The simplification of the election of certain German employees' representatives

by Frank Wooldridge

Some key changes have been made to the election of employee representatives in German public and private companies and other forms of entities.

The rules governing the election of employees' representatives to the supervisory boards of certain undertakings underwent certain amendments as the result of the enactment of the Act of 18 May 2004, which came into force on 1 July 2004. (BGBl [2004] Vol 1, pp 974 *et seq*). The law is said to simplify the rules governing such elections; this is apparent from its German title, which is "*Zweites Gesetz zur Vereinfachung der Wahl der Arbeitnehmervertreter*".

The Act makes certain changes to the rules governing employee codetermination in the supervisory boards of coal, iron and steel companies, as well as to the Codetermination Act 1976, which introduced a system of quasi-paritative codetermination in companies employing more than 2,000 persons. The changes which it made to the rules governing codetermination in the supervisory boards of coal, iron and steel holding companies are significant. The changes to the other two principal systems of codetermination in accordance with the Act of 1976 and that of 1951 governing codetermination in coal, iron and steel companies are of less significance, consisting entirely of minor textual amendments.

Because of the decline of the coal, iron and steel industries in Germany, it is thought inappropriate to attempt a detailed account of the many changes made to the rules governing employee participation in the supervisory boards of coal, iron and steel companies. The Coal, Iron and Steel Holding Company Act (*Mitbestimmungsergänzungsgesetz, MBErgG)*, as amended by paragraph 2 of Article 2 of the Act of 18 May 2004, applies to groups of companies one-fifth or more of whose turnover is derived from activities concerning coal, iron or steel, or one-fifth or more of whose employees are engaged in these industries. Article 6 of the Act of 18 May 2004 repealed the provisions of the Works Councils Act (*Betriebsverfassungsgesetz*) of 1952 concerning employee participation in the supervisory boards of public and private companies and certain other entities employing between 500–2,000 persons. However, many of the provisions of the Works Councils Act 1952 have been re-enacted by Article 1 of the Act of 18 May 2004, which also contains some new provisions governing the relevant form of codetermination. The most important provisions of Article 1 are considered below.

ARTICLE 1 OF THE ACT OF 18 MAY 2004

Article 1 takes the form of a statute entitled "*Gesetz über die Drittebeteiligung der Arbeitnehmer in Aufsichtsrat,*" which may be roughly translated as "statute governing supervisory boards in which employees constitute one third of their members". Because of their apparent practical importance, the detailed provisions of paragraphs 1–15 of Article 1 receive special consideration. The form of codetermination which they cover is in fairly widespread use, and some significant changes have been made to the rules of law covering it. Article 1 contains a useful consolidation of the rules governing codetermination in public and private companies and other entities employing between 500-2000 persons, and also appears to deal with some questions which were not formerly regulated.

Scope of Article 1

Paragraph 1 of Article 1 of the 2004 Act sets out the kinds of undertaking to which the relevant form of codetermination is applicable. These not only include public and private companies employing between 500–2,000 persons, but also public companies registered before 1 August 1994 which employ less than 500 persons, unless they are family companies, ie companies which have only one member who is a natural person, or whose members are related by consanguinity or marriage. Paragraph 1 is also applicable to trading and industrial cooperatives and mutual insurance undertakings having between 500-2000 employees.

However, paragraph 1 excludes undertakings which in a direct and preponderant sense have political, confessional,

charitable, educational, scientific or artistic objectives, or which have the purpose of reporting or expressing opinion, and to which Article 5(1) sentence 2 of the Federal Constitution is applicable. The provisions of paragraph 1 clearly resemble the provisions of paragraphs 76, 77(1) and 81 of the Works Councils Act 1952, which were formerly applicable.

The application of the relevant system of codetermination to groups of companies is dealt with by paragraph 2 of Article 1, which has a wider ambit than paragraph 76(4) of the Works Councils Act, which was formerly applicable to such groups. According to paragraph 2(1), the employees of dependent companies within the meaning of paragraph 18(1) of the German *Aktiengesetz* of the controlling company also participate in the election of employees' representatives to the supervisory board of that company. Paragraph 18(1) stipulates that companies between which there is a control contract, or which are integrated with one another, constitute a group. In addition, it provides that dependent companies are presumed to form a group with the company which controls them. Paragraph 2(2) of Article 1, which is apparently intended for purposes of clarification, and which has no counterpart in the Works Councils Act 1952, provides that insofar as the participation of representatives of employees or the supervisory board of a controlling company depends on the presence or the number of employees of the controlling company, the employees of dependent companies are taken into account where there is a contract of control between the two companies, and also where the dependent company is integrated with the controlling company.

Paragraph 3 of Article 1 contains definitions of certain fundamentally important terms used in the recent Act, ie employee (*Arbeitnehmer*) and plant, establishments, or factory (*Betrieb*). Certain executives (*leitende Angestellte*) who have the power of appointing and dismissing workers are excluded from the definition of an employee, in accordance with paragraph 5(3) of the Works Councils Act of 2001. The definition of *Betrieb* in paragraph 3(2) of Article 1 of the 2004 Act is that contained in paragraph 4(2) of the Works Councils Act of 2001. Such an establishment must employ at least five persons entitled to vote, and should be either separated in space from the principal establishment or be of an independent nature by reason of its functions and character. Paragraph 3(3) of Article 1 contains special rules governing ships.

The supervisory board

The rules governing the establishment of the supervisory board of undertakings subject to the system of codetermination under which one third of the members of the supervisory board are representatives of the employees are set out in paragraph 4 of Article 1 of the law of 18 May 2004. According to paragraph 4(2), if one or two employees' representatives have to be elected to the supervisory board, these must be chosen from the employees of the undertaking. If more than two such persons have to be elected to the supervisory board, at least two of them must work in the undertaking. The number of members of a supervisory board of a public company depends on the nominal capital of the company, and must be divisible by three, according to paragraph 95 *AktG*.

Employees' representatives on the supervisory board who are employed by the relevant undertaking must be at least 18 years old, and have worked for the undertaking for at least one year. Employment in undertakings which are entitled to participate in the election of employees' representatives on the supervisory board of the relevant undertaking counts towards the period of one year. This period must be unbroken, and must end immediately before the employees of the undertaking become entitled to elect their representatives (paragraph 4(3) of Article 1 of the Law of 18 May 2004). According to paragraph 4(4), men and women must be elected as employees' representatives on the supervisory board in proportion to their respective numbers in the undertaking.

The election of employees' representatives to the supervisory board is dealt with by paragraph 5 of Article 1. According to paragraph 5(1), such representatives are elected by means of a simple majority vote which takes place generally, is secret, and covers the same period of time for which the shareholders representatives on the supervisory board are elected in accordance with the law or the company's statutes. The provisions of paragraph 76(2) sentence 1 of the Works Councils Act 1952 were in similar terms. The employees of the undertaking who have reached the age of 18 are entitled by paragraph 5(2) of Article 1 to participate in the ballot. According to paragraph 6 of Article 1, voting takes place on the basis of nominations made by the works council and by the employees. Those made by the employees must be made by at least one-tenth of those employees entitled to vote, or by at least 100 such employees. The rules contained in paragraph 6 are the same as those contained in the formerly applicable text, paragraph 76(3) of the Works Councils Act 1952.

Paragraphs 7 and 8 of Article 1 of the Law of 18 May 2004 deal with certain matters (which were not regulated by the Works Councils Act 1912). The former paragraph deals with the question of alternate employees' representatives in the supervisory board. It provides that in every nomination made for a particular candidate, it is possible to also nominate a substitute for that candidate. However, an actual candidate may not be nominated as a substitute. If a candidate is elected as an employees' representative on the supervisory board, the substitute member nominated together with him is treated as being elected also.

According to paragraph 8(1) of Article 1, the organ charged with the legal representation of the undertaking has to make known the names of the employees representatives and their alternates in the various establishments of the undertaking, and publish them in the electronic version of the Federal Gazette. Should the employees of another undertaking participate in the choice of the employees' representatives on the supervisory board of the relevant undertaking, the organ entrusted with the legal representation of the first national undertaking has to make known the names of the persons elected, and their alternates in the various establishments of that undertaking.

Certain matters which are not regulated by the Works Councils Act 1952 are dealt with in paragraphs 9–11 of Article 1 of the Law of 18 May 2004. Paragraph 9 of Article 1 covers the protection of employees' representatives on a supervisory board from harm. It provides that such purposes must not be disturbed or hindered in the exercise of their activities o the supervisory board. They must neither be given advantages nor suffer prejudice by reason of such activities. The same rule applies to the development of their careers. The safeguarding of electoral processes governing employees' representatives and the costs of elections for such representatives are dealt with in paragraph 10 of Article 1.

Article 10(1) provides that nobody must hinder the election of an employees' representative on the supervisory board; furthermore no person may be restricted in the exercise of their voting rights or right to be elected. According to paragraph 10(2) nobody may influence the election by the use or threat of prejudicial actions, or by means of the grant or promise of advantages. Finally, paragraph 10(3) provides that the undertaking bears the costs of the election. Absence from work rendered necessary for the exercise of voting rights or activities in an electoral committee does not justify any reduction in salary.

The cancellation (*Anfechtung*) of the vote for employees' representatives is dealt with in the rather complex provisions of paragraph 11. According to paragraph 11(1), the election of an employees representative or alternate representative on the supervisory board may be avoided by the industrial court (*Arbeitsgericht*) when there has been an infringement of significant provisions governing electoral law, the capacity to become elected or electoral procedures, and there is no justification for such actions, unless the relevant infringement could not have altered or influenced the result of the election. An application for the cancellation of the election may, according to paragraph 11(2), be brought by at least three persons entitled to vote, a works council, or the organ entrusted with the legal representation of the undertaking. However, such cancellation may only take place within a period of two weeks from the publication of the result of the relevant election in the electronic version of the *Official Gazette*.

Paragraph 12 of Article 1 largely corresponds with the formerly applicable paragraph 76(5) of the repealed Works Councils Act 1952: however the second sentence of paragraph 12(1) has some original features, as also does paragraph 12(2). The first sentence of paragraph 12(1) provides that an employees' representative on the supervisory board (of a company covered by the relevant system of codetermination) may be removed from office before the period of such office has terminated on the motion of a works council (*Betriebsrat*) or at least one fifth of the employees entitled to vote. A resolution of the employees entitled to vote is necessary after such a motion has been passed by paragraph 12(2). The resolution takes place by means of a general, secret and direct vote, and must be passed by a majority consisting of at least three quarters of the votes cast.

Final provisions

Paragraphs 13–15 of Article 1 of the law of 18 May 2004 deal respectively with the power of the Federal Government to enact statutory instruments governing the procedure for the election and removal from office of employees representatives; the effect of certain references in other statutes and instruments; and transitional provisions governing the repealed Works Councils Act 1952. The provisions of paragraph 13 only differ slightly from those contained in paragraph 87 of the Works Councils Act (now repealed). Paragraph 14 provides that insofar as other statutes refer to provisions which have been repealed by Article 6, sentence No 2 of the Act of 18 May 2004, the latter provisions shall be replaced by the corresponding provisions of the latter Act. Finally, paragraph 15 provides that insofar as appointments or removals from office which took place before 1 July 2004 are concerned, the Works Councils Act 1952 remains applicable, despite the fact that it has otherwise been repealed.

OTHER PROVISIONS CONCERNING EMPLOYEE CO-DETERMINATION

Articles 2–4 of the Act of 18 May 2004 make certain other alterations to the other three laws governing employee participation in supervisory boards. As already indicated, there are of a minor character, except insofar as the rules governing employee participation in the supervisory board coal, iron and steel holding companies are concerned. Only a brief account of certain of the alterations in the law governing the latter companies will be attempted below.

Coal, iron and steel holding companies must establish a supervisory board consisting of seven representatives of the employees, seven of the shareholders, and one additional person if at least one-fifth the turnover of the controlling and dependent companies is derived from activities connected with coal, iron and steel, or if one-fifth of the employees of the former companies carry on such

activities. In calculating the turnover, a deduction is made for the costs of procuring raw and accessory materials and fuel. The Coal, Iron and Steel Holding Company Act (*Mitbestimmungsergänzungsgesetz, MBErgG)* continues to be applicable to public and private limited companies: the provision governing the necessary number of employees was incorporated in the Act by paragraph 2 of Article 2 of the Act of 18 May 2004.

Coal, iron and steel holding companies employing more than 7,000 persons elect the employees representatives on the supervisory board by an indirect method, through the medium of delegates. The rules relating to the members of such delegates and their votes contained in paragraph 9 MBErgG have been altered by paragraph 6 of Article 2 of the Act of 18 May 2004. Paragraph 101 of the MBErgG, which deals with the persons and bodies which may challenge the election of an employees representative or substitute representative to the supervisory board, has been amended by paragraph 8 of Article 2 of the Act of 18 May 2004. Consultative bodies, consisting of representatives of the senior executives of the holding company or its subsidiaries set up in accordance with applicable legislation (*Sprecherausschussgesetz* of 1989, as amended) are now permitted to make such a challenge.

This may also be made, *inter alia* by three employees of the companies comprised in the group, and by the works council of the holding company *(Gesamtbetriebsrat*). The provisions of paragraph 22 MBErgG governing the election and removal from office of employees representative, on the supervisory board of the holding company contained in paragraph 22 MBErgG have also been revised by the somewhat complex provisions of paragraph 9 of Article 2 of the Act of 18 May 2004.

The alterations made to the MBErgG by the above Act sometimes appear to have resulted in more complex provisions, but may possibly be justified by the need for greater clarity and efficacy in certain areas.

The amendment made to the Codetermination Act (*Mitbestimmungsgesetz*) of 1976 in Article 3 of the Act of 18 May 2004 consists entirely of minor changes in wording. Thus, for example paragraph 19 sentence 1 of the Codetermination Act is changed by Article 3 so as to provide for the publication of the names of the employees representatives on the supervisory boards of companies subject to the quasi-paritative system of codetermination in the electronic version of the Federal Gazette. The amendments made to the Coal, Iron and Steel Codetermination Act 1951, as subsequently amended, which are set out in Article 4 of the Act of 18 May 2004, are also of relatively minor importance. Indeed, they would seem to be of even less significance than those made to the Codetermination Act 1976.

CONCLUDING REMARKS

It is apparent that the most important amendments to the existing legislation governing employee participation in the supervisory board by the Act of 2004 were those made in replacement for the Works Councils Act (*Betrebsverfassungsgesetz*) of 1952. The Act of 18 May 2004 was intended to simplify the rules governing such employee participation, and to deal with certain questions which were not fully dealt with or unresolved. The Act was not intended to make fundamental changes in the rules of law governing codetermination, for example by introducing the option of a single tier or two tier board, or by reducing the proportion of employees representatives on supervisory boards subject to one of the Codetermination Acts to one-third in all cases. There have been pleas for such fundamental changes in German law in recent years, but it seems doubtful whether they will result in legislation in the immediate future. However, the German Chancellor appointed a Commission in 2004 to consider the question of codetermination.

Frank Wooldridge

Formerly Adjunct Professor, University of Notre Dame