

## Germany

by Roland Köstler \*

### Foreword

From October 2004 on, it will be possible to found a European Company (SE): a company with a European legal identity. Employee involvement in an SE is governed by a supplementing Council Directive and by national laws on transposition. 'Involvement of employees' is defined in the Directive as any mechanism that includes information, consultation, and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company.

In Germany, participation is a long-standing tradition:

The recognition by law of unions as the collective bargaining party and also as a legal basis for electing works councils at plant level started after the First World War. Shortly after, in 1922, a law was created for delegating one or two members of the works council to the supervisory boards of stock companies. Since then, we have had a dualistic approach for representing workers' interests: collective agreements by trade unions, and 'legally independent' works councils.

All that resumed after the Second World War. The experiences with fascism were among the reasons why representation at board level was expanded.

From 1951, through 1952 and 1976 (see the details of the laws illustrated below) to the present day, the legislative acts have been one thing; practice and, in particular, the interlocking of the various players quite another:

Everything is dependent on the corporate legal structures: in Germany we have the two-tier system with a board of management that runs the company and a supervisory board to appoint and control management. However, the size and the internal structure of the workers' representation in the boards differs under the various laws (even the details for Groups of Companies differ). These particulars must then be viewed against their respective historical backgrounds (as will be shown below). The election procedures are also different, although the election period is generally for about 5 years.

It is also important to note that according to two of the laws (Acts of 1951, 1976), we have trade union representatives on the supervisory board who are not employees of the company (only unions with members in the company can make proposals for these seats).

The work in the supervisory boards proceeds adequately only if it is related to the day-to-day work of the works councils in the plant, the company, and even the group (for example, with preliminary meetings where certain information is assembled and strategies are discussed), and naturally also that of the trade unions.

---

\* Head of Economic Law division of the Hans Böckler Stiftung, Düsseldorf (Foundation of the German Federation of Trade Unions)

And you must always consider that the work of the unions, especially the collective bargaining process, is distinct from the discussions in the supervisory boards and the business of the works councils.

So, representation of workers' interests at board level (employee involvement, in the language of the SE, or co-determination as it is called in Germany) is only one tool for serving workers' interests.

The following pages should provide an idea of that form of participation. They also explain why for us – in the light of our traditions and our awareness of that tool's possibilities – that representation is so important for the forthcoming European companies.

### **Legal foundations**

Corporate Co-determination is based on three laws:

- **the Coal and Steel Industry Co-determination Law of 1951,**
- **the Works Constitution Act of 1952 &**
- **the Co-determination Law of 1976.**

They regulate the election process, but for the practice of the Board of Management and the Supervisory Board in the last analysis, the legislation applicable to public limited companies is relevant:

### **Corporate legal structures**

according to the German Stock Corporation Law (AktG). The structure is called: The Two-tier / Dualistic System because of the two organs:

#### ***The board of management***

- manages the company, plans, coordinates and supervises the company's activities.

#### ***The supervisory board***

- appoints and monitors the Board of Management
- possesses rights of information and audit
- has the right to approve business decisions

and we have naturally: ***The General Meeting of Shareholders***

- elects representatives of the shareholder side to sit on the Supervisory Board
- formally approves the actions of the Board of Management and the Supervisory Board
- makes decisions on the articles of incorporation and disposal of profits

## **Company co-determination in detail**

### **1. Appointment of management**

The Supervisory Board appoints the members of the Board of Management for a fixed period of time and is also responsible for the employment contracts (salary) and the size of top management.

Every board member is appointed on the basis of a majority decision. In the spheres covered by the Coal and Steel Industry Co-determination Act and the 1976 Act, a so-called Personnel Director has to be appointed. In the Coal and Steel Industry this cannot occur against the votes of a majority of the workforce representatives on the Supervisory Board, so in effect the trade union representatives on the Supervisory Board have a right of nomination in this respect. In the case of the Co-determination Act 1976, the first vote has to produce a two-thirds majority in the case of all managerial (also the Personnel Director) appointments. If this is not forthcoming, the matter goes to arbitration by a committee based on equal representation of both sides of the Supervisory Board. In practice, therefore, decisions on such matters are usually made on a consensual basis.

### **2. Monitoring of the Board's management of the company's business operations**

The task of the Supervisory Board is to monitor the management. The latter is obliged to inform the Supervisory Board on business policy and other basic aspects of corporate planning at least once a year and to provide information on business operations on a regular – at least quarterly – basis. This should not only occur within the framework of meetings (minimum number of meetings varies from 4 to 2 – with a individual minority right to special meetings) but also in other contexts. The Supervisory Board and individual members can request further information required for the purposes of monitoring and discussion.

The Supervisory Board as a whole can also decide to launch investigations either by individual members or by experts.

### **3. Business operations requiring Supervisory Board approval**

The Supervisory Board has to draw up a list of business operations that are important for the company and which it has therefore decided will require its approval. It is, however, not permitted for management activities to be transferred to the Supervisory Board. The Board of Management may not then undertake such activities without the approval of the Supervisory Board. It is thus possible, via discussion, to exert an influence on company policy, even when you don't reach a majority in the Board. This is one of the reasons why, in practice, disagreements can occur over the range and the details of such lists. If the Supervisory Board withholds approval, the meeting of shareholders can reverse this decision but only by a 75% majority vote.

### **4. Scrutiny of annual accounts**

The Supervisory Board scrutinises the annual accounts, the annual report and the proposals for disposal of profits and has to provide a written report on these to the shareholders' meeting. To help it in this task it also commissions an auditor, who makes a written report for the members of the Supervisory Board and reports during the Supervisory Board meeting on the main results of his audit. The profitability of the company also has to be discussed at this meeting.

In its report, the Supervisory Board also has to inform the General Meeting of Shareholders about the manner and extent to which it has scrutinised the management of the company's business operations during the business year.

In public limited companies, the Board of Management and the Supervisory Board can jointly approve the annual accounts. This means that the accounts have then been certified and the Meeting of Shareholders can only make decisions regarding disposal of the net profit for the year.

### **5. Duty of care and confidentiality**

The Supervisory Board and every member thereof is bound by the duty of care of any properly authorised scrutiner. By the nature of things, the different origins of the members of the Supervisory Board mean that in practice there can be disagreement on this. The same goes for the corporate goals pursued by management and their implementation within the company (especially with regard to human resources measures.)

Confidentiality has to be maintained on matters related to company secrets. Properly interpreted, this is provision intended to protect the company from its competitors and not to isolate the employee representatives on the Supervisory Board from their colleagues in the works councils and the unions.

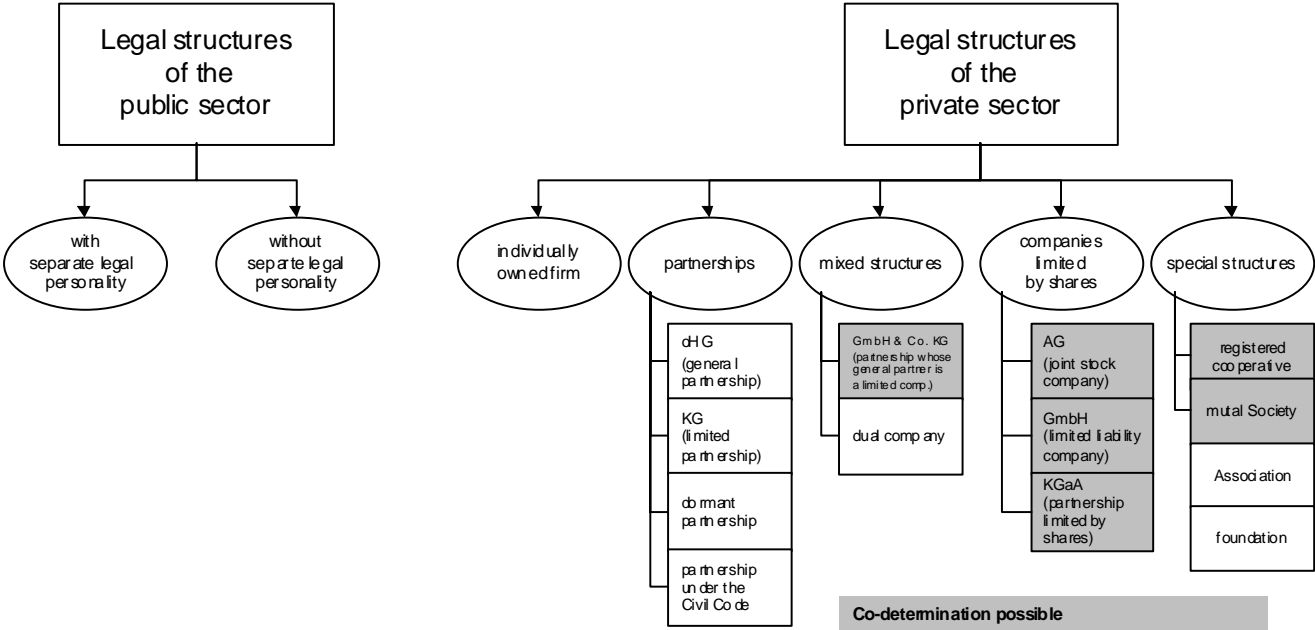
### **6. Workforce representatives on the Supervisory Board**

The individuals elected to represent the workforce on a body within an incorporated firm clearly have a special role allocated to them. On the other hand: they have the same rights in the Board as the shareholder-members, even in the matter of remuneration they get extra to their fees as workers or works council members (by agreement, union members contribute a certain amount of the remuneration to the Hans-Boeckler-Foundation).

To come back to the special role: There is no such thing as ‘company interests’ which have priority above all else and the interests of the employees are an element brought in here as well as those of the shareholders. In practice, the two principles of co-operation and the representation of diverse interests can be compatible, provided there is a proper and timely flow of information. This includes the workforce representatives on the Supervisory Board regarding themselves as part of the system of employee participation. Work on the Supervisory Board should be linked to the activities of the Works Council members and carried out in collaboration with the trade unions represented within the company / group.

The employee representatives can and should elucidate the problems related to their work also to the workforce in general. This can be done in such a way that it does not conflict with their duty of confidentiality.

# Survey of Legal Structures of Companies in Germany



# MATRIX

## Scope of the Coal, Iron and Steel Industry Codetermination Act, the Codetermination Act of 1976 and the Works Constitution Act of 1952

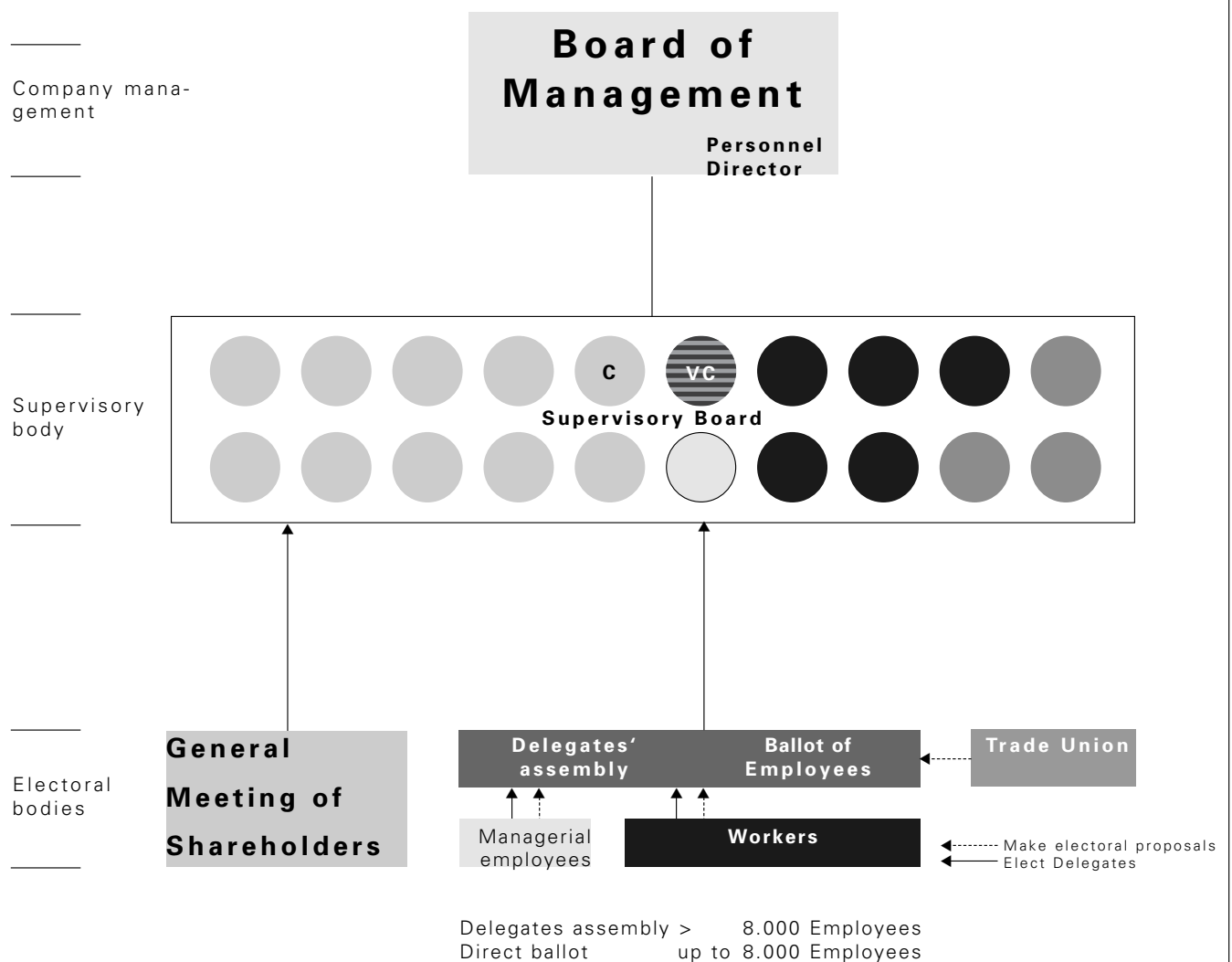
Object and /or legal form		No. of employees*			
		0 – 500	> 501 – 1000	1001 – 2000	over 2000
<b>Ideological establishments</b> (§ 81 Works Const. Act 1952; § 1 IV Codetermination Act)					
Undertakings under private law (except ideological establishments and coal, iron and steel companies)	<b>Individually owned firm</b>				
	<b>OHG (general partnership)</b>				
	<b>KG (limited partnership)</b>				
	<b>GmbH &amp; Co. KG</b>				<b>Codeterm. act, § 4**</b>
	<b>Mutual insurance society</b>		§ 77 II		
	<b>Registered cooperatives</b>		§ 77 III		
	<b>GmbH (limited liability company)</b>		§ 77 I		
	<b>KGaA (partnership limited by shares)</b>	No codeterm. (if registration before 10.8.94 only if family enterprise, § 76 VI)	§ 76 I Works Const. Act of 1952 in connection with § 129 I Works Const. Act		<b>Codeterm. act, § 1 I</b>
<b>AG (joint stock company)</b>	§ 76 I				
Coal, iron and steel companies acc. to 11 Coal, Iron and Steel Industry Codetermination Act	<b>AG (joint stock company)</b>		§ 76 I		
	<b>GmbH (limited liability company)</b>		§ 77 I	<b>Coal, Iron and Steel Industry Codeterm. Act, § 1 II</b>	

\*Possibly additions according the respective relevant rules for groups.

\*\*Only the general partner (GmbH, AG) is liable to practice codetermination, whereby under §4 of the Codetermination Act the employees of the limited partnership are numbered among those of the general partner.

# THE SUPERVISORY BOARD

## COMPOSITION ACCORDING TO 1976 LAW ON CO-DETERMINATION

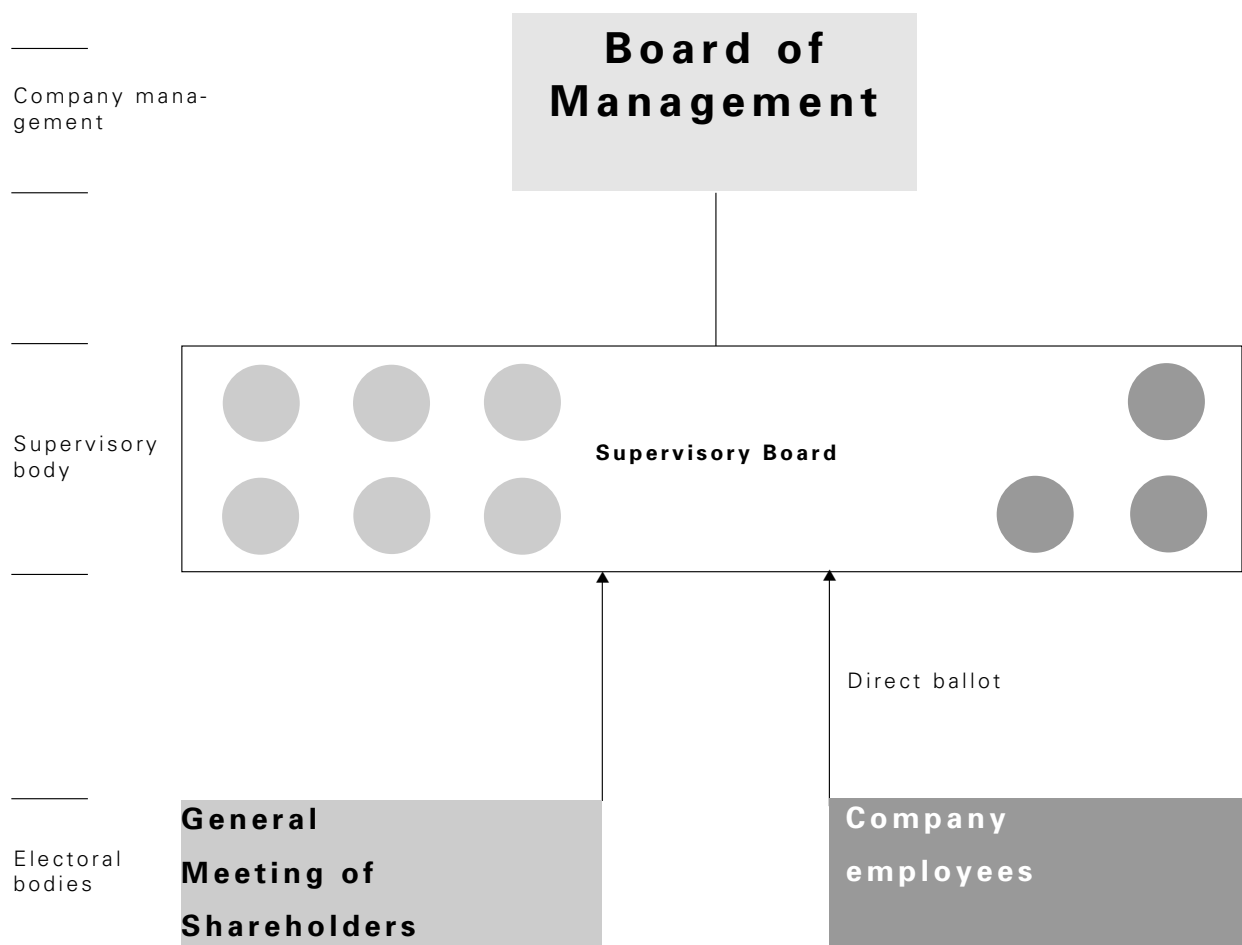


Size of the Supervisory Board:  
**12** up to 10.000 Employees  
**16** up to 20.000 Employees  
**20** more than 20.000 Employees

Actually about 767 Companies

# THE SUPERVISORY BOARD

## COMPOSITION ACCORDING TO 1952 WORKS CONSTITUTION ACT

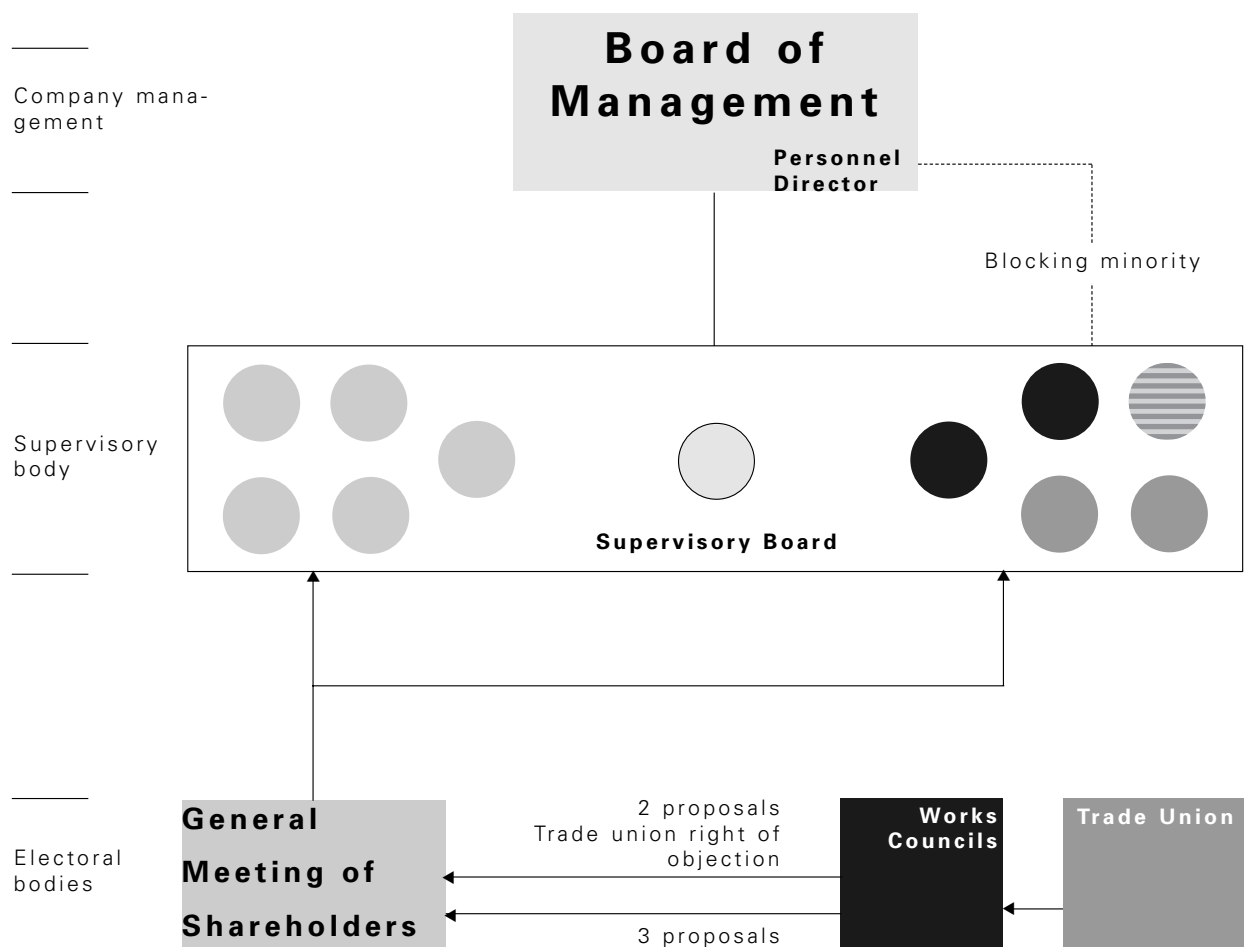


Size of the Supervisory Board:  
3 up to 21 (depending on share capital)

Actually about 2.000 Companies

# THE SUPERVISORY BOARD

COMPOSITION ACCORDING TO COAL AND STEEL  
CO-DETERMINATION LAW OF 1951



Size of the Supervisory Board:  
11, 15, 21 (depending on share capital)

Actually about 50 Companies