

Germany

Introduction

In the Federal Republic of Germany, there is a strict distinction between the organisation of employees through trade unions and the organisation of employees through Works Councils. In particular, Works Councils do not have the right to call for strikes. They are rather obligated to work together with the employer on the basis of mutual trust and cooperation (*vertrauensvolle Zusammenarbeit*). Trade unions, on the other hand, may call for industrial action, provided the legal conditions are met. However, both systems of employee representation have a long historical tradition, as well as an important practical meaning for companies doing business in Germany.

Purpose And Practical Importance Of Union Representation

At the end of the 19th century, the first trade unions were founded aimed at the improvement of the appalling working conditions during the initial period of industrialisation. As a result of these actions, collective bargaining agreements (*Tarifverträge*) were established as a unique source of employment law. The purpose of collective bargaining is to ensure that the working conditions are negotiated between equal parties rather than by the individual employee, who has generally been considered to have less influence than his or her employer.

Today, the practical importance of collective bargaining agreements is obviously high. Every year, approximately 7,000 new collective bargaining agreements are concluded, which means that currently there are more than 69,600 collective bargaining agreements in force. These agreements are directly effective for about seven million employees, and a much higher number of individual employment agreements refer to the working conditions set forth in collective bargaining agreements. Also, about 454 collective bargaining agreements are declared to be mandatory by decree of the Federal Ministry of Labour and Social Welfare, meaning that even if an employer has not concluded a collective bargaining agreement or referred to it in the employment agreement, it has to comply with the provisions of a mandatory collective bargaining agreement, provided the employer falls within the scope of applicability of such agreement.

Purpose And Practical Importance Of Works Councils

From the beginning of its development in the middle of the 19th century, the idea of employee representation by Works Councils has been separate from the organisation through trade unions. The purpose of the Works Council, generally speaking, is to enable employees to participate in decisions concerning the organisation of the business and the workforce in its entirety. While collective bargaining agreements deal particularly with material working conditions (e.g., remuneration, working time, etc.), the rights of Works Councils mainly relate to formal working conditions that must be regulated uniformly for all employees of the business and that are normally subject to the employer's right of direction.

According to information from the Federal Ministry of Labour and Social Welfare, about 35% of all employees are currently engaged in businesses in which Works Councils exist. As a matter of practice, most sizeable businesses have a Works Council, while in smaller businesses there is often no need to form a Works Council since the employees are in close contact with their employer.

Sources Of Collective Labour Law

The laws dealing with the organisation of employees through trade unions and the representation of employees through Works Councils are called collective labour law. They are distinguished from individual labour law which contains the rights and obligations of employers and employees as set forth by statute or provided for by contract. The main sources of collective labour law are:

1. Art. 9 para 3 of the German Constitution (*Grundgesetz*, or "GG");
2. The Collective Bargaining Act (*Tarifvertragsgesetz*, or "TVG");
3. The Works Constitution Act (*Betriebsverfassungsgesetz*, or "BetrVG");
4. Collective bargaining agreements between a trade union and either an individual employer (*Firmentarifvertrag*) or an employers' association (*Verbandstarifvertrag*); and,
5. Works agreements between the Works Council and the employer (*Betriebsvereinbarung*).

Trade Unions

The General Role Of Trade Unions

The main function of trade unions is to negotiate and enter into collective bargaining agreements with either an individual employer or an employers' association. If a certain employer is a party to such an agreement, or is a member of an employers' association that concluded a collective bargaining agreement, the provisions of the agreement have direct legal consequences for the relationships between the employer and union members working in its enterprise. Provisions of individual employment agreements deviating from the working conditions set forth in a collective bargaining agreement are valid only if they are in favour of the employee concerned (Sec. 3 and 4 TVG). During the term of the collective bargaining agreement, industrial disputes regarding working conditions contained in the agreement are unlawful.

Furthermore, union representatives are allowed to represent union members in labour court proceedings.

In addition to the above-mentioned functions, trade unions also generally play a very important role as political lobbyists. Without the unions' informal consent, it is rather difficult to enact or amend employment law provisions in Germany.

Constitution Of A Trade Union

Art. 9 para 3 of the German Constitution guarantees the constitutional right to freely establish trade unions and employers' associations. In order to be qualified, a trade union must be formed freely and voluntarily in order to improve employees' working conditions. In particular, it must be independent and have no members of the opposing party, such as employers (*Gegnerfreiheit*). Also, it must be powerful enough to negotiate collective bargaining agreements with the opposing party (*Mächtigkeit*). However, unlike in other jurisdictions, it is not necessary in Germany for a union to be expressly recognised before entering into collective bargaining negotiations. As a matter of fact, the most powerful and important German trade unions are affiliated with the Confederation of German Trade Unions (*Deutscher Gewerkschaftsbund* or "DGB") and organised with regard to different lines of business. According to the statutes of the various associated unions, one union is solely competent to conclude collective bargaining agreements with all employers within a specific line of business or the

respective employers' association. Recently, there is a growing tendency to establish unions for specialized employees, such as pilots (*Vereinigung Cockpit*) or hospital doctors (*Marburger Bund*), since these groups do not feel represented by the DGB unions.

The Scope Of Trade Union Rights In Businesses

The BetrVG grants trade unions substantial rights that can be exercised either in collaboration with or without regard to the Works Council, provided that the union is represented in the business (i.e., that it has at least one member employed in the particular business). Unions may influence to a certain extent the Works Council elections, can take the employer to court in case of gross violation of its duties under the BetrVG, and have certain consulting authority in connection with training and education seminars for Works Council members. Furthermore, unions are permitted to be present at every session of the general works assembly (*Betriebsversammlung*). Additionally, subject to some restrictions (e.g., obligatory security regulations, protection of trade secrets, etc.), union officials have the right to access the employer's premises in order to exercise their rights provided by the BetrVG. The right of free access, however, does not exist for general union purposes. Nevertheless, according to a recent judgement of the Federal Labour Court, trade unions are entitled to recruit or enlist new trade union members also through employees not working in the employer's business.

The Function Of Trade Union Representatives

In addition to the union rights contained in the BetrVG, unions can exercise some influence within the business through spokesmen (*Vertrauensleute*), whose function is to provide a contact or liaison between the union organisation and its members. Given the extensive participation rights granted to the Works Council, however, union spokesmen, in practice, have little meaning.

Works Councils

The most important representative body under the BetrVG is the Works Council, Nevertheless, further representative bodies may be established, such as the committee for managerial employees (*Sprecherausschuss*), the youth and trainee representation (*Jugend- und Auszubildendenvertrag*), or the severely disabled employees' representation (*Schwerbehindertenvertretung*).

General Requirements And Principles

Requirements For The Establishment Of Works Councils

The BetrVG applies to private enterprises regardless of their legal form, such as stock corporations (*Aktiengesellschaft*) or companies with limited liability (*GmbH*), but not to federal, state, or municipal agencies or authorities, or to any enterprises incorporated as legal persons under public law. The territorial application of the BetrVG extends to all businesses located in Germany, regardless of whether or not the employer and the employees are German citizens or whether or not the individual employment agreements are governed by German law.

According to Sec. 1 BetrVG, a Works Council may be established in businesses which regularly have at least five permanent employees eligible to vote, of whom three are eligible for election. Employees are eligible to vote if they have reached the age of 18. Employees of the business are entitled to be elected if they have been employed for at least six months, unless the business has been in existence for less than six months.

If the preconditions for setting up a Works Council are not met, the employees are not allowed to individually exercise the collective rights granted by the BetrVG. Even if the conditions are met, there is no statutory obligation to establish a Works Council, neither for the employer nor for the employees. The employer, however, has to refrain from any action that could impede or interfere with the formation of a Works Council. Otherwise, the employer can be subject to imprisonment of up to one year or to criminal fines.

With regard to the requirements for setting up a Works Council, the BetrVG refers to the terms “business” and “employee.” However, it defines neither the term “business” nor the term “employee.” Therefore, both terms have to be clarified with reference to the general definitions in German labour law.

Business And Subordinate Business

Generally, the term “business” is defined as a unit of organisation or establishment in which the entrepreneur, either alone or together with its employees, pursues – on a continuing basis – operational purposes with the assistance of means both tangible and intangible. Consequently, a business establishment is not an enterprise in its entirety, but is the individual unit in which people work. As a rule of thumb, a unit is considered to be a business as meant in the BetrVG if it has a human resources department in which all important decisions regarding personnel are made.

If a unit does not meet the above-mentioned preconditions of Sec. 1 BetrVG, it is a subordinate establishment of another business. Such subordinate business for Works Council purposes is considered as one unit together with the main business, and its employees are deemed to be employees of the latter. A subordinate business is defined as any business establishment that meets the general definition of a business and serves the main business in a subordinate function. In the event that such a subordinate business meets the conditions contained in Sec. 1 BetrVG, a separate Works Council can be established if the subordinate business is located some distance from the main business and is independent in terms of functions and organisation (Sec. 4 BetrVG).

Employees And Managerial Employees

Under German labour law, an “employee” is defined as a person who, by individual employment contract, is obliged to render services for another person as directed by the latter. The main criterion for distinguishing employees from self-employed independent contractors is whether or not the individual is personally dependent on the person who requests his or her services. The BetrVG does not cover self-employed independent contractors, but it does cover all types of employees who permanently work in a business unit, including, for instance, part-time employees.

Sec. 5 para 2 and para 3 BetrVG expressly exclude from coverage certain groups of persons, regardless of whether they can be considered as employees under the general definition. In particular, this holds true for individuals who act as legal representatives of the business or enterprise pursuant to the applicable civil or commercial law provisions (e.g., managing directors [*Geschäftsführer*] of a company with limited liability or members of the board [*Vorstand*] of a stock corporation) and managerial employees (*leitende Angestellte*). According to Sec. 5 para 3 BetrVG, managerial employees are those who:

1. Are authorised to independently employ and terminate employees of the entire or a part of the business unit;
2. Have certain statutorily defined powers to represent the company, i.e., general power of attorney (*Generalvollmacht*), procuration (*Prokura*), etc.; or,
3. Exercise duties of specific importance for the existence and the development of the enterprise or a business unit, whereby they either independently decide upon how they carry out their duties without being subject to detailed instructions of their employer or significantly influence decisions of the employer.

Particularly with respect to the third category, it is often very difficult to determine whether an employee can be considered as a managerial employee and, therefore, cannot vote for and is not represented by the Works Council. In case of a dispute, the labour court is competent to decide if a person can be grouped into the category of managerial employees.

Scope Of Representation

The Works Council created in a business unit only represents the employees who belong to that specific business. The affiliation to a certain business unit can be particularly difficult with respect to employees whose services are made available to another employer (e.g., an affiliated company). If employees are temporarily leased from one company to another, the employees on the payroll of the lending company generally remain members of that company's business, even if they are borrowed for a longer period of time and, thus, are integrated into the organisation of the borrowing company. The same holds true in relation to employees who are temporarily transferred to a foreign company. On the other hand, the German Works Council does not, under any circumstances, represent employees who work in and are hired by foreign branches of German companies irrespective of whether the foreign branch is independent or considered to be subordinate to the parent business.

The Co-operation Between Employer And Works Council

Since the German Constitution guarantees economic freedom, the employer, as an entrepreneur, is granted freedom of decision, which cannot be and is not overridden by the BetrVG. Hence, fundamental economic or business decisions are reserved to the employer as a result of its control of the property and the facilities.

Within this framework, the employer shall, in furtherance of the interests of the employees as well as the business, co-operate with the Works Council in good faith, thereby observing applicable collective bargaining agreements. As a consequence of this general principle, the employer, for instance, may not unlawfully interfere with the work of the Works Council, shall observe and safeguard the principle of non-discrimination, and shall inform the Works Council in a timely and complete manner in order to enable the latter to duly and properly exercise its functions under the BetrVG. The Works Council, on the other hand, must not disturb the operations or the peace in the workplace (i.e., it must not agitate against the employer or distribute provocative pamphlets). Industrial disputes are not allowed on the works level, but are limited to trade unions. On the contrary, the employer and the Works Council

shall meet together at least once a month and discuss problems with the clear purpose of reaching a mutual understanding. Secret information that Works Council's members receive from the employer in connection with their office must be kept confidential.

In case of a gross infringement of the duties under the BetrVG, the employer is entitled to apply to the labour court for the dissolution of the Works Council or the expulsion of an individual Works Council's member.

Election Of Works Councils

In Germany, Works Councils are elected at four-year terms. Since the last elections were held in 2006, the next elections will be in 2010. When a Works Council is elected in a business for the first time, it remains in office until the following May 31, falling within the sequence of four-year intervals, provided that there is at least one calendar year between the date of the election and that May 31. Afterwards, Works Council elections are regularly held from March 1 until May 31, except elections that become necessary for extraordinary reasons, such as the dissolution of the Works Council or material changes in the number of persons employed in the business.

The Works Council election is organised by an election committee that, in cases of the first election of a Works Council, is elected by the general works assembly (*Betriebsversammlung*) or appointed by the Works Council in office. The election committee has a duty to organise the election in an expeditious and timely manner and to count the votes. Members of the election committee are entitled to paid time off in order to perform their duties and are protected against termination of employment.

The members of the Works Council are elected directly by the employees. The election shall take place during working hours, and the employer is not permitted to reduce wages or salaries. Further, the employer has to bear all costs incurred in connection with the election, excluding any campaign costs.

If substantial provisions regarding the right to vote, the eligibility for election, or the election procedure are violated, the election can be contested in court. If a Works Council was created in an election that is held null and void, all actions of that Works Council are null and void from the date of the court decision.

The size of the Works Council varies depending on the total number of employees or employees entitled to vote. In a business employing from five to 20 employees

entitled to vote, the employees vote for a single works representative (*Betriebsobmann*). In businesses employing from 21 to 50 persons entitled to vote, the Works Council consists of three members. In businesses with 51 employees or more, the size of the Works Council increases depending on the number of employees, regardless of their right to vote.

Works Council Members

Works Council members perform their duties without any extra compensation. However, they are entitled to sufficient paid time off to perform their functions, without losing any remuneration they normally would have earned. In businesses with more than 200 regular employees, one or more members of the Works Council must be completely relieved from all work duties while getting paid their normal remuneration.

Each member of the Works Council must be relieved from work, with pay, for the attendance of training courses that are necessary for the proper performance of his or her function. The costs of such courses are borne by the employer. In addition, members of the Works Council are entitled to be relieved from work for a total of three weeks, with pay, in order to attend educational or training seminars that are recognised by the State Labour Ministry as being useful for the Works Council's functions.

Apart from the regular expiration of the Works Council's office, the office of a single Works Council member is terminated if he or she resigns, terminates his or her employment, or is no longer eligible for or is, by court order, excluded from the Works Council.

Members of the Works Council and substitute members enjoy special protection against dismissal. Pursuant to Sec. 15 German Termination Protection Act (*Kündigungsschutzgesetz* or "*KSchG*"), an employer may dismiss a Works Council's member or a substitute member only for cause (*wichtiger Grund*), which is generally hard to prove in practice. Additionally, the Works Council must give its prior consent. If it withholds its consent, the employer must request the labour court to overrule the lack of consent. The same procedure applies if the employer intends to transfer a Works Council's member to another business.

Management Of Works Councils

Any Works Council has to elect a chairman and a vice chairman. The chairman has the function of representing the Works Council, but must not act without authorisation through a Council resolution. Therefore, an employer cannot rely on the chairman's authority without confirmation that his or her actions or statements are supported by the Council's decision. The chairman, in any case, is authorised to accept notices of the employer on behalf of the Works Council.

All costs incurred by the Works Council in the exercise of its functions are to be borne by the employer, provided that such costs could reasonably be regarded as indispensable at the time they were incurred. These costs include, for example, expenses for travelling, accommodation, interpreter, legal fees, and fees for the services of legal counsel in circumstances where legal advice can be considered necessary. Further, the employer is obliged to provide the Works Council with office space, material, facilities (e.g., notice board), and personnel as required by the Works Council in order to conduct its day-to-day business and to hold meetings and consultations.

Functions And Rights Of Works Councils

General Duties And Tiers Of Participation

According to Sec. 80 BetrVG, the Works Council has the following general duties:

1. To ensure that the provisions set forth by statutes, regulations (particularly regarding work safety and protection against work accidents), collective bargaining agreements, and works agreements are observed by the employer;
2. To propose to the employer measures that benefit the plant and the workforce;
3. To further the enforcement of equal rights for female and male employees and to promote compatibility of family with employment;
4. To mediate between employees and employer;
5. To promote the integration of handicapped persons, foreign employees, senior persons, and other employees deserving special protection; and,
6. To cooperate with youth representatives.

In addition, the BetrVG grants the Works Council a variety of specific participation rights that can generally be distinguished as follows:

1. Rights to information (i.e., the employer has to provide the Works Council with information in a complete and meaningful manner, supported by documentation if so required, and give the Works Council the opportunity to comment on the information it has received);
2. Rights of consultation and co-operation (i.e., the employer is obliged to hear any arguments given by the Works Council and to jointly discuss and develop the topic involved);
3. Veto-rights and rights of consent (i.e., the Works Council has the right to block management decisions until an agreement is reached or a decision by the labour court is taken overruling the veto); and,
4. Rights of co-determination (i.e., the employer cannot make or enforce any decision in related matters without the Works Council's consent or a decision of the conciliation board (*Einigungsstelle*)).

With respect to the matters concerned, the rights of participation contained in the BetrVG can be divided into four categories:

1. Social matters (Sec 87 – 89 BetrVG);
2. Operational matters such as organization of workplace, work place, and work environment (Sec. 90 et seq. BetrVG);
3. Personnel matters (Sec. 92 – 105 BetrVG); and,
4. Economic and financial matters (Sec. 106 – 113 BetrVG).

Social Matters

One of the most important areas of the Works Council's co-determination is covered by Sec. 87 BetrVG dealing with social matters. Any measure of the employer in relation to any matter included in the enumerative catalogue of this provision is invalid unless the employer reached an amicable agreement with the Works Council or a decision of the conciliation board is taken. As a general rule, the co-determination rights granted in Sec. 87 BetrVG are limited to collective matters (i.e., that they must affect the employees at large). Measures vis-à-vis one or more individual employees, however, as a general rule, can be taken without the approval of the Works Council.

Of great practical importance are the Works Council's co-determination rights regarding working hours, wages, and salaries. The employer must reach an agreement with the Works Council on the beginning and end of a workday, breaks, overtime work, variable work hours, shift work, and the introduction of temporary reductions of the regular work hours. However, the co-determination right does not extend to the duration of daily or weekly working hours. The same holds true for the amount of wages and salaries. These material working conditions are subject to either individual employment agreements or collective bargaining agreements. On the other hand, the employer must obtain the consent of the Works Council on collective rules regarding criteria to be applied for determining wages and salaries of all employees, the implementation of systems that classify wages according to performance or time spent (e.g., bonus schemes), the mode of payment, and the method of determining criteria for pension rights.

Another area that, in practice, often gives rise to disputes between employers and their Works Councils is the installation and operation of devices designed to monitor or control the behaviour or the work efficiency of employees. According to the jurisdiction of the Federal Labour Court, the Works Council's co-determination right is triggered if the mere possibility of technical supervision and control exists; it is not necessary for the employer to actually intend to use the device for such a purpose. Therefore, the co-determination right not only includes, inter alia, productivity measuring devices or automatic storage of phone calls including private calls, but – particularly – computer-assisted personnel information systems.

In addition to the above-mentioned matters, Sec. 87 BetrVG covers plant regulations and behaviour of employees (e.g., entrance control, time clocks, smoking, etc.), vacation (e.g., general guidelines regarding vacation, vacation schedules, general shutdown of the plant for vacation purposes, etc.), health and safety, social facilities (e.g., cafeterias, pension funds, etc.), employer-owned homes, systems for operational suggestions, and promotion of investment by employees.

Operational Matters

The employer must inform and consult with the Works Council regarding certain operational matters, the proposed measures to be taken, and the impact of those measures on the business and on the workforce. Those operational matters include:

1. Construction of, or alterations and additions to, manufacturing, administration, and other plant facilities;

2. Technical installations;
3. Work processes and work methods; and,
4. Positions.

Further, the Works Council can demand measures to alleviate or mitigate hardships arising from changes affecting positions, work processes, or the work environment if such changes contradict proven research about social work systems.

Personnel Matters

In respect to personnel matters, the BetrVG distinguishes between general and individual matters. General personnel matters trigger the following participation rights:

1. The employer is obliged to fully inform and consult with the Works Council on all matters regarding general personnel planning (e.g., planning of personnel structure, recruiting, development, costs, etc.);
2. The Works Council may demand, as a general rule, that the employer make any job vacancies known in a way that ensures that all employees receive notice thereof;
3. The content and use of questionnaires and appraisals is subject to the prior consent of the Works Council;
4. The employer must seek the Works Council's approval on guidelines concerning the selection of employees to be hired, transferred, regrouped under collective bargaining agreements, or dismissed (in businesses with more than 500 employees, the Works Council also has the right to demand that the employer introduces guidelines regarding qualifications, personnel situation, and social status); and,
5. The Works Council has a consultation right concerning vocational training, including the installation and equipping of training facilities, and a co-determination right relating to the implementation of training measures.

In businesses with more than 20 regularly employed persons, the employer must inform the Works Council before hiring, grouping, regrouping, or transferring an employee covered by the BetrVG. The Works Council can refuse its consent on the intended measure with respect to one of the grounds listed in Sec. 99 para 2 BetrVG (e.g., if the measure is illegal or causes disadvantages for other employees that

cannot be justified). If the Works Council withholds its consent, the employer may request the labour court to rule the consent in lieu of the Works Council. In the event the employer fails to consult the Works Council, the latter can demand the suspension of the hire or transfer.

Of utmost importance is the Works Council's participation right regarding any dismissal of employees covered by the BetrVG. A notice of termination given without first hearing the Works Council is null and void. In a lawsuit, a valid dismissal can only be based on grounds for which the employer provided the Works Council with sufficient information.

Economic And Financial Matters

In businesses with more than 100 permanent employees, the Works Council must establish an economic committee (*Wirtschaftsausschuss*). The economic committee discusses economic matters with management and then reports those consultations to the Works Council. The employer is obliged to provide the economic committee with timely and full information regarding, for instance, the company's economic and financial situation, reorganisation plans, and the shutdown, reduction, or relocation of plants. In particular, management has to inform the economic committee about planned share sales or asset sales. If a company does not meet the conditions for establishing an economic committee, the Works Council itself has the right to be informed regarding an intended share sale or asset sale.

Since operational measures normally have significant impact on the entire or parts of the workforce, the BetrVG ensures that, in businesses with more than 20 employees, the Works Council is involved in the planning process of such actions. If no Works Council exists, rumours about an operational measure planned by the employer quite often give employees a reason to establish a Works Council (although a Works Council elected after the employer has made its decision on an intended operational change does not have consultation rights in regard to that change).

According to Sec. 111 BetrVG, operational changes trigger certain participation rights of the Works Council if they are significantly detrimental to the personnel or to large segments thereof. Such operational changes include:

1. The reduction of operations in, or the closure of the whole or important units of, the establishment;
2. The transfer of the whole or important units of the establishment;

3. The amalgamation with other establishments or the divestiture of establishments;
4. Important changes in the organisation, purpose, or plant of the establishment;
5. Where an entirely new method of work or production is introduced; or,
6. Dismissals for compelling business reasons, depending on the number of employees concerned (e.g., the dismissal of six or more employees in a business with 21 to 59 employees).

The actual sale or transfer of a business to a third party does not, in itself, fall under Sec. 111 BetrVG. The seller is only obliged to inform the Works Council about the fact of the intended asset sale. However, if the transfer of business is accompanied by operational changes in the sense of Sec. 111 BetrVG, management must observe additional participation rights of the Works Council. Firstly, the employer must inform the Works Council about the reasons for the intended measure, the timetable for implementation, any applicable alternative measures, and the justification for the measure chosen. According to German labour court decisions, the Works Council must be involved in the planning before the management has made a final decision as to whether or not the operational change should take place or how the change will be implemented. Once all of the required information has been provided to the Works Council, the employer must consult with the Works Council in an attempt to conclude an “equalisation of interest” agreement (*Interessenausgleich*). An equalisation of interest agreement addresses if and how the operational change should be implemented as well as if and how disadvantages for the employees can be moderated. If an agreement cannot be reached, both parties can apply to a conciliation board, which, however, has no power to force an agreement upon the employer. The consequence of not seeking an equalisation of interest agreement or deviating from its content is that the employees concerned can claim compensation for any hardship caused by the operational change.

The Works Council does, however, have the power to obtain from the employer (through a final and binding decision of the conciliation board) a package of compensation and social benefits designed to alleviate actual or possible hardship to the workforce resulting from the operational change. In practice, negotiations regarding the content of this social plan (*Sozialplan*) take most of the time spent on consultations regarding operational changes and can quite often last for several months. The social plan, inter alia, can consist of commuting allowances,

rehabilitation subsidies, incentive payments, transfer of accrued pension rights, payment of the difference between unemployment benefits under the government plan and the regular net income, and – most importantly – severance payments to dismissed personnel (normally one-half to one gross monthly salary per each year of employment).

Agreements Between Works Councils And Management

In relation to those areas of business operations where the BetrVG grants the Works Council rights of participation, the Works Council and employer may, either formally or informally, enter into valid and binding agreements. Formal agreements are called works agreements (*Betriebsvereinbarungen*) and are valid only if they are in writing and signed by both parties. The main difference between informal agreements and formal works agreements is that the latter have immediate legal consequences on the relationships between the employer and all individual employees of the business. This means that they create direct rights and duties on the part of the employer, in relation to the employee, from which the parties can only deviate when in favour of the employee.

If works agreements and collective bargaining agreements deal with the same issue, the provisions set in the latter, as a general rule, have priority. Generally, the provisions of collective bargaining agreements override diverging provisions of works agreements, even if the latter are more favourable for the employees. Furthermore, the employer is not allowed to enter into agreements with its Works Council regarding issues covered in a collective bargaining agreement, even if the company is not bound by such collective bargaining agreement. If the employer is bound by a collective bargaining agreement, according to a recent decision of the Federal Labour Court, the trade union can stop the employer from implementing a works agreement that is not in compliance with the provisions of the collective bargaining agreement.

If management and the Works Council cannot reach an agreement upon a certain matter, the parties can agree to have the dispute settled by a conciliation board – a body with specific arbitration or mediation functions. In a limited number of matters (e.g., social matters, social plan, etc.), the BetrVG provides for a compulsory conciliation proceeding that, in principle, leads to a final and binding works agreement. The conciliation board consists of an equal number of members appointed by management and the Works Council, as well as an independent chairman who has the decisive vote. In practice, most of the chairmen of conciliation boards are

labour judges. In cases where conciliation proceedings are compulsory, the final decision of the conciliation board is subject to court appeal only with respect to questions regarding whether or not the conciliation board violated general principles of law and whether or not it exceeded its discretion granted in the BetrVG. All costs of the conciliation board, including the Works Council's costs and compensation for the members and the chairman of the committee, have to be borne by the employer.

Enforcement Issues

If an employer fails to seek its Works Council's prior consent regarding a social matter covered by Sec. 87 BetrVG, the Works Council is considered to have a claim to compel the employer from taking the intended measure. With respect to operational measures according to Sec. 111 BetrVG, it is disputed among German labour courts whether the Works Council can apply for a temporary injunction in order to prevent the employer from going ahead with the intended measure. As a matter of fact, the enforcement of the Works Council's participation rights regarding operational changes depends on the labour court district in which the business is located.

In case of major infringements of its provisions, the BetrVG provides for criminal sanctions and administrative fines of up to EUR 10,000.

The Interaction Between A Works Council And A Trade Union

Both systems of employee representation through trade unions and Works Councils are separated under German law. Therefore, the Works Council generally has to perform its duties independently from trade unions, but may request union assistance. In particular, trade union officials can represent the Works Council in labour court proceedings, provided that at least one member of the Works Council belongs to the union. Upon request of 25% of the Works Council's members, a union official is allowed to attend Works Council meetings.

Beside this formal interaction, a significant number of Works Council's members are also union officials or union members at the same time. Hence, union politics quite often indirectly influence the cooperation between the Works Council and the employer.

Also, in case of operational changes, an employer may have to negotiate with both the Works Council and the trade union: in addition to social plan negotiation with

the Works Council under Sec. 111 et al. BetrVG, the employer may additionally be obliged to deal with similar claims of the trade union, according to a recent decision of the Federal Labour Court. The Federal Labour Court ruled that claims regarding severance payments, extension of notice periods as well as payments for professional training due to operational changes can be the content of a collective bargaining agreement. Thus, the negotiation of a social plan is not the exclusive right of the Works Council. Therefore, a strike regarding these matters can be admissible irrespective of the costs of the measures. The court furthermore underlined that negotiations with the Works Council relating to the same matters do not suspend union rights.

Trade Union And Works Council Employee Protection Rights

As a consequence of the constitutional freedom of association (Art. 9 para 3 of the German Constitution), an employer must not in any way discriminate against an employee with respect to his or her union membership. Further, during the hiring process, an employer is not allowed to ask the applicant whether he or she is a union member. If the employer does ask that question, the applicant is technically allowed to lie.

The BetrVG ensures that no member of the Works Council shall suffer any disadvantage from his or her office. Any discrimination in pay and work in relation to comparable employees during the period of office and for a period of one year following the expiration of such term of office (two years for members who have been totally relieved from their work duties) is prohibited. Furthermore, Works Council's members are protected against ordinary dismissals with notice during the period of their office and for one year after its expiration. In case of a closure of the entire or a part of the business, the employment of Works Council's members generally can only be terminated effective as of the time of the shutdown.

Other Types Of Employee Representation

Employee Representation Under The BetrVG

All employees working in a specific business are members of the “general works assembly” (*Betriebsversammlung*), which must meet every three months. The general works assembly is the mechanism by which the Works Council regularly or on

special occasions reports to the employees on its activities. Once a year, the employer is obliged to inform the general works assembly about the social and personnel status of the business, as well as its financial condition and development.

The BetrVG further provides that all Works Councils existing in a particular enterprise must establish a Joint Works Council (*Gesamtbetriebsrat*), which has the exclusive authority in those matters that concern the enterprise in its entirety and that cannot be handled by the local Works Councils. Further, a Group Works Council (*Konzernbetriebsrat*), composed of members of the various Joint Works Councils, may be established. The Group Works Council deals with matters relating to a whole group of companies.

Additionally, employees under the age of 18 are represented by the Works Council as well as by a committee of youth representatives (*Jugend- und Auszubildendenvertretung*), which is responsible for ensuring that the interests of juvenile employees are properly protected. The committee of youth representatives does not, however, have any veto or co-determination rights.

Corporate Employee Representation

Corporate employee representation refers to employees' co-determination on the supervisory board (*Aufsichtsrat*). The main function of the supervisory board is to appoint and dismiss the managing directors of the company, including the conclusion and termination of their service contracts. In this respect, the supervisory board also supervises their performance. The scope of co-determination of the supervisory board depends on the number of employees in the company. In companies with up to 500 employees, there is no mandatory co-determination in the supervisory board. In companies with more than 500 and up to 2000 employees, there must be a supervisory board established under the provisions of the One-Third Participation Act (*Dittelbeteiligungsgesetz*, or "DrittelbG"). Accordingly, one-third of the members of the supervisory board must consist of representatives of the employees. This applies in particular to stock corporations (*Aktiengesellschaft*, or "AG"), limited liability companies (*Gesellschaft mit beschränkter Haftung*, or "GmbH"), cooperative society (*Genossenschaft*), and partnerships limited by shares (*Kommanditgesellschaft auf Aktien*, or "KGaA"). In a stock corporation, a limited liability company, cooperative society, or a partnership limited by shares employing more than 2000 employees, the supervisory board must consist of equal numbers of employees and shareholders under the Codetermination Act (*Mitbestimmungsgesetz*, or "MitbestG").

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