Recommendations: shaping the co-determination of the future, adopted by the German “Co-determination Commission”

At its sixth and final meeting on 22 April 1998 the Kommission Mitbestimmung (Co-determination Commission) unanimously adopted the following “Recommendations: shaping the co-determination of the future”. The Commission had been set up back in 1996 by the Bertelsmann Foundation and the Hans Böckler Foundation with the aim of collating the practical experiences gained with co-determination and of offering advice and making recommendations on the way it should be developed in future. The Commission consisted of leading figures from the business community, trade unions, collective organisations and politics; the accompanying social-scientific work was conducted under the leadership of Prof. Dr. Wolfgang Streeck, Director of the Max Planck Institute for Social research in Cologne.

The central task of the Commission, which had been proposed by the Foundations and accepted by the Commission members, was based on the conviction that co-determination constitutes one of the central pillars of Germany’s economic order, and must be retained and developed further as an element of the social market economy. All the participants were in agreement that co-determination is oriented towards cooperation and is therefore incompatible with any form of confrontational ideology. Where it functions in accordance with the idea of cooperation, it is in equal measure a means of social integration and of effective corporate leadership, combining as it does social responsibility with economic reason. Modern leadership in a co-determined company does not rely on orders from the top, but rather on creativity from the bottom, by incorporating employees at all levels into the firm’s processes and opening up opportunities for autonomous action.

This recognition, which had emerged not least from previous projects conducted by both of the Foundations on the subject of corporate culture, has certainly exerted a not inconsiderable influence on the members of the Commission. And it led to the belief that a corporate culture oriented towards both the market and the workforce is an essential competitive advantage; in this co-determination is a central, and determining factor.

The Commission has made an extremely thorough study of co-determination in practice, in order to derive recommenda-

1 The full version of the concluding report of the Commission is available in German: Bertelsmann Stiftung and Hans Böckler Stiftung (eds.), Mitbestimmung und neue Unternehmenskulturen - Bilanz und Perspektiven: Bericht der Kommission Mitbestimmung, Gütersloh 1998.
tions for those bearing responsibility in related areas, be it in companies, collective organisations, trade unions or the political sphere.

More than 50 experts were called upon to contribute their knowledge and experience of co-determination, including entrepreneurs and managers, trade unionists and works councillors. Comprehensive preliminary work as conducted in the form of numerous hearings with social scientists and on three committees. In addition, members of the Commission conducted a series of interviews with representatives of collective organisations and trade unions and with politicians and experts from the field.

Given the complexity of the topic and the unanimous view of the members of the Commission that the common core of their findings should not be obscured by differences of detail, each and every member of the Commission cannot be held to each and every formulation in the following recommendations. In the interest of reaching a joint position, members have in some instances accepted certain formulations even though they themselves would have preferred to have gone further or not as far. For the sake of the project as a whole, mutual concessions were and are always necessary on individual questions; it was only on the basis of this willingness to compromise that the concluding report and the recommendations could be unanimously adopted.

The atmosphere in the Commission was at all times businesslike, fair and characterised by mutual respect. Criticism was seen as evidence of devotion to the common task. The esprit de corps within the Commission proved extremely productive.

The Foundations have successfully shown that personalities from different interest groups are perfectly willing to act together. This is conditional, however, on clear recognition of the overriding goal and a strong commitment to achieving a result in an atmosphere of mutual tolerance. From this perspective, the Co-determination Commission constitutes an example of a trust-based culture.

The Foundations have sent a signal. They call on the “forces of optimistic reason” across all political and social boundaries to overcome tactical foot-dragging in all its forms and to come to the realisation that successful economic modernisation must incorporate interpersonal relationships, must, in other words, be based on a corporate culture that points to the future.

**Recommendations: shaping the co-determination of the future**

1. At the end of the 20th century, the task of shaping co-determination must be seen in the context of the necessary adaptation of the German system of labour relations to changed markets, technologies, organisational structures and ways of life. The aim must be to
reach agreement on and to operationalise a new ‘works social contract’ that brings rights and duties, security and risks, collective and individual interests, formal rules and informal corporate cultures, and statutory and collectively agreed regulation of labour relations in the plant and the company into a new balance, one that takes account of changing economic and social conditions. To this end it is necessary to identify and cultivate the historical strengths of co-determination, to adapt it to new necessities and to open it up to new opportunities. Important hints are to be obtained here from careful observation of the actual practice of co-determination, the future-oriented elements of which need to be elaborated and reinforced by creative policy-making.

2. German co-determination has contributed to cooperation between employers and employees based on mutual trust primarily by statutorily underpinning the participation rights of the workforce. In particular, it has been conducive in a sustained manner to the broad-based deployment of non-hierarchical and information-intensive managerial methods and to the creation of cooperative corporate cultures. Where co-determination has been understood by both sides in this sense, it has contributed to the success of the firm, to the benefit of all concerned. The development of co-determination in the coming years must follow the guiding vision of a cooperative, decentralised, participatory and information-intensive corporate culture.

3. In the course of its development into an infrastructure of workplace cooperation, co-determination has adapted in a differentiated way to the specific technical and economic circumstances prevailing in the various branches and companies. This has led in practice to highly differentiated forms of co-determination, underpinned by a uniform legal basis. Co-determination policy and law must respect the diversity of co-determination that has evolved and support, in a differentiated way, the case-by-case optimisation of co-determination practice with respect to workplace and company-specific characteristics.

4. The experiences of the 1990s have shown that, given joint efforts to shape it, co-determination can be developed into a competitive advantage for firms located in Germany. The dependable incorporation of all participating interests ensured by co-determination enables the ‘productivity of cooperation’ to be mobilised in a more difficult market environment. What is vital for German firms in the coming years is to make strategic use of the advantages of co-determination. To this end its effectiveness must be guaranteed in the face of changing conditions.

5. The task of moulding co-determination in a differentiated way that takes account of individual situations, in order to bring about the transition to a new workplace social contract, cannot in the first instance be performed by government. Responsibility for the productive use of
co-determination lies primarily at workplace and company level. In addition, it is the responsibility of the organised labour market parties, with the means at their disposal, to facilitate and support a differentiated modernisation of co-determination at workplace and company level. The co-determination of the future must be developed as part of the self-organisation of society; any legislative reforms must be based on this principle.

6. Even within a changing European environment, co-determination will remain as an element of an autonomous German system of industrial relations. The task of German policy-makers, therefore, must be to adapt it to new conditions, in order to retain its advantages, not least at the points of contact with the emerging European works and corporate constitution. Irrespective of any legislative changes that may become necessary, co-determination must and can be adjusted to new conditions by means of a flexible adaptation of its day-to-day practices, particularly with the support of the parties to collective bargaining. The already extant and substantial scope for such adaptation should be utilised more intensively and extended.

7. In day-to-day practice co-determination has proved able, often to an astounding degree, to adapt to new organisational circumstances in plants and companies undergoing change by means of a diverse, improvised and innovative development of institutions and procedures adapted to meet the needs of the situation at hand. Examples include the delegation of works-council co-determination rights to work and project groups, an appropriate distribution of competencies between plant, company and group-level works councils, and the application of the "spirit" of company co-determination laws to new corporate structures that were no longer adequately covered by existing law. A modern co-determination law must not restrict the scope for such innovations, that are negotiated on a contractual basis to deal with the specific needs of individual companies.

8. The numerous efforts observed in practice to render co-determination more flexible, less bureaucratic and more highly decentralised, reflecting the new economic, technological and organisational conditions, deserve the support of government, the social partners and the labour courts. The aim of a future-oriented remoulding of co-determination must be to open up co-determination for negotiated solutions to a greater extent than has been the case to date, without endangering the peace and trust-creating function of the statutory basis of co-determination. Instruments that might be considered in this context include collectively and voluntarily agreed works constitution norms in accordance with Articles 3 and 4 of the law on collective agreements (Tarifvertragsgesetz) and Article 3 of the Works Constitution Act (Betriebsverfassungsgesetz) on the structure and mode of operation of the co-determination organs. This is conditional, however, on the concerns about
the possibility of strike action in support of additional co-determination rights being removed.

9. The co-determination of the future demands structures that are appropriate to the indispensable diversity of its concrete forms and the expectations made of them. Consequently, participation rights must be able to be additionally established - on the basis of joint agreement - at a level that is below that applying to all equally, and below the level of the central workplace co-determination organs. Given its considerable flexibility, the collective agreement appears particularly suited to the situation-specific development of co-determination, all the more so given that a growing proportion of the regulatory activities of the co-determination organs at plant level is determined by option clauses in collective agreements concluded at supra-company level.

10. As an insurance policy against breaches of trust at the workplace, German co-determination law has made a decisive contribution to creating and stabilising a cooperative corporate culture. Co-determination law will remain indispensable in the future to reduce conflict potential and underpin process-oriented cooperation as a mandatory basis for autonomous development in diverse and increasingly highly differentiated workplace situations. Particularly politic in this context would appear to be an extension of the scope for plant-level agreements on the structure and mode of operation of the co-determination organs. In particular it is necessary to extend the scope for institutional innovation and joint organisational learning existing at the workplace, and to remove legal uncertainty surrounding the exploitation of this scope.

11. Collective agreements and free collective bargaining between trade unions and employers’ federations should support the conclusion of “production location agreements” (Standortvereinbarungen) between the works council and the employer, the aim of which is to safeguard existing and create new jobs. To the extent that medium-term investment commitments by the employer depend on the ability of the works council to incorporate provisions on working time and pay that are normally regulated by collective agreement into a joint package of measures to maintain competitiveness and employment at the production location, this should be permitted by the relevant collective agreements. In particular, they should support a distribution of pay and working time that accords with the specific conditions of the individual case, and is aimed at maximising employment, along with other measures to expand employment. The necessary protection against excessive bargaining power by the “other” side and the prevention of a “race to the bottom” between competing firms can be assured by a provision in the collective agreement for a ratification by the parties to collective bargaining of plant-level agreements that inter-
vene in and modify collectively agreed provisions.

12. Seen from the perspective of the parties to collective bargaining, co-determination can be used as an instrument to achieve a differentiated implementation of an employment-oriented collective bargaining and pay policy. The practice of reaching production location agreements indicates that collective understandings between the parties on the mode of converting productivity growth into employment need not fail merely because the details of such an implementation cannot be regulated centrally and uniformly due to the complexity of their conditions. The local “Alliances for Jobs” concluded at local level in numerous firms could be made even more effective if they were supported by a corresponding collectively agreed alliance at industry or national level. This would ensure that concessions made by the trade unions regarding wage flexibilisation and working conditions are actually used to safeguard and expand employment.

13. New forms of employment and of workplace and corporate organisation threaten to lower the value of the legal resources of co-determination. Where stable and legitimate employee interests in exerting a representative influence on events in the workplace and company exist, they must be enabled to take effect even under changed organisational circumstances. The strategic utilisation of the productive resources of co-determination must not be allowed to fail as a result of their erosion. In view of the diversity and uncertainty of the developments involved, it may be politic to promote workplace or collectively agreed solutions adapted to the situation at hand by opening up the scope for regulatory activity at local level and by instituting process-oriented rights. To the extent that these remain inadequate, it may be necessary to amend co-determination law, in particular by redefining the legal definitions of concepts such as group, company, workplace and employee. Legal amendments could be preceded by legally sanctioning pilot schemes agreed jointly by the parties. There is a legitimate public interest in maintaining the integrity and effectiveness of co-determination.

14. The increasing importance for employment of small and medium-sized enterprises, in which there is not usually a works council, or at least not a full-time employee representative, threatens to lead to a loss of importance and influence of co-determination as a whole. To the extent that more flexible branch/regional collective agreements transfer regulatory responsibilities to the social partners at workplace level, the limited diffusion of works councils in small and medium-sized enterprises poses a threat to the reform of the system of supra-plant collective agreements, and thus to the effectiveness of the dual system of industrial relations as a whole. It would appear to be a priority task for trade unions and employers’ federations
to ensure that collective agreements, co-
determination and government regula-
tion are able to interact in an optimal way even under the specific conditions prevailing in small and medium-sized enterprises. Among other things, this means that ways must be found, on the basis of joint efforts, to overcome the existing barriers to the setting up of works councils. This is conditional on due attention being paid to the specific condition prevailing in such enterprises and, above all, the avoidance of an excessive formalisation of decision-making processes.

15. In the past co-determination has repeatedly and successfully adjusted to changes in competitive conditions. It now must face up to the challenge of dealing with increasing cost pressure, new innovation requirements, shortened decision-making times and more demanding investors in the context of increasingly globalised goods and capital markets. In order to achieve this, numerous changes will be required in its structures and modes of operation. Successful and promising approaches to this have already been implemented in a large number of companies; they must be pursued, observed and supported.

16. The question of co-determination on the supervisory board is particularly controversial, with widely differing positions being taken. Representatives of industry have argued for a reduction in the size of co-determined supervisory boards in order to enable them to work more efficiently. Representatives of the trade unions, on the other hand, are in favour of maintaining the number of supervisory board members stipulated by law, in order to ensure that greater expertise is brought into the company. There is agreement, however, on the urgent need to simplify the procedures for elections to the supervisory board under the 1976 Co-determination Act.

17. The presence of employee representatives on the supervisory board does not constitute an obstacle to the board performing its supervisory function in those companies in which a corporate culture based on trust exists that enables the employee representatives to exercise their co-determination rights in a non-schematic and non-formalistic way. The creation of such a culture can be promoted, as is shown by the practice in a large number of successful companies and groups, by continuously informing all members of the supervisory board, including the employee representatives, at more meetings and on a broader range of issues than is required by law. Clearly, such a practice is conditional on the maintenance of absolute respect for the mutual trust established.

18. The continued effectiveness of co-
determination will depend decisively on the maintenance of a division of tasks between co-determination and collective bargaining. The reform of supra-plant level collective agreements in certain industries must not be achieved by methods that call into question the dual sys-
tem of labour relations. In particular, the social partners at plant level must not be transferred regulatory tasks - nor should such tasks fall to them due to a failure on the part of collective bargainers - whose performance at plant level would pose a threat to trustful cooperation between the works council and management, or would bring the works council into conflict with employees' negative right of association or the trade unions' monopoly on the right to strike. Adherence to Article 77 (3) of the Works Constitution Act is thus of fundamental importance.

19. At the same time, there exists a whole range of opportunities for collective agreements to delegate regulatory issues to the social partners at plant level that are in accordance with both the Works Constitution and the Collective Agreement acts. To this extent co-determination can be used as part of a controlled decentralisation of the collective bargaining system, with the aim of rendering collective agreements more flexible, in the face of a growing need for more highly differentiated plant-level solutions, and thus to ease the pressure on such agreements.

20. In co-determined German companies that employ a significant proportion of their total workforce in other European countries, over the medium-term the question will increasingly arise as to the legitimacy of filling the employee block on the supervisory board exclusively with German representatives. A simple solution to this problem is not apparent at the present time. What could be examined, however, is whether, in the context of possible changes in the electoral procedures for the internal employee representatives, the possibility of electing representatives of workforces located abroad should be opened up.

21. To the extent that the institutional structures of co-determination in a future European Joint-stock Company will be left to negotiations between employers and employees, it is to be expected that the negotiations will be conducted by the representatives of German labour with the aim of preventing a reduction in their scope for co-determination in the course of the transition to a European corporation law, at least in German parts of the company. Fears that the europeanisation of corporation law could lead to a cut in the level of co-determination that has evolved in Germany could lead to tensions between employers and workforces at plant level. For this reason the transition of German companies to a new legal form under European law should only proceed with the early and complete involvement of the co-determined company organs.

22. The europeanisation of the corporate constitution offers German companies the chance of using the cooperative management model of co-determination as a guiding vision for the creation of a cross-border corporate culture and identity. Numerous indications suggest that the economic performance and value of
German co-determination is frequently underestimated abroad. To a significant degree, the future of co-determination will depend on the trust placed in it by foreign investors. Government and the central partners are called upon to seek ways to correct the mistaken view of co-determination prevailing in public opinion abroad, by means of joint publicity measures.

23. Conflicts of interest between employers and trade unions surrounding the details of co-determination are certain to remain in future. Yet there is no justification for losing sight, because of these differences, of their joint interest in a constructive, on-going development of co-determination as a whole. The task of creating awareness of this common interest could be served by a continuation of the dialogue between the social partners begun in the Co-determination Commission, on the basis of joint observation of the changing circumstances in workplaces and companies; this might focus on the emergence of new forms of employment and of workplace and company organisation, and on the Europeanisation of production and corporate structures. The continuation of a "co-determination dialogue", oriented towards practical requirements, in which both collective organisations and workplace representatives participate, could help continuously to reassert the joint interests held in common by the social partners.

24. Where co-determination comes into conflict with the economic goals of a company, the causes do not usually lie in the statutory provisions - to which both successful and not so successful companies are equally subject - but rather in their application. Consequently, the aim in the on-going development of co-determination must focus on local process optimisation by achieving as broad a diffusion as possible of the best practices developed by the leading companies. This requires new forms of case-by-case information and advice provision that take account of the diversity of actual co-determination cultures and problems, and that are able to promote the use of the opportunities for development and experimentation that must be granted at plant level.

25. In addition, the provision of back-up support for a situationally appropriate operationalisation of co-determination in the individual enterprise would appear to be a priority task for the collectively organised social partners. One instrument that could be deployed to this end are joint advisory bodies - possibly, although not necessarily, in the form of joint institutions as provided for by Article 4 (2) of the Collective Agreement Act - to which companies could turn voluntarily when modernising their co-determination processes and to mediate in cooperation processes or in cases of conflict. Such institutions could also play a part in helping to improve the skills and know-how of works councillors and managers in dealing with the increasingly complex co-determination system. Also conceiv-
able would be more frequent recourse for co-determination purposes to social partner agreements, not linked directly to collective bargaining, with the help of which enterprises could be informed of and recommended new opportunities for the productive use of co-determination in line with the prevailing best practices.

26. The on-going development of co-determination by means of a continuous observation of co-determination in practice, the organisation of a permanent co-determination dialogue at a high level and separate from bargaining and decision-making situations, and case-by-case advice provision and mediation are all to be seen as public development tasks, the performance of which is primarily the responsibility of the organised social partners. The Commission calls on them to search together for suitable organisational forms for observation, dialogue and advice provision, permitting synergy effects between these areas to be used and external know-how brought in. This must be allowed to lead neither to the creation of new bureaucracies nor to the division of new, joint tasks among existing bureaucracies. A central role will therefore be played by flexible, project-specific expert staffs and the establishment of competence networks that transcend organisational boundaries.

Professor Karl-Heinz Briam
Chairman of the Co-determination Commission