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INDUSTRIAL DEMOCRACY:
LEGAL DEVELOPMENTS IN EUROPE 1977–1979

by Walter Kolvenbach*

Introduction

The announcement that Mr. Douglas A. Fraser, President of the United Auto Workers union, is a candidate for election as a director of the Board of Chrysler Corporation, once again has focused the attention of the United States of America on the codetermination systems already existing or being discussed in a number of European countries. It is obvious that for the American labor relations system and for corporate lawyers, this move raises many legal problems. Such problems have become all too familiar to Europeans.2

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1. This announcement found worldwide publicity because until now it was generally believed that "the American legacy of individualism and distrust for government control will prevent what has happened in Europe from arriving here." Mills, Europe’s Industrial Democracy: an American Response, HARV. BUS. REV., Nov.-Dec. 1978, at 143.
Traditionally, codetermination, as a means by which employees participate in decision-making at the shop or board levels, has been regarded merely as a concern of labor law. More recent experiences demonstrate that, in those countries which make legal provision for codetermination, the results pervade the entire field of company law.

An increasing number of nations on the Continent are enacting detailed, comprehensive statutes on the matter. The Western European labor movements seek to resolve issues affecting the workplace through political and legislative means instead of by collective bargaining. This contrasts with the United States' approach, wherein a decentralized trade union structure negotiates with the employer over the problems of the workplace; political questions are deemed extraneous to the "traditions and interests of the American labor movement." In view of the new developments, it seems appropriate to quote Peter F. Drucker: "Thus, it seems apparent that codetermination, even where it is merely debated and then set aside, is an explosive issue that has important political as well as social ramifications. We in this country would do well to pay greater attention to this issue."("4

The right of employees to participate in management decisions is recognized by almost all European political parties. Typically, the President of France, M. Giscard d'Estaing, stated in 1976, "Participation of workers' representatives in the life of their company reflects the workers' aspirations not to be left out of decisions that concern them." (However, it is unclear whether the British Conservatives, now returned to power, still would go as far as to say, "Employees' interests should now be fully recognized by giving them rights which are comparable to those of shareholders.")) For the main part, worker participation, industrial democracy and its institutions will continue to advance in the 1980's in every European country. While assuming different forms in different countries, it is encouraged by strong support from the EEC Commission in

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5. V. Giscard d'Estaing, Democratie Francaise (1976).
In general, participation is instituted first at the shop-floor level, normally by the establishment of works councils or similar institutions. They are the first step in the establishment of participative institutions, often followed by the election or appointment of employees to the board of directors. Some European countries allow participation solely at the shop-floor level while others also allow employees to participate in the management or supervisory organ of the company.

Unfortunately, the preferred equivalents in English to describe the pertinent phenomena vary: "industrial democracy," "participative democracy," "worker participation," "co-gestion," (actually French) and "codetermination." Even in countries wherein they originated, disagreement exists as to the precise meanings of these terms. There are many forms of employee representation in industry which assume their own constitution, powers, and objectives, yet lack proper terminological differentiation as, for example, works council, joint council, and comité d'entreprise. Hence, identical titles in the original language may not represent similarity in nature and function any more than distinct titles necessarily correlate with separateness of structure; translation without in-depth description has compounded the confusion.

What are the objectives of Industrial Democracy?

Working conditions were influenced as strongly by mechanization in the last century as they are now by automation and computerization. The division of labor and the rise of large industrial units were two early results. A more recent result is the drive for the humanization of work at the factory level, including more democratic decision-making. Among the phrases often used in this connection are "better quality of life," both at work and beyond, and "social responsibility" of the enterprise for the consumer as well as the employee.

7. Hudson Research Europe, European Trade Unions, Labour Movements and Worker Participation 1990 at 54 (1977) (paper prepared for the 7th International Management Symposium Davos, held May 23-25, 1977) ("the participation gospel has spread like a wild fire").

8. The existing statutes and agreements on works councils are summarized and printed in English in W. Kolvenbach, Employee Councils in European Companies (1978).

9. Humanizing Work, Industrial Society's Next Task, ATLAS REPORT,
Industrial Democracy assumes different forms in different countries but it has a common definition: that each individual in the work organization should share in the information and power relevant to the decisions affecting him. The extent to which the individual partakes of information, power and decision-making serves as the point of departure for the various humanistic movements.10 Industrial democracy has created information rights and, in some countries, decision rights, for a large number of employees.

Of course, an inalienable part of democracy is precisely the right of the individual to free personal development. Yet, the concomitant and unresolved question arises concerning the limit attached to this freedom by the protection of minority rights.11

A survey published by the Anglo-German Foundation on December 12, 1979, and based on field work in 14 British companies shows that the amount of involvement in decision-making at work is “astonishingly low.” Conversely, there was wide agreement among those questioned that greater employee participation would lead to better decisions. 72% of the survey respondents thought that employee representation on boards was desirable.12 It is interesting to compare the result of this survey with British studies in 1975, wherein a “substantial proportion of individuals felt that they should be informed, but not necessarily further involved, in decision-making processes.”13

Another interesting survey concerning the effectiveness of cooperation between works councils and management in the Federal Republic of Germany showed that the relationship between these two institutions in the enterprise is better than surmised. 1700 companies with a total of 4.1 million employees participated.14 61% of the participating enterprises report that frequent dis-

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June 1977, at 31.

14. The survey was conducted by Institut der Deutschen Wirtschaft. The results were published in Blick durch die Wirtschaft, Nov. 8, 1979 and Handelsblatt, Nov. 12, 1979, at 6.
Discussions between the works council and management take place. 28% have these discussions monthly, 3% every two weeks and 9% weekly. The sessions last an average of 2½ hours each, personal and social matters are discussed. In personal matters the works councils as well as management initiated such discussion in 43% of all relevant situations. The legal possibility of including union representatives not employed in the enterprise has been used often by 6% of the firms, occasionally by 58%, and never by 36%.

It is interesting also to examine costs. For the average employee's year, they are roughly DM 179. Total expenses for an enterprise with 500 employees run from DM 80,000 to DM 95,000; enterprises with 10,000 employees list annual expenses between DM 1.5 and 1.8 million, and enterprises with 100,000 employees list DM 15 to 18 million. These figures show that the works councils are also a cost-intensive factor.

The German Shop-Constitution Act provides for a certain number of works council members to be paid and relieved from work. Thus, 10% of all members are free from work to act as fulltime works council members. Almost 75% of the workforce participate in works meetings, which are convoked by the works council at least once per year.

The Historical Development of Industrial Democracy.

Worker representation has been discussed since the beginning of the Industrial Age. In the British printing and foundry industries shop stewards were elected as early as 1824 and 1831, respectively. During the years 1848 and 1849, the National Constitutional Assembly (Verfassungsgebende Nationalversammlung) meeting in the Paulskirche at Frankfurt Main, Germany, drafted and discussed an amendment to the Industrial Code (Gewerbeordnung) in accordance with which the employees in each factory would elect a "Factory-committee" as jointly representative of employers and employees. While this amendment never came into effect, rights which these committees would have had resemble strongly the co-determination rights which similar institutions enjoy in many European countries today.

In 1891, a German law first mentioned "worker committees" which could be regarded as forerunners of the modern works council. The term "Industrial Democracy" appeared for the first time.

in 1902. The Austrian Constitutional National Assembly enacted a law establishing employee representation in factories and the Constitution of the German Reich (Weimarer Verfassung) devoted particular attention to worker representation. This article was implemented by the Works Council Law of February 4, 1920 and had considerable influence on the development of the principle of employee representation in other European countries. The first law on the appointment of works council members to the supervisory board of companies was passed by the German Reichstag on February 15, 1922.

It was only after World War II that worker representation in the decision-making process at shop floor and board levels became political issues.

**The Realization of Industrial Democracy.**

Three main forms of worker participation have been developed: a) Participation in the decision-making process at the shop-floor level through works councils (or similar institutions) or in some countries, especially the United Kingdom and Ireland, through shop stewards; b) Participation in the decision-making process at the board level through employee directors; and c) Participation through ownership in the company (Asset-
This paper deals only with works council and board representation. In order to explain the new developments in these two fields, it may be advisable to begin by explaining some of their legal aspects.

**Works Council Legislation**

In most countries the works council as an institution has been created to establish good relations between management and the workforce. The institution is designed to promote cooperation and solve problems at the shop-floor level. Therefore the works council in general is not an instrument of collective bargaining. In most of these countries the exclusive exercise of the right to collective bargaining has been guaranteed by legislation to the trade unions.

This development is partly the result of history: initially, works councils only received information on technical aspects of the factory or company. Gradually the amount of information has been increased so that now the information to be given normally includes economic and financial information. As more rights were granted to the works councils by legislation or agreement, it became easier for these councils to engage in a limited process of collective bargaining with management for problems which were immediately connected with shop-floor activities.

A common expression for agreements between works councils and management is "Agreement for the Plant" (*Betriebsvereinbarung*). These agreements, limited to the individual factory or company, supplement nation- or industry-wide negotiated collective bargaining agreements between the trade unions on the one side and employers associations on the other.

Thus, a "double layer of agreements" is developing. The development in the Scandinavian countries is typical of this situation. General agreements or laws are particularized by detailed and specific

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22. The Commission of the European Communities published a memorandum on *Employee Participation in Asset Formation* (COM (79) 190 final) (Aug. 29, 1979) which surveys the legislation and systems existing in the member states. The memorandum indicates very clearly that the Commission favors collective funds, into which part of the profits of the companies would have to be paid. This system is strongly opposed by the employers associations because of the super bureaucracies which will develop and the ownership potential of such large funds in industry. See Raskin, *Pension Funds could be the Unions' Secret Weapon*, *Fortune*, Dec. 31, 1979, at 64.
agreements for the individual plant or company. This flexible approach can provide for local necessities, while centralized collective bargaining agreements cannot. Local differences must be solved under local circumstances.23

Worker participation at the shop floor level (or in management) and collective bargaining coexist in most European countries; these two different procedures or institutions should not be confused. In general, both institutions have elements of cooperation and conflict and both intend to resolve conflicts or ultimately, to avoid them. Of course, issues that are resolved in one country by collective bargaining mechanisms are resolved in another by participative institutions (such as works councils). The term "collective bargaining" normally refers to nation-wide or local agreements between employers and employees, or employee organizations, while "worker participation" at the shop floor level occurs in the individual factory or company.

Collective bargaining hardly can be imagined without the existence of a trade union or some other organization to represent employees and/or laborers. Conversely, the works council, as an institution of the factory employees, may exist without the presence or participation of trade unions. This explains why, in most European countries, the trade unions always have claimed that they are the exclusive representative of all employees, regardless of the size of the membership in the trade unions or the degree of unionization in the respective country. This claim or demand of the trade unions has been termed "one channel representation," and in some countries, especially the United Kingdom, it has resulted in strong opposition by trade unions to works councils; these trade unions believe in polarization instead of cooperation.24 It is obvious that trade unions which believe in opposition to the employers cannot consider employee representatives (works councils) as suitable instruments for solving shop floor problems. They are wary of the works councils


24. C. McClure, Die betriebliche Mitbestimmung der Arbeitnehmer in den USA (1975) (inaugural dissertation at the University of Bonn) is of the opinion that American employees have obtained certain, though limited, participative rights through collective bargaining. See also Summers, Worker Participation in the United States and the Federal Republic: A Comparative Study from an American Perspective, 29 Recht der Arbeit 257 (1979).
developing into institutions for collective bargaining and for the negotiation of work conditions and wages between the management of the factory or company and the employees. They do not want works councils to become the exclusive bargaining partners for management or employers' organizations, as this would reduce the influence (and gradually also the strength) of the trade unions. In countries with "two-channel representation," factory trade union representation co-exists with the elected works council. Particularly in countries where legislation for the compulsory establishment and election of works councils exists, these councils are the representatives of all sections of the workforce regardless of their membership in trade unions. Trade unions rarely attain such strongly democratic representation because the members of the workforce normally belong to different groups of employees or professions. In some countries, the competing trade unions make universal representation impossible.

The existence of "two-channel representation" does not preclude close cooperation between the trade unions and work councils. The system does not inevitably result in unilateral representation of the employees through their elected works councils, especially if the legal basis for the works councils expressly defines their rights and duties. In countries with such legislation, other regulations normally define the rights and duties of trade unions as collective bargaining partners of the employers or their organizations. Since the works council as an institution is part of a system of industrial democracy, it may well be argued that the work "democracy" in itself requires a universal electorate with voting rights for every employee. In those cases where voting rights are reserved for trade union members only, a limited industrial democracy has been achieved. Full industrial democracy exists only if members of the workforce who are not members of a trade union are not deprived of their right to elect their own representatives.

Not surprisingly, where national works council systems were created, either by statute or agreement, trade unions have attempted to exert strong influence over them. In some countries, the trade unions enjoy an exclusive or preeminent right to nominate candidates for election to works councils. Even where this privilege does not exist, the trade unions attempt to exercise an influence on the election of candidates that is commensurate with their strength in the enterprise. In countries like Austria and Germany, where the works council legislation stipulates direct active and passive voting rights for all employees regardless of membership in a trade union, union candidates in strongly organized enterprises have a greater
chance of election than non-union candidates. Legally, this is "two-channel representation":

(1) The works council is the democratically elected institution representing all employees of the enterprise;

(2) The trade union organization in the enterprise primarily represents its own members as a partner in collective bargaining agreements which are not negotiated at regional, national, or industrial levels.

Works councils are based legally either on statute (Austria, Federal Republic of Germany, Belgium, Luxembourg, the Netherlands), or on nation-wide agreements (Denmark, Norway, Sweden).25 In Switzerland, the United Kingdom and the Republic of Ireland, agreements for specific industries, regional areas or firms are preferred. A combination of statute and agreement has developed recently in Scandinavia. The United Kingdom also is considering the possibility of having fall-back legislation concurrent with voluntary agreements. Whether legislation requires works councils depends primarily on the national legal system and customs. The inclination towards legislation also results from an increasing governmental intrusion into labor relations and from the state of the economy.

It is interesting to compare the composition of the works councils:

In Scandinavia, Belgium and France, the works councils consist of one or more appointed representatives of management and elected or appointed representatives of the employees. In Austria, the Federal Republic of Germany and, since September, 1979, the Netherlands, all members of works councils are elected directly from the workforce. Here, representatives of management normally are not present at council meetings. Most trade unions consider this independent, homogeneous works council as the only genuine employee representative institution.

Great differences also exist with respect to the right and tasks of the councils. The Scandinavian cooperative council occupies a unique position here since the agreements expressly describe it as an institution "to further the cooperation between employer and employees." This broad description gives the council a mandate far beyond the tasks enumerated in many statutes; due to this, the cooperative councils in Denmark, Norway and Sweden have enlarged

25. For an English translation of the laws and agreements of these countries see W. Kolvenbach, Employee Councils in European Companies (1978).
their activities; and, in addition, Sweden has reached an extensive enactment of their rights.

Councils in countries like Belgium and France are less powerful and influential. There, employee representatives primarily receive information and have only limited opportunities to participate in the decision-making process. However, the amount of information given to these bodies has grown over the years with trade unions and employees continuing to demand an expansion of their informational rights. In all countries, including Austria and the Federal Republic of Germany with their very extensive council jurisdictions, the dissemination of extensive information to the workers preceded codetermination. Presumably, it is with the establishment of a broad base of information that council members acquire the dual desire to obtain more data (which they may pass on to their fellow workers) and to act upon the revealed facts. Therefore, the passing on of information may be regarded as an initial phase in the development of works councils which will extend eventually to codetermination rights.

Worker participation in the decision-making process at the board level.

James Furlong calls codetermination "the peaceful revolution," and Robert Ball paints a picture of "the hard hats in the board room." In the name of industrial democracy, an increasing number of European nations are enacting legislation to permit worker representatives to become members of their respective boards of directors.

In many of these countries, this new development has had a strong influence on the economic and managerial decision-making process, as well as on the legal status of the board of directors. It has led to the membership of worker representatives in the board of directors, the Aufsichtsrat, the conseil d'administration or similar institutions which exist in almost all European company law. These representatives of the workers either are elected by the workforce of the company or are appointed by works councils, trade unions, or other representatives of the employees. Under our traditional

systems, the members of the board of directors or supervisory organs of a share-holding company were elected or appointed by the representatives of the capital invested in the company, i.e., the shareholders. Under the new system, the shareholders are deprived of their exclusive right to appoint these members, with the workforce being given the right to elect or appoint part of the membership. This is "regulated capitalism." The company is no longer an instrument of profit maximization for the sole interest of the shareholders; but the interests of the employees and of the public must be taken into account. The interest of the employees equals that of the shareholders. Company law thus has changed its character. It has developed from company law (droit des sociétés or Gesellschaftsrecht) to a law of enterprises (droit des entreprises or Unternehmensrecht).

Given the new approach, management now has to balance all the relevant interests: those of the shareholders who demand a return on their investment, the interest of the employees who demand good wages and job security, and the interests of the public, speaking for the national interest. Corporate social responsibility compels management to consider the interests of the workforce as an important element of that public interest.

The philosophy of enlarged responsibility for enterprises is expressed in new organizational forms in the various European codetermination systems. The company is no longer a capitalistic

28. Schmitthoff, Social Responsibility in European Company Law, 30 Hastings L. J. 1421 (1979). One commentator has examined the question whether the German experience of giving the workers and the public a larger voice in corporate decisions sheds new light in the discussion regarding the role of the American board within the company. To include the employees in the corporate constituency has implications for "both corporation law and labor law; indeed, that it constitutes a new linkage between the two and causes many of its analytical and practical problems." Vagts, Reforming the 'Modern' Corporation: Perspectives from the German, 80 Harv. L. Rev. 23, 65 (1966).


30. Roth, Corporate Social Responsibility: European Models, 30 Hastings L. J. 1437 (1979). In this context, the development in Norway is important. There, demands are being made that companies of a certain size inform and consult with municipal authorities if business matters could be of importance to the municipality. It was even suggested that these local authorities should have the right to demand seats on the boards of companies operating within their boundaries.
organization but a combination of capital and work force. This combination becomes visible in the allocation of seats on the board of directors or the equivalent institution, i.e., the legal representation of the company. The impact of the worker directors as board members depends on the legal system in which they operate. "One tier" and "two tier" systems play an important role. A typical “one tier” board organization is the Anglo-Saxon “board of directors” or the French “Conseil d’Administration”; Luxembourg and Denmark also use this system. Hereunder, the board or conseil manages the company in all respects. This all-encompassing authority includes “supervision,” which under the two tier system is assigned to the supervisory board. The characteristic legal problems of employee membership in a one tier organization particularly include individual responsibility of the board members and liability to the owners, i.e., the shareholders of the company.

The two tier system separates the representatives of the shareholders in the company formally and visibly from management. These shareholder representatives supervise the management board which, as the executive of the company, is responsible for the day-to-day operations of the company. Members of the management board are appointed by the supervisory board; no one may be a member of both institutions. The influence of the supervisory board is important because under many two tier systems, e.g., the German, it approves the balance sheet with the profit and loss statement. Codetermination legislation gives the employee representatives on the supervisory board the same rights and duties as the owner representatives, including the obligation to keep information confidential.

31. In the United Kingdom, representatives from the labor force are called ‘worker directors.’

32. W. Kolvenbach, Workers Participation in Europe 19 (1977). The two-tier board model is also discussed by Schoenbaum & Lieser, Reform of the Structure of the American Corporation: The ‘Two-Tier’ Board Model, 62 Ky. L. J. 91 (1973); and Roth, Supervision of Corporate Management: The ‘Outside Director’ and the German Experience, 51 N. C. L. Rev. 1396 (1973). The French experience with an optional two-tier system indicates that there exists a certain reluctance to abandon a system to which companies and shareholders have been accustomed for many years. See Caussain, La Societe a Directoire: Bilan et Perspectives, [1976] Gazette du Palais (No. 12451) 289.


34. § 172 Aktiengesetz vom 6.9.1965, BGB 11 1089.
Unlike the traditional supervisory board, which was homogeneous, current boards, because they are composed of these two distinct groups or "benches," (the shareholder representatives on one side and the employee representatives on the other side) face conflicting interests. Confrontations occur but compromises are inevitable if a board is to remain a viable entity.

Today, there are two options in Europe on codetermination:

a) Codetermination in large enterprises should not be institutionalized. There should be complete freedom to deal strongly with the enterprises on working conditions and other matters. It would not be wise to have a mixed group of owner and worker representatives on the boards of such enterprises.

b) The second opinion favors institutional codetermination, a representation of worker interest in the decision-making bodies of the enterprise, i.e., in the supervisory board. This would create a co-responsibility for the functioning of the company. The structure of the company should be based on cooperation between management, capital and labor.

The Dutch system is a compromise between these two philosophies. It seeks to avoid the partisan influence of interest groups on the supervisory board and the subsequent creation of vested interests. This system is unique in Europe because it has made codetermination effective without having direct worker representation on the supervisory board.

The Co-Optation System

Under the Dutch system the appointment and removal of members of the supervisory board is no longer decided by the assembly of shareholders, but by the supervisory board itself.

The supervisory board nominates candidates for co-optation to the board. The rationale behind this principle is that the supervisory board is a team which must safeguard the interests of capital and labor, which assists management and which has co-responsibility for general problems of the company.

The principles of this system are:
- Each supervisory board member retires every 4 years, but he may be reappointed.
- Supervisory board members are no longer appointed or reappointed at the shareholders' meeting, but by the supervisory board itself.
The shareholders' meeting, the works council and also the management may make recommendations for appointments, but the supervisory board is not bound by these recommendations.

The supervisory board cannot co-opt a person as a member of the supervisory board if either the shareholders' assembly or the works council objects. The basis for objections may be that the candidate would be unsuitable as a supervisory board member or that because of his appointment the supervisory board "would not be properly composed."

If the supervisory board does not agree with the objection, it can appeal to the "Social Economic Council." This Council can declare the objection justified or unjustified. If the Council declares the objection unjustified, the candidate nominated may be appointed by the supervisory board.

This reform deprived the shareholders' assembly of one of its principal rights and handed these powers to the supervisory board. It also gave important powers to the works council, i.e. the right to recommend and to object to membership on the supervisory board. Thus, the system tries to introduce a combination of capital and labor as a factor in the company's structure. There are exceptions to the above rules for international parents and subsidiaries of international parents, but these exceptions are minor.

Surprisingly, the Dutch system does not give any criteria for the composition of the supervisory board. Therefore, this will depend largely on the agreement of all concerned and finally, on the Social Economic Council.

Ideally, the supervisory board should be a harmonious body, in which individual members do not represent certain sectional interests. It was intended that there be no bargaining between shareholders and works councils for the appointment of new supervisory board members, but such bargaining does occur. All supervisory board members need the full confidence of both shareholders and employees. The work of the supervisory board must be guided by the interests of the company and its business as a whole.

The Commission of the European Community opines that the separation of management and supervisory bodies is the model which is "the best adapted both to the needs of large, modern enterprises and to the requirements of society in general as regards such enterprises."35 Of course, the Commission recognizes the difficulty in

compliance for those member states which traditionally have had one-board systems; therefore, for a transitional period, the co-existence of both systems shall be permitted until the dualist system can be realized.

In its report, the Bullock Committee proposes the formation of supervisory boards in British companies. This would facilitate employee participation in the decision-making process at the company level.

One more point should be mentioned: the necessity of creating a democratic substructure for the employee board members. The Bullock Committee expressed its surprise "that so many people in this country have placed so much emphasis on works councils and similar consultative committees." For practical reasons, it is very difficult to imagine how industrial democracy can work without democracy at the base, i.e., works councils elected by all employees of the enterprise. Only democratic structures in the workshop and at the office level make it possible to appoint candidates for worker-directors to handle the election machinery. To introduce a country to the worker-director system without creating such a basic structure is like building the roof of a house without having built the basement first. The Bullock Report apparently underestimates the difficulties arising from different trade unions and other organizations active in the enterprise. If a system of worker-directors is to function, there must be an interlocking scheme of participating institutions in the company with a base structure of the works council type and board membership by employees so as to create a working relationship between the work force and management.37 The works council can exist without codetermination on the board, but not vice-versa.

Recent Development in Works Council Legislation

Two examples of recent developments in employee representation at the shop floor are the Netherlands and Portugal. While the Netherlands have completely revised the existing works council

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the Portuguese Parliament has passed legislation to fill a gap in its legislative system provided for under its constitution.

The Netherlands

The Netherlands have a long history of works council legislation. The first Works Council Act was passed on May 4, 1950. On January 28, 1971 a completely revised Act was passed which became effective on April 1, 1971. Under the first Works Council Act, the council was designed to contribute to a smooth operating environment in the company. Subsequent changes in industrial relations and new ideas on the economic order of the country gave rise to the new Act of 1971. The new Act further formalized the function of the council. It regulated the appointment of council members through elections and recognized the delegating/deciding authority of the council on specific matters. Management was obliged to consult the council and obtain its agreement concerning such items as pension schemes, profit sharing plans and personnel policy in general.

Over the years, the trade unions became disappointed with their lack of effective influence in this type of council. As a result, in 1973 the Dutch government asked the Social Economic Council for advice. The presence of a works council generally is regarded as a positive factor, but, as the report of the Council in 1975 made apparent, opinions differ with regard to its rights, competence, structure and procedures. In 1976, the government presented a revised works council bill containing a number of structural reforms. The bill was heavily debated in the Dutch

38. The Dutch Constitution was amended in 1938 by articles 152 and 154, providing for employee participation. Act of Jan. 19, 1939, Staatsblad 100-105.
40. Wet op de Ondernemingsraden, 1971 | Staatsblad 54; 1971 | ILO LEG. SER. Neth. 1.
41. Most works councils members did not consider themselves as representatives of the trade unions but as the representatives of their colleagues. Albeda, Recent Trends in Collective Bargaining in the Netherlands, 103 INT'L LABOUR REV. 3 (1971).
42. The opinion of the two largest Trade Union Federations, NVV and NKV, is reported in 1974 | EUR. INDUS. REL. REV. (No. 10) 16.
43. Tweede Kamer der Staten-General, Zitting 1975-1976, 13 954.
parliament; at one time it was expected that, with a change in the Dutch government, it would be quite a while before the bill would be passed. However, on July 5, 1979, the new legislation was signed into law by the Queen.

The modifications can be grouped in three categories:

- Application of works council legislation to a greater number of companies;
- Composition by elected members only;
- Extension of the rights and competences of the council.

The original bill provided for works councils in all enterprises having more than 25 employees. The new act made works councils compulsory for enterprises with more than 100 employees. The extension of the works council legislation to a greater number of enterprises was heavily debated until a compromise was reached. The 100 employees-regulation finally was accepted, but, in addition, the Social Economic Council can, through an ordinance, extend the application of the works council legislation to companies with fewer than 100 employees.

Management per se no longer is represented in the new works councils. The previous legislation provided for works councils to consist of the manager of the enterprise and members elected by the employees of the company. The new legislation states in revised Art. 6(1), that the works council consists only of elected members. Debate on this point was very intensive. Political and scientific organizations interested in the subject very carefully studied the situation in those countries, like Germany and Austria, where unilateral works councils, or, as it was called in the Netherlands, "Zelfstandige" councils, existed. Members of the Dutch councils are elected for terms of two years each, but the works councils themselves may have a regulation extending the term of office to three years. Generally speaking, all the regulations concerning the electoral procedure were formulated more precisely and extensively.

The new act expands the rights and competences of the works councils in company affairs. The levels of competence are:

a) informational rights,

b) advisory rights,

c) agreement rights.

44. The Dutch public, trade unions and the legal profession discussed the new principles extensively (more rights for the works council, a unitarian works council with more independence from management). See, e.g., Mulder, Poppe, Slagter, & Teunissen, De Zelfstandige Ondernemingsrad (1979).

45. Staatsblad van het Koninkrijk der Nederlanden 1979, 448.
a) Informational rights

Management and works council must meet at least six times per calendar year. Management as well as works council may request additional meetings with two weeks' notification. In all such general meetings, the members of the supervisory board of the company also must be present. At least twice per year the general business affairs are to be discussed in such meetings. The subjects on which information must be provided have been extended significantly. Major new subjects under the compulsory right of information are future plans and projections, semiannual financial statements and capital investment plans. Interestingly enough, the works council must be notified as soon as possible of the intention to hire an outside consultant.\(^4\)

b) Advisory rights

The works council must be asked for advice on all major policy questions. These include the sale of the company, merger, closing down, extensive layoffs of personnel, expansions, changes in organization and all matters generally concerning personnel policy.

The request for advice has to be accompanied by an explanation of the reasons for the proposed decisions and the consequences which the decision would have for the employees of the enterprise. The works council does not have to comment on the request for advice unless a meeting with management has taken place. If there is no agreement between management and works council, management must delay its decision for one month, during which the works council may call upon a special court in Amsterdam for a decision on the proposed management procedure.

During the discussions of the legislation, strong objections were raised. These clauses were thought to affect the manageability of the companies in a negative way, especially through the delay of vital decision-making processes.

c) Agreement rights

The works council must approve of changes in the following areas: remuneration system, retirement plans, work or vacation time, management development programs, hiring and firing, promotion policy, handling of grievances and similar matters related to personnel decisions. If the works council refuses to approve a proposed change, management may refer the matter to a special

\(^4\) Id., Art. 31c.
commission for a final decision. A decision by management without the approval of either the works council or the commission is null and void.

It is important that, under Art. 40 of the new law, the works council has an opportunity to comment on the intended appointment of a director of a company. In other words, the management is appointed by the owners, but the owners must give the works council the opportunity to register its opinion about the intended appointment. This comment must be solicited early enough so that the advice of the works council may influence the intended decision. The request for advice must be accompanied by information explaining the reasons for the intended appointment. In the light of the entire Dutch system of codetermination, this is certainly a most important step, one which must be seen in connection with the co-optation of members of the supervisory board and the influence therein of the works council. Now, the works council receives the additional opportunity to comment on the persons who are making the day-to-day decisions in the company.

In general, it can be stated that the new Dutch law will have considerable impact on the day-to-day life of Dutch companies. It has enlarged greatly the rights and duties of the works council, but it also has obliged management to communicate permanently with its works council and to discuss with it in advance many intended decisions. In this respect the new law shows some resemblance to the Works Council Act of 1972 in the Federal Republic of Germany.

In early November, 1979, the Dutch government introduced an interesting new bill into Parliament. If this bill becomes law there will be four categories of enterprises in the Netherlands:

a) Enterprises with fewer than 10 employees. For these firms no codetermination is envisaged.

b) Enterprises with 10 to 35 employees. This group comprises approximately 20,000 to 30,000 firms. For these firms codetermination will be introduced by the new legislation. There is an intention to include an additional article in the works council legislation obliging the employer to hold assemblies of the employees at least twice a year. Affairs of the business are to be discussed in these meetings. One quarter of the employees may vote to

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demand additional meetings of this kind.

c) Enterprises with 35 to 100 employees comprising approximately 8,000 to 11,000 firms. These firms also will have a works council, the rights of which will differ according to the size of the firm.

d) Enterprises with more than 100 employees. For these approximately 4,000 firms, the new Works Council Act already applies.

The Dutch government is of the opinion that industrial democracy should be introduced into small firms because employees therein want it even though they are not employed by large companies. Employees of small firms also must have some kind of opportunity to influence their companies.48

Portugal

Employee representation at the shop floor level as well as in supervisory organs of the company was one of the objectives of the recent Portuguese revolution. Therefore, Articles 55 and 56 of the Constitution of Portugal, which was passed by the Constitutional Assembly in September, 1975, expressly state that “the workers have the right to establish works councils for the defense of their interests and for democratic intervention in the life of the enterprise.” Article 56 provides some details as to the rights of these works councils.

Workers’ commissions were established all over Portugal in the course of the change of governmental system; their rapid evolution is very interesting. After initial confrontations between them and management a working climate gradually developed to the point where now, in most companies, weekly meetings bring about an understanding of the problems of the business and the market.49

In January, 1977, the Portuguese Communist Party (P.C.P.) introduced a bill into Parliament (No. 8/1) proposing to regulate works councils (Comissões de Trabalhadores) as a supplement

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48. Prof. M. G. Rood gave a “snapshot” of the present codetermination situation in the Netherlands and is of the opinion that the works council legislation will be extended to smaller enterprises. M. G. Rood, Bedrijfs-democratic: vlag of ladig? (1979) (speech at the Rijksuniversiteit te Leiden on Nov. 9, 1979, published by Kluwer, Deventer and Boston).

to Articles 55 and 56 of the Constitution. To counter this initiative, the Portuguese government submitted a bill to Parliament (No. 43/1) on the same subject; the Commission of Labor (Comissão de Trabalho) of the Assembleia da República submitted a revised form of the government's draft. After discussion in Parliament, this revised draft was passed on July 12, 1977.

Subsequently, the President of the Republic refused to sign this bill because, under Article 277 of the Portuguese Constitution, all bills must be approved by the President in conjunction with the Revolutionary Committee. The Committee has the right to make a decision concerning a bill's constitutionality within twenty days. In the case of this bill, the Constitutional Commission (Comissão Constitucional), pursuant to Article 284 of the Constitution, advised the Revolutionary Committee on September 16, 1977 that the bill was not in accordance with the Constitution. This finding was based on a critique of the clauses concerning the election of the works council members.

Finally, on August 8, 1979, Parliament passed law no. 46/79. The election of works councils must be announced at least 15 days in advance and by at least 100, or 10%, of the permanent employees of the enterprise. The members of the works councils are chosen from lists of candidates in direct, secret and proportional election. The list of candidates requires the signature of 100, or 10%, of the permanently employed workers. Each employee may sign only one list.

There is a new feature in this law not found in the first act of July 19, 1977: "No permanently employed worker of the enterprise may be impaired in his right to vote and to be elected and that is independent of age and office."

Article 18 of the law lists the rights of the works councils:

a) to receive all information necessary for their activities;
b) to oversee the management of the enterprise;
c) to influence the reorganization of production activities;
d) to participate in the development of labor laws and the economic and social plans of their industry as well as participate in the establishment of government plans.

It is expressly stated that the works council may not interfere with normal competences of the administration and technical and functional hierarchies of the enterprise.

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Meetings shall not take place during normal working hours and must not disturb the normal working process. Within normal working hours, a maximum of 15 hours per year may be used for meetings at the work place, but the normal and important work must continue without interruption.

Management must give the works council certain information:

a) plans for the enterprise and its budget;
b) internal guidelines;
c) organization of production and its influence on manpower and equipment;
d) situation of purchases;
e) planning, volume and development of sales;
f) personnel policy and establishment of basic criteria, total amount of salaries and hourly wages and their distribution to the different job categories, social benefits, productivity, minimum requirements and absence quotas;
g) bookkeeping questions, profit and loss statements, and balance sheets;
h) forms of financing;
i) taxes and similar contributions;
j) plans for changes in the activity of the enterprise, the share capital and plans for changing the enterprise's production.

Besides these information rights, the Comissões de Trabalhadores has the duty to comment, in writing, on the following matters:

a) contracts of viability;
b) liquidation or bankruptcy of the company;
c) closing of factories or production lines;
d) any step which results in a considerable reduction of personnel in the factory or a substantial worsening of the working conditions;
e) establishment of the yearly vacation plan of the employees and change in the working time for all or part of the employees;
f) change of the basic rules for job evaluation and promotion;
g) change of domicile by the factory or business;
h) approval of the statues of government-owned enterprises and changes thereof;
i) appointment of the management in government-owned enterprises.

The most important clauses in practice are those dealing with surveillance of management. Article 26 states that it is the purpose of the supervision of management (and this is completely different from the original Article 25 of the bill which was not approved by
the Revolutionary Council) to enable the workers to influence democratically and to participate responsibly in the life of the business, especially the production process. The law lists a number of exceptions to this oversight. These concern industries for the issuance and production of currency, the nationalized press, scientific and military research, etc.

Pursuant to their right to oversee management, the works councils are required to comment on certain business decisions:

a) to evaluate and comment on the financial and economic plans of the enterprise, especially in connection with production plans and their changes and the control over the implementation of these plans;

b) to supervise the optimal use of the technical, human and financial resources of the enterprise;

c) to propose to management and the employees measures for improvement of the qualitative and quantitative productivity, especially the rationalization of the production and technical processes, and the reduction of bureaucracy;

d) to supervise the fulfillment of laws and statutes as far as they are relevant to the enterprise and the industry;

e) to submit to the competent institutions of the company proposals, recommendations and critiques concerning the professional training and further general education of the employees and, more generally, the improvement of the working hygiene and security climate;

f) written reports on breaches of the statutes or regulations of the plant to the competent supervisory bodies of the company or, if these do not act in a suitable manner, to the competent governmental authorities;

g) to defend the rightful interests of the employees of the enterprise as well as those of employees in general against the managerial institutions of the company and the competent governmental institutions.

The articles on employee participation in the decision-making bodies of a company have been completely reworded as compared with the Law of July 1977. In state-owned enterprises, the supervision of management is exercised through the participation of employee representatives in some body (or bodies) of the enterprise (Article 30). It depends on the statutes of each of these enterprises which body is in question, and how many employee representatives will be elected or appointed by the works council. (This was already the case in state-owned enterprises, such bodies being either the general council or the supervisory council. None of them are man-
The Article goes on to note that in private industry the parties, that is the company’s shareholders and presumably the works council, also may reach agreement on this matter. This is a rather vague and nonbinding clause. Finally, the Article says that a new act of Parliament may regulate this subject.

A new Article 31 was introduced, but it does not fit very well under the heading of supervision of management, despite being covered by the broad scope of Article 26. Article 31 introduces co-management to the state-owned enterprises, yet, makes no reference to the private sector. It states that in state-owned enterprises, the workers must have at least one representative in the management body. Within 60 days after the effective date of this legislation, the workers’ commission can take the necessary steps under Articles 30 and 31.52 The remaining articles of the law deal with the intended reorganization of production facilities, another matter in which the works councils have a profound right of participation and approval.

As far as the rights and duties of the works councils are concerned, it generally may be concluded that this new Portuguese legislation stands in line with some of the furthest developed works council legislation existent in Europe. The clauses regarding employee participation in the decision-making process at the board level of state-owned enterprises are particularly important and far reaching. They too determine the close connection between participation in decision-making processes at the shop floor and board room levels. As the troubled history of the new law shows, the future of such a development depends on the political situation in Portugal.

Spain

Joint committees have existed in Spanish enterprises since 1947,53 but the members were dependent upon the state-controlled trade unions, which could not compare with trade unions in democratically-governed countries. After the democratization of Spain, the Spanish Government and the most important trade unions negotiated a new works council system. On December 6, 1977, the Spanish Consejo de Ministros published a Royal Provisional Decree (Real Decreto Provisional) regulating the election procedure of

52. Law No. 46/79, Article 40.
works councils, but not their rights and duties. On December 16, 1979, the Spanish parliament passed a "Statute of Employees" which, according to newspaper reports, contains regulations for works councils similar to the German regulations. By the end of 1979, when this paper was finished, the new legislation had not yet been published.

Recent Developments Concerning Employee Membership in Company Organs

Federal Republic of Germany

To understand recent discussions regarding codetermination (Mitbestimmung) in Germany, it is necessary to remember that there exist three different legislations, namely, for:

a) companies governed by the Coal and Steel Act of 1951,

b) companies with more than 500, but fewer than 2,000 employees (Shop Constitution Act of 1952),

c) companies with more than 2,000 employees (Codetermination Act of 1976).

Since the enactment of the Codetermination Act of 1976 (which provided for a transitional period until July 1, 1978) many large German companies now have supervisory boards with half of the seats occupied by employee-elected members. To recapitulate,

54. For an English translation of this provisional decree, see W. Kolvenbach, Employee Councils in European Companies, 247-251 (1978)


the essentials of the new act are as follows.

The act affects all companies regularly employing more than 2,000 employees which have the legal form of either the share company (Aktiengesellschaft), the partnership limited by shares (Kommanditgesellschaft auf Aktien), or the company with limited liability (Gesellschaft mit beschränkter Haftung). At least 600 to 700 German companies practice this form of codetermination.

Under this Act, the supervisory board (Aufsichtsrat) must have 12 members if the company regularly employs fewer than 10,000 people. Of these 12, six are to be representatives of the shareholders and six representatives of the employees.

In companies which have between 10,000 and 20,000 employees, there are 16 members in the Aufsichtsrat. Eight of these are appointed by the shareholders and eight by the employees.

Large companies which regularly employ more than 20,000 people have an Aufsichtsrat of 20 members. Ten of these are drawn from the shareholders and 10 from the employees.

It is interesting to note the special provision for a business concern controlling a group of companies. All employees of the companies affiliated inside Germany are eligible to vote for the Aufsichtsrat of the parent company.

For the employee members of the Aufsichtsrat, the law differentiates between three categories:

a) Employees working in the company. They must be 18 years old and have been with the company for at least one year.

b) Representatives of the trade unions. This includes officials of all trade unions, which are "represented in the company," i.e., trade unions which are active in the company.

c) Senior employees, management personnel, or decision-making key personnel (leitende Angestellte). The definition for this group is rather complicated and there already exist decisions of the German Supreme Labor Court interpreting it.

Dependent upon the size of the Aufsichtsrat these groups are represented as follows:

An Aufsichtsrat with 6 employee members has 4 employee members working in the company and 2 trade union representatives.

An Aufsichtsrat with 8 employee members has 6 employee members working in the company and 2 trade union representatives.

An Aufsichtsrat with 10 employee members has 7 employee members working in the company and 3 trade union representatives.

Among the employee members working in the company there
must be at least one "Leitender Angestellter." The relationship between the employee members and the senior employees depends upon the numerical relationship between the members of these two groups of employees within the company. Furthermore, at least one blue-collar worker must be an employee member of the board.

The election of the employee members takes place, not directly, but through electors. While companies with fewer than 8,000 employees may hold direct elections, the employees of these companies also normally opt for the elector system.

In companies employing more than 8,000, the employees have the opportunity to vote for a direct election without electors. The German trade unions strongly favored the elector system. It therefore came as a great surprise when, in two large German chemical companies, the employees voted in favor of direct elections. At BASF, 54 percent of the employees voted for direct elections. At DEGUSSA, the percentage was even greater: 88.3\(^5\) Employees in Hapag Lloyd, Michelin Germany and Woolworth Germany also voted for direct election\(^6\)

These results can be considered a defeat for the trade unions who had hoped to have a stronger influence on the electors than with direct elections. Critics of this procedure always had pointed out that direct election is more democratic.

Decisions of the Aufsichtsrat usually are by majority vote. Since there are even numbers of members (12, 16, or 20), an equal vote would result in a deadlock. To prevent this, the Mitbestimmungsgesetz (Codetermination Act) provides that a second poll is to be held and in this second poll the chairman has a double or tie-breaking vote. This double vote gives the shareholders' bench a slight edge for the chairman of the board is always a shareholders' representative.

The Aufsichtsrat appoints the members of the management board (Vorstand) with a two-thirds majority. If a two-thirds majority cannot be achieved, a committee appointed from among the members of the Aufsichtsrat votes within one month. If this committee does not reach agreement, the tie-breaking vote of the chairman is decisive, i.e., the chairman and, thereby, the shareholders, in the end, appoint the members of the management board.

There must be a labor director on the management board of virtually every company falling under the act. He is a full member

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of the board. The term "Arbeitsdirektor" has been borrowed from the Coal and Steel Codetermination Act. However, in the coal mining and steel industry, the labor director cannot be appointed against the vote of the employee members of the board. Under this Act, the labor director is an ordinary member of the management board and, therefore, he can be elected even if the employee members of the Aufsichtsrat vote against him. This has led to difficulties in some companies, when the trade unions wanted to enforce the election of their candidate.

**Is the Codetermination Act of 1976 Constitutional?**

Beginning with the parliamentary proceedings, and continuing after the legislation had come into effect, strong objections against the parity concept were raised. It was argued that this concept conflicted with the German Federal Constitution because it prejudices the shareholders’ final right of decision and interferes with the autonomy of both unions and management to bargain collectively, as guaranteed by the country’s Basic Law (Grundgesetz). Article 14 of the German Constitution grants the right to own property. The use of property is not without restriction; certain social limits exist. It was argued that the value of the property of the shareholders is diminished without compensation being

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61. The question of who has the final decision-making power has provoked a great deal of discussion. See Mooney, *A Delicate Balance: Equal Representation for Labor on German Corporate Boards*, 16 HARV. INT’L L. J. 352 (1975). Another commentator argued strongly that the Act brings about an encroachment on the rights of American shareholders in violation of the German-American Commercial Treaty of 1954. Wengler, *Parity Codetermination in West German Companies and International Law*, 9 VAND. J. TRANSNAT’L L. 1 (1976). This point was heavily debated in Germany. By granting a double vote to the chairman of the supervisory board, the Bundestag sought to avoid a constitutional challenge to the law.

62. Osso Esser, President of the Confederation of German Employers’ Associations asked, “what limit does free bargaining impose on the development of the controversial principle of workers’ codetermination?” In his opinion the parity codetermination realized through the new legislation infringes upon the principle of free bargaining and therefore, the Federal Constitutional Court has to decide “whether the political legislator has remained within the bounds set by the constitution.” *Parity Codetermination Endangers Wage Negotiation Autonomy, Commerce in Germany*, April 1978, at 15.
provided for this kind of expropriation. Thirty German industrial associations and nine large companies, all falling under the Codetermination Act of 1976, sued before the Federal Constitutional Court (Bundesverfassungsgericht) at Karlsruhe, a procedure which, under the Basic Law of the Federal Republic of Germany, clarifies the constitutionality of legislation.\(^{63}\)

In its decision of March 1, 1979,\(^{64}\) the Court held that the 1976 Codetermination Act does not violate any constitutional rights, especially not those of shareholders and employers. The Court stated that the chairman of the supervisory board, who is always a representative of the shareowners, by virtue of this second and deciding vote, thereby preserves the shareholders' right of ultimate control. The Court also came to the conclusion that the constitutional guaranty for employers' organizations and trade unions regarding their collective bargaining autonomy is not affected by the new law precisely because the ultimate decision regarding the appointment of members to the management board, who are involved in these negotiations, rests with the shareholders again, if necessary, by recourse to the double vote. The utilization of the double vote is not an extraordinary and "hostile" step but the use of a right which the law grants to the chairman of the board for very important reasons: to safeguard the ultimate decision-making rights of the owners of the company. The decision encourages owner representatives and employee representatives on the supervisory boards to cooperate and to make the law workable.

The importance of the decision for future codetermination discussions in Germany and very likely also in the European Community is to be found in the statement of the Court that the so-called "full parity," i.e., the abolition of the double vote of the chairman would be a violation of the constitutional ownership guaranty.\(^{65}\) Thus, the Federal German Constitutional Court erected

\[^{63}\] Art. 93,2 and 4a, Grundgesetz fur die Bundesrepublik Deutschland [GG] vom 23.5.1949, BGB1 1949.1.


\[^{65}\] "The Legislator remains within the limits of permissible content and border definitions if the codetermination of employees does not lead to a situation in which decisions regarding the capital invested in the enterprise can be made against the will of the shareowners; if the shareowners are not deprived because of codetermination of the control to choose the management of the enterprise and if they retain the right of final decision." Id. at 350.
a dam against the desires of the trade unions to extend the new law to full parity or even beyond this. However, the Court advised owners and trade unions alike: "If there exists on both sides (of the board) a readiness for loyal cooperation, codetermination will have a different result than if the atmosphere in the company is dominated by mutual distrust or hostility." 

Does the new Codetermination System work?

The experiences gathered at the first election of the employee members under the Codetermination Act of 1976 already present some interesting aspects: one of the seats allocated to the trade union on the board of DuPont Germany was filled by the General Secretary of the International Chemical and Energy Workers' Federation. The workers of Ford in Germany elected as a member of the supervisory board the General Secretary of the International Metalworkers' Federation; the Assistant General Secretary of this international trade union organization was elected to the board of Standard Electric Lorenz, a company of the ITT-group. This new "trade union jet-set" will contribute to the union's influence on the board, but it may also result in problems for the international trade union movement, especially in conflict situations such as investments abroad or plant allocations. Eugen Loderer, the President of the powerful metalworkers trade union (I. G. Metall), sits on the board of Volkswagen, an important factor with regard to the question whether Volkswagen would have built a U.S. factory earlier than it did. Another conflict situation: can a member of the board like the regional head of the IG Metall organize strikes directed against Daimler-Benz, the company where he has duties as a board member?

Another aspect is that the election procedure is of very long duration. In extreme situations, up to 56 weeks are necessary for the various possibilities which the law foresees. Needless to say

66. James Furlong believes that the court's decision is likely to intensify a broad interest in codetermination. Workers in the Boardroom, Wall St. J., Mar. 12, 1979, at 18, col. 3.
67. 50 BVerfGE 290, 331 (1979).
the costs of the elections can run very high, especially if the indirect (elector) procedure is used. Large companies with many subsidiaries and factories inside Germany have to spend millions of Deutsche Marks for travel expenses, printing costs and last, but not least, working hours.

In most Germany companies affected by it, the new system has been in operation now for two years. Of course, there were difficulties in the beginning, sometimes due to lack of experience or even lack of good will. Emotions ran high, but by and large, a working climate has taken over. Now, however, it is apparent that the Codetermination Law of 1976 has not been incorporated into German company law. The Act was a compromise between the governing Social Democratic-Liberal coalition on one side and the German trade unions on the other side. Already, in its statement on the motives of the Bill, the Bundesregierung informed the Bundestag: “The purpose of the bill is to regulate codetermination by the employees and to retain, as far as possible, the company law already in effect. There is no intent to effect an extensive revision of the law of the enterprise.”71 The government continued by stating that the development and incorporation of the law of the enterprise to a modern system fitting the economic and social developments of our time will be a long-lasting task. A commission of experts (Unternehmensrechtskommission) was assembled to study the relevant legal problems. One of the major tasks assigned to the commission was the study of the “organization of the enterprise, including the rights of owners and employees.”72 After almost eight years of work, on December 18, 1979, the commission submitted its report to the Minister of Justice, Dr. Vogel. The commission could not agree on recommendations but did state explicitly that the existing Codetermination Acts, especially the Act of 1976, were not included in the work of the commission, because the existing codetermination law had been “pulled over” the company law. The commission therefore studied the possibility of an organic combination of codetermination legislation and company law.73

73. Press release of the Federal Minister of Justice dated Dec. 18, 1979, at 4. The report has more than 1000 pages and will be published in 1980. The commission could not agree on recommendations to the legislature, but the report will provide valuable scientific background material for future developments of the law of the enterprise.
The Federal Minister of Labor, who was responsible for the codetermination bill of 1976, has stated repeatedly that this legislation would not be incorporated into the company law. Instead, it would be "pulled over" it to avoid difficult changes and a time-consuming revision of company law.  

German company law has been enacted under completely different circumstances. This has given rise to unique problems, of which one example may suffice. In order to protect the interests of the shareholders, management is obliged to give the supervisory board virtually unlimited information. The corollary to this far-reaching informational right is that the members of the supervisory board must keep such information secret. Out of this a conflict situation has developed: the trade unions are of the opinion that their representatives in the boards must inform their constituency of board discussions and also give the trade union members on the boards the opportunity to report any interesting information to their headquarters. A typical conflict of this type developed at AEG-Telefunken, the ailing German electronics firm. After a decision of the board to release 13,000 employees, the worker directors issued a press release. They claimed that, when it comes to jobs, their obligation to inform their constituents supersedes any secrecy obligation.  

Conflict situations of this kind may be expected in the future. They underscore the necessity of utilizing the possibilities of company law reasonably and of reconciling codetermination principles with the well considered interests of the company.

France

It is surprising that the first legislation passed after World War II in France, a conservative country, concerned the participation of employees in the Conseil d'Administration. This can be traced back to a wording in the preamble of the French Constitution of 1946 (to which the constitution of 1958 refers) which reads as follows:

74. This statement was confirmed in his speech to the Deutsche Bundesrat when he introduced the bill there. Bundesrat 404. Sitzung, Apr. 5, 1974, at 112.
75. § 90, Aktiengesetz 1965.
76. § 116 in connection with § 93, Aktiengesetz 1965.
"Tout travailleur participe, par l'intermédiaire de ses délégués à la détermination collective des conditions de travail ainsi qu'à la gestion des entreprises."  

Ordinance 45-280 was passed on February 22, 1945, to implement the preamble. The ordinance was incorporated subsequently in the Code du Travail (itself dating from December 13, 1910). It provides French companies with a limited form of cogestion. It should be noted here that the French word "participation" includes the concept of "interessement," participation in the shares of a company, and "cogestion," participation in the decision-making process.

Another implementation by the preamble of the 1946 Constitution is the legislation concerning work councils (Comités d'Entreprise) for all companies employing more than 50 persons. Article L.432-4 of the Code du Travail grants to the Comité d'Entreprise a number of consultation rights. Among these is the right to delegate two of its members to the Conseil d'Administration. These two members have the right to attend the meetings of the Conseil d'Administration or those of the supervisory board which might exist since the introduction in 1966 of an optional dualist structure for the Société Anonyme. Under this legislation, companies may choose between the traditional system in which the Conseil d'Administration possesses complete managerial authority to act in the name of the company or a system (similar to that found in Germany) in which a three-to-twelve member supervisory board is appointed at the share-holders' meeting to select for four year periods a directoire to manage the company. The two worker representatives lack an actual vote; the law merely accords them a "consulting vote." It further provides that if two representatives are delegated to the Conseil d'Administration, one representative must be a member of the cadres. In the French context, this subsumes the classes of senior employees, engineers and specialists. The other represents the employees in companies where

78. Trans: "Each employee participates through his delegate in the collective decision on the working conditions as well as in the management of the enterprise." For a survey on the sociological and political discussions regarding "participation" in France see M. DESVIGNES, DEMAIN, LA PARTICIPATION, AU-DELA DU CAPITALISME ET DU MARXISME (1977).
the different classes of personnel form separate election groups.

This French form of cogestion is part of the works council legislation. The regulation for employee members of the Conseil d'Administration or supervisory board is found in few lines only within the regulations covering the works councils.

The discussion in France concerning the relationship between employers and employees had been strongly influenced by the report which the committee chaired by Pierre Sudreau published on February 13, 1975. This Rapport Sudreau proposes to change the structure of the various types of French enterprises which originated in the 19th century and to improve the relationship between capital and workforce. It recommends a humanization of working conditions in France and proposes changes in French company law. The report deals with practically all aspects of an enterprise; the suggestions span a wide range, from the improvement of working conditions, and the participation of employees in the share capital of the enterprise to cogestion and co-surveillance. The Rapport Sudreau does not recommend real voting rights for the employee representatives in the Comité d'Administration or supervisory board nor does it recommend the appointment of members to these two bodies, though it states that a participation of one third of the members could be considered.

This cautious attitude of the Comité d'Etude pour la Réforme de l'Entreprise probably may be explained by the strong opposition of most French trade unions to the German type of codetermination. This is a result of their fight for the idea of contrepouvoir. The committee recommends that employee representation should be accomplished in the form of a joint exercise of supervisory, rather than management, functions. Therefore, a distinction between management tasks, for which the general management is responsible, and supervisory responsibilities, which would be exercised by the Conseil d'Administration, is recommended. This notion of joint supervision stimulated many comments and discussions subsequent to the report's publication.

This co-surveillance was only part of the committee's recommendations for more and better information for employees. Other recommendations concern a yearly social balance (Bilan Social Annuel) and improvement of the participation of employees in

profit sharing schemes.

The French trade unions were partly disappointed by the results of the report. On the other hand, they doubted whether the recommendations made by the Comité d'Etude pour la Réforme de l'Entreprise would be réalisèd within a reasonable time.83

The French government started work on the realization of some of these proposals in little steps. In April 1976, President Giscard d'Estaing proposed an industrial reform to improve the role of employees in the company without reducing the authority of management. The first step in this direction was the law on the Bilan Social (no. 77-769 of July 12, 1977)84 which introduced into the fourth book of the Code du Travail a number of regulations for a compulsory annual social balance, i.e., a report on the social development of the company. In all companies with at least 300 employees the management must establish a social balance which is to be presented to the works council. This social balance includes all essential figures which permit the works council to judge the situation of the enterprise in social matters (Article L. 438-3). Therefore this balance has to contain information on employment, wages and salaries, security and hygiene in the enterprise, continued job training and the living conditions of the employees and their families. The works council must comment on the social balance; its report is to be submitted to the inspecteur du travail. In public companies the social balance plus the comment of the works council is to be submitted to the shareholders. Transitional regulations provide that the first social balance is to be made in 1979 for enterprises employing at least 750 persons and in 1982 for enterprises which employ at least 300 persons. Although the new legislation encountered criticism,85 it is a step forward in the accomplishment of the Sudreau recommendations.86

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86. Workers' Movement Falters in Europe, N.Y. Times, Jan. 5, 1978, at D1, col. 1. Jonathan Kandall reported from France that the Sudreau Report "has become a dead letter because of opposition from employers . . . and from the main labor federations."
It is surprising to see the attention that the French government pays to the lower management personnel (cadre). Loi No. 78-587 of January 2, 1978, compels the managing director to study measures for improving information and consultation concerning general company policy and for enabling the cadre to exercise more responsibilities in the enterprise.

The next step was taken in Bill No. 324, concerning the participation of cadres in the Conseil d'Administration and conseil de surveillance of certain public companies. This bill was presented to Parliament by the French Prime Minister and the "Ministre du Travail et de la Participation" (this official title of the French Labor Minister indicates the importance that is attached to participation in France), but a decision is not expected before 1980.

The bill proposes that a new Chapter IV be added to the fourth book of the Code du Travail under the present heading "Participation des Salariés à la Gestion des Entreprises" ("Participation of Salaried Employees in the Management of the Enterprise"). In sociétés anonymes with more than 500 salaried employees, the ingénieurs, chefs de service and cadre administratif, commerçant ou technique would elect one or two representatives, depending on the size of the new councils, to the Conseil d'Administration or conseil de surveillance. The election would take place at least one month before the general assembly elects the members of the conseil. The most important fact in the bill is that these representatives of the cadre would have the same rights and duties in the Conseil d'Administration as the owner representatives. Thus, administrators elected by employees would have voting rights in France for the first time. Also, the profit sharing rules are being expanded in accordance with the recommendations of the Sudreau Commission.

It remains to be seen whether the French government succeeds in its gradual enlargement of participation rights of employees in French companies.

Norway

Norway has added a variation to the European worker directors

89. In 1975, the French government published all existing regulations concerning profit sharing and employee participation in the share capital of companies in the special brochure No. 1317. [1975] J.O.
systems which is not only unique and interesting, but also has the advantage of great flexibility because it can be applied to individual industries according to their necessities and situations. This "introduction of co-determination step by step" permits slow introduction of the new model and less disturbance of existing structures. Employee participation in the decision-making process through formal representation on the boards was established first in selected state-owned companies in 1965 and has continued on a broader scale since January 1, 1973. On May 12, 1972, the National Assembly, the Storting, adopted some important amendments to the Companies Act of July 6, 1957. These amendments had been proposed by the Eckloff Committee. They affected the boards of companies and their composition and, furthermore, created a new body, the Corporate Assembly. A Royal Decree (Kongelig Reso- lusjon) of November 24, 1972 supplemented this law. On June 14, 1974, there was a further amendment to the Companies Act, and a completely new Companies Act was passed by Parliament on June 4, 1976. It became effective as of January 1, 1977.

The original rules applied only to enterprises within industry and mining. By the Royal Decree of November 23, 1973 (now replaced by a new Decree of December 10, 1976), special rules for companies within the building and construction industry were introduced. Wholesale and retail trade, restaurants, hotels, and domestic transportation were also included. As of January 1, 1976, the rules apply to all companies regardless of their activity, with certain exceptions (mainly newspapers and other publications, financing and insurance companies).

At that time, the majority of the Norwegian Parliament was of the opinion that the formalization of employee participation in the decision-making process should be extended to as many different kinds of industries and employee groups as possible. Contrary to

92. For the history of these developments, see the opening addresses of the Norwegian Minister of Local Government and Labor, the president of the Norwegian Employers' Confederation, and the first secretary of the Norwegian Federation of Trade Unions (LO) at the Oslo Symposium of the ILO, published in Labor-Management Relations Series of the ILO, Geneva, 1976, at 81.
other countries where legal definitions have brought compulsory employee participation in boards, in Norway this has been achieved through voluntary arrangements or agreements which were negotiated under the supervision and with the intervention of the "Kommunal-og-Arbeidsdepartement." A few of these arrangements are:

- Two agreements of 1974-1975 covering consumer cooperation enterprises and institutions within farming (which are not in the form of a company).
- A 1974 agreement covering part of the newspaper industry.
- Agreement and individual arrangements covering major parts of the insurance companies.
- A white paper to Parliament in November 1976 concerning all employees in public administration and enterprises which are not covered by special legislation.93
- Committee report to the Norwegian Government of January 1977 concerning employee and additional public representation on the boards of commercial banks. A similar proposal has been prepared for savings banks.94
- In the spring of 1977 a committee report concerning employee representation in enterprises which are not organized as joint stock companies.

The existing regulations provide that in small companies (fewer than 50 employees) the company statutes may determine that the employees of the company elect members to the company board. In these small companies, workers' representation is, therefore, the result of voluntary negotiations between the parties within the company.

In medium-sized companies (50 to 200 employees) representation of employees on the board is compulsory if more than 50% of the company's employees submit a written demand for it. The company then has to accept employee representation on the board. This representation can be up to one third of the members on the board (at least two directors).95 In companies with a share capital of more than 400,000 nkrs the board must have at least 3 members and, if they so choose, 2 additional employee representatives. The basic rule is that the majority of the board always must be elected by the shareholders.

94. NOU 1976:52.
95. Section 8-17, Company Act 1976.
In companies with more than 200 employees, a Corporate Assembly (Bedriftsforsamling) of at least 12 members will be elected. Two thirds of the members, with deputy members, are elected by the General Assembly. One third of the members, with deputy members, are elected by and from among the employees. If the company belongs to a concern or other group of companies, to which the company is bound through common owners’ interest or joint leadership, a majority of the employees within the concern or group of companies may demand a common representation for all the employees within the concern or group.

The Corporate Assembly elects the board of directors, which will consist of at least five directors. If one third of the members of the Corporate Assembly so demand, the election of the directors shall be governed by the principle of proportional representation. Thus, one third of the directors would be employees.

The Corporate Assembly may adopt recommendations to the board on any matter. At the proposal of the board, the Corporate Assembly adopts resolutions in matters concerning substantial investments, rationalization and restructuring of operations if this results in a major change or reallocation of the workforce.

The Corporate Assembly is a controlling, supervisory organ. The board of directors executes the day-to-day management. In companies with a share capital of more than 1 million nkrs the board of directors must delegate part of its role to management, or to a president or managing director. However, the board retains responsibility for what it has delegated.

The description of the existing system would not be complete without mentioning the permanent influence of public authorities which is exercised in the decision-making process of Norwegian enterprises. The government has pronounced a policy that state ownership in private industry is not to be extended. Nonetheless, state dominance and control are increasing, partly due to the fact that the state-owned oil company has heavily invested in the oil producing and oil using industry.

Furthermore, the Norwegian Government has supported strongly large segments of Norwegian industry. In this connection, the above-mentioned proposal regarding commercial banks will probably eliminate the present voting control by private shareholders.

96. Section 8-18, Company Act 1976.
in these banks. In various ways the government or other public authorities either are already represented in the decision-making bodies of Norwegian companies or are in the process of entering these bodies.

Against this background, a commission submitted a general report in February 1977 recommending that enterprises of a certain size have extensive obligations to inform and consult with municipal or county authorities as far as matters of importance for local communities are concerned. It further suggested that municipal or county authorities should have the right to demand representation on the boards of directors of larger enterprises within their community boundaries. While it remains to be seen whether these recommendations become regulations, this aspect of public representation will be of greater importance for the development of employee participation in the decision-making process of Norwegian companies. A completely new method of influencing the decision-making process of companies could result. This new method would add to the already existing ways to participate in the decision-making process of companies in Norway.

A further form of employee representation was introduced by a law of June 10, 1977, which came into effect on January 1, 1978. All banks must have a "Repraesentantskab," an organ which is higher than the General Assembly. This institution decides on the statutes, increase or decrease of share capital, merger, acquisitions, divestments, etc., with a two-thirds majority. It issues guidelines for the business which bind the board and administration of the bank. Furthermore, it approves the balance sheet and decides on the remuneration of board members and managing directors. It also elects the members of the board.

Under the new law, in a Repraesentantskab with 15 members, 8 are elected by Parliament, 4 by the shareholders and 3 by and from among the employees. The regulations for this procedure state, that under the new system, the influence of the shareholders will be reduced. Therefore, the Norwegian State gave the shareholders the right to sell their shares to the government at a price, which was either the quotation at the stock exchange for the day, when the law came into effect, or the average of the stock quotation for the years 1975-1977.

A shareholders' group sued the government arguing that the price for the takeover by the government was inappropriate. They

98. Lov av 10. juni 1977 nr. 60.
claimed that the quotation at the stock exchange had lost a number of points because of the decision of Parliament and charged that the average of 3 years was not a fair price, because, given the parliamentary interference, only the real value would be appropriate.

On December 22, 1978, the Court at Oslo (Oslo Byrett) decided in favor of the shareholders. The government appealed to the highest Norwegian Court (Norges Hyesterett). On June 1, 1979, this court overruled the decision of the court of first instance and upheld the pricing clauses of the law. The controversy is similar in magnitude to the lawsuit regarding the constitutionality of the German Codetermination Act of 1976.

It can be expected that the developments in Norway will continue. The Norwegian Prime Minister recently confirmed that codetermination rights of the employees will be introduced in the insurance and shipping industries. Extending this law to companies with fewer than 50 employees also will be discussed. Such developments would be perfectly consistent with the "step by step" method adopted by the Norwegian Parliament.

Sweden

In Sweden, the "Act relating to Board Representation for the Employees in Joint-Stock Companies and Cooperative Associations" has been in effect since July 1, 1976. This replaced the law of April 1, 1973, which covered companies with 100 employees or more. The purpose of the act is "to afford to the employees insight and influence in respect of the enterprises' activity." The size of companies falling under the new regulation was reduced from 100 to 25 employees. Therefore, some 8000 companies are covered by the new law. The boards of these companies include two employee members. In addition, the local trade union may

100. L. No. 57 (1979).
appoint two deputy members, who have the right to attend and speak at board meetings, even if the normal number is present.

The procedure by which the employee members of the board are determined is interesting. The act states that decisions on the establishment of board representation shall be taken by the local trade union which has a collective agreement with the enterprise and which represents more than half of the employees in the enterprise. In other words, the companies' employees must be 51% unionized to be eligible for two representatives on the board.

Swedish law allocates the central role in codetermination to the trade unions, while other countries with institutionalized co-determination award the decisive position to the works councils. The Swedish variant may be defined as "decentralized co-determination" because there are regional or other differences in the effectiveness of codetermination.

The trade unions decide whether or not they want to establish board representation for a company with more than 25 employees. If they do, then they must notify the board of directors in writing.

In board committee meetings, one employee representative has the right to be present and to participate in the discussions. This representative is elected by that union which has the highest number of organized employees in the enterprise. Employee members of the board are not allowed to take part in board deliberations on matters concerning negotiations with trade unions, giving notice of collective agreement, or strikes or other industrial action. In all other matters, the board members of the employees have the same rights and duties as the shareholders' representatives under the Swedish Companies' Act of 1975.

On January 1, 1977, a new law came into effect, giving the employees additional co-determination rights also affecting the representation of employees on boards of directors. This "Act on Co-Determination at Work" has a highly controversial Section 32:

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104. 1976:580. This translation of the title is used by Circular Letter No. 8/76 to the federations and part-owners of the Swedish Employers' Confederation (Svenska Arbetsgivareforeningen). For summaries of this legislation, see Wall St. J., June 4, 1976, at 6, col. 3, and Business Week, June 21, 1976, at 42. For an English translation of the complete law, see F. Schmidt, Law and Industrial Relations in Sweden 234 (1977). In that translation, the title of the law is given as "Act on the Joint Regulation of Working Life."
Between parties who conclude a collective agreement on wages and general conditions of employment there should, if the employee party so requests, also be concluded a collective agreement on a right of joint regulation for the employees in matters which concern the conclusion and termination of contracts of employment, the management and distribution of work, and the activities of the business in other respects.

This act introduced a further mechanism for decentralized codetermination: the unilateral decision of the trade union to expand its authority to codecide in matters of company management.105

Since August 1977,106 the Swedish employers' organization (SAF) and the trade unions have been negotiating a co-determination agreement. This agreement would regulate the discretionary elements in the law. One of the legal problems involved in the negotiations concerns the transfer of decision-making powers to a joint management institution or even to the employees. This is considered to be in conflict with company law, because it would reduce the authority of management without a concurrent reduction in their liability under existing company law. Therefore, the Swedish Parliament had to state that company law enjoys priority.107

Until now, the negotiations have not made progress. The consequent failure to implement the new law has resulted in the continuation of present conditions.108

SAF is of the opinion that the various codetermination issues cannot be isolated from one another. It continues to favor legislation for the different levels of codetermination in the company.

It will be interesting to observe further developments in Sweden. In the summer of 1978, the Social Democratic Party proposed the introduction of 50/50 representation on boards, initially for all companies having at least 500 employees. However, this may

105. Swedes Ponder Long Range Effect of Law Giving Workers More Say in Management, Wall St. J., Mar. 25, 1977, at 38, col. 1. ("[T]he new law is a framework document that leaves the details to be negotiated by the LO and the Swedish Employers' Federation. . . . The law is giving more power to trade unions.")


have been merely an election campaign argument, comparable to the proposal for collectively controlled employee investment funds.

_Ireland_

In July of 1975, the Irish Minister of Labour proposed to Parliament a bill concerning the election of employees to the boards of state enterprises.\textsuperscript{109} In this proposal the Irish government declared that seven commercial state enterprises should have employee-elected directors on their boards. Among the state-owned enterprises are the national airline Aer Lingus, the British and Irish Steam Packet Company Ltd. (the B&I Line), the Electricity Supply Board (or E.S.B.), a sugar producing and food processing company, and a company producing fertilizer. The total number of workers affected is estimated at 50,000, covering a wide range of occupations and a significant proportion of the Republic's workforce.

The bill was passed by the Irish Parliament on April 4, 1977,\textsuperscript{110} and published under the official title "Worker Participation, State Enterprises Act, 1977."\textsuperscript{111} The act provides that one third of the members of the boards concerned will be elected by and from the workforce. The election is by secret ballot and under the proportional representation system. The employees who are elected will be appointed as directors by the Minister concerned.

The elected employees hold the office of director for periods of three years each, and may be reelected. They possess the same rights, responsibilities, and duties as the other directors and receive the same fees and allowances. The elected worker directors represent not only the interests of the workforce, but share with the other directors the same general responsibility for the overall objectives of the enterprise and the government policy for the particular sector. The elected directors are not permitted to participate or assist in collective bargaining, nor may they vote at the board level on certain issues, such as employees' remuneration and conditions of employment. Thus, as far as possible, a conflict of interest is avoided. The normal standard of confidentiality will apply to elected directors.


\textsuperscript{110} See Explanatory Memorandum of 1976 and Second State Speech of the Minister for Labour (mimeographed).

\textsuperscript{111} Published in No. 6 of 1977 (Wt. - 800.5/77. Cahill. (7317).G.16).
because (as the commentary to the bill states) "they will not have
the function of or responsibility for communications between the
board and the workforce."

The commentary stresses the point that the elected directors
will be appointed within the existing single tier board structure. It
further states: "The introduction of two-tier-boards would be an
unnecessary complication at this stage which would not add to the
level of participation. Two-tier-boards (i.e., a legislative system of
separate supervisory and management boards) were not primarily
designed as a vehicle of workers' participation but rather as an at-
tempt to give greater protection to shareholders' interests." The
commentary also points out that the one-third worker director sys-
tem is in line with the general pattern in European countries.

All statements made in connection with the act recognize that
this is the first step in employee representation at the management
level. Further steps will have to follow in due course.

The proposal stated that the provisions for the election of
directors by and from the workforce should be seen in the context
of a broader approach coordinating actions at all levels, and that this
should result in greater management and trade union interest in
progress at other levels, especially in examining forms of worker
participation in management decisions and in considering the devel-
lopment of appropriate machinery, such as works councils.

This statement was repeated by the Irish Government in its
"This scheme will be monitored closely to see if any changes are
called for in the light of experience, especially in the context of
promoting worker participation in management in the private
sector."¹²

United Kingdom

The "Report of the Committee of Inquiry on Industrial Demo-
cracy" (Bullock Report)¹³ was heavily debated in the United King-
dom and comments were made from all sides. CBI (Confederation
of British Industry), which was originally in favor of limited legisla-
tion on worker directors, has meanwhile strengthened its position
against the proposals of the Bullock Report. In its "Programme for
Action" adopted at the CBI's first National Conference in Brighton

¹² Government Publications (Prl. 6836).
¹³ Her Majesty's Stationery Office [HMSO], Cmnd. 6707 (1977).
in November, 1977, it has set a policy which virtually rules out support for any legislation on employee participation.\footnote{114} The Trade Union Congress (TUC) was more enthusiastic about the majority report of the Bullock Committee, which was described as an approach consistently endorsed by TUC. TUC only requested that nationalized industries should also be included in the future legislation, to give workers in these industries parallel representational rights.\footnote{115}

The Labour Government continued its efforts to establish worker directors on the boards of nationalized industries or services which it considered as pilot experiments. British Steel Corporation had already appointed employee directors in 1963 on the basis of a recommendation of the Organizing Committee of the British Steel Corporation.\footnote{116} At first three employee directors were appointed to each group board for periods of three years each. Then, in 1970, the Minister appointed one of the employee directors to the board of the Corporation itself. Now the British Steel Corporation has 17 worker directors in all at various levels, including five on the main boards. They are presently paid £ 1500 per year for their duties. At first they were barred from holding union office, but this is now allowed.\footnote{117}

\begin{enumerate}
\item \textbf{CBI, Britain Means Business} 1977 at 49 (November 1977). But, on the other hand, CBI favors voluntary agreement and representation of all employees. “Participation must continue to be built from the bottom.” \textit{id.} at 50.
\item \textbf{T. Jones, Employee Directors in the British Steel Corporation, Participation in Industry}, 83 (1973).
\item In a letter of Feb. 15, 1978, British Steel Corporation stated that since its earliest days the Corporation has had an employee as a member of its main board. This representative’s function has not been advisory but he has
\end{enumerate}
After three years of negotiations, on January 1, 1978 worker directors were appointed to the board of the post office, where they have equal representation with management. The composition of the board is broadly similar to the Bullock Report's formula $2X + Y$, even though the government at that time disclaimed any connection with the Bullock proposals. Management and the Trade Union appoint the two $X$ components, and the independent $Y$ members are appointed by the Secretary for Industry in order to allow him to fulfill his responsibilities for the Post Office to Parliament. It is no secret that the British Government used some pressure to speed up negotiations between the old Post Office Board and the postal workers' union, obviously in order to set an example of industrial democracy in another public service.\(^{118}\)

In September, 1979, the industry secretary announced a review of the Post Office's worker director experiment.\(^{119}\)

In May, 1978, the British Government published a White Paper\(^{120}\) in which it recognized that there have been sharp divisions of opinion on the recommendations of the Bullock Committee's report. It puts on record the government's view that the development of employee participation in decisions affecting workers' lives and jobs is no longer a question of "if" but of "when and how." The paper proposes that employers in companies employing more than 500 people in the UK should be put under a legal obligation to discuss with employees' representatives, before decisions are made, all major proposals affecting the employees of the business. As to the mechanics, the White Paper proposes a "Joint Representation Committee." Concerning board level representation, the govern-

shared equally with other Board members the corporate responsibility for the collective decisions of the Board. The main Board also has as one of its members the former (now retired) Assistant General Secretary of the main steelworkers' trade union—the Iron and Steel Trades Confederation. The Corporation has stated publicly that it would welcome the appointment (by the Government) of more trade unionists on its main Board.


119. *Worker Directors are Likely to Become Rare Breed*, Daily Telegraph, Sept. 14, 1979. (Reports that it was suggested that the introduction of the Post Office's worker director experiment had coincided with a rapid deterioration in industrial relations.)

ment admits that the consultations following publication of the Bullock Report did not result in consensus on the principle, but the British Government expresses the opinion that it would not be satisfactory to rely entirely on voluntary progress and therefore proposes that, when employees wish it, they should have a right to representation on the board of their company.

Among the proposals contained in the White Paper, the two-tier-board structure is suggested to be optional for the company. Members of the board of directors must have the same legal duties and responsibilities. Employees in companies employing 2000 or more people in the UK should have a statutory right to have employees of the company on the board of directors. To begin with, the employees should elect up to one third of the members of the board.121

The general election which brought the Conservative Party into power had considerable influence on the discussion concerning industrial democracy in Great Britain. The efforts to create new legislation on collective bargaining, to restrict the powers and mechanisms of the trade unions, will certainly play the major role in British labor relations for some time to come. Industrial democracy will therefore remain a very remote goal for the foreseeable future.

Further developments are difficult to predict. Mr. Jim Prior, Employment Secretary, seems to favor the acquisition of shares by the employees as a means to further their influence in the company’s decision-making process. It therefore seems that employee share ownership will become easier. Another idea is to revise company law proposals prepared by previous Conservative and Labour administrations to require statutorily that company directors take the interests of employees as well as those of shareholders into account.122

The European Economic Community

The European Commission has strongly committed itself to the promotion of industrial democracy because, among other reasons, it wants to further a Common Market for companies through harmonization of company laws. It has proclaimed employee

participation as a fundamental objective of the European Community, partly because most of the Community's member states have some kind of employee participation at the board level either in the form of employee board members without voting rights (as in France) or with full voting rights (as in Denmark, Luxembourg, and some of the countries dealt with herein). Most of the member states with employee participation at the board level have favored the one third model which, outside of the Community, is used in Austria, Sweden, Norway, and, to some extent, Spain. Therefore, it is not surprising that this one third model plays an important role in discussions in the European Economic Community and the European Parliament.

In 1972 the Commission published the "Proposal for a Fifth Directive Regarding the Structure of Sociétés Anonymes and the Powers and Obligations of their Organs." The stated purpose was to "coordinate the safeguards which, for the protection of the interests of the members and others, are required by companies of member states within the meaning of the second paragraph of Article 58 of the Treaty."

Under this proposal the member states may choose between two models for the legislative determination of board membership. In the first, the appointment of members of the supervisory board is made partly by the general assembly of shareholders and partly by the employees. The employees elect at least one third of the total membership. Under the second model, the board is composed by way of co-option (Dutch model).

Discussion of the proposal for the Fifth Directive was intensified by the "Green Paper." In this Green Paper, the Commission recognized that progress in the field of industrial democracy could only be made with the passing of a considerable amount of time, and that only certain minimum standards as to company structure could be achieved. These should be as flexible as possible, and take the different national experiences into account.

A further proposal for employee representation on boards is contained in the draft of the European Company Statute, first


proposed by the Commission on June 30, 1970. Following an opinion expressed by the European Parliament in July, 1974, this proposal has been amended to read that shareholders are to elect one third of the members of the supervisory board, and the employees the second third. The two groups of members so elected then co-opt together the remaining third. These last are to be independent of both employees and shareholders, representing general interests. They must have the necessary knowledge and experience, and may not be directly dependent on shareholders, employees, and/or their respective organizations.

At its meeting of April 26, 1979, the Legal Affairs Committee of the European Parliament adopted a report in which it submitted a motion for a resolution to the European Parliament. The Committee rejected the co-option model, which it did not consider "a genuine form of employee participation in the organs of the company, since there is no point in employee representation in the organs of the company unless employees are free to elect candidates who enjoy their confidence." It drew attention to the close interrelationship between the proposal for a Fifth Directive and the proposal for a Statute for European Companies, urging them upon the Council of Ministers. Under the Treaty of Rome, the Council has sole legislative jurisdiction in Common Market Affairs.

Article 2 of the draft establishes the concept of the dualistic structure of the company (management organ and supervisory organ). The Committee reworded this article to read that the member states can choose between the dualist system and a unitary system with a single administrative organ during a transitional period of five years. It further amended the draft by introducing the concept of the Labor Director (Arbeitsdirektor), as it exists in the German coal and steel industries.

At the session of May 7, 1979, the President of the Parliament formally announced the receipt of the Legal Affairs Committee's report. On May 10, the President announced that the motion for a resolution together with the amendments that had been

126. Art. 75a.
tabled to it would be put to a vote at the beginning of the next day's sitting." A quorum call on May 11 failed to raise the number of members required under the Rules of Procedure, and the vote was therefore placed on the agenda of the next sitting. The Parliament adjourned at the end of this day and a new European Parliament was elected, the first to be chosen by direct universal suffrage. This new Parliament convened for the first time on July 17, 1979.

On September 26, the chairman of the German Trade Union Association (DGB), Heinz Oskar Vetter, attempted to bring the resolution to a vote in the new Parliament. The draft of the Fifth Directive was referred back to the Legal Affairs Committee for consideration. In the new Committee, the rapporteur Manfred Schmidt, a German Social Democrat, had been replaced by the Dutch Liberal Aart Geurtsen. According to newspaper reports, discussion of the draft will take place in the Parliament’s plenary session in February 1980.

Conclusion

A summing-up of the existing European models and systems for worker directors or employee participation on supervisory boards shows that the various systems are strongly influenced by national developments. It will therefore be difficult to find a common system for all European countries or all member states of the European Community. Of utmost importance will be the question whether the board system practiced in some countries (e.g., the United Kingdom) is suitable for having worker directors who are theoretically to be involved in the day-to-day management of the company. The supervisory board model is better suited to having employee representatives among its members. This is due to the limited duties the supervisory board normally has in the company laws of the countries involved.

Industrial democracy has become one of the major topics

129. Id. at 89.
130. Id. at 95-96.
of the 1970s, and it can be expected that the discussions will con-
tinue during the next century. The practical experiences collected
so far in those countries whose commitment to industrial democracy
is broad and long-standing have shown that industrial democracy
institutions, especially worker directors, cannot be introduced into
company laws without adjusting all other clauses of the law, thus
affecting the rights and duties of all board members. This will also
be a necessity in countries like the Federal Republic of Germany,
where the present regulations are working, but where also experience
shows that it is not possible merely to "pull" co-determination
legislation over the existing company laws.

Experience has further shown the worker directors require a
constituency, one they can only have at the shop floor level. There-
fore, the institutionalization of shop floor level employee repre-
sentation is a first step toward the development of higher organi-
zational institutions: worker directors as participants in the decision-
making process of the company.