

Many Happy Returns: 50 Years Statuto dei lavoratori, 100 Years Betriebsverfassungsrecht

The German System of Employee Representation at the Workplace in Comparative Perspective

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Abstract

The essay endeavors to compare the development of the German codetermination system as originally provided under the Weimarer Republik and further developed according to the Bonner GG with the Italian Workers Statute, highlighting similarities and differences from the point of view of workers representation system.

Keywords: Statuto dei Lavoratori; Betriebsverfassungsrecht; Workers representation at plant level; Works Councils.

1. Introduction.

For labour lawyers both South and North of the Alps, 2020 marks a year of important legislative anniversaries. In Italy, the *Legge 20 maggio 1970 n. 300*,¹ generally referred to as *Statuto dei lavoratori* – the Workers’ Statute – turns fifty. In Germany, on the other hand, it is exactly one century ago that the *Betriebsrätegesetz*² – the Works Council Act – was adopted. Though quite different in substance and scope, both statutes constitute cornerstones in the

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¹ Norme sulla tutela della libertà e dignità dei lavoratori, della libertà sindacale e dell’attività sindacale, nei luoghi di lavoro e norme sul collocamento, Gazz. Uff. n. 131/1970.

² Betriebsrätegesetz vom 4.2.1920, RGBl. 1920, 147.

labour law systems of Italy and, respectively, Germany and form the basis of workplace democracy in the two countries. In Germany, the 100th anniversary of the Works Council Act has been commemorated in various publications.³ Moreover, numerous conferences and workshops had been planned by scholars as well as practitioners to debate the past and future of the German Works Constitution – unfortunately, however, most of these events had to be cancelled due to the Covid-19 pandemic.

Following Germany's defeat in World War I, the monarchical system of the German Empire was toppled in the November Revolution of 1918. The Emperor abdicated the throne and went into exile. A democratic parliamentary republic – later known as the Weimar Republic – was installed. The new constitution, drafted by a national assembly and adopted in 1919, embodied – for the first time in German history – fundamental civil liberties and also social rights. In particular, Article 165 of the Weimar Constitution guaranteed, in its first paragraph, the right to workers and employers to freely associate and to engage in collective bargaining. The second paragraph of that provision stated that workers, in order to pursue their economic and social interests, should receive legal representation through workers' councils at plant, regional and national level. However, the multilayer framework envisaged by Article 165(2) of the Constitution never materialized: the legislature refrained from implementing the workers' councils at regional level (*Bezirksarbeiterräte*) and the national economic council (*Reichswirtschaftsrat*), which was supposed to bring together representatives of capital and labour, was set up merely as an interim body (*vorläufiger Reichswirtschaftsrat*) and failed to gain any political importance.⁴ Only the workers' councils at plant level (*Betriebsarbeiterräte*) were actually implemented by the legislature, on the basis of the *Betriebsrätegesetz* of 4th February 1920, and did play an influential role in industrial relations.

Unfortunately, the new participatory rights created under the new statute – like the whole democratic parliamentary system of the Weimar Republic – were of no long duration. Soon after seizing power, the National Socialists led by Adolf Hitler abolished the works councils. The very notion of enabling a dialogue between employers and employees and striking a balance between the interests of the two sides was at odds with the totalitarian Nazi ideology. Rather, the Nazis embraced the idea of *Führerprinzip* – the 'leader principle' – not only in the realm of government and politics, but likewise with regard to industrial relations. In their view, the employer was vested with unrestricted powers and the workforce had to pay unconditional obedience to his instructions.

It was only after World War II and the liberation from the Nazi regime that the framework of employee participation through works councils at plant level was re-established in (Western) Germany. The *Betriebsverfassungsgesetz* of 11th October 1952⁵ – in English usually

³ Most notably, a volume entitled "100 Jahre Betriebsverfassungsrecht" and edited by Edith Gräfl, Stefan Lunk, Hartmut Oetker and Yvonne Trebinger has been recently released by the publisher C.H.Beck. The book contains 63 articles authored by reputable labour law scholars and practitioners. See Gräfl E., Lunk S., Oetker H., Trebinger Y., *100 Jahre Betriebsverfassungsrecht*, C. H. Beck, Munich, 2020.

⁴ See Gamillscheg F., *Überlegungen zum Verhältnis von Gewerkschaft und Betriebsrat*, in Farthmann F., Hanau P., Isenhardt U., Preis U. (eds.), *Arbeitsgesetzgebung und Arbeitsrechtsprechung – Festschrift für Eugen Stablhacke*, Hermann Luchterhand Verlag, Munich, 1995, 129, 137.

⁵ BGBl. 1952 I 681.

referred to as the Works Constitution Act⁶ – was modelled, to a significant extent, after the *Betriebsrätegesetz* of 1920. The drafters of the statute were keen to maintain continuity and stick to the model of labour relations instituted at the outset of the Weimar Republic.⁷ Subsequently, the Works Constitution Act underwent two major reforms in 1972 and 2001 – both initiated by Social Democratic-led governments with a view to strengthening employee representation at the workplace, in particular by expanding the powers of works councils.

The present paper provides an overview of the German system of employee representation at the workplace. Section II highlights the main characteristics of the German works constitution, in particular the dual model of employee representation. Section III explores the relationship between trade unions and works councils with a special focus on collective bargaining. Finally, Section IV looks briefly ahead to future challenges and concludes.

2. Main features of the German works constitution.

2.1. The concept of “works constitution”.

The concept of ‘constitution’ (*Verfassung*) is usually used in the context of states and refers to the rules and principles by which a state is organized. In particular, the term refers to a system of checks and balances, generally with a view to curbing the power of the sovereign and guaranteeing individual rights for citizens. The term ‘works constitution’ (*Betriebsverfassung*) is clearly meant as a reference to the process of constitutionalization and democratization which was at the centre of political struggle in Germany and other continental European states during the 19th century and the first decades of the 20th century. The analogy between politics and industrial relations was a point often made at the turn from the 19th to the 20th century.⁸ Social-minded entrepreneurs such as Heinrich Freese had the vision of a ‘constitutional factory’ in which workers, represented by a ‘factory parliament’, had a say in decisions of the employer regarding works rules (*Arbeitsordnung*) and other conditions of employment.⁹ When the German Reich passed an amendment to the Trade Act in 1891,¹⁰ finally providing for permanent workers’ committees in factories – the establishment of which, however, was not mandatory, but at the discretion of the employer – August Bebel, a leading figure in the Social Democratic Party, famously criticised the new representative body: “The system of workers’ committees [...] is a sham system. [The committees] amount to nothing more than similar constitutional institutions in the realm of

⁶ A translation of the statute in its current version provided by the Federal Ministry of Labour and Social Affairs is available at <http://www.gesetze-im-internet.de/englisch_betrvg/englisch_betrvg.html>.

⁷ Gamillscheg F., *Kollektives Arbeitsrecht II: Betriebsverfassungsrecht*, C. H. Beck, Munich, 2008, 4; Reichold H., *Betriebsverfassung als Sozialprivatrecht*, C. H. Beck, Munich, 1995, 358 ff.

⁸ Ramm T., *Workers’ Participation, the Representation of Labour and Special Labour Courts*, in Hepple B. (ed.), *The Making of Labour Law in Europe*, Hart Publishing, Oxford, 1986, 242, 248.

⁹ Reichold H., nt. (7), 99 ff.

¹⁰ Sections 134-134h of the *Gewerbeordnung*, RGBl. 1891, 261.

politics: they are a sham constitutional fig leaf, designed to conceal factory feudalism.”¹¹ Later, it was Hugo Sinzheimer, the founding father of German labour law, who drew a comparison between the political power of the state and the social and economic power of the employer. In his essay ‘The democratization of labour relations’ from 1928, Sinzheimer wrote that while the notions of freedom and democracy had “inebriated” the political arena, the social sphere was lagging behind: employers in capitalist enterprises could still exercise “unrestricted absolutist power” over workers, who were stuck “in a state of total subordination”.¹²

Against this backdrop, the provisions on workers’ councils in the Weimar Constitution of 1919, on which Sinzheimer as a member of the constitutional assembly had a great influence,¹³ and the enactment of the Works Council Act in 1920 can be viewed as an attempt to re-align politics and the economy, by extending the new democratic participatory rights achieved after the end of monarchy to the realm of labour relations. Of course, the relationship between the state and its citizens differs in many important aspects from the relationship between employers and employees.¹⁴ In particular, the employment relationship is – from a strictly legal point of view – a horizontal relationship between equal individuals and, hence, any regulatory intervention to enhance the rights and freedoms of employees interferes with the rights and freedoms of employers. However, what the political constitution and the works constitution have in common is the aim to juridify power¹⁵ – public power in the former case and economic power in the latter: the exercise of power is subjected to legal regulation: Those exercising power are held accountable, and those over whom power is exercised are given guarantees and participatory rights. More specifically, the participatory rights flowing from the works constitution are conceived as a counterweight to the employer’s right to manage employees – the ‘right to command’ – which is intrinsic to the employment relationship.¹⁶

As the term *statuto* suggests, the Italian *Statuto dei lavoratori* also rests on the notion of constitutionalizing industrial relations. The Workers’ Statute is drafted in a style similar to that of many modern state constitutions like the Italian Constitution of 1948 or the German *Grundgesetz* of 1949, which place particular emphasis on fundamental rights, both individual and collective: the first chapter deals with basic rights of the single employee such as freedom of expression (Article 1) and the right to health as well as physical and physical integrity (Article 9). The second chapter is concerned with the right to associate and protects employees and their organisations against interference from employers. And finally, the third

¹¹ See Gamillscheg F., *Kollektives Arbeitsrecht I: ein Lehrbuch*, C. H. Beck, Munich, 1997, 106.

¹² Sinzheimer H., *Die Demokratisierung des Arbeitsverhältnisses*, in Kahn Freund O. Ramm T. (eds.), *Arbeitsrecht und Rechtssoziologie, Gesammelte Aufsätze und Reden*, vol. I, Bund-Verlag GmbH, Frankfurt am Main, 1977, 115, 121.

¹³ See on Sinzheimer’s role in the drafting of these provisions Kempen O. E., *Hugo Sinzheimer – Architekt des kollektiven Arbeitsrechts und Verfassungspolitiker*, Societats Verlag, Frankfurt am Main, 2017, 66 ff. See also on Sinzheimer’s impact on German labour law Dukes R., *Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law*, in *Journal of Law and Society*, 35, 2008, 341.

¹⁴ Reichold H., nt. (7), 10.

¹⁵ On juridification as the main purpose of constitutions Reichold H., nt. (7), 5 ff.

¹⁶ See on the general purpose of the Betriebsverfassung Koch U., in Schaub G. (ed.), *Arbeitsrechts-Handbuch*, 18th ed., C. H. Beck, Munich, 2019, § 210, 1.

chapter embodies ‘positive rights’ actively promoting employee participation at the workplace through trade union representative bodies and works meetings.¹⁷

By contrast, the German Works Constitution Act – in the same vein as its predecessor, the German Works Council Act of 1920 – attaches less importance to individual rights and places a major focus on institutional and procedural issues such as the modalities for the establishment of the works council, its prerogatives and rules of procedure. Substantive rights of workers are somewhat hidden in the Act, e.g. in Article 75(1) *Betriebsverfassungsgesetz*, which provides that “[t]he employer and the works council shall ensure that all persons working in the establishment are treated in accordance with the principles of law and equity, in particular that no one is subject to discrimination on grounds of race, ethnic origin, descent or other origin, nationality, religion or belief, disability, age, political or trade union activities or convictions or on the grounds of gender or sexual identity.” Thus, the Works Constitution Act can be said to be structured in a way similar to the Weimar Constitution of 1919, which addressed civil rights and liberties, less visibly, in its second part, whereas the first part dealt with the different branches and institutions of government and their respective responsibilities.

2.2. Two-channel system of employee representation.

The system of employee representation in Germany – unlike in Italy, Sweden or the United Kingdom and similar to France and many Eastern European countries¹⁸ – rests on two different pillars: trade unions and works councils.¹⁹ These two channels of worker involvement differ quite considerably from each other.²⁰ Trade unions are voluntary associations of employees protected under Article 9(3) of the German Constitution and Article 11 of the European Convention on Human Rights. They represent the interests of their members, both at company and sectoral level, mainly by seeking to reach collective agreements with single employers or employers’ organisations. Works councils (*Betriebsräte*),

¹⁷ See on the different types of rights embodied in the Workers’ Statute Giugni G., *Diritto Sindacale*, Cacucci Editore, Bari, 2015, 107 ff.

¹⁸ For a comparative overview of the different models of employee representation in Europe see e.g. the various reports in Blainplain R., *Systems of Employee Representation at the Enterprise*, Bulletin of Comparative Labour Relations, 2012; Roth M., *Works Council*, in Basedow J., Hopt K. J., Zimmermann R., Stier A. (eds.), *The Max Planck Encyclopedia of European Private Law*, Oxford University Press, Oxford, 2012, 1782, 1783 ff. See in particular for a comparison between the German and the Italian model of workplace representation Henssler M., *Klassenkampf statt Co-Management? – Betriebsverfassung in Italien – Zugleich ein rechtsvergleichend geschärfter Blick auf die Besonderheiten der deutschen Betriebsverfassung*, in Gräfl E., Lunk S., Oetker H., Trebinger Y. (eds.), *100 Jahre Betriebsverfassungsrecht*, C. H. Beck, Munich, 2020, 173.

¹⁹ One could even argue that with employee codetermination in the advisory board of bigger public and private limited companies there is a third channel of employee representation in Germany. However, since employee participation at board level forms part of corporate law, it will remain outside the scope of this paper. See for a thorough analysis of employee participation in company boards from a comparative perspective Seifert A., *Employee Participation at Board Level in Europe*, in Basedow J., Su C., Fornasier M., Liukkunen U., *Employee Participation and Collective Bargaining in Europe and China*, Mohr Siebeck, Tübingen, 2016, 209.

²⁰ For an overview of the German system of employee representation at the workplace in English see Waas B., *Employee Representation at the Enterprise in Germany*, in Blainpain R., *Systems of Employee Representation at the Enterprise*, Bulletin of Comparative Labour Relations, 2012, 71.

on the other hand, are employee representative bodies within companies or group of companies provided for by statute and elected by the whole workforce, not just by union members. Their participatory rights range, depending on the subject matter at issue, from information and consultation rights to veto rights and the right to conclude works agreements, a special category of collective agreements.²¹

A characteristic feature of works councils is their legal obligation to collaborate with the employer. In particular, controversies arising between the works council and the employer are to be settled amicably. Section 2(1) of the Works Constitution Act requires the works council to cooperate with the employer “in a spirit of mutual trust”. In a similar vein, Section 74(1) of the Act provides that the employer and the works council are to “discuss the matters at issue with an earnest desire to reach agreement and make suggestions for settling their differences.” What is more, works councils may not call strikes or take other collective measures against the employer.²² Instead, disputes between the employer and the works council are generally submitted to arbitration.²³ With regard to certain issues, the Works Constitution Act even provides for mandatory arbitration. Against this backdrop, works councils are often perceived as co-managers rather than adversaries of management. Some commentators praise the cooperative approach underlying the German works constitution, arguing that the duty to cooperate and to settle disputes amicably keeps conflicts between trade unions and employers away from the workplace.²⁴ Others are critical and reluctant to recognise works councils as true defenders of workers’ interests. This is especially true after corruption cases involving members of works councils in large enterprises have drawn considerable public attention in the recent past. At Volkswagen, for instance, the company’s management used to pay high sums of money to the leaders of the works council and invite them on luxury trips and sex parties in exchange for their support. Although these cases are singular and cannot be said to reflect a general pattern, they have undoubtedly cast a negative light on works councils – especially those in large corporations – alienating them, to some extent, from workers and trade unions.

According to Section 1 of the Works Constitution Act, works councils are to be installed in ‘establishments’ with a minimum of five permanent employees. Thus, the organisational unit represented by the works council is not the company as a whole, but only the single plant or shop – the *Betrieb* –, i.e. a sub-entity of the company generally lacking legal personality but having some degree of organisational autonomy.²⁵ In a nutshell, the German system of employee representation can be characterised as ‘establishment-based’, unlike for example

²¹ For further details see below III 3.

²² Section 74 (2) of the Works Constitution Act.

²³ Section 76(5) of the Works Constitution Act.

²⁴ Henssler M., nt. (18), 184.

²⁵ For a definition of the concept of *Betrieb* generally relied upon by the German Federal Labour Court see BAG 25 May 2005 – 7 ABR 38/04 (sub. B I 1). From a EU law perspective, the concept of *Betrieb* is akin to the concept of ‘establishment’ used in Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ 2002 L 80/29 (see Article 2(b)) as well as in Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ 1998 L 225/16; see on the meaning of the term ‘establishment’ in the latter CJEU 30.04.2015 – Case C-80/14 (*USD AW and Wilson*), para 49.

the French model which relies on the *comité social et économique* – formerly known as *comité d'entreprise* – and is ‘company-based’.²⁶ In this regard, the Italian legislature has adopted an approach similar to the German one, by providing in Article 19 of the Workers’ Statute that trade union representative bodies can be established in each ‘production unit’ (*unità produttiva*) of a given company. To determine whether a business unit or group of employees meet the criteria of a ‘production unit’, the Italian courts apply a test which very much resembles the test applied by German courts to identify a *Betrieb*. The decisive element is whether the unit at issue is – from a merely functional perspective – sufficiently autonomous and independent in the management of employees.²⁷ It should be noted that Italian law sets a higher threshold for the implementation of representative bodies for employees by requiring that more than 15 workers are employed in that unit.²⁸ In practice, however, the differences between the two approaches are small since, in Germany, works council are extremely rare in units employing less than 15 workers.

2.3. Regulatory imbalance between the two channels of employee representation.

Despite the dual structure of the German system of employee representation, the Works Constitution Act is concerned solely with one channel of worker participation: the works councils. The second channel – the representation of worker interests through trade unions and, in particular, collective bargaining – falls outside the scope of the Act. The issue of (union-led) collective bargaining is dealt with in the Collective Bargaining Act (*Tarifvertragsgesetz*). The latter statute can be characterised as a ‘frugal’ piece of legislation: whereas the Works Constitution Act encompasses more than 130 sections, setting out specific rules on the establishment and the powers of works councils, the *Tarifvertragsgesetz*, though applying to collective bargaining both at company and sectoral level, contents itself with just 12 sections. In fact, the Collective Bargaining Act is silent on important issues such as the criteria to determine whether an employee organisation has legal capacity to conclude a collective agreement. Likewise, the statute lacks any provision on the right to strike and other collective measures. The reason for the limited content of the Act is that the German legislature has been reluctant ever since to interfere with the relations between social partners, thus leaving it to the courts to settle many controversial legal issues in industrial relations and set the rules for collective bargaining and collective action. In particular, the Collective Bargaining Act and the Works Constitution Act contain only very few provisions on union representatives in companies and their powers to represent the workforce vis-à-vis management.

²⁶ See Article L2311-2 Code du travail. It must be mentioned, however, that the law provides also for the possibility to create a representative body solely for the single establishment, the *comité social et économique d'établissement* in accordance with Article L2316-20 Code du travail. In Germany, on the other hand, it is possible to create superordinate representative bodies at company (the *Gesamtbetriebsrat*) and even at group level (the *Konzernbetriebsrat*) to coordinate the activities of the various works councils at plant level, *see* Sect. 47 et seq. and Sect. 54 et seq. of the Works Constitution Act.

²⁷ *See* e.g. Cass. 30 July 2019, n. 20520; in a similar vein Cass. 22 August 2003, n. 12349.

²⁸ *See* Article 35(1) of the Statuto dei lavoratori.

What becomes apparent here is a certain ‘regulatory imbalance’ between the two channels of employee representation. This marks yet another important difference between the German and the French legal order. The French *Code du travail*, which also follows a two-channel model, contains quite detailed rules not only on works councils (i.e. the *comités sociaux et économiques*) but likewise on employee representation through trade unions ‘within the company’ (*au sein de l’entreprise*). As some commentators have pointed out, the *Code du travail*, in its Articles on the *section syndicale*²⁹ and, above all, the *délégué syndical*,³⁰ has ‘institutionalized’ the role of union representatives at company level.³¹ These provisions spell out the rights and powers of union representatives at company level, e.g. in relation to protection against dismissal, the right to paid time off to perform their duties or the right to use, in certain circumstances, facilities provided by the employers such as office rooms, noticeboards or information technology. In addition, the *Code du travail* specifies the modalities and subject-matters of collective bargaining at company level.³²

In Germany, the Works Constitution Act is not completely silent on the role trade unions perform in the workplace. Section 2(1) of the Act emphasizes that the employer and the works council are to co-operate “with the trade unions [...] represented in the establishment”. Moreover, trade unions ‘represented in the establishment’ – i.e. trade unions with at least one member among the workforce³³ – enjoy a number of rights and privileges under the Works Constitution Act. In particular, in plants where no works council has been established yet, unions are entitled to call a works meeting to appoint an electoral board for the election of a works council.³⁴ Likewise, unions may challenge the result of the election of the works council on the grounds that electoral rules have been breached.³⁵ Also, trade unions may seek injunctive relief against employers or works councils who grossly violate their duties under the Works Constitution Act.³⁶ It should be noted, however, that these provisions are not directly related to the very purpose of trade unions, namely to represent the interests of their members through collective negotiations and collective action. Rather, the provisions reflect the fact that the drafters of the Works Constitution Act have entrusted trade unions with the task of promoting the participatory rights provided to employees under the Act and, at the same time, monitoring compliance with the Act by both employers and works councils. Thus, the role attributed to trade unions under the Act may be described as that of ‘private enforcers’ of the *Betriebsverfassungsgesetz*.³⁷ The reason for charging trade unions

²⁹ Article L2142-1-1 et seq. Code du travail.

³⁰ Article L2143-1 et seq. Code du travail.

³¹ Krause R., *Gewerkschaften und Betriebsräte zwischen Kooperation and Konfrontation*, in *Recht der Arbeit*, 2009, 129, 130.

³² Article L2232-12 et seq. Code du travail.

³³ This is how the German Labour Court interprets the clause, see BAG 25 March 1993, 7 ABR 65/90, NZA 1994, 612, 613.

³⁴ Section 17(3) of the Works Constitution Act.

³⁵ Section 19(2) of the Works Constitution Act.

³⁶ Section 23 of the Works Constitution Act.

³⁷ It should be noted, however, that according to some authors, the rights and powers conferred on trade unions under the Works Constitution Act also relate to the trade unions’ own purpose of representing the interests of their members vis-à-vis the employer, see on this issue Krause R., nt. (32),138.

with this task is that they are deemed to have particular expertise in defending the rights and interests of employees as well as in industrial law in general.³⁸

In this context, Section 2(2) of the Works Constitution Act provides that, “in order to permit the trade unions represented in the establishment to exercise the powers and duties established by this Act, their agents shall [...] be granted access to the establishment”³⁹ subject to certain conditions. It is important to note that, as highlighted in the text, the right granted to union representatives to seek access to the premises of the company is restricted to the performance of the tasks attributed to trade unions under the *Betriebsverfassungsgesetz*. Thus, if a union representative seeks access to company premises for the purpose of recruiting members or engaging in collective bargaining or action, he or she may not invoke Section 2(2) of the Works Constitution Act. Rather, in the absence of pertinent statutory provisions, the courts have derived a right for trade union representatives to access the premises of the company from the constitutional right of freedom of association.⁴⁰ This example again illustrates that the German Works Constitution Act – unlike the *Code du travail* in France or the *Statuto dei lavoratori* in Italy – falls short of institutionalizing the role of trade unions at company level. Rather, it is for the courts to determine the rights and powers enjoyed by union representatives inside the company. To that end, the courts usually engage in a balancing test, weighing the workers’ freedom to associate against the employer’s freedom of enterprise.

2.4. Possibilities for collective bargaining parties to modify the structure of employee representation.

The Italian Workers’ Statute and the German Works Constitution Act also differ in the extent to which collective bargaining parties can amend or depart from the respective statutory rules. In Italy, the *Statuto dei lavoratori* is conceived as a piece of ‘auxiliary legislation’ (*legislazione di sostegno*).⁴¹ In the context of labour law, the term ‘auxiliary legislation’ was famously coined by the German-British labour lawyer Otto Kahn-Freund and describes a legal framework which aims to promote and facilitate collective bargaining.⁴² Thus, unlike ‘regulatory legislation’ by which the state determines certain substantive rights and duties of the parties to the employment contract (e.g. with regard to maximum working hours, minimum wages, or health and safety measures), ‘auxiliary legislation’ seeks to enhance self-regulation by employers and employees. In fact, the *Statuto dei lavoratori* essentially confines itself to granting workers the right to establish trade union representative bodies at company level – the *Rappresentanze sindacali aziendali* (RSA) – and to offering special guarantees to the leaders of such representative bodies such as protection against dismissal or the right to paid

³⁸ Krause R., nt. (32), 138.

³⁹ Emphasis added.

⁴⁰ See e.g. Bundesarbeitsgericht 22 June 2010, 1 AZR 179/09, NZA 2010, 1365.

⁴¹ Giugni G., nt. (17), 107.

⁴² Kahn-Freund O., *Labour and the Law*, Stevens & Sons Ltd, London, 1972, 72 ff.

time-off. By and large, the statute is silent as to how the RSA are to be organised, whether and under which modalities they are elected, and what their powers are. Rather, it is for the social partners to concretize these issues.⁴³ What is more, the main Italian union confederations and employers' organisations have concluded, in some cases also with the participation of the government, national agreements supplementing or even departing from the *Statuto dei lavoratori*.⁴⁴ Most importantly, they have modified the structure of employee representation at the workplace by creating a new representative body originally not envisaged by the *Statuto dei lavoratori*: the *Rappresentanze sindacali unitarie* (RSU).⁴⁵ Whereas the RSAs are single union bodies which may exist alongside each other in workplaces in which more than one trade union is present, the RSUs constitute a unified representative body elected by the whole workforce and potentially encompassing representatives of all trade unions that are active in the workplace at issue.

By contrast, the German Works Constitution Act is a rather rigid piece of legislation, consisting for the most part of mandatory rules, and thus more akin to the notion of 'regulatory legislation' than to that of 'auxiliary legislation'. The possibilities for social partners to contract around the statutory framework of the *Betriebsverfassungsgesetz* are still very limited. In 2001, the legislature amended the Act to grant more autonomy and flexibility to social partners. The new Section 3 of the Works Constitution Act allows for collective agreements adjusting the system of employee participation to the organisational structure of a particular company or group of companies. For instance, where workers are employed in different establishments but perform similar tasks and report to the same supervisor, collective bargaining parties can agree to establish a joint works council for the employees in the different establishments. Also, additional representative bodies may be set up to facilitate collaboration among works councils within the same company or group of companies. The right to conclude such agreements rests primarily with trade unions on the one hand and employers' organisations or individual employers on the other.⁴⁶ In some circumstances, it is also possible for works councils to enter into such agreements with the employer without the involvement of trade unions.⁴⁷

Apart from Section 3, the Works Constitution Act leaves only little room for amendments to the system of employee representation.⁴⁸ In particular, social partners are precluded from depriving works councils of their statutory powers or interfering with their functioning by implementing additional representative bodies under the control of the employer or trade

⁴³ See Giugni G., nt. (17), 88 ff. describing the reasons for the legislative deference to social partners.

⁴⁴ See in particular the *Protocollo tra Governo e parti sociali del 23 luglio 1993* as well as the *Protocollo d'intesa del 31 maggio 2013* and the *Testo Unico sulla Rappresentanza: Confindustria – Cgil, Cisl e Uil*, 10 gennaio 2014.

⁴⁵ It should be mentioned, however, that according to Article 29 of the Workers' Statute, the RSA may be the representative body of more than one trade union. Thus, the creation of a single body – like the RSU – representing various trade unions inside the company is not entirely incompatible with the *Statuto dei lavoratori*.

⁴⁶ Section 3(1) of the Works Constitution Act provides that an agreement modifying the structure of employee representation shall take the form of a *Tarifvertrag*. According to Section 2(1) of the Collective Bargaining Act, a *Tarifvertrag* is concluded between a trade union and single employers or employers' organisations.

⁴⁷ See Section 3(2) of the Works Constitution Act.

⁴⁸ For a thorough discussion of the limits of self-regulation by social partners with regard to the system of employee representation at the workplace see Gamillscheg F., nt. (7), 211 ff.

unions which are vested with similar responsibilities, but lack the institutional independence afforded to works councils.⁴⁹ Likewise, social partners cannot extend the powers of works councils at the expense of trade union rights. The reasons for the restrictions imposed on contractual freedom by the Works Constitution Act relate to the two-channel system of the German model of employee representation and especially to the competition between trade unions and works councils (which will be highlighted in the next section of this paper). With the Works Council Act, the legislature has sought to strike a balance of powers between the two channels of worker participation, i.e. works councils and trade unions. This balance would be put at risk if social partners were free to alter the legal framework provided by the *Betriebsverfassungsgesetz*. In particular, trade unions could be inclined to conclude agreements with employers aimed at diminishing the influence of works councils on labour relations. Works councils, on the other hand, could try to make arrangements with employers seeking to keep trade unions at bay. Thus, the mandatory nature of the German Works Constitution pursues the goal of maintaining an equilibrium between the three main actors in German industrial relations: employers, trade unions and works councils.

3. Trade Unions and Works Councils: Rivals, Allies, or Both?

3.1. Competition between trade unions and works councils.

In Italy with its system of trade union pluralism, competition among trade unions at plant level is a common feature in industrial relations. The situation is different in Germany where in each sector of the economy employees are usually represented by a single trade union affiliated to the *Deutscher Gewerkschaftsbund* (DGB), the main German trade union confederation. In recent times, autonomous unions representing specific groups of professionals such as medical doctors, pilots, flight attendants or train conductors have emerged outside the umbrella of the DGB. In the respective sectors, these unions compete with the unions affiliated to the DGB who aim to represent all employees inside that sector and not just certain occupational groups. However, the emergence of inter-union competition is confined to few sectors, essentially the health and transportation sectors. By and large, Germany has stuck to trade union monism.

While trade unions in Germany only rarely face competition from other unions, they are often confronted with a different rival at company level: the works council. Due to the two-channel system of the German works constitution,⁵⁰ trade unions have no monopoly on worker representation. In particular, it should be borne in mind that, unlike for works councils, there is no legal framework specifying the participatory rights and powers of trade unions and their representatives at plant or company level. In other words, as already shown, the role of trade unions at company level is much less ‘institutionalised’ than that of works

⁴⁹ Krause R., nt. (32), 135 ff.

⁵⁰ See *supra* 2.2.

councils.⁵¹ This fact places trade unions at a disadvantage in getting their voice heard at the workplace.

The rivalry between trade unions and works councils dates back to the 19th century. Back then, a number of entrepreneurs set up, on a voluntary basis, factory committees and similar non-union representative bodies in a move designed to grant participatory rights to workers bypassing, and thus weakening, trade unions. Towards the end of the century, when the first statutes providing for the election of workers' councils especially in the mining industry were enacted, trade unions and social democrats were opposed to the new legislation as they feared being marginalised by the new employee representative bodies.⁵² Immediately after the end of the First World War, the conflict between trade unions and workers' councils flared up again. Inspired by the Russian revolution, radical groups within the Social Democratic Party – which later became the German Communist Party (KPD) – sought to establish a system of government in which all economic and political power was to lie in the hands of workers' councils: “All power to the councils!” was the rallying cry of this movement. Whereas in the 19th century workers' councils faced suspicion and criticism from trade unions for being too benevolent towards employers, the situation had totally changed in the aftermath of World War I. Workers' councils had now turned into aggressive advocates of workers' rights and were promoted by anti-capitalist revolutionaries. Despite this radical turn, they remained a threat to trade unions, who feared a loss of influence if the political vision of a soviet republic were to materialize. Consequently, trade unions pursued a less radical political agenda and supported mainstream Social Democrats' quest for a parliamentary republic, thus rejecting the idea of transferring public power to workers' councils.

After violent clashes with many deaths (including the murder of the Communist leaders Rosa Luxemburg and Karl Liebknecht), the mainstream Social Democrats, backed by former Reichswehr officers and other nationalist as well as monarchist groups, eventually prevailed. As already mentioned,⁵³ the Weimar Republic became a parliamentary republic. Article 165 of the Weimar Constitution, which aimed to strike a compromise between the supporters of a parliamentary system and the more radical groups advocating a soviet republic, remained an unfulfilled promise: the system of workers' councils envisaged by that provision was implemented only partially – solely the councils at company level came into being and gained importance.⁵⁴ The works constitution established a clear hierarchy between trade unions and works councils: the former were attributed the role of ‘designated representatives’ (*berufene Vertreter*⁵⁵) for the workforce and charged with the task of negotiating the terms and conditions of employment with employers at sectoral and national level. The role of the latter was essentially confined to ensuring that individual employers complied with the applicable

⁵¹ See *supra* 2.3.

⁵² See also the famous criticism levelled against the introduction of the factory committees by August Bebel (“sham constitutional fig leaf”), *supra* 2.1.

⁵³ See *supra* 1.

⁵⁴ *Ibid.*

⁵⁵ This was the language used in Section 1 of the Stinnes-Legien Agreement, a collective agreement signed by the major employers' organisations and trade unions on 15 November 1918, shortly after the end of World War I and the collapse of the German Empire. The agreement set out the foundations for the economic order and industrial relations in the new republic.

collective agreements at plant and company level.⁵⁶ Only in the absence of an applicable collective agreement concluded by a trade union was the works councils entitled to engage in collective bargaining with the employer on wages and other employment issues.⁵⁷

Despite the fact that trade unions have been officially recognized as the primary representatives of workers and – as we shall see below – collective agreements concluded by trade unions take precedence over agreements concluded by works councils, the antagonism between the two has not ceased to exist. The reasons are various. From the trade unions' point of view, works councils tend to act 'selfishly'⁵⁸ as they tend to place the interests of the workforce in their own company or plant above the interests of employees elsewhere. Trade unions, on the other hand, are generally 'sector-oriented', meaning that they pursue the interests of all employees in a given industry. Moreover, works councils represent and are elected by all employees in the respective plant, no matter whether they are union members or not. Therefore, works councils feel committed also towards non-unionised employees. Finally, what trade unions particularly dislike about works councils is that they take a less confrontational attitude towards employers and are not entitled to call strikes.⁵⁹ Thus, for trade unions, works councils are no reliable partners when conflicts with the employer arise (e.g. in the context of collective bargaining).

3.2. Cooperation between trade unions and works councils.

Describing the relationship between trade unions and works councils as a relationship merely marked by competition and mistrust, however, does not tell the whole story. It is equally true that trade unions and works councils are allies and cooperate in many respects. Although works councils are formally independent from trade unions, there are often strong personal ties to trade unions as the majority of German works council members are unionised.⁶⁰ Trade unions have come to realize that works councils are an important channel through which they can reach out to employees and gain a toehold in the workplace. This aspect is all the more crucial since trade unions – as we have already seen above – lack an institutionalised body of representation at plant and company level. Therefore, at the elections for the works council, trade unions generally present their own list of candidates.⁶¹

⁵⁶ Section 78(1) of the Works Council Act of 1920.

⁵⁷ Section 78(2) of the Works Council Act of 1920.

⁵⁸ This attitude adopted by works councils is sometimes referred to as *Betriebsegoismus*, i.e. 'company-related selfishness', see e.g. Gamillscheg F., nt. (4), 142.

⁵⁹ *See supra* 2.2.

⁶⁰ According to a survey conducted by the Institut der deutschen Wirtschaft in relation to the works council elections held in 2018, more than 58% of all works council members in Germany were members of a trade union. The survey is available here <https://www.iwkoeln.de/fileadmin/user_upload/Studien/IW-Trends/PDF/2018/IW-Trends_2018-04-06_Betriebsratswahlen_2018.pdf>.

⁶¹ Section 14(3) of the Works Constitution Act expressly permits trade unions to submit lists of candidates for works council elections.

Having their own representatives on the works council renders it much easier for trade unions to make their voice heard and pursue policy goals at plant level.⁶²

Moreover, the Works Constitution Act itself promotes cooperation between works councils and trade unions. Section 2(1) of the Act requires the employer and the works council to collaborate “in cooperation with the trade unions and employers’ associations represented in the establishment”. More specifically, Section 31 of the Act provides that, upon request of one-fourth of its members, the works council may invite a delegate of a trade union represented on the works council to attend meetings in advisory capacity. This offers the opportunity to works councils to avail themselves of the expertise and advice of trade unions in relation to the representation of worker interests and employment matters in general. Works councils, on the other hand, play a supportive role for trade unions by ensuring that employers actually comply with collective agreements.⁶³ As we shall see in the next section, cooperation between trade unions and works councils also occurs with regard to collective bargaining.

3.3. The role of works councils in the context of collective bargaining.

Unlike non-union representative bodies in foreign jurisdictions whose rights are limited to information and consultation,⁶⁴ works councils in Germany are vested with the right to conclude collective agreements with employers. Under Section 77 of the Works Constitution Act, the works council may enter into ‘works agreements’ (*Betriebsvereinbarungen*) with the employer. Similar to collective agreements concluded by trade unions (*Tarifverträge*), works agreements are also capable of producing ‘mandatory and direct effect’ – also referred to as ‘normative effect’ – on individual employment relations.⁶⁵ ‘Mandatory effect’ means that the parties to the individual employment contract – the employer and the individual employee – may not derogate, to the detriment of the employee, from the employment terms provided for by the works agreement. ‘Direct effect’, on the hand, means that the works agreement

⁶² It is noteworthy that the Works Constitution Act allows employees to wear two hats, i.e. to hold an office under the Works Constitution Act, e.g. as a member of the works council, while at the same time participating in activities of trade unions. According to Section 74(3) of the Works Constitution Act, [t]he fact that an employee has assumed duties under this Act shall not restrict him in his trade union activities even where such activities are carried out in the establishment.”

⁶³ See Section 80(1) of the Works Constitution Act.

⁶⁴ This is true, as a general rule, for the *French comité social et économique*. The same applies to European Works Councils in the context of Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), OJ 2009 L 122/28. However, as Gamillscheg has pointed out, representative bodies vested solely with information and consultation rights, often turn into de facto actors of collective bargaining and engage in negotiations with the employer, see Gamillscheg F., *Wandlungen in der französischen Betriebsverfassung*, in Annuß G., Picker E., Wissmann H., *Festschrift für Reinhard Richardi*, C. H. Beck, Munich, 2007, 1025, 1037.

⁶⁵ For an overview of the German collective bargaining system and the legal effects of collective agreements see Fornasier M., *Collective Bargaining in Germany and its Interaction with State Legislation and Individual Employment Contracts*, Basedow J., Su C., Fornasier M., Liukkunen U., *Employee Participation and Collective Bargaining in Europe and China*, Mohr Siebeck, Tübingen, 2016, 29, 31 ff. The essay is available online at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2714373>).

gives rise to rights and duties in the individual employment relationship *ipso iure* – in other words, the employer and the employee are not required to incorporate the works agreement into the individual employment contract in order to give effect to it. However, the normative effect of works agreements differs from that of *Tarifverträge* in that it encompasses not just the employees who are union members, but all employees in the given plant represented by the works council. Thus, works agreement can be said to produce normative effect *erga omnes*.

In order not to interfere with trade unions rights – in particular, the prerogative of trade unions to bargain collectively – the Works Constitution Act provides for collective agreements concluded by trade unions to take precedence over works agreements concluded by works councils unless the parties to a collective agreement (*Tarifvertrag*) provide otherwise. According to Section 77(4) of the Works Constitution Act, “[w]orks agreements shall not deal with remuneration and other conditions of employment that have been fixed or are normally fixed by collective agreement (*Tarifvertrag*).” The provision limits the possibilities of employers and works councils to enter into works agreements quite substantially. What is noteworthy about this rule is that it also applies to employers who are not members of an employers’ association and therefore not bound by a collective agreement. If an employer falls within the territorial scope of a collective agreement (*Tarifvertrag*) for the relevant industry, he or she may not conclude agreements with the works councils on issues covered by the collective agreement regardless of whether the collective agreement is actually binding on that employer. What is more, a collective agreement does not necessarily have to be in force for the plant or company at the time the works agreement is to be concluded. It is sufficient that a collective agreement covering the subject matter of the works agreement is usually in place for the sector at issue. Moreover, it should be noted that Section 77(4) of the Works Constitution Act also prohibits the conclusion of works agreements that are more favourable to employees than the applicable collective agreement. The rationale for this rule is that works councils could disincentivize employees from joining trade unions (and thus affect freedom of association) if they were able to stipulate terms of employment that afford better protection and more extensive rights to workers than the agreements negotiated by trade unions.

According to the case law of the Federal Labour Court, an exception to Section 77(3) of the Works Constitution Act applies to the employment issues laid down in Section 87(1) of the Act with regard to which the works council enjoys wide-ranging co-determination rights.⁶⁶ Here, the employer and the works council are precluded from concluding works agreements only if the employer is actually bound by a collective agreement (*Tarifvertrag*) which deals with the respective issue. Secondly, social compensation plans negotiated by works councils, e.g. in the event of a restructuring of the company, are also exempted from the restrictions on works agreements under Section 77(3) of the Works Constitution Act.⁶⁷ Thus, social compensation plans may contain provisions on wages even where a collective

⁶⁶ BAG 10 December 2013 – 1 ABR 39/12, NZA 2014, 1040 para. 19. Among the issues dealt with by Section 87(1) of the Works Constitution Act are the “distribution of working hours among the days of the week”, “temporary reductions or extensions of the hours normally worked”, or the “introduction and use of technical devices designed to monitor the behaviour or performance of employees”.

⁶⁷ See Section 112(1) of the Works Constitution Act.

agreement (*Tarifvertrag*) dealing with wages is in place. Likewise, the labour courts permit social compensation plans to co-exist alongside collective agreements concluded by trade unions at company level with a view to mitigating the social impact of a restructuring.

During the economic crisis which hit Germany in the late 1990s and caused a sharp rise in unemployment, conflicts between trade unions and works councils came to the surface. In several companies, employers and works councils struck deals to secure employment and prevent layoffs (*betriebliche Bündnisse für Arbeit*). Generally, those deals sought to reduce labour costs for employers by extending the weekly working hours for employees. The additional working time was to be remunerated at a rate of pay lower than that provided for in the collective agreement. In exchange, employers pledged not to lay off employees for a few years. These agreements – especially the clauses on the extension of working hours and the reduction of the rate of pay – were clearly incompatible with the terms of employment stated in the collective agreements applicable to the relevant industry. From a legal point of view, the agreements negotiated by the works councils were not void on the basis of Section 77(3) of the Works Constitution Act since they were not concluded in the form of a *Betriebsvereinbarung* producing normative effects. Rather, the deals took the form of informal accords and were implemented through individual amendments to the employment contracts with the consent of each of the affected employees. In the ‘Burda’ ruling, the Federal Labour Court held that this practice was unlawful insofar as it undermined existing collective agreements.⁶⁸ The Court also created a special remedy for trade unions to obtain injunctive relief against employers who engage in such a practice.

Although not expressly stated by the Court, the ‘Burda’ ruling is based on the assumption that works councils and employers can only derogate from the terms of a collective agreement provided that the parties to the collective agreements give their consent. Soon after the decision of the Court, trade unions acknowledged the need for flexibility of companies facing economic crises. Consequently, they concluded collective agreements at sectoral level allowing individual companies in economic hardships to negotiate agreements at plant or company level that temporarily modify or suspend certain employee rights flowing from sectoral collective agreements.⁶⁹ Such agreements designed to secure jobs may take the form of a collective agreement (*Tarifverträge*) concluded by trade unions and employers at company level. In some industries, they may also take the form of works agreements (*Betriebsvereinbarungen*) concluded directly between the employer and the works council.⁷⁰ Thus, the ‘Burda’ ruling has paved the way for what has been described as a model of ‘coordinated decentralisation’⁷¹ in collective bargaining: adjustments to the economic needs of individual companies are reached on the basis of a consensus among employers, trade unions and works councils. This approach has resulted in a considerable flexibilization of

⁶⁸ BAG 20 April 1999 – 1 ABR 72/98, NZA 1999, 887.

⁶⁹ A famous example for this type of agreements is the ‘Agreement of Pforzheim’ concluded for the metalworking industry in 2004.

⁷⁰ This is especially true for the chemical industry, see Haipeter T., *Tarifregulierung zwischen Fläche und Betrieb: Koordination und Praxis in der Chemie- und Metallindustrie*, WSI-Mitteilungen 2009, 195, 186 ff.

⁷¹ See, in the context of the Dutch system of collective bargaining where a similar pattern exists, Smit E., van het Kaar R., *Die Zukunft der Mitbestimmung in den Niederlanden– Vier Szenarios*, WSI-Mitteilungen 2009, 94, 95.

collective bargaining. Some commentators credit this model of collective bargaining with the impressive decline in unemployment Germany has witnessed during the last 15 years.

A topic of current debate is to what extent works agreements can derogate from the terms of employment stipulated in the individual employment contract. The general rule is that works agreements – like collective agreements – can alter the terms of the individual employment contract only in favour of the employee. However, the courts take a different view with regard to standard terms used in employment contracts. In the past, the Federal Labour Court applied a ‘collective test of favourability’ to assess whether the works agreement amending the individual employment contract was valid.⁷² Under this test, the courts examined whether the changes to the individual employment contracts made employees collectively better off. Thus, the works agreement could actually reduce the rights or benefits for a certain group of employees provided that, in the same agreement, the rights or benefits for other employees were extended, thereby setting off the losses incurred by the first group. In its recent case law, the Court seems to have abandoned the ‘collective test of favourability’ and adopt a more liberal approach towards works agreements. In some cases, the Court has inserted an implied term into employment contracts that standard terms of employment are subject to modification through works agreements.⁷³ According to the Court, such modifications are permissible regardless of whether they are more favourable to each individual employee or to the workforce as a whole. If confirmed in future case law, this new trend in the case law would indeed broaden the scope of collective bargaining for works councils.

4. Conclusion and future outlook.

One hundred years ago, when the German works constitution came into being in the immediate aftermath after World War I, the relationship between trade unions and works councils was strained: each side looked at the other with suspicion and jealousy. Today, while some degree of rivalry still persists, trade unions and works councils have become allies and collaborate in many areas, including collective bargaining. What challenges will the German system of workplace representation face in the future? Like in other European countries, the most difficult task will be to organize and represent a workforce that is becoming more and more heterogenous and fragmented. With the proliferation of remote working and other non-standard forms of employment, it is increasingly difficult for works councils to identify common ground and interests among employees. Moreover, as union density is decreasing continuously, the synergy between trade unions and works councils will also diminish, which could eventually result in the weakening of both channels of employee representation. However, what can be learned from the past one hundred years is that the works constitution has been capable of adjusting to a great variety of political, economic and technological

⁷² BAG (GS) 16 September 1986 – GS 1/82, NZA 1987, 168.

⁷³ See e.g. BAG 30 January 2019 – 5 AZR 450/17, NZA 2019, 1065 para. 59.

change. We have reason to be optimistic that the *Betriebsverfassung* will be able to cope also with future challenges.

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