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CO-MANAGEMENT (MITBESTIMMUNG) IN GERMAN LAW

ABSTRACT

Based on the social principle whereby capital and labour are intended to “co-manage” or “co-determine” (mitbestimmen) the functioning of the company, employee co-management (Mitbestimmung) is one of the pillars of the German social partnership. It seeks a balance between the rights of capital and those of labour. Therefore, it offsets the considerable weight of the employer within the company by establishing legal representation regimes that allow employees to control and participate in the management of the company through elected or designated representatives. Therefore, without compromising the preponderance of shareholders on the supervisory board, employee co-management ensures a permanent social dialogue at the top of the company. This social cohesion undoubtedly constitutes one of the essential elements behind the performance of German companies. This paper not only presents the laws and regulations that govern employee co-management, but also explores its different legal regimes and its real impact on the functioning of the supervisory board of a company.

KEY WORDS: *Co-Management, Employee Participation, Supervisory Board.*

RÉSUMÉ

Reposant sur une philosophie sociale selon laquelle le capital et le travail ont vocation à « cogérer » ou « co-déterminer » (mitbestimmen) la marche de l'entreprise, la cogestion des salariés (Mitbestimmung) constitue l'un des piliers du partenariat social allemand. Elle recherche un équilibre entre les droits du capital et ceux du travail en compensant le poids considérable de l'employeur au sein de l'entreprise. Pour ce faire, la cogestion instaure des régimes légaux de représentation permettant aux salariés, par l'entremise de représentants élus ou désignés, d'exercer un droit de contrôle et de participer à la gestion ainsi qu'à l'organisation de l'entreprise. Ainsi, tout en ne pas portant atteinte à la prépondérance des actionnaires au sein du conseil de surveillance, la cogestion garantit le maintien d'une concertation sociale permanente au sommet de l'entreprise. C'est sans doute cette cohésion sociale qui constitue l'un des éléments essentiels de la performance des entreprises allemandes. Outre la présentation des lois qui organisent la cogestion des salariés, la présente analyse se penche sur les différents régimes juridiques qui la composent et sur sa portée réelle au sein du conseil de surveillance.

MOTS-CLÉS : *Cogestion, participation des travailleurs, conseil de surveillance.*

Along with the system of collective bargaining based on the contractual autonomy of trade unions and employers' organisations (*Tarifautonomie*), employee co-management (*Mitbestimmung*) is the second pillar on which the German social partnership rests.¹ The co-management system is based on a specific social philosophy based on the principle of balance and equality (*Gleichberechtigung*) between the rights of capital and those of labour. Indeed, co-management is the embodiment of the logic that capital and labour should "co-manage" or "co-determine" (*mitbestimmen*) the running of the company. It is intended to offset the considerable weight of the employer, which remains significant in spite of the existence of social laws and collective agreements.² To achieve this, it establishes a sharing of the entrepreneurial power which takes the form of legal representation regimes that allow employees to control and participate in the management of the company through elected or appointed representatives.³

However, it is necessary to clearly distinguish between co-management at the establishment level, that is to say within the actual structure where employees work, and co-management within the supervisory board (*Aufsichtsrat*), which is a corporate body placed at the level of the legal entity that owns the assets making up the company. At the establishment level, a works council (*Betriebsrat*) must be set up if the establishment has a workforce of at least five employees. The co-management carried out by the works council allows the interests of the employees to be better taken into account when decisions are taken that have a direct or indirect impact on their working conditions.⁴ Such decisions include, for example, the introduction of new working methods, the replacement of certain workers, agreements to extend or reduce working hours, the granting of higher pay rates (*über tarifliche Zulagen*), the modification of working hours or the reduction of bonuses⁵.

Co-management within the supervisory board only applies in certain types of company - mainly the limited liability company ("GmbH") and the public limited company ("AG") - employing more than 500 people. These companies have employee representatives on the supervisory board, whereas, normally, the latter is a corporate body where only shareholders are represented. It should be pointed out, however, that the supervisory board is not the management body. Under German company law, the company is run by the management board (*Vorstand*), the supervisory board merely being a body that oversees the management carried out by the management board. This means, therefore, that the employee members of the supervisory board are merely indirectly participating in the management of the company by the management board. This form of participation in the supervisory board is referred to as "*unternehmerische Mitbestimmung*" (economic co-management).

- 1 R. Lasserre, „La cogestion allemande à l'épreuve de la globalisation“, *Regards sur l'économie allemande*, no.72, 2005, p. 7; H. Otto, „Das konturlose Arbeitskämpfrecht des BAG – Vom Arbeitskampf als *ultima ratio* zur nahezu unbeschränkten Kampffreiheit?“, *RdA*, 2010, p. 135.
- 2 W. Hromadka and F. Maschmann, *Arbeitsrecht Band 2, Kollektivarbeitsrecht und Arbeitsstreitigkeiten*, 7th ed., Heidelberg, Springer, 2017, p. 225.
- 3 H. Reichold, *Betriebsverfassung als Sozialprivatrecht*, Munich, Beck, 1995, p. 543; W. Hromadka and F. Maschmann, *op. cit.* (n° 2), p. 225.
- 4 See also the contribution of Wolfgang Däubler in this issue of the RDCTSS.
- 5 W. Hromadka and F. Maschmann, *op. cit.* (n° 2), p. 225.

It is important to emphasise that the term "*Mitbestimmung*" in German law is usually translated into French as "*cogestion*" (in English "co-management" or "co-determination"). The authors have observed this convention even though the term "*cogestion*" as it is used in French (or "management" in English) does not accurately convey the role of employees within German companies. Indeed, there is no employee participation in the management body (management board) since employees participate only in the supervisory board, which is the body that oversees the running of the company.⁶

In German law, employee co-management is organised by a number of different laws. These laws can be classified according to whether they apply to establishments or to companies.⁷ In establishments, co-management is governed by the *Betriebsverfassungsgesetz* of 25 September 2001,⁸ the *Europäische Betriebsrätegesetz* of 28 October 1996,⁹ and the *Sprecherausschussgesetz* of 20 December 1988.¹⁰ As for co-management in public service establishments, it is organised by the *Bundespersonalvertretungsgesetz* of 15 March 1974,¹¹ as well as the *Personalvertretungsgesetze* of the 16 Federal States.¹²

In companies, co-management is governed by the Workers' Co-Management Act (*Mitbestimmungsgesetz*) of 4 May 1976,¹³ the *Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat* of 18 May 2004,¹⁴ the *Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie (Montan-Mitbestimmungsgesetz)* of 21 May 1951¹⁵ and the *Gesetz zur Ergänzung des Gesetzes über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie* of 7 August 1956.¹⁶

For transnational entities, there is also the *Gesetz über die Beteiligung der Arbeitnehmer in der Europäischen Gesellschaft* of 22 December 2004,¹⁷ the *Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Genossenschaft* of 14 August 2006,¹⁸ as well as the *Gesetz über die Mitbestimmung der Arbeitnehmer bei einer grenzüberschreitenden Verschmelzung* of 21 December 2006.¹⁹

It is only for co-management in public services that a single law on employee co-management applies. In all other cases, it is possible that several laws (up to four in

6 C. Teichmann, «Le dirigeant d'*Aktiengesellschaft* en Allemagne», in Y. Chaput and A. Lévi (ed.), *La direction des sociétés anonymes en Europe*, Paris, Litec, 2008, p. 13.

7 W. Hromadka and F. Maschmann, *op. cit.* (n° 2), p. 226.

8 Federal Law Gazette (BGBl. I) 2001, p. 2518.

9 Federal Law Gazette (BGBl. I) 1996, p. 1548.

10 BGBl. I, p. 2312.

11 BGBl. I, p. 2312.

12 See W. Ilbertz, U. Widmaier and S. Sommer, *Bundespersonalvertretungsgesetz mit Wahlordnung unter Einbeziehung der Landespersonalvertretungsgesetze*, 13th ed., Munich, Beck, 2015, para. 58 et s.

13 BGBl. I, p. 1153.

14 BGBl. I, p. 974.

15 BGBl. I, p. 347.

16 BGBl. I, p. 707.

17 BGBl. I, p. 2675, 3686 for the transposition of Directive 2001/86/EC of 8 October 2001.

18 BGBl. I, p. 1911, for the transposition of Directive 2001/72/EC of 8 October 2001.

19 BGBl. I, p. 3332, for the transposition of Directive 2005/56/EC of 26 October 2005.

some cases) will apply concurrently. Furthermore, co-management at the establishment level and co-management within the supervisory board constitute different regimes which may, where appropriate, apply at the same time to the same company.²⁰

This paper aims to present the different legal regimes relating to co-management (I) and the real extent of its application in the supervisory board (II).

I - THE TWO LEVELS OF CO-MANAGEMENT IN GERMANY

From the point of view of its scope, employee co-management operates on two separate levels: on the one hand, at the establishment (*Betrieb*) level (A) and, on the other, at the company (*Unternehmen*) level (B), that is to say the body that forms the legal entity.

A - CO-MANAGEMENT AT THE ESTABLISHMENT LEVEL (*BETRIEBLICHE MITBESTIMMUNG*)

First introduced in 1952, the *betriebliche Mitbestimmung* has been modified on several occasions and constitutes the ordinary law system that applies to all establishments with at least five employees. The *betriebliche Mitbestimmung* is a consultation system that introduces power sharing on management issues, with a very precise and balanced division of the respective prerogatives of the employer and the staff representatives within the *Betriebsrat* (works council).²¹ The employer retains its autonomy in economic decisions as well as its prerogatives with regard to employment contracts. At the same time, the *Betriebsrat* has a right to information and oversight in all areas and situations where the social rights and interests of the employees could be affected by the manager's decisions. It should be noted that the establishment has no legal capacity on its own. The establishment constitutes the employees' place of work and may be a production site or an administrative entity within the company. A company may maintain several establishments, each of them with the right to set up its own works council.

Co-management at the establishment level covers day-to-day labour relations, and the *Betriebsrat* has wide-ranging areas of competence encompassing all aspects of the life of the establishment.²² The *Betriebsrat's* powers are particularly important in the social domain. Indeed, for all matters relating to the collective management of personnel and to working conditions, the co-management rules mean that the employer cannot take valid decisions without first having consulted the *Betriebsrat* and obtained its formal agreement. Concerning personnel matters involving hiring and firing and any other issue relating to the individual employment contract, the *Betriebsrat* has a suspensive right of oversight of the lawfulness and "social relevance" of such measures. As regards economic matters relating to the organisation of the establishment or the production, the *Betriebsrat* has extensive consultative powers enabling it to put forward proposals, which the employer is free to consider. However, for any economic decision with tangible consequences

20 W. Hromadka and F. Maschmann, *op. cit.* (n° 2), p. 227.

21 In co-management at the establishment level, the *Betriebsverfassung* (works constitution) codifies the system of worker participation, determining the respective rights, obligations and powers of the *Betriebsrat* (works council) which is elected by the employees.

22 It should be noted, however, that, depending on the field, these attributions of the *Betriebsrat* have a very variable scope, ranging from a simple right to information to genuine co-decision-making.

for the personnel, the employer is obliged to present a social support plan containing compensatory measures which must obtain *Betriebsrat's* agreement.

B - UNTERNEHMERISCHE MITBESTIMMUNG OR EMPLOYEE REPRESENTATION ON THE SUPERVISORY BOARD

Under the *unternehmerische Mitbestimmung* system, employees exercise their co-management rights through elected or appointed representatives who sit on the company's supervisory bodies. The employees' representatives have voting rights on those bodies along with the representatives of the owners or shareholders.²³ This form of co-management only applies to the largest companies and is subject to three separate regimes governed by different laws: the regime introduced by the *Montan-Mitbestimmungsgesetz* of 1951 (1), that provided for by the *Drittelbeteiligungsgesetz* of 2004 (2), and, finally, that organised by the 1976 *Mitbestimmungsgesetz* (3). The scope of each of these laws is limited to companies of a particular legal form. In each case a minimum size of workforce applies.

1 - Co-management as introduced by the *Montan-Mitbestimmungsgesetz* of 1951

The Law of 21 May 1951 on Co-Management in the Mining and Steel Industries (*Montan-Mitbestimmungsgesetz*) was the very first law on employee co-management adopted in Germany after the Second World War.²⁴ Its scope remains limited to private limited companies and limited liability companies (GmbH) in the mining and steel sector employing more than 1,000 people (§ 1, paragraph 2 *Montan-Mitbestimmungsgesetz*). Pursuant to the provisions of this law, the supervisory board has eleven members: There is parity between workers and shareholders, whereby each group is represented by five members or four members plus one other member. The 11th seat is allocated to a neutral person. It is imperative that two of the four employees' representatives belong to the company in question and that they be put forward by the works council to the body in charge of the elections. As for the two other members and the fifth employees' representative, they are also put forward by the works council, but at the proposal of the central organisations (*Spitzenorganisationen*) after prior consultation of the trade unions represented in the company in question. Under §§ 4, 6, and 8 of the *Montan-Mitbestimmungsgesetz*, the aforementioned neutral person is appointed by the members of the supervisory board. Then, he or she is put forward to the body in charge of the vote (normally the shareholders' meeting). Besides the parity within the supervisory board, the *Montan-Mitbestimmungsgesetz* always grants the employees of the companies to which it applies the right to be represented on the management board by a human resources director (*Arbeitsdirektor*). The appointment and removal of this director always requires the agreement of the majority of the workers (§ 13 *Montan-Mitbestimmungsgesetz*).

23 W. Hromadka and F. Maschmann, *op. cit.* (n° 2), p. 226.

24 On the history of co-management in companies, see T. Raiser, "Introduction", in T. Raiser, R. Veil and M. Jacobs (ed.), *Mitbestimmungsgesetz und Drittelbeteiligungsgesetz*, 6th ed., Berlin, de Gruyter, 2015, Introduction, n° 1-36; O. Sandrock and J. J. du Plessis, in J. J. du Plessis, B. Großfeld, C. Luttermann et al., *German Corporate Governance in International and European Context*, 2nd ed., Heidelberg, Springer, 2012, p. 151 et s.

It should be noted that, on the one hand, the *Montan-Mitbestimmungsgesetz* provides for the strongest form of employee co-management. On the other hand, from the hierarchy of norms perspective, it occupies a higher position than the other provisions in this area.²⁵ This particular situation is explained by the fact that when this system was introduced in 1952, the companies in the mining and steel sector were of paramount importance to Germany's economic development. Therefore, they were paid particular attention. Today, the mining and steel sector has almost disappeared in Germany, which means that the number of companies to which the *Montan-Mitbestimmungsgesetz* applies is now very small.

2 - The "one-third parity" system introduced by the *Drittelbeteiligungsgesetz* of 2004

The second co-management regime was introduced by the Works Constitution Act (*Betriebsverfassungsgesetz*) of 19 July 1952, amended by the *Drittelbeteiligungsgesetz* of 1 July 2004. This model is based on the so-called "one-third parity" rule. Its scope is limited to the representation of employees on the supervisory boards of companies not covered by the *Montan-Mitbestimmungsgesetz* or the 1976 *Mitbestimmungsgesetz*. These companies are the public limited company (*Aktiengesellschaft* - AG), the partnership limited by shares (*Kommanditgesellschaft auf Aktien* - KGaA), the limited liability company (*Gesellschaft mit beschränkter Haftung* - GmbH), the mutual insurance company (*Versicherungsverein auf Gegenseitigkeit* - VVaG) and cooperative societies (*Erwerbs- und Wirtschaftsgenossenschaften*) with 501 to 2,000 employees (§ 1, paragraph 1, points 1-5 *Drittelbeteiligungsgesetz*).

In this version of co-management, the supervisory board has 3 to 21 members. However, it is important to note that the number of members of the supervisory board must always be odd. If the composition of the board is such that the number of employees' representatives that equals a third of the members is three or more, at least two of them must be chosen from within the company (that is to say they must be employees), whilst the rest may be from outside the company (for example trade union delegates). If this is not the case, only employees of the company in question can be chosen to represent all the staff on the board.²⁶ Employee representatives are elected directly by their fellow workers.

3 - "Parity" co-management introduced by the 1976 *Mitbestimmungsgesetz*

The third and final model of co-management is organised by the Law of 4 May 1976 (*Mitbestimmungsgesetz*). This model is considered as forming the most important legal basis for employee co-management.²⁷ Its scope covers companies organised in the form of a public limited company, a partnership limited by shares, a limited liability company, or a cooperative society, as long as they employ more than 2,000 people (§ 1, paragraph 1 *Mitbestimmungsgesetz*). However, the *Mitbestimmungsgesetz* also covers companies

25 A. Seifert, «Actionnariat salarié et gouvernance d'entreprise en Allemagne», *Bulletin de droit comparé du travail et de la sécurité sociale*, 2001, p. 196.

26 § 4 alinéa 2 *Drittelbeteiligungsgesetz*.

27 M. Henssler, „Arbeitnehmermitbestimmung im deutschen Gesellschaftsrecht“, in T. Baums and P. Ulmer (ed.), *Unternehmens-Mitbestimmung der Arbeitnehmer im Recht der EU-Mitgliedstaaten*, Heidelberg, Recht und Wirtschaft GmbH, 2004, p. 133.

governed by the 1951 *Montan-Mitbestimmungsgesetz*, religious communities, organisations with ideological aims (*Tendenzunternehmen*), such as political, charity, scientific, or cultural enterprises, as well as philanthropic or educational religious organisations depending on them (whatever their legal form).²⁸

The supervisory board in the companies that come under the *Mitbestimmungsgesetz* has 12, 16, or 20 members according to whether the company employs less than 10,000 people, between 10,000 and 20,000 people, or more than 20,000 people (§ 7, paragraph 1, sentence 1, points 1-3, *Mitbestimmungsgesetz*). Exemptions may be provided for in the articles of association of each company. However, such exemptions are allowed only if they increase the aforementioned thresholds (§ 7, paragraph 1, sentence 2, *Mitbestimmungsgesetz*). The seats on the board are divided up according to the principle of parity, whereby the employees and the shareholders hold each 50% of the seats. However, this parity is to the disadvantage of employees insofar as the chairman of the supervisory board is usually one of the shareholders' representatives and holds the casting vote if there is a tie.²⁹

For supervisory boards with six or eight employees' representatives respectively, four or six of them must belong to the company in question and have at least one year's service. As for the other two, they must be chosen by the trade unions, which must in turn be represented in the company or in one of its subsidiaries (§ 7, paragraphs 2 to 4, *Mitbestimmungsgesetz*). For supervisory boards with ten employees' representatives, seven must be employees and three trade union delegates. Their appointment is subject to the same conditions as that of the representatives mentioned above. They are elected either directly by the employees or by their delegates, depending on whether the company employs less than 8,000 employees for the first case or more for the second. However, this principle is an alternative solution that only applies when the personnel concerned by the vote have not decided otherwise. Such a decision requires a request signed by one twentieth of the employee electors, and it will only pass if 50% of the employees concerned actually voted and the decision received a majority of the cast votes (§ 9, *Mitbestimmungsgesetz*). The election of the employees' representatives by the delegates chosen in accordance with paragraphs 12 *et seq.* of the *Mitbestimmungsgesetz* takes place on the basis of proposals made on the one hand by the employees (§ 15, *Mitbestimmungsgesetz*) and on the other by the unions (§ 16, *Mitbestimmungsgesetz*).

²⁸ § 1, paragraphs 2 and 4, *Mitbestimmungsgesetz*.

²⁹ This question is dealt with in detail under point D of this paper. See also R. Lasserre, *prev. art.* (no. 1), p. 9; A. Seifert, *prev. art.* (n° 25), p. 197.

CO-MANAGEMENT (MITBESTIMMUNG) IN GERMAN LAW

The different employee co-management regimes described above can be summed up as follows:

Overview of the different employee co-management regimes³⁰

1. Depending on the company in question	Mitbestimmungs-gesetz	Montan-mitbestimmungsgesetz (1951)	MitbestErG ³¹ (1956)	DrittelbG ³² (2004)
a) Legal form	Public limited company, partnership limited by shares, cooperative society (§ 11 No. 1)	Public limited company, limited liability company (§ 1 II)	Public limited company, limited liability company (§ 1)	Public limited company, partnership limited by shares, cooperative society, mutual insurance company (VVaG) (§ 1 I)
b) Size	Over 2,000 employees (§ 1 I No. 2)	Over 1,000 employees (§ 1 II)	Over 1,000 employees in the group of companies (§ 1)	Over 500 employees (§ 1 I)
c) Scope	Does not apply to enterprises with ideological aims (so-called <i>Tendenzunternehmen</i>), such as political, charity, scientific or cultural enterprises, as well as religious organisations (§ 1 IV)	Applies only to companies in the mining sector (§ 1 I 1, 2)	Applies only in the controlling company which is not subject to the regime of the <i>Montanmitbestimmungsgesetz</i> (§ 3 I)	Does not apply to enterprises with ideological aims (so-called <i>Tendenzunternehmen</i>), such as political, charity, scientific, or cultural enterprises, as well as religious organisations and their charitable and educational institutions

³⁰ Source: W. Hromadka and F. Maschmann, *op. cit.* (n° 2), p. 239-241.

³¹ *Gesetz zur Ergänzung des Gesetzes über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie*, 7 August 1956.

³² *Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat*, 18 May 2004.

2. According to the supervisory board	Mitbestimmungsgesetz	Montan-mitbestimmungsgesetz (1951)	MitbestErG (1956)	DrittelbG (2004)
a) Summary	<p>Up to 10,000 employees: 6 members for the employees and 6 members for the shareholders</p> <p>Up to 20,000 employees: 8 members for the employees and 8 members for the shareholders</p> <p>Over 20,000 employees: 10 members for the employees and 10 members for the shareholders (§ 7 I)</p> <p>Parity</p>	<p>4 shareholders' representatives and 1 other member 4 employees' representatives and 1 other member 1 other member (§ 4 I)</p> <p>In companies with a share capital of more than: - 10 million euros: optionally 15 members - 25 million euros: optionally 21 members (§ 9)</p> <p>Parity and neutral member</p>	<p>7 shareholders' representatives 7 employees' representatives 1 other member (§ 5 I 2)</p> <p>In capital companies with over 25 million euros: optionally 21 members (§ 5 I 3)</p> <p>Parity and neutral member</p>	<p>1/3 of the members represent the employees (§ 4 I)</p> <p>1/3 parity</p>
b) Employees' representatives	<p>With 6 members: 4 employees of the company 2 union representatives</p> <p>With 8 members: 6 company employees 2 union representatives</p> <p>With 10 members: 7 company employees 3 union representatives (§ 7 II)</p>	<p>2 company employees</p> <p>2 members and 1 other member put forward by the umbrella organisation (<i>Spitzenorganisation</i>) (Exception: see § 4 II)</p> <p>§§ 4 I 2 lit. B, 6 I 1</p>	<p>5 employees of the company belonging to the group of companies</p> <p>2 union representatives (§ 6 I 2)</p>	<p>At least two company employees (§ 4 II)</p>

II - EXTENT OF EMPLOYEE CO-MANAGEMENT IN THE SUPERVISORY BOARD (*AUFSICHTSRAT*)

In order to grasp the extent and the importance of the employee co-management in German companies, it is necessary to analyse the powers of the supervisory board (A) and to determine who, between the employees and the shareholders, prevails within the supervisory board (B).

A - THE POWERS OF THE SUPERVISORY BOARD

German company law has the particularity of strictly separating the management and the supervision functions.³³ The management of a public limited company is exercised by the management board (*Vorstand*), whilst the supervisory board (*Aufsichtsrat*) oversees the management board. Unlike French law, German law does not allow companies to choose between a monistic system (with a board of directors) and a dualistic system (with a management board and a supervisory board). Under German law, every public limited company is obliged to adopt the dualistic system and to set up both a management board and a supervisory board.³⁴ This strict separation of the management and the supervision functions is implemented through a set of binding rules that impose compliance with the three following principles:

- Independent management carried out by the management board;
- Limitation of the supervisory board's role to the supervision function;
- Legal impossibility of being a member of both the management board and the supervisory board at the same.³⁵

The management board is responsible for the management of the company (§ 76 *Aktiengesetz*).³⁶ The supervisory board may not exercise any management functions.³⁷ However, its role is not only to oversee or supervise, but also to dialogue and advice. Especially in public limited companies, the supervisory board is an important supervision body, in that it appoints and removes the members of the management board (§ 84, paragraph 1, *Aktiengesetz*), oversees their actions (§111, paragraph 1, *Aktiengesetz*), and represents the company, where appropriate, in its relations with the management board (§ 112 *Aktiengesetz*). It also decides the compensation of the members of the management board (§ 87, paragraph 1, *Aktiengesetz*).³⁸ In addition, the supervisory board may subject the completion of certain transactions to its prior agreement (§ 111, paragraph 4, *Aktiengesetz*). The examination of the company's consolidated annual financial statements, which can have an influence on dividend distribution policy, is a power exercised jointly by

33 C. Teichmann, *prev. art.* (n° 6), p. 16.

34 The only way for a public limited company to circumvent this mandatory rule would be to convert into a European company, which has its own system of employee participation.

35 § 105(1) *Aktiengesetz*: „Ein Aufsichtsratsmitglied kann nicht zugleich Vorstandsmitglied ... sein“.

36 § 76 *Aktiengesetz*: „Der Vorstand hat unter eigener Verantwortung die Gesellschaft zu leiten“.

37 § 111(4) 1 *Aktiengesetz*: „Maßnahmen der Geschäftsführung können dem Aufsichtsrat nicht übertragen werden“. It should be noted, however, that legal opinion is tending more and more towards having the supervisory board assume a role of advisor to the management board.

38 See also § 107, paragraph 3, third sentence *Aktiengesetz* as well as the *Gesetz zur Angemessenheit der Vorstandsvergütung* of 5 August 2009 (BGBl. I, p. 2509).

the management board and the supervisory board (§ 172, AktG in conjunction with § 264, paragraph 1, second sentence, *Handelsgesetzbuch*).

The employees' representatives on the supervisory boards of public limited companies have voting rights with the same weight as the shareholders' representatives. They have access to all the information on the company's economic and financial situation and are involved in all the major decisions concerning the distribution of profits and the investment policy. They take part in all the decisions relating to the choice of directors, mergers and acquisitions as well as the company's new development policies. Therefore, they have a power of oversight and supervision.³⁹ This power must be exercised in the interests of the company as a whole and not only in the workers' interests. Obviously, it is true that the employees' representatives are naturally closer to the workers' concerns. Nevertheless, it would constitute a misconduct if they exercised their duties solely in the interests of the workers. In that case, they could be liable to pay damages.

In the limited liability company (*GmbH*), the members appoint the managers of the company (§ 46 No. 5, *GmbHG*). The same applies to companies operating under the one-third party co-management system.⁴⁰ On the other hand, in mining companies and large corporations, the supervisory board has the power to appoint managers of the company as it does in public limited companies (§ 12 *Montan-Mitbestimmungsgesetz*, § 31 *Mitbestimmungsgesetz*). In addition, the supervisory board decides the compensation of the managers.⁴¹ As in private limited companies, the supervisory board of limited liability companies in the mining sector may subject certain decisions by the managers to its prior agreement (§ 3, *Montan-Mitbestimmungsgesetz* in conjunction with § 111, paragraph 4, *AktG*). However, the general meeting may impose binding instructions on the management, thereby overriding certain decisions taken by the board of directors.⁴²

B - THE PREPONDERANCE OF THE SHAREHOLDERS WITHIN THE SUPERVISORY BOARD

Notwithstanding the employee co-management rules, the shareholders remain the predominant actors within the supervisory board. This preponderance of the shareholders is guaranteed not only in the case of parity participation of the shareholders and the employees, but also in cases where the employees hold a third of the seats on the company's supervisory board.

39 W. Hromadka and F. Maschmann, *op. cit.* (n° 2), p. 235.

40 Comp. § 77, par. 1, second sentence *BetrVG* 1952.

41 BGH 14 November 1983, *Neue Juristische Wochenschrift* (NJW) 1984, p. 733. It is important to note that the application of the rules of the management board of the public limited company to the supervisory board of the GmbH is the subject of some debate. For more details on this debate, see V. Rieble and B. Schmittlein, *Vergütung von Vorständen und Führungskräften Vergütungsregulierung durch VorstAG und Aufsichtsrecht*, Munich, Beck, 2011, par. 32 et s. Nevertheless, these rules should not be applied to the supervisory board of the GmbH due to the fact that neither the *Mitbestimmungsgesetz* nor the *GmbHG* refers to the new wording of § 87, *AktG*.

42 W. Zöllner, K.-G. Loritz and C. W. Hergenröder, *Arbeitsrecht*, 7th edition, Munich, Beck, 2015, § 53 III 3.

In fact, it has already been noted that the *Drittelbeteiligungsgesetz* provides that one third of the seats on the supervisory board must be occupied by employees' representatives. The scope of this law extends to all private limited companies and all limited liability companies employing more than 500 people. In such a system where employee participation involves a third of the seats on the supervisory board, the shareholders' representatives clearly predominate as they hold two thirds of the seats. This means, therefore, that the shareholders are always able to pass their resolutions even if they are opposed by the employees' representatives.

However, the preponderance of the shareholders appears less obvious in cases of so-called "parity" representation. It has already been explained above that this type of participation is organised by the *Mitbestimmungsgesetz*, which applies to private limited companies and limited liability companies employing more than 2,000 people. In these companies, the employees' representatives account for half the members of the supervisory board. This could lead one to believe that the employees' representatives have the possibility of using their vote to block decisions, to the detriment of the shareholders. Yet this is not the case as the preponderance of the shareholders is guaranteed by the fact that the chairman of the supervisory board has the casting vote. Indeed, the rules relating to the procedure for electing the chairman of the supervisory board result in the fact that the chairman of the supervisory board is practically always a representative of the shareholders. More particularly, the chairman of the supervisory board is elected in the first round of voting by the members of the supervisory board. If no candidate obtains a majority, the chairman is elected in a second round of voting only by the shareholders' representatives. Consequently, the chairman is practically always a representative of the shareholders. Therefore, this means that the so-called "parity" system of participation is not parity representation in the strictest sense.⁴³ It is important to emphasise that these provisions that guarantee the preponderance of the shareholders are an essential condition that guarantees that the co-management does not breach the property rights of the shareholders, which are guaranteed by the German Constitution (*Grundgesetz*).⁴⁴

43 C. Teichmann, *prev. art. (n° 6)*, p. 14.

44 See the decision of the German Constitutional Court (*Bundesverfassungsgericht*) on co-management, published in the Court's collection of its decisions (*Bundesverfassungsgerichtsentscheidungen*, BVerfGE, 50, p. 290 et s.).

Conclusion and prospects for reform of the employee co-management system

The employee co-management under German law may be considered not only as a factor of social cohesion, but also as one of the essential elements behind the good performance of German firms.⁴⁵ Whilst not affecting the preponderance of the shareholders within the supervisory board,⁴⁶ co-management guarantees that a permanent social dialogue is maintained at the top of the company. It enables employees, thanks to their precise knowledge of the company's actual circumstances, to better defend their interests and to rebalance the debates within the decision-making bodies.⁴⁷ The success of the German co-management system is certainly due to the readiness to compromise (*Kompromissbereitschaft*) that characterises the German culture. Indeed, seeking a consensus is perceived in Germany not as a weakness, but rather as a strength that gives to decisions greater legitimacy.⁴⁸ There is no doubt that this aspect could generate an enthusiasm for the German system of co-management with Germany's neighbours, with France in particular.

However, it is necessary to point out that the co-management arrangements as they have been organised since the nineteen seventies are not unanimously popular in Germany. It is true that co-management within the supervisory boards of large corporations is regularly approved by almost all German political parties, in particular the Christian Democrats and Social Democrats. Even the representatives of industry and the business community, who after the *Mitbestimmungsgesetz* came into effect in 1976, initially challenged parity co-management in the Constitutional Court,⁴⁹ accepted the presence of workers on the supervisory board in the end. However, the fact is, and this should not be neglected, that a considerable number of German companies get round the co-management rules, either by setting up a European Company or by using a company registered abroad on the basis of the European freedom of establishment.⁵⁰ This concerns, of course, but a minority of companies. nevertheless this development confirms the need for a reform of the co-management rules in German law, all the more so as these rules do not take account of employees being hired by German companies or their subsidiaries but having

45 R. Lasser, *prev. art.* (n° 1), p. 8.

46 C. Teichmann, *prev. art.* (n° 27), p. 153-154.

47 R. Lasser, *art. préc.* (n° 1), p. 10.

48 J.-L. Beffa, *La France doit choisir*, Paris, Seuil, 2012, p. 210.

49 See above, footnote n° 44.

50 C. Teichmann, "Mitbestimmungserstreckung auf Auslandsgesellschaften", *Zeitschrift für Wirtschaftsrecht (ZIP)*, 2016, p. 899.

their workplace abroad.⁵¹ In the opinion of several authors, a reform of the German co-management system should take account of the European model consisting of negotiation between workers and corporate bodies on the system of co-management.⁵²

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- 51 The Court of Justice has just confirmed that the exclusion of employees employed abroad complies with European Union law (C-566/15 (*Erzberger/TUI AG*), ECLI: EU: C: 2017: 562).
- 52 See the summary of the discussion by O. Sandrock and J. J. du Plessis, *prev. art. (n° 24)*, p. 187-191. For a more recent analysis, see C. Teichmann, „Reform der Unternehmensmitbestimmung durch Einführung einer Verhandlungslösung“, in M. Habersack, C. Behme, H. Eidenmüller et al. (ed.), *Deutsche Mitbestimmung unter europäischem Reformzwang*, Heidelberg, Deutscher Fachverlag GmbH, 2016, p. 135-161.

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~ C. Teichmann, « Le dirigeant d'Aktiengesellschaft en Allemagne », dans Chaput/Lévi (ed.), *La direction des sociétés anonymes en Europe - Vers des pratiques harmonisées de gouvernance ?*, Litec, Paris, 2009, p. 9-54.

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Publications :

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~ J. Monsenepwo, « Apport des instruments de la Conférence de La Haye au droit des affaires dans l'espace OHADA », *Schriftenreihe Junges Afrikazentrum*, n° 5, 2016, p. 1-30.