

- Results of the “Biedenkopf Commission” - the Government Commission on the modernisation of employee board-level representation in Germany.

An Executive Summary by the Hans-Böckler-Foundation

In 2005, the former red-green coalition, led by Chancellor Gerhard Schröder, set up a Commission on “The modernisation of employee board-level representation in Germany”¹. The Commission was charged with producing proposals on how to adapt legislation on board-level representation in large German companies – where representatives of both employees and shareholders have equal numbers of seats – to changed economic and social conditions. Professor Kurt Biedenkopf, the CDU politician and former President of Saxony, was named as the chair of the Commission. Professor Biedenkopf had led a similar commission in the 1960s, which in 1976 resulted in the Co-determination Act that regulates employee representation at board level. The new government coalition of the CDU and SPD retained and continued with the red-green government’s Commission initiative.

The second “Biedenkopf Commission” ended its work when it handed over its report to Angela Merkel, the German Chancellor on 12 December 2006. The Commission’s remit was to examine “a further development of modern employee board-level representation, against the background of European and global challenges”. The Commission was made up of representatives of employees and employers, as well as academics. It was intended that the representatives of the employers and employees should come to an agreed common position. Its rules provided that, if the two sides were unable to agree, the academic members should deliver their own report. In the end no agreement was reached. The employers had moved away from the common ground of the Commission’s work, which was that its recommendations should be based on current legislation (in other words the continuance of equal representation at board level). The representatives of the employers questioned this core point right up to the final session of the Commission and demanded that the number of employee board-level representatives be cut to a third. At present, German legislation stipulates that employees have a third of the seats on supervisory boards in companies with at least 500 employees, while in those with 2,000 and more they have, in line with the 1976 Co-determination Act, the same number of seats as the shareholders, thus giving parity of representation. In addition companies in the coal, iron and steel industries with at least 1,000 employees are covered by the so-called Montan Co-determination Law of 1951. Prof Biedenkopf stated that the employers’ demands lay outside the remit of the Commission. In this way the employers prevented the Commission reaching consensus. The employee and employer representatives had widely divergent views on many issues, and, therefore, the academic members produced their own proposals for legislative changes, and included the statements of the employer and employee sides separately.

The academic members stated that they saw no reason to propose a fundamental revision of the German system of board-level representation. Rather they called for its careful further development. In the words of the report, “The academic members consider that a fundamental revision of the existing legislation is unnecessary and that the protection for employee interests provided by the existing regulations remains appropriate.”

¹ This report refers to “employee board-level representation” rather than using the phrase “company co-determination”, which is a direct translation of the German word “Unternehmensmitbestimmung”, the main subject of the Biedenkopf Commission.

I. Composition and remit of the Commission

The Commission was made up of nine members:

- Three independent academic members: the Commission Chair Prof Biedenkopf, Prof Wolfgang Streeck (Director of the Max Planck Institute for the Study of Societies) and Prof Hellmut Wissmann (a former president of the Federal Labour Court)
- Three employer representatives: Dr Dieter Hundt (President of the Confederation of German Employers' Associations – BDA), Jürgen Thumann (President of the Federation of German Industry –BDI) and Dr Manfred Gentz (President of the ICC-International Chamber of Commerce – Germany and former board member of DaimlerChrysler)
- Three employee representatives: Michael Sommer (President of the Confederation of German Trade Unions – DGB), Jürgen Peters (President of IG Metall – the metalworking union) and Günter Reppien (Chair of the company works council at RWE Power AG)

The remit of the Commission, as set up by the government, was as follows:

*“Employee involvement in companies forms a core element of the social market economy and the culture of Germany companies. It faces important challenges, not just because of European developments. Therefore, the remit of the Commission is to make proposals for a further development in the system of employee representation at board level, which is modern and appropriate to European circumstances, **taking current legislation as its starting point.***

The Commission will analyse the arrangements for employee board-level representation in Europe and on the basis of this will evaluate the strengths and weaknesses of German board-level representation, in particular against the background of European and global challenges. This evaluation and work on practical suggestions for reform will lead to a report from the Commission.”

(Author’s emphasis)

The current CDU-SPD government retained this way of working. It described board-level representation as a “successful model” in the coalition agreement between the two political parties and agreed to take up “the results of the Commission **on which agreement had been reached**” and “as far as necessary and appropriate, to make modifications to national board-level representation”.

(Author’s emphasis)

II. Controversial issues in the Commission

The following points were those where the Commission was unable to reach agreement:

- The economic and social consequences of employee representation at board-level and how to assess the relevant existing academic studies.
- The retention of equal representation of employees and shareholders on supervisory boards in large companies – in line with the 1976 Co-determination Act
- The way workplace employee involvement (through the works council) and board-level employee involvement (through the supervisory board) should work together. The points at issue were: whether, while keeping employee involvement at workplace level, board-level employee involvement should be reduced, and whether the representation of external trade unionists should be removed.
- The introduction of negotiations on the practical forms of employee-representation in individual companies’ supervisory boards. At stake here were: the issues to be negotiated – such as the size of the supervisory board or the representation of employees outside Germany; the question as to who were the legitimate negotiating parties; and the legal form of the agreement to be reached.

III. Contents of the report

1. Overall assessment of board-level representation

The report from the *academic members of the Commission* provides a reminder that the need for employee board-level representation was not a question of economics. They emphasise that the goal of the 1976 Co-determination Act was not to improve company competitiveness, but rather to provide employees with a democratic voice in company decisions that affected them. The reason for board-level representation is that a company is to be understood as a social grouping, in which the owners, company management and employees work together with a common purpose. For this reason, in their view, democratic participation through board-level representation continues to be essential. As the employer and business associations have conducted the debate on board-level representation entirely on the basis of economic arguments, this clarification was sensible.

There are general methodological difficulties in examining the economic impact of board-level representation, but the report makes the following explicit points on the existing empirical evidence. "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, and to propose a fundamental revision of the legislation, let alone its repeal". They consider it is not possible to produce proof of negative effects of board-level representation. It is true that, in the light of the variability of the research results and existing methodological problems, no clear conclusions can be reached, but the results of current research tend more towards a positive evaluation of the economic impact of board-level representation.

The report also confirms that board-level representation is not a competitive disadvantage to Germany, as it does not hinder foreign direct investment, and there is no evidence of a "co-determination discount" in capital markets, and that only very few cases of companies avoiding board-level representation are known. They conclude, "Employee representation at supervisory board level is no hindrance to a positive evaluation of Germany as a place to do business".

The academics see the following positive consequences of employee involvement:

"In the view of *the academic members*, the involvement of employees at workplace level and on supervisory boards has succeeded in the task of providing an effective instrument for reconciling the differing interests of employees and employers, particularly in economically difficult times. The co-operative approach of the German system of employee involvement has not simply had a positive impact on the motivation and sense of responsibility of employees; it also has important social effects through its contribution to the maintenance of social harmony. Companies can and should take competitive advantage of the productivity provided by co-operation."

They consider that employee involvement continues to be an instrument for reconciling differing interests and maintaining a company's social cohesion. In addition, the academics forecast that a number of factors could increase the importance of employee involvement. These include the move from classical industry to knowledge-based production, the increased importance of employee expertise and competence, the current developments in financial markets and among investors, and the growth of social tensions and conflicts.

2. The most important reform proposals of the academic members of the Commission

The academics identify three areas where they see the greatest need for reform:

- Making board-level representation more flexible through negotiating options and a simplification of current legislation
- Opening up board-level representation to Europe and beyond
- Eliminating inconsistencies and contradictions in the current legislation on board-level representation

Making existing legislation simpler and more flexible

The academic members of the Commission recommend adapting the current legislation on board-level representation to changed institutional and economic circumstances. They are in favour of allowing negotiations *in the following areas* in order to give companies greater freedom to come to their own arrangements. These are:

- The extent of board-level representation within the group structure: negotiations should be able to result in both a more intensive degree of involvement (for example, a move from a third of the seats to half) as well as a reduction in the degree of representation (such as cutting the proportion from half to a third).
- The size of the supervisory board: the supervisory body should be able to be either larger or smaller than the size currently set by the legislation.
- The involvement of the company's employees outside Germany in the supervisory board and the elections to the supervisory board.

If in these areas no agreement is reached the current legislation – the 1976 Co-determination Act – will continue as before for companies with 2,000 or more employees. The introduction of one-third representation as a fallback in the case of the negotiations breaking down – something the employers demanded – was rejected.

More problematic – from the trade union viewpoint – are the academics' proposals on the composition of the negotiating body on the employees' side. Although this body is charged with negotiating the concrete arrangements on board-level representation in the company, it is not to be led by the unions in the talks with the employer's side. Instead the body is to be made up of representatives of the works council, the union and senior management², in line with the number of seats each group has in the supervisory board. The academics have said that a three-quarters majority in the negotiating body should be sufficient to take decisions, but the result of this is that in certain circumstances the unions could be out-voted. Indeed where employees from outside Germany are brought in, it is proposed that it should be possible to reduce or remove completely union participation, even where the unions themselves oppose this. In these circumstances only employees of the company would be members of the supervisory board. Under certain conditions, the unions would no longer have any direct role at board-level.

The possibility that trade union representatives could lose their seats in this way, through a majority decision taken against their wishes, is unacceptable to the unions. The positive impact of employee board-level representation in Germany depends directly on the good and complementary co-operation in the supervisory board of employee representatives from within the company and trade union representatives who come from outside – something which the academics' report specifically confirmed. The trade unions – the bodies that negotiate collective agreements – demand that they should lead the negotiations (involving the works councils) and that the form of board-level representation agreed should be established by a collective agreement. On this basis the unions support the involvement of employees from outside Germany.

² Under the 1976 Co-determination Act, a limited number of seats in supervisory boards are reserved for representatives of senior managers (leitende Angestellte).

Making board-level representation European and international

It is to the credit of the report from the *academic members of the Commission* that they point to the necessity of involving employees working outside Germany in the German supervisory board. In this context, they emphasise that there are diverse and varying arrangements for the involvement of employees in company decisions in Europe, which have grown historically and cannot simply be compared on the basis of the proportion of seats on supervisory boards in large companies. Therefore it cannot be stated that the German system of board-level representation is a unique phenomenon, as the employers' side had claimed.

There were disagreements in the Commission as to whether the “freedom of establishment” provided by European law required new legislation in order to protect board-level representation. The freedom of establishment allows companies with a non-German legal structure to set up in Germany, in practice allowing board-level representation to be evaded – although this is legally questionable. However, the academic members of the Commission have decided against proposing specific protection for the German system of board-level representation at this time. So far there have only been a few cases where board-level representation of employees has been evaded in this way, and they therefore consider that there is no need for the legislator to step in, although further developments should be watched to see if intervention becomes necessary later. The unions, on the other hand, are of the view that the loophole in the law should be closed at once.

Clearing up problems in the current legislation

The report also deals with contradictions and inconsistencies in the existing system of board-level representation in Germany. For example, a management board in a private limited company (GmbH), has less onerous reporting requirements in relation to its supervisory board than a management board in a public company (AG). It is the common view of both employers and employees that the election procedures to choose employee representatives on the supervisory board are too complicated. However, the views of the two sides on how these procedures could be simplified are very different. The academics have proposed that the supervisory board members representing employees should be elected by the members of the works council – an employee-side proposal. They also call for the membership of supervisory board sub-committees with decision-making powers to reflect the membership of the supervisory board as a whole. This is to avoid the impact of board-level representation being restricted, through the delegation of supervisory board powers to sub-committees.

IV. A comparison of the positions of the employees and employers

1. The unions

The **unions welcome** the following points of the Commission's report in particular:

- The clearing up of contradictions and inconsistencies in the current system of board-level representation
- The simplification of the election of supervisory board members
- The possibility of involving employees outside Germany in supervisory boards
- The fact that the current legal position has been chosen as both the starting point for negotiated solutions in companies and the fallback position, if the negotiations fail, and the rejection of the proposal that the fallback position should be a one-third representation on the supervisory board, as called for by the employers
- Distributing seats in decision-making sub-committees of the supervisory board in line with the division of seats in the supervisory board itself

The aspects of the report which the **unions** are particularly **critical** of are,

- that unions are not to lead the negotiations on specific arrangements for board-level representation in individual companies, and that agreements on such arrangements will not take the form of a collective agreements;
- that union representatives can be outvoted in the negotiating body and could lose supervisory board seats against their will;
- that negotiations could lead to a reduction in the level of employee representation on supervisory boards;
- that there is no legally prescribed list of specific items of business conducted by the management board, which require the agreement of the supervisory board (legal catalogue of business items requiring assent);
- that no recommendation has been made on reconsidering the minimum number of employees – the threshold – from which employees have the right to equal numbers of seats on the supervisory board, and the inclusion of additional criteria;
- that the duties of the labour director (the individual responsible for personnel issues on the management board) have not been strengthened, and that his or her appointment has not been made contingent on the agreement of the employee representatives.

2. The employers

The employers' side rejects the entire report because of its failure to meet their demand for a general reduction to one-third in the proportion of seats held by employee representatives in supervisory boards. This would then also become the basis for negotiations, as well as the fallback position if negotiations fail. They are in favour of negotiations on the level of employee involvement irrespective of group or company structures. However, they reject the possibility that negotiations could lead to a strengthening of the existing system of employee representation at board level. In their view, in future, employees would only have the same number of seats as shareholders on supervisory boards where companies were prepared to agree with this in negotiations.

The **employers welcome** the following points of the Commission's report in particular:

- The possibility of being able to involve employees outside Germany in supervisory boards
- The fact that board-level representation is, in principle, open for negotiation
- The rejection of the suggestion that agreements on board-level representation should be in the form of collective agreements (which could then be subject to strike action)
- The emphasis that foreign companies in Germany should not be subject to German rules on board-level representation without further discussion

The aspects of the report which the **employers** are particularly **critical** of are:

- the generally positive assessment of board-level representation and the rejection of the fundamental need for reform;
- the positive assessment of the way employee involvement at workplace level and employee involvement at board-level work together;
- the rejection of the proposal that, where negotiations over arrangements for board-level representation fail, the fallback position should be a one-third representation on the supervisory board;
- the possibility of allowing negotiations to also result in a strengthening of board-level representation in company structures;
- the planned electoral arrangements for membership of a negotiating body and for the supervisory board, in particular the rejection of a general ballot of the workforce;
- the rejection of the introduction of a general right to choose a one-tier board structure;
- the fact that the elimination of contradictions and inconsistencies in the current legislation results in some cases in an upgrading of board-level representation.

V. Prospects

At the time of writing (February 2007) it is unclear, whether and in what form the Commission results will be taken up in legislation by the German government or the German parliament. The DGB has stated that it is willing to participate if there are such initiatives. Chancellor Merkel has shown that she is in favour of employee representation at board level and has emphasised that “board-level representation is part of our social market economy, which it is impossible to imagine doing without, and which has proved itself in Germany”.

The work of the Commission has, in a structured way, pointed to the new challenges facing employee involvement, as well as examining the various arguments and refuting the unfounded criticisms and attacks that are directed against it. Employee representation at board level will remain on the German political agenda.