and a third (32.2 per cent) were entering their third.⁹

How is the works council organised?

In organising its activities, the works council chair, elected by the whole works council from among its members, plays a key role. His or her legal functions include calling the meetings and setting the agenda. (As well as a chair, the works council must also elect a vice-chair to take over the chair's functions if he or she is unable to carry them out.)

The law also requires that in works councils with nine or more members (above 200 employees) a separate works committee should be elected from the works council to deal with day-to-day business. (The works council chair and vice-chair are automatically members of this committee.) If the works council wishes, it can also set up other sub committees.

In companies with more than 100 permanent employees, the law requires the setting up of another body, the economic committee. This committee is consulted on economic and financial issues. It is chosen by the works council, but in certain circumstances, the council can decide to do without an economic committee and take over its functions.

There is also separate representation for young people and for the disabled, who are able to take part in works council discussions of concern to them.

Health and safety committees should be set up in all workplaces with more than 20 employees. These are joint bodies with the employer, together with safety delegates (*Sicherheitsbeauftragte*), who are appointed by the employer. The works council has two representatives on the health and safety committee (see **Box on page 18**).

The legislation does not set out how often the works council should meet. It does state, however, that the works council should meet the employer 'at least once a month'.

In practice, weekly works council meetings are common. This is what Germany's largest union, IG Metall, recommends.¹⁰

Works council meetings, which take place during working hours, are not public, and decisions are taken by a simple majority of those present, with all members having an equal vote. Works council members have a duty to attend, unless they have a good reason for their absence, such as sickness, holiday or travelling on company business, and decisions can be taken only if at least half the members are present. On other matters, the law requires that the works council adopt its own standing orders, which set out its procedures.

As well as meetings, the works council can set consultation times when employees can bring their concerns and proposals to the works council. These

times should, in the first instance, be agreed with the employer and their existence does not eliminate employees' rights to speak to works council members at other times.

The works council is also responsible for holding works meetings, which all employees should attend. It also calls departmental meetings for those unable to attend the normal meeting, perhaps because they are in a separate location, or to deal with issues affecting one group of workers in particular. The meetings should be held once a quarter, during working hours, and all employees may attend without any loss of pay.

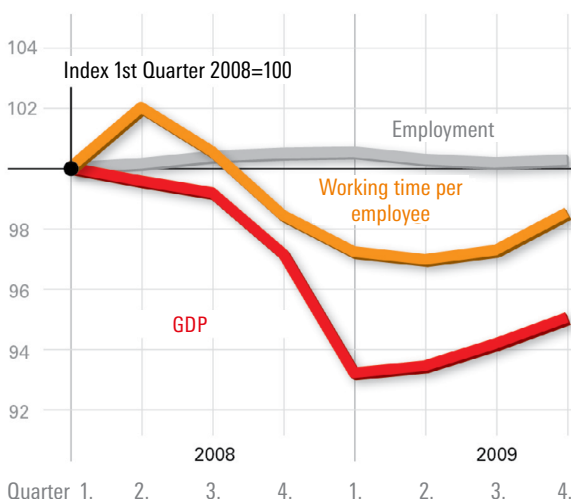
The agenda of the meeting is determined by the works council and should deal with issues of direct concern to the workplace, including collective bargaining policies, social and environmental matters, gender equality and the integration of non-German employees. Once a year the employer should report to the works meeting on a range of issues, including the financial situation, the position on gender equality, the integration of non-German workers and environmental policy.

The employer is entitled to attend all works meetings, as are representatives of the trade unions with members in the workplace.

3.2 The rights of the works council

Figure 8

Managing the crisis in Germany – not possible without codetermination



The expansion of short-time working (STW), the reduction of overtime, the use of working time accounts and shorter working time saved a total of 1 million jobs during the crisis.

Except for STW, all instruments are based on collective agreements and/or company agreements between management and works councils or employment contracts.

Source: IMK 2013 © Hans-Böckler-Stiftung 2013, https://www.boeckler.de/pdf/mbf_praes_arguments_co_determination.pdf



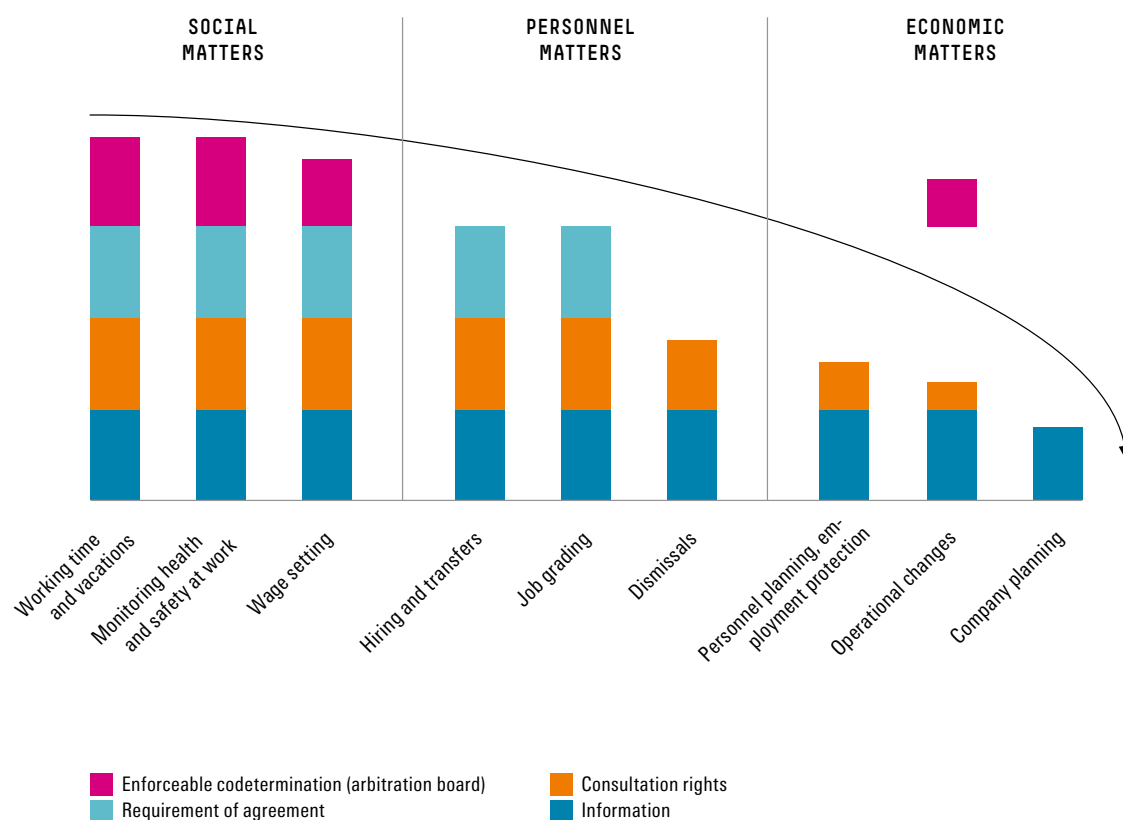
Key points

- The works council cannot just consider the employees alone. It must work with the employer 'in a spirit of mutual trust ... for the good of the employees and the establishment'.
- The works council's four main types of rights include:
 - information;
 - consultation;
 - objection/refusal of consent; and
 - enforceable codetermination (where the employer cannot act without the works council's agreement).
- Objections/refusals of consent can be replaced by a judgment of the labour court, but under enforceable codetermination issues in dispute go to a conciliation committee, a joint body with an independent chair, for resolution.
- The works council's powers in relation to the employer's economic plans and decisions are generally limited to information and consultation, although they are greater when the employer plans changes that may have a negative effect on employees.
- Its powers are more extensive in individual personnel/human resource issues, where, in certain circumstances, it can raise objections that can be overturned only by the labour court.
- It has the most far-reaching powers in relation to social issues affecting the whole workforce, and there are a number of topics, such as working time arrangements or holiday rules, which are subject to enforceable codetermination.
- The fact that many issues are subject to enforceable codetermination means that many binding works agreements are signed by the employer and the works council.
- The works council plays a particular role on workplace health and safety.

Introduction

Works councils exist to ensure that some of the key decisions at the workplace are not taken by the employer alone, but also involve representatives of the workforce. The works council cannot consider just the interest of the employees, however. Its legal basis is to work together with the employer 'in a spirit of mutual trust ... for the good of the employees and the establishment'. At the same time, the law recognises that there will inevitably be conflicts between the interests of the employer and the workforce, and also makes it clear that trade unions have a separate duty to protect their members' interests.

Works Constitution Act codetermination curve



Source: www.BR-Fachanwalt.de, https://www.imu-boeckler.de/data/Beteiligungsrechte_des_Betriebsrats_en.pdf

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The works council has a number of general duties, which include ensuring that the employer complies with existing legislation and collective agreements, making proposals to the employer for the benefit of the workplace and the employees and promoting action on a number of issues (gender equality, work-life balance, the integration of disabled workers, the employment of older workers, the integration of foreign workers and protection of the environment). It also has specific rights and duties in relation to health and safety at the workplace (see **Box on page 18**).

Its most important rights, however, relate to its ability to influence the employer's actions and decisions. These rights vary in their impact, according to the issues concerned. In broad terms, the works council's rights are strongest in social areas affecting the whole workforce, such as the organisation of working time, and weakest in economic matters, such as the company's financial planning. The extent of the works council's rights in individual personnel or human resources cases, such as appointments or dismissals, lies somewhere between these two ends of the spectrum (see **Figure 9**).

Different types of rights

The legislation offers works councils a number of different types of rights in their dealings with employers. The precise wording for these rights used in the legislation varies, depending on the area concerned, but essentially the rights fall into four main categories. These are set out below, starting with the least extensive and ending with the most far-reaching.

- **Information** – the most basic right of the works council is to be informed of the employer's position and, in some cases, plans. The works council also has a right to inspect documents in certain circumstances.
- **Consultation** – in some cases, the law requires that the works council be 'heard'; in others, it specifies that consultation must take place in such a way as to allow the works council's views to be 'taken into account', and in others it refers to the right of the works council to make recommendations.
- **Objection and refusal of consent** – in certain circumstances, the works council can block the

actions of the employer by refusing its consent to what is planned. However, the employer can apply to the labour court for a decision in lieu of the work council's consent and, if successful, implement the plans.

- **Enforceable codetermination** (sometimes known as genuine or equal codetermination) – in the areas where this applies, the employer cannot act without the agreement of the works council: a decision by the labour court cannot substitute it. The only way that the works council's objections can be overcome is through a decision of the so-called 'conciliation committee' (*Einigungsstelle*), a body made up of equal numbers of representatives of the works council and the employer, with an independent chair. This is the most powerful of the works council's rights (see **Appendix** for more details on how the conciliation committee works).

There are substantial differences between areas in the way that these rights apply, and these are set out below, looking at the three main areas in which the works council has some influence:

- economic issues;
- individual personnel/human resources issues; and
- social issues affecting the whole workforce.

Economic issues

On economic issues, the works council's rights are generally limited to information and, to some extent, consultation. This reflects the principle that companies must, as far as possible, be free to take their own decisions in this area. But even here, some issues are subject to enforceable codetermination.

In companies with more than 20 permanent employees the employer has to report to staff on a quarterly basis concerning **the financial situation and progress** of the company. There is also a general duty on the employer to provide the works council with the 'full and timely information' necessary for it to 'discharge its duties', as well as a right to have access to the documentation it needs. This includes a specific right of the works council to have access to the company's payroll lists.

Companies with more than 100 permanent employees must set up an economic committee (*Wirtschaftsausschuss*), which receives information from the employer on a range of issues, including the **company's economic and financial situation, investment plans and work methods**. The information must be comprehensive and provided in good time. If the economic committee considers this is not the case, the issue can ultimately be referred to the conciliation committee for a binding decision. (The works council can also take over the functions of the economic committee itself, however.)

When future plans are being considered, the works council's rights go beyond information, to consultation. Where employers want to make **changes to buildings, technical plants, working procedures**

and operations or employment, the works council must not just be informed in good time of what is planned, but also consulted. And this consultation should take place in a way that ensures that the works council's suggestions and objections can be taken into account in the planning.

The aim of this consultation is that the job should be adapted to the needs of the employees rather than the other way around. Where it appears clear that this is not the case, or special burdens are being imposed on employees, the works council can ask the employer to take further action to eliminate, reduce or compensate for the stress imposed. If these further actions are not agreed, the issue is subject to enforceable codetermination and is referred to the conciliation committee.

In addition, in companies that normally have more than 20 permanent employees, employers must inform and consult the works council when they plan **changes that may have a negative impact on the workforce**. The measures covered by this requirement to consult include plant closures and operational reductions, transfers, amalgamating workplaces and splitting them up, major changes in work organisation or equipment and the introduction of new work methods or processes. (In companies with more than 300 employees, the works council can be helped by an external consultant – see **page 20**).

Where potentially negative changes are planned, the works council has two further rights. First, it can seek to reach agreement on a so-called '**reconciliation of interests**', which aims to ensure that the changes are introduced with the least possible disadvantage to the employees. Second, it can agree a so-called '**social plan**', which seeks to compensate the employees for the disadvantages that remain.

The agreement on the reconciliation of interests, which is likely to cover issues such as when and how the changes will take place, is a voluntary agreement; in other words, the employer cannot be compelled to accept it, although both sides can ask for mediation. However, the social plan – which typically deals with issues such as compensation for redundancy, rights to retraining, earnings protection in the case of job changes, and payments for additional travelling costs – falls under the heading of enforceable codetermination. In other words the conciliation committee can impose an agreement if the employer and the works council cannot agree. The social plan is also unusual in that it deals with pay, which is not normally covered by works council agreements.

Staff planning and training are both an economic and a personnel/human resources issue. As a result, the works council's rights in this area are more extensive than in purely economic matters. It must be informed and consulted on staff planning and has the right to make proposals in relation to job security and increased employment. The employer must also consult on training facilities and training programmes, while retraining and some other training issues, such as the number of trainees, are subject to enforceable codetermination.

The works council can also oppose the appointment of a training officer or ask for their removal, if they are not seen to be competent. Where this is disputed, the issue goes to the labour court.

Individual personnel/human resources issues

The works council's rights are generally more far-reaching in the area of individual personnel or human resources issues, although generally, where there are disputes between the works council and the employer, the final decision is in the hands of the labour court rather than the conciliation committee.

In companies with more than 20 employees, the works council has substantial rights in relation to decisions on **recruitment, placement on a specific grade, regrading and transfer**. The works council must be informed in advance and its consent is needed, although this cannot be withheld arbitrarily. The legislation states that the works council is justified in withholding its consent if the appointment, grading, regrading or transfer would:

- breach legislation or a collective agreement;
- run counter to existing staffing guidelines;
- be likely to lead to the dismissal of an existing member of staff or the failure to transfer an existing staff member from a temporary contract to a permanent contract;
- result in unfair treatment for the staff member concerned;
- occur despite the fact the vacancy had not been advertised internally, if this has been agreed; or
- be likely to result in the appointment or transfer of an individual who would cause trouble through unlawful behaviour, in particular through racist or xenophobic activity.

The works council must inform the employer in writing of its refusal to consent, although the labour court can overturn this refusal if the employer brings and wins the case.

The works council also has rights with regard to **dismissals**. It must be consulted before every dismissal, with the employer providing the reasons for the decision. If it is not consulted, the dismissal is null and void. Within strict time limits, the works council can raise objections to the dismissal or it can oppose it. Raising objections in itself will not prevent the dismissal going ahead, but the employer must attach the works council's objections to the dismissal notice and this may help the employee if he or she contests the dismissal in court.

If the works council opposes the dismissal, the employee set to be dismissed will continue to be employed until the case has been decided in the labour court, provided the employee concerned has made an application for the case to be heard. As with decisions on recruitment, grading and transfers, however, the works council can oppose a dismissal only in certain circumstances. These are:

- if the employer has failed to take account of social issues in making the decision: this would be the case, for example, in a redundancy situation if an individual with long service and family responsibilities were to be dismissed while a recently recruited single employee was to be kept on;
- if the decision is not in line with the agreed guidelines for dismissals, where these have been agreed in advance by the works council and the employer;
- if the employee to be dismissed could be employed in another existing position;
- if the employee could be kept on after a reasonable amount of training or retraining; and
- if the employee could be kept on after a change in the employment contract, which the employee is willing to accept, including if this involves worse conditions.

The works council has enforceable codetermination rights in drawing up **guidelines for future action** in this area, for example in setting permanent rules for redundancy selection. If the contents of these guidelines cannot be agreed between the two sides the issue goes to the conciliation committee to be resolved. In smaller workplaces the works council cannot require that these guidelines be drawn up, but, in workplaces with more than 500 employees, it can require that the employer produce them.

Finally, the works council has a role in dealing with **employees' grievances**. If it considers them to be justified it can take up the case and ask the employer to remedy them, with disagreements being resolved in the conciliation committee. This procedure cannot be used where the grievance relates to employees' legal rights.

Social issues affecting the whole workforce

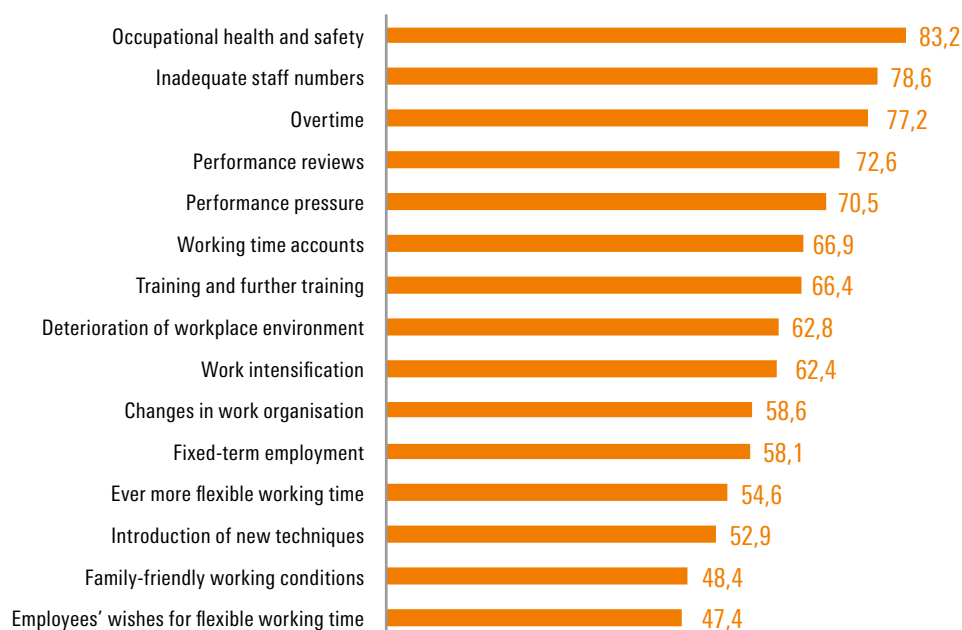
The works council has its most extensive rights with regard to social issues that affect or potentially affect the workforce. On these issues, the works council has enforceable codetermination rights. It must positively agree to the employer's proposals, and if they cannot agree, the question is decided by the conciliation committee.

The topics covered by this are almost all set out in a single section of the legislation (Section 87 of the Works Constitution Act). They are:

- **works rules** – including works clothing, passes and the methods for recording attendance;
- **daily starting** and finishing times, including breaks and how hours are distributed;
- any temporary **reduction or extension of normal working hours**, particularly overtime;
- the time, place and **form in which workers are paid**;
- the general **rules for taking holidays**;
- the introduction and use of **devices to monitor employees' behaviour or performance**;
- arrangements to prevent **accidents and occupational ill-health** (see Box on page 18);

What did works councils deal with in 2016?

15 items mentioned most frequently



Source: Baumann, Helge (2018), https://www.boeckler.de/pdf/wsi_aiw_br.pdf

WSI

- **social provision** for employees, such as social funds, canteens and works buses;
- rules on **works accommodation**, where it exists;
- **pay arrangements** in the workplace, such as commission and long-service payments;
- **bonus rates** and performance-related pay;
- rules for workplace **suggestion schemes**; and
- rules for **group work**.

In each of these 13 areas the works council does not need to wait for the employer to act. It also has the right to make its own proposals to which the employer must respond with the aim of reaching agreement.

As well as in these areas, the works council also has enforceable codetermination rights over the contents of **staff questionnaires** and personal data used for assessments.

In practice, health and safety is the single issue that works council members report dealing with most frequently (83.2 per cent), but it is exceeded by working time, if all its forms are added together. These include overtime (77.2 per cent), working time accounts (66.9 per cent), ever more flexible working time (54.6 per cent) and employees' wishes for more flexible working (47.4 per cent). Some answers indicate that the works council also deals with issues relating to the pressure of work: inadequate staff numbers (78.6 per cent), perfor-

mance pressure (70.5 per cent) and work intensification (62.4 per cent). Issues relating to the company's financial plans do not appear in the chart, but areas in which the works council has a right to influence developments, such as training and further training (66.4 per cent), changes in work organisation (58.6 per cent) and the introduction of new techniques (52.9 per cent) are present in the list (see Figure 10)

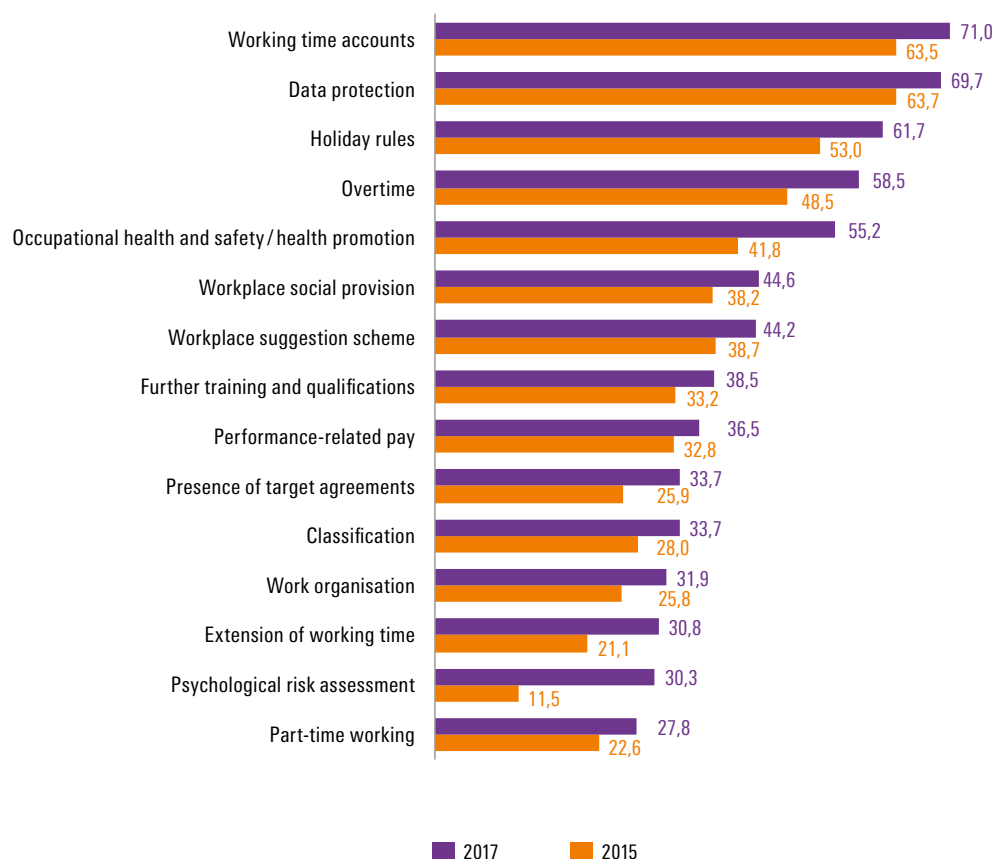
Works agreements

The fact that the employer is sometimes effectively compelled to reach agreement with the works council has resulted in a large number of works agreements (*Betriebsvereinbarungen*) on issues covered by enforceable codetermination. There are also other areas, such as the environment and health and safety, however, in which employers and works councils are encouraged in the legislation to reach voluntary works agreements. All works council agreements must be implemented by the employer and continue in force until a new agreement has been negotiated. Other than in cases of redundancy, these agreements do not cover pay or other conditions fixed through collective bargaining with the unions (often at industry level), unless the collective agreement itself permits this.

In practice, there is a very large number of works agreements. Each workplace with a works council has

Works agreements: (trending) topics 2017

Percentage of workplaces with works agreements on the following topic:



Source: Baumann, Helge (2018), https://www.boeckler.de/pdf/wsi_aiw_br.pdf, own translation

WSI

on average around 23 works agreements. Many of the topics most frequently covered by works agreements are those in relation to which the works council has enforceable codetermination rights under Section 87 of the Works Constitution Act, such as working time, holiday arrangements, overtime, health and safety, social provision for employees, suggestion schemes and performance-related pay (Baumann et al., 2017; WSI-Policy Brief 25, 2018) (see Figure 11).

The works council and health and safety

The works council has particular role to play in the area of health and safety. It has a general responsibility to try to ensure that health and safety provisions and accident prevention measures are observed and to support the appropriate accident insurance providers (Unfallversicherungsträger) in their efforts to eliminate hazards by offering suggestions, advice and information. In workplaces with more than 20 employees, it works with the health and safety committee

(Arbeitsschutzausschuss), which is a joint employer/employee body that includes two works council members.

It has the right to participate in health and safety inspections and to be given details of any instructions issued by the appropriate authorities. It should also receive details of any reports on health and safety issues, as well as notification of any accidents. The works doctor and health and safety specialists must inform the works council of any significant developments in the area of health and safety, and of any proposals they intend to make to the employer. They must also advise the works council on health and safety issues if they are asked for this.

In addition, the works council must approve the appointment or dismissal of the works doctor and the health and safety specialist. The arrangements for the prevention of accidents and occupational diseases and for health protection are also subject to works council agreement. If

no agreement is reached, the issue goes to the conciliation committee for a decision.

The works council must also be consulted on the appointment of safety delegates, (*Sicherheitsbeauftragte*), who are individual employees appointed by the employer, and whose role is to support the employer in health and safety issues, to influence employees and to note failings. However, it is not necessary for the employer to obtain the works council's agreement to their appointment.

3.3 Other aspects of works council activities

Key points

- Works council members have a right to paid time-off to perform their duties, and in workplaces with more than 200 employees at least one member has a right to work full-time released from their normal work.
- The employer must pay the full costs of any training that is 'necessary' for the activities of the works council. This includes the costs of training, travel and accommodation, as well as the wages of those being trained.
- Works council members are protected against dismissal during their period of office and for one year afterwards.
- Employee representative structures can also be set up at a higher level than an individual workplace. A central works council (GBR) must be set up if there is more than one works council in a company and a group works council (KBR) can be set up if works councils representing a majority of employees in the group want this.

Resources

Works council members must be given time off at their normal level of earnings to carry out their duties, such as attending meetings or giving advice. In workplaces with fewer than 200 employees, the details of this are not laid down by law. But in larger workplaces the law sets out the number of works council members who should be freed from their normal work.

One member should be freed from their normal work in workplaces with 200 to 500 employees; two where there are 501 to 900; three for 901–1,500; four for 1,501–2,000; and then one for each extra thousand employees, up to 10,000, with one for each 2,000 after that. This means that in a workplace with between 5,001 and 6,000 employees, where the works council has 31 members, eight should be freed from their normal work.

In practice, a recent survey shows that in the vast majority of cases (84.6 per cent) the number of works council members on full release was in line with the legislation, with 8.0 per cent having fewer than the legislation prescribes and 7.4 per cent having more. The picture is similar if only works councils with a right to full-time release (companies above 200 employees) are considered, although here there is a considerably higher proportion in which the full quota is not used (23.4 per cent) and a slightly higher proportion in which it is exceeded (9.1 per cent). In 67.5 per cent of these cases the number freed from normal duties was in line with the legislation (Baumann/Brehmer, 2015) (see Figure 12).

Figures produced in 2018 by the IW, which is close to the employers, are very similar. It found that in workplaces with 200 or more employees, 23.7 per cent had fewer works council members freed from their duties than provided for in the law, and 7.9 per cent had more (Kestermann et al., 2018; IW-Trends 4, 2018).

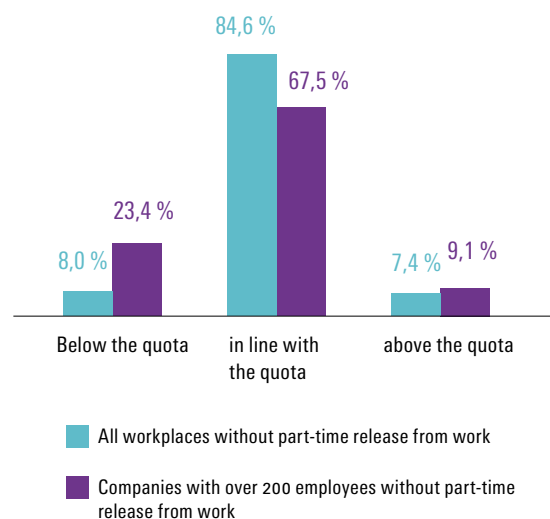
In addition, all works council members have the right to take part in training courses that are 'necessary' for their work on the works council. This training must be fully paid for by the employer, both the wages of the works council member during the training and the costs of the course, including accommodation and travel costs.

Works council members also have the right to apply individually for at least three weeks' time off for more general training/education in the course of their period of office (four weeks for newly elected members). Unlike training, however, which is seen as essential and applied for by the works council as a whole, the employer is not obliged to pay the costs

Figure 12

Is the release quota fully used up?

Use of release from work in percentage terms...



Source: WSI-Betriebsrätebefragung 2015, WSI-calculation, own translation. <https://www.wsi.de/de/betriebsraetebefragung-14622.htm>

WSI

of this training, only the wages of the work council member taking part.

In practice, the most important of training right is the right to receive the training 'necessary' for the work of works council members because under this part of the legislation all training costs are paid. As a result, a large number of organisations offer training. Acquiring a basic understanding of the Works Constitution Act, employment law and applicable collective agreements, as well as some grounding in legal, technical and economic issues, is accepted as being part of the essential knowledge every works council member must have. Training in these issues must, therefore, be fully paid for by the employer. Deciding whether other training is necessary, on issues such as vocational training, technological changes or a more detailed knowledge of employment law, will depend on the circumstances.

The employer must bear the costs of the works councils, which can be extensive. In addition, in companies with more than 300 employees, where the employer proposes to make changes that may have a negative impact on the workforce, the works council can be assisted by an external consultant.

In practice, the costs of the works council that the employer must bear include the provision of rooms, stationery, photocopying, computers and postage and telecommunications costs. Typically, a works council with five members will have its own room. There may also be other costs, such as paying for the translation of works council reports into languages other than German if there are large numbers of non-German speaking employees. In very large companies the works council, or the works council for the whole group, may have paid professional staff.

Protection against dismissal

Works council members are protected against dismissal during their period of office and for one year afterwards. They can be dismissed only for extraordinary reasons – such as gross misconduct – and only if the works council agrees, or, it refuses to agree, the labour court accepts that the dismissal is justified.

Works council members are also protected against involuntary transfers, if the consequence is that they lose the right to be a works council member, for example by being transferred to another workplace. As with summary dismissal, a transfer in these circumstances is possible only if the works council agrees, or, it refuses to agree, the labour court accepts that the transfer is justified.

Work council members can be dismissed if the workplace closes or the department in which they work closes, but only if they cannot be transferred elsewhere.

In practice, the protection against dismissal appears to work effectively. However, the unions report that in a few cases employers attempt to disrupt the work of the works council, most frequently by attempting to dismiss works council members. A survey of four of the largest unions, published in 2014, found that only 38 per cent of local union districts (the lowest level of

trade union structures with a full-time official) reported any cases of this type, and the average number per district was just 1.7 (Behrens/Dribbusch, 2014).

Representation at a higher level than the workplace

As well as works councils at workplace level, the German system provides for the creation of two other employee representation bodies at a higher level than the workplace. These are the central works council at company level (*Gesamtbetriebsrat* – GBR) at company level and the group works council (*Konzernbetriebsrat* – KBR) at group level.

A central works council (GBR) must be set up if there is more than one works council in a company. Its members are not directly elected by the employees but chosen by the individual works councils within the company that send their members as representatives.

The central works council has its own area of responsibility: 'to deal with matters affecting the company as a whole or two or more of its establishments, which the individual works councils are unable to settle within their establishments'. Individual works councils can also delegate matters to the central works council.

There are no rules on how often the central works council should meet. It should meet as often as necessary. At least once a year, however, the central works council should call a meeting of the chairs, vice-chairs and works committee members of all the works councils in the company, at which it reports back on its activities. The employer should also attend.

It is also possible to set up a works council at group level, covering all the companies in a group. Unlike the central works council, however, which must be established if there are several works councils in a company, setting up a group works council, sometimes called a combine works council (*Konzernbetriebsrat* – KBR) is voluntary. A resolution to approve setting up a group works council must be approved by works councils representing more than 50 per cent of the employees in the group.

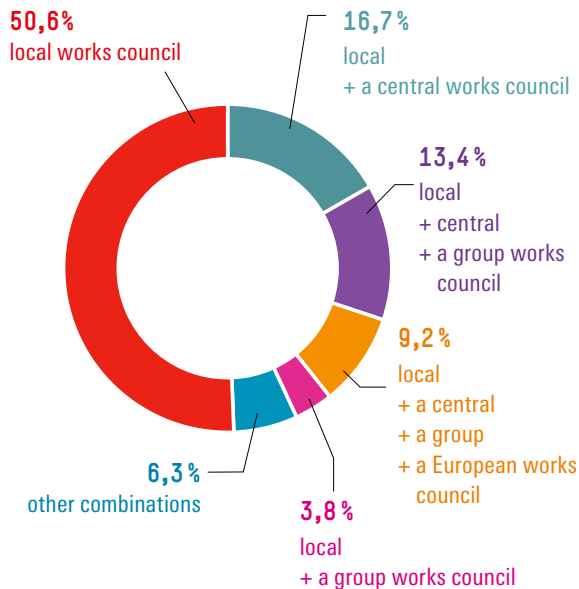
The group works council deals with issues that affect the group or several companies within the group and that cannot be dealt with by the central works councils (GBR).

Around 40 years ago company and group works councils were relatively rare and found only in the largest companies. However, the latest figures show that almost half of all works councils (49.4 per cent) are part of a structure involving a higher level representative body (Haipeter et al., 2019). One in six (16.7 per cent) just have a central works council (GBR) above them, but almost a quarter 22.6 per cent are in a structure with both a central and a group works council (KBR), including 9.2 per cent with also a European works council (a European-level body) (see Figure 13).

Figure 13

Several levels of codetermination are common

Private companies with codetermination and at least 20 employees have a ...



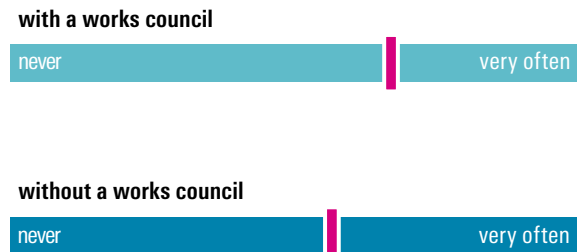
Source: Böckler Impuls 2 / 2019, own translation, <https://www.boeckler.de/de/boeckler-impuls-mehr-schlagkraft-durch-arbeitsteilung-4421.htm>.

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Figure 14

Codetermination leads to training

Further training is offered in workplaces ...



Source: Böckler Impuls 12 / 2014, own translation, https://www.boeckler.de/pdf/mbf_praes_arguments_co_determination.pdf

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3.4 The impact of workplace level codetermination

There is considerable evidence of ways in which workplaces with works councils perform better than those without:

- A study on productivity found that workplaces with works councils were, on average, 18 per cent more productive than those that did not have them, after taking into account other factors, such as capital intensity, workforce qualifications and the extent of part-time work. This increased productivity was more noticeable in workplaces in which productivity started from a low point than in those where it was higher, but it was present in all size groups (Müller, 2015).
- A study on innovation found that 78 per cent of workplaces with works councils made product innovations or introduced new ideas between 2008 and 2010, compared with 61 per cent of those without a works council (Cantner et al., 2014).
- The same study also found that workplaces with works councils were more likely to offer further training than those without (see Figure 14).
- A study on trainees found that trainees were more likely to stay on after their training in workplaces with works councils than in those without. The difference was 20.5 percentage points after one

year, 24.5 percentage points after two years and 26.5 percentage points after three years (Kriechele et al., 2014).

Works councils are also seen as positive by employers, although there are calls for changes in some areas. The website of the BDA, the main German employers' association, states that 'the works constitution [the rules governing works council] has proved itself time and time again and is a defining element of company and workplace culture'.¹¹

4 CONCLUSION

The previous pages set out how codetermination works both at workplace and at board level. As well as looking at the legal framework, this document aims to give some insight into how codetermination works in reality, as well as highlighting some of the evidence on its impact.

It is, however, only an initial introduction to the topic. Further information on all the issues covered is available in English and German on the website of the Institute for Codetermination and Corporate Governance (I.M.U.), at <https://www.imu-boeckler.de/en/index.htm>.

THE CONCILIATION COMMITTEE (EINIGUNGSSTELLE)

The conciliation body exists to resolve differences between the employer and the works council in cases in which the employer requires the agreement of the works council – so-called enforceable codetermination – but it has so far proved impossible for the two sides to reach agreement. It can also play a role in areas in which the works council does not have enforceable codetermination rights, but the voluntary use of the conciliation committee requires the agreement of the employer and is rare.

The conciliation committee is almost always a temporary body set up to resolve a specific issue. It consists of equal numbers of representatives of the two sides – there will typically be between one and four on each side, who may be from within the workplace or from outside, plus an independent chair. If the two sides cannot agree on the chair, the labour court will appoint one, and chairs are often labour court judges.

The conciliation committee should begin work as soon as possible and its key purpose is to reach agreement between the two sides. It will typically involve an exchange of views and it may also hear witnesses or ask for reports from experts. Following this, proposals to resolve the dispute are put forward and voted on. The independent chair does not take part in the first round of voting, and if there is a majority for one of the proposals put forward – all conciliation committee members must be present – this ends the proceedings and the proposal is adopted. If there is a tie, however, the proposals, which must be

unchanged from the first round of voting, are voted on a second time and the independent chair must vote. If there is a majority for one of the proposals, it is adopted, but if none of the proposals gains a majority, for example because the chair votes against them all, the process continues.

The adopted proposal must be set out in writing and signed by the chair. It is binding on the parties involved, although it can be challenged in court on legal grounds.

Both the works council and the employer can ask for the setting up of a conciliation committee to resolve an issue subject to enforceable codetermination which is in dispute. The costs of the conciliation committee, which include payment of the independent chair and the representatives of the two sides, if they are external to the workplace, are borne by the employer. In some cases the works council will have support from an external lawyer, which must also be paid for by the employer.

In practice, the conciliation committee is used relatively rarely. Of the 4,125 works council members surveyed in 2015, only 6.5 per cent said that the conciliation committee procedure had been used in their workplace in the previous 12 months, although a third of this number said that the procedure had been used more than once over this time. The responses indicated that in one in eight companies works agreements were a result of decisions by the conciliation committee, but in general it was clear that often simply the threat of referring a disputed issue to the conciliation committee was sufficient to get the employer to agree (Brehmer/Baumann, 2015).

ENDNOTES

- 1 The legal basis of workplace level codetermination is the Works Constitution Act (Betriebsverfassungsgesetz) which was initially passed in 1972, and which has subsequently been revised on a number of occasions.
- 2 The three pieces of legislation regulating company level codetermination are the Codetermination Act (Mitbestimmungsgesetz) of 1976, which deals with companies with 2,000 employees or more, the One-third Participation Act (Drittelbeteiligungsgesetz) of 2004, which deals with companies with between 500 and 1,999 employees, and the Coal and Iron and Steel Codetermination Act (Montanmitbestimmungsgesetz) of 1951, which deals with companies producing coal and iron and steel.
- 3 This system of board level representation in coal and iron and steel companies was introduced in 1951, reflecting the popular determination that these powerful industries should be brought under greater democratic control and should not be able to be misused, as they had been during the Nazi period.
- 4 Abschlussbericht der Biedenkopf-Kommission https://www.boeckler.de/pdf/mbf_biedenkopfkommission.pdf [06.07.2020].
- 5 This analysis looks at the results from 18,093 workplaces reported by four unions, including the two largest IG Metall and ver.di.
- 6 A survey based on responses from 1,140 companies.
- 7 The 59% figure comes from the 2018 IW study. The 75% figure comes from Trendreport Betriebsratswahlen 2014.
- 8 In addition to the works council structure, there is separate provision for the representation of executive employees. Provided there are 10 executive employees, either in the plant or in the company, they can choose to elect a body to represent them. This can have between one and seven members, depending on the number of executive employees involved.
- 9 Figures from 2018 I.M.U. study based on IG Metall figures.
- 10 <https://netkey40.igmetall.de/homepages/virtueller-gewerkschaftssekretaer/1betriebsratundbetriebsratsarbeit/15formaliendesbetriebsverfassungsgesetzes/152wannundwieoftdarfderbetriebsratsitzungenmachen.html> [06.07.2020].
- 11 „Die Betriebsverfassung hat sich in der Praxis immer wieder bewährt und ist ein prägendes Element der Unternehmens- und Betriebskultur.“ in Betriebsverfassung <https://www.arbeitgeber.de/www/arbeitgeber.nsf/id/BEF23015AF9E6A32C12574F00031631A> [06.07.2020].

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