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# THE EUROPEAN ECONOMIC COMMUNITY AND THE TRANSNATIONAL CORPORATION

WALTER KOLVENBACH\*

## INTRODUCTION

The expansion of the activities of transnational corporations (TNCs) has resulted in unfriendly reactions and multifold tensions in both industrialized nations and developing countries. To a large extent this can be attributed to the growing economic interdependence between national and geographical markets. Critics, however, seem to neglect the important role that TNCs have played and are still playing in the economic development of the Third World.<sup>1</sup> Unfortunately, there exists only limited research concerning the effect of the activity of TNCs in underdeveloped areas.<sup>2</sup> This is one reason for the lack of

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1. Vernon, *Storm over the Multinationals: Problems and Prospects*, 55 FOREIGN AFF. 243 (1977); Gruhler, *Die Kontroverse um die Multinationalen Unternehmen—Kritik der Vorwürfe und Forderungen*, DIE AKTIENGESELLSCHAFT (No. 4), at 87 (1975); Poche, *Internationale Wettbewerbspolitik und Multinationale Unternehmen*, 25 DER BETRIEB HEFT 1157 (1975); Hawrylyshyn, *The Internationalization of Firms*, 5 J. WORLD TRADE L. 72 (1971).

2. Examples of such publications are: D. VAN DEN BULKE, J.J. BODDEWYN, B. MARTENS & P. KLEMMER, *INVESTMENT AND DIVESTMENT POLICIES OF MULTINATIONAL CORPORATIONS IN EUROPE* (1979); R. MONTAVON, M. WIONCZEK & F. PIQUEREZ, *THE ROLE OF MULTINATIONAL COMPANIES IN LATIN AMERICA* (1979); J. MASINI, M. IKONICOFF, C. JEDLICKI & M. LANZAROTTI, *MULTINATIONALS AND DEVELOPMENT IN BLACK AFRICA* (1979); S.E. ROLFE & W. DAMM, *DIE MULTINATIONALE UNTERNEHMUNG IN DER WELTWIRTSCHAFT* (1979); J.M. LAYA, *LE SECRET DES MULTINATIONALS* (1980) (describes the strategies of the Nestlé Company); I. LAPALOMBA-ST. BLANK, *MULTINATIONAL CORPORATIONS IN COMPARATIVE PERSPECTIVE* (1977) (presents the results investigated by the Conference Board of the behavior of United States firms in Brazil, Nigeria and Malaysia). See also E. PAUSENBERGER, *INTERNATIONALE UNTERNEHMUNGEN IN ENTWICKLUNGSLÄNDERN, IHRE STRATEGIEN UND ERFAHRUNGEN* (1980); Pausenberger, *How Powerful Are the Multinational Corporations?*, INTERECONOMICS, May/June 1983, at 130.

recognition of the valuable contribution by TNCs to the integration of the world economy and to the promotion of technical and sociological progress.<sup>3</sup> Unlike smaller corporations, TNCs have the potential to advance the material welfare of the world by increasing the production of goods and services, thus reducing the devastating poverty facing many countries and continents.

In the early 1960's, when it became obvious that the developing countries would have great difficulty in reaching the standard of living of the industrial countries, the United Nations, as well as the European Economic Community (EEC), developed programs to encourage worldwide economic collaboration. At the Sixth Extraordinary Session of the United Nations in 1959 the Third World nations attempted to claim their share of the resources leading to economic wealth. Within the framework of a new economic and international order, attempts were made to have TNCs increase their role in the Third World. At the same time, Third World nations made further attempts to control these corporations and their activities.<sup>4</sup>

Effective control of transborder activities frequently creates conflicts between the national sovereignty of the home and host countries. The activities of a TNC, therefore, can be controlled only through the cooperation of more than one sovereign state.<sup>5</sup> The resulting legal problems were recognized and examined fairly early.<sup>6</sup> In view of the criticism of the transborder activities of TNCs, the question has been raised: "Is it possible to subject transnational corporations to international control?"<sup>7</sup> International activities cannot be controlled effec-

3. Sölter, *Der Beitrag multinationaler Unternehmen zur Sicherung der Welthandelsfreiheit*, in Festschrift zum 65. Geburtstag von Burkhardt Röper Wettbewerbs und Fortschritt (1980). See also Poeche, *Multinationale Unternehmen in der Diskussion*, in FIW Dokumentation Heft 3 (1977) (the author describes the importance of multinational enterprises).

4. For the remarks of Professor J. Tinbergen, at a discussion in Brussels on Nov. 18, 1976, see EUR. CENTRE STUDY & INFO. MULTINATIONAL CORP. (ECSIM), *THE ROLE OF MULTINATIONAL COMPANIES IN THE PERSPECTIVE OF A NEW INTERNATIONAL ORDER* (1976).

5. Rubin, *Multinational Enterprise and National Sovereignty: A Skeptic's Analysis*, 3 L. & POL'Y INT'L BUS. 1 (1971); see also Rittner, *Die multinationalen Unternehmen und die Möglichkeiten eines Weltwirtschaftsrechtes*, in Festschrift für Reimar Schmidt 221 (1976).

6. Harms, *Rechtsprobleme inter- und multinationaler Unternehmen*, Der Betriebs-Berater, May 20, 1969, at 603; Litvack & Maule, *The Multinational Firm and Conflicting National Interests*, 3 J. WORLD TRADE L. 309 (1969); Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739 (1970).

7. Langer, *Aussenwirtschaftsdienst des Betriebs-Beraters*, Dec. 1973, at 645; see also Grossfeld, *Multinationale Unternehmen als Regelungsproblem*, Die Aktiengesellschaft, Jan. 1975, at 1; van Doorn Ooms, *The Multinational Firm and International Regulation*, 29 INT'L ORGANIZATION 169 (1975); Borwer & Tepe, *The Charter of Economic*

tively because of the lack of supra-national power of existing international organizations. For instance, decisions of the General Assembly of the United Nations are not *per se* binding on the member states,<sup>8</sup> and yet such decisions in many cases have become the basis for international customs which, at least in part, have later been codified in international agreements.<sup>9</sup>

In 1972, the United Nations Economic and Social Council (ECOSOC) considered the role of multinational corporations (MNCs) and asked the Secretary General to appoint a group of eminent persons (GEP) to study the role of MNCs and to formulate recommendations for appropriate international action. In preparation, the Department of Economic and Social Affairs of the United Nations Secretariat prepared a report to the GEP. Among the proposals presented in the report was the suggestion that "a broad international code of conduct in respect of multinational corporations" should be negotiated. The report recognized that such a code would be difficult to enforce but that "such a code could also serve as a guide to the review and appraisal of the activities of host and home countries as well as of the multinational corporations."<sup>10</sup>

A subsequent GEP report addressing "the impact of multinational corporations on development and on international relations" recommended a code of conduct for MNCs and governments. It concluded that

a code of conduct may be a consistent set of recommendations which are gradually evolved and which may be revised as experience or circumstances require. Although they are not compulsory in character, they act as an instrument of moral persua-

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*Rights and Duties of States: A Reflection or Rejection of International Law?*, 9 INT'L LAW. 296 (1975).

8. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966).

9. Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 25, 57 (1970-71); Sohn, *Voting Procedures in United Nations Conferences for the Qualification of International Law*, 69 AM. J. INT'L L. 310 (1975) (examples concerning the voting procedure); Haight, *The New International Economic Order and the Charter of Economic Rights and Duties of States*, 9 INT'L LAW. 591 (1975); Primoff, *International Regulation of Multinational Corporations and Business—The United Nations takes Aim*, 11 J. INT'L L. & ECON. 287 (1976); Amerasinghe, *Dispute Settlement Machinery in Relations between States and Multinational Enterprises—With particular Reference to the International Centre for Settlement of Investment Disputes*, 11 INT'L LAW. 45 (1977).

10. See *Multinational Corporations in World Development*, U.N. Doc. ST/ECA/190, U.N. Sales No. E.73.II.A.11 (1973).

sion, strengthened by the authority of international organisations and the support of public opinion.<sup>11</sup>

In addition to this recommendation, the GEP suggested the creation of appropriate machinery to implement such a code.<sup>12</sup> In Resolution No. 1913, ECOSOC adopted the proposals for establishing the implementing machinery, specifically the creation of the United Nations Center on Transnational Corporations. Since then the Center has strongly influenced the work on a United Nations Code of Conduct for TNCs.<sup>13</sup> Despite considerable progress in the formulation of the code, it is still far from being adopted by the General Assembly of the United Nations.<sup>14</sup>

The purpose of this paper is to examine the various codes of conduct that have been formulated, proposed and commented upon, especially with regard to worker representation on TNC boards. As shall be discussed, these codetermination mechanisms have met with some resistance since many TNCs do not wish to permit these measures of control over their behavior.

#### INDUSTRIAL RELATIONS IN LARGE CORPORATIONS

Industrial relations can be defined as the framework and procedure of relations among employers, employees and their organizations. In most European countries, a delicate balance of power between man-

11. See *The Impact of Multinational Corporations on Development and on International Relations* at 55, U.N. Doc. E/5500/Rev. 1/ST-ESA/6, U.N. Sales No. E.74.II.A.5 (1974).

12. For an intensive study of the questions involved, see *Summary of the Hearings before the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations*, U.N. Doc. ST/ESA/15, U.N. Sales No. E.74.II.A.9 (1974).

13. See *Transnational Corporations: Issues Involved in the Formulation of a Code of Conduct*, U.N. Doc. E/C. 10/17 (1976).

14. Details of the work progress can be found in: Rubin, *Reflections Concerning the United Nations Commission on Transnational Corporations*, 68 AM. J. INT'L L. 73 (1974); Rubin, *The Multinational Enterprise at Bay*, 68 AM. J. INT'L L. 475 (1974); Wang, *The Design of an International Code of Conduct for Transnational Corporations*, 10 J. INT'L L. & ECON. 319 (1975); Coonrod, *United Nations Code of Conduct for Transnational Corporations*, 18 HARV. INT'L L.J. 273 (1977); Chance, *Codes of Conduct of Multinational Corporations*, 33 BUS. LAW. 1799 (1978); Walde, *Der UN-Verhaltenskodex für Transnationale Unternehmen: Schritte zu einem Weltwirtschaftsrecht*, 285 RIW/AWD 1978; H. SCHWAMM, *THE CASE OF A UNITED NATIONS CODE OF CONDUCT ON MULTINATIONAL CORPORATIONS*, 8 (1978) (Information No. 57 der Internationalen Treuhand AG, Basel); Bockstiegel & Catranis, *Verhaltenskodex der Vereinten Nationen für Multinationale Unternehmen: Illusion oder absehbare Realität?*, 1980 N.J.W. 1823; Maynard, *The Commission and Center on Transnational Corporations*, 1 COMPANY LAW. 226 (1980).

agement and labor is the secret of industrial relations. Since MNCs engage in centralized planning and decisionmaking, such decisions may be contrary to or incongruous with local customs. The remote decision-making center, in regard to decisions affecting the workforce, is inaccessible to employee representatives or trade unions. Lack of proper information aggravates these problems. Consequently, trade unions in particular have sought international control of MNCs. Governments, particularly in developing countries, favor the adoption of international rules and regulations for these large enterprises, which extend their activities beyond the boundaries of national legislation. The right to establish employee representation at the shop floor level (works councils) and, ultimately, the right to establish employee membership on the board of directors are favorite subjects in the discussions on codes of conduct for MNCs. This is attributable to trade union influence and, in some countries, hostile public opinion.

The development in this area has been broad. The EEC, for example, has been influenced by international efforts to establish such codes of behavior, especially with regard to the relationship between management and labor. The ECOSOC draft previously discussed, which refers in paragraph 46 to the Tripartite Declaration of the International Labor Office (ILO) in Geneva, would compel TNCs to inform trade unions and employees on the performance of the local entity and the corporation as a whole, where appropriate. Furthermore, the draft procedures for consultation on matters of mutual concern would be worked out between entities of TNCs and trade unions or other representatives of the employees in accordance with national law and practice.<sup>15</sup> Similarly worded clauses can be found in all other codes, statements and draft documents on this subject.

#### INTERNATIONAL LABOR OFFICE

One of the aims of the ILO is the furtherance of industrial relations and, therefore, employee representation in various enterprises. A formal recommendation on the subject was adopted by the 35th Session of the General Conference of the ILO on June 4, 1952.<sup>16</sup> Following

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15. See Report of the Intergovernmental Working Group on a Code of Conduct, 15th, 16th and 17th Sessions, Annex III, Draft U.N. Code of Conduct on Transnational Corporations (as completed at the 17th Session, 10-21 May 1982), U.N. Doc. E/C.10/6 English Annex at 13 (1982).

16. Recommendation No. 94, 35th Session of the General Conference of the International Labor Organization, published as Annex 1 to *LABOUR-MANAGEMENT RELATIONS SERIES* No. 13 (Geneva Int'l Labor Office, 1962). No. 1 is particularly important for this paper:

Appropriate steps should be taken to promote consultation and cooperation be-

this recommendation, in a number of expert reports and conferences, the ILO has discussed general problems of industrial relations inside large enterprises. The experiences collected show that the works council system, as it is presently being practiced in many European countries, establishes or increases codetermination rights and codecision participation for employees in corporations.<sup>17</sup>

In this connection, the contribution of multinational enterprises to economic and social progress has also been studied. The ILO gathered information on the impact of multinational enterprises on employment and training and came to the conclusion that multinational enterprises have created a great number of jobs in host countries.<sup>18</sup> On November 16, 1977, the governing body of the ILO adopted the "tripartite declaration of principles concerning multinational enterprises and social policy."<sup>19</sup> In the preface to this tripartite declaration, the director-general of the ILO states that this is

the outcome of several efforts by the International Labor Office to reach agreed solutions in a highly complex and controversial area of social policy through dialogue and negotiation between governments, employers and workers. The consensus thus reached represents a unique example of common worldwide social policy formulated by governments, employers and workers, in the best traditions of the ILO. The guidelines contained in the declaration should serve to enhance the positive contribution which multinational enterprises can make to economic and social progress and to reducing or resolving the difficulties to which their operations may give rise.<sup>20</sup>

The chapter on industrial relations states that "multinational enterprises should observe standards of industrial relations not less favourable than those observed by comparable employers in the country concerned."<sup>21</sup> Article 46 further states that "[r]epresentatives of the workers in multinational enterprises should not be hindered from

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tween employers and workers at the level of the undertaking on matters of mutual concern not within the scope of collective bargaining machinery, or not normally dealt with by other machinery concerned with the determination of terms and conditions of employment.

17. For details of the existing works council legislation and agreements in Europe, see W. KOLVENBACH, *EMPLOYEE COUNCILS IN EUROPEAN COMPANIES* (1978).

18. See ILO, *THE IMPACT OF MULTINATIONAL ENTERPRISES ON EMPLOYMENT AND TRAINING* 30 (1976, 2d impression 1977).

19. ILO, *TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY* (1977, 2d impression 1978).

20. *Id.* at 1.

21. *Id.* at 11.

meeting for consultation and exchange of view among themselves."<sup>22</sup> Article 56 adds: "In multinational as well as in national enterprises, systems devised by mutual agreement between employers and workers and their representatives should provide, in accordance with national law and practice, for regular consultation on matters of mutual concern. Such consultation should not be a substitute for collective bargaining."<sup>23</sup> Even though the declaration is voluntary it has had a considerable "transnational influence" upon employment legislation and practice in many countries.<sup>24</sup>

#### ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD)

On June 21, 1976, the member states of OECD passed a "declaration on international investment and multinational enterprises,"<sup>25</sup> which contains an annex with "guidelines for multinational enterprises."<sup>26</sup> These guidelines are not binding, but they have become important terms of reference, and the review procedure, to be conducted every three years, will serve to improve the effectiveness of the guidelines. Their importance can be recognized by the fact that they have strongly influenced not only the work on the United Nations Code of Conduct, but also legislative efforts in the EEC. The first review in 1979 has shown that TNCs are aware of and observe the OECD guidelines. The guidelines urge enterprises, "within the framework of law, regulations and prevailing labour relations and employment practices,"<sup>27</sup> to provide to representatives of employees information needed

22. *Id.* at 12.

23. *Id.* at 13.

24. At the Berlin Conference of the International Bar Association in August 1980, H. Gunter (special advisor on multinational enterprises of the ILO) commented on the importance of the governing body of the ILO approving and adopting this instrument. It therefore represents the opinion of the regular ILO body, composed within the regular ILO structure, and is not just the opinion of experts. See INT'L B.A., CODES OF CONDUCT FOR TRANSNATIONAL CORPORATIONS—SIGNALS OF PUBLIC EXPECTATION? (1980).

25. See OECD, DECLARATION BY THE GOVERNMENTS OF OECD MEMBER COUNTRIES AND DECISIONS OF THE OECD COUNCIL ON GUIDELINES FOR MULTINATIONAL ENTERPRISES, NATIONAL TREATMENT, INTERNATIONAL INVESTMENT AND DISINCENTIVES, CONSULTATION PROCEDURES 11 (1979). See also Vogelaar, *The Guidelines in Practice*, OECD OBSERVER, May 1977, at 2; Plaine, *The OECD Guidelines for Multinational Enterprises*, 11 INT'L LAW. 339 (1977); Hawk, *The OECD Guidelines for Multinational Enterprises: Competition*, 46 FORDHAM L. REV. 241 (1977); Schwamm, *The OECD Guidelines for Multinational Enterprises*, 12 J. WORLD TRADE L. 342 (1978); Wakkie, *Some Comments on the Impact of the OECD Guidelines for Multinational Enterprises on European Employment Relations*, 2 LOY. L.A. INT'L & COMP. L. ANN. 75 (1979).

26. OECD, *supra* note 25, at 15.

27. *Id.* at 19.



for meaningful negotiations on conditions of employment and information which enables the employees "to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole."<sup>28</sup> In case of changes in the operations which would have major effects upon the livelihood of the employees, reasonable notice of such changes is to be provided to employee representatives. Furthermore, cooperation with employee representatives and appropriate governmental authorities is recommended "so as to mitigate to the maximum extent practical adverse effects."<sup>29</sup> Although the guidelines are voluntary and not legally enforceable, they have played a major role in a number of cases in which TNCs have been involved in Europe.

The guidelines are recommendations jointly addressed by member countries of the OECD to the multinational enterprises. It is not up to the TNCs to decide whether they accept the guidelines—the weight of the governments of the OECD are behind them. In addition, business and labor have already accepted the guidelines. This brings about a moral impact and relative binding effect. One of the first and best known cases relating to the guidelines is the *Badger* case.<sup>30</sup> Other cases have clarified the OECD guidelines and their application. One of the most important problems is the co-responsibility of the parent company for the actions and commitments of its subsidiaries. This goes "to the heart of the multinational matter since it also involves the central decision-making structure of the multinational enterprise, which constitutes, as is stressed time and again, the essence of the multinational enterprise."<sup>31</sup>

#### LEGAL EFFECT OF CODES OF CONDUCT

Whether the codes of conduct should be binding or non-binding is a question that arises repeatedly in all discussions concerning codes of conduct for TNCs. This issue must be considered in light of complex and changing economic realities. A binding code would restrict the activities of TNCs and, perhaps, their readiness to invest. The principle of free enterprise would be involved and a binding code could be effective only if the member states of the organization promulgating such a code would adapt their legislation accordingly. This would result in special legislation for TNCs and very likely lead to discrimination

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28. *Id.* at 20.

29. *Id.*

30. R. BLANPAIN, *THE BADGER CASE AND THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* (1977).

31. Blanpain, *The OECD Guidelines for Multinational Enterprises and Labour Relations 1976-79*, in *LABOUR RELATIONS EXPERIENCE AND REVIEW* 273 (1979).

against such enterprises.<sup>32</sup> A binding code could also create national legal problems.<sup>33</sup> The universal acceptance of the clauses in a code could possibly raise the international standard of behavior in these matters and eventually change the purely voluntary character of the principles agreed upon by member states. Internationally recognized codes of conduct for TNCs can greatly influence moral standards in business. They are a first step on uncertain ground and a second best solution for lack of better alternatives.<sup>34</sup>

These legally non-binding codices have been termed "soft law." It is possible, however, that one day the principles embodied therein could develop into customary international law. Adherence to the codices would strengthen their influence upon the legal thinking of the world; governments as well as TNCs would refer to them. Kuusi is certainly right when he states:

It is to be hoped that the development of new codes of conduct would contribute to the replacement of the old legal doctrines, rooted in the late 19th century, by a new body of rules relating to foreign investment and would lead to the recognition of a new notion of a favourable investment climate . . . it remains to be seen, however, to what extent problems of such complexity and relations of such variety and intricacy as those between states and transnationals will in the end lend themselves to legal regulations.<sup>35</sup>

Another commentator, Professor John H. Jackson, has rightly stated: "Since no single agency has a monopoly on code formulation, and since there exists such a wide range of goals and objectives, clearly

32. *Id.*

33. See generally Baade, *The Legal Effect of Codes of Conduct for Multinational Enterprises*, in *LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES* (N. Horn ed. 1980); Schachter, *The Twilight Existence of Non-Binding International Agreements*, 71 *AM. J. INT'L L.* 296 (1977); H. SCHWAMM, *WHY CODES OF CONDUCT FOR MULTINATIONAL CORPORATIONS?* (1980) (Information No. 61 of Internationalen Treuhand AG, Basel). In regard to the United States, see Baade, *Multinationale Gesellschaften im amerikanischen Kollisionsrecht*, *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 37 (1973); Schwartz, *Are the OECD and UNCTAD Codes Legally Binding?*, 11 *INT'L LAW.* 529 (1977). In regard to the Federal Republic of Germany, see K.M. Messen, *Internationale Verhaltenskodizes und Sittenwidrigkeitsklauseln*, 1981 *N.J.W.* 1131.

34. See Grossfeld, *Multinationale Unternehmen als Anstoss zur Internationalisierung des Wirtschaftsrechts*, in *WIRTSCHAFT UND RECHT* 106 (1980).

35. J. KUUSI, *THE HOST STATE AND THE TRANSNATIONAL CORPORATION: AN ANALYSIS OF LEGAL RELATIONSHIPS* 166 (1981) (reprint).

one danger is the emergence of codes which conflict with each other, either explicitly or implicitly."<sup>36</sup>

### THE EUROPEAN COMMUNITIES

The possibility of conflicting situations has been aggravated by the activities of the Commission of the European Communities (the Commission). After intensive studies, which must be viewed against the background of the discussions in the OECD, ILO and United Nations, the Commission, on November 7, 1973, reported to the Council of Ministers on the situation of multinational undertakings in the Community.<sup>37</sup> In its report, "Multinational Undertakings and Community Regulations," the Commission points out that

the growing hold of multinational undertakings on the economic, social and even political life of the countries in which they operate, gives rise to deep anxieties which are sufficiently divided, particularly in the areas of employment, competition, tax avoidance, disturbing capital movements and the economic independence of developing countries to demand the attention of the public authorities.<sup>38</sup>

The Commission attributes this development to the size and geographical spread of multinational undertakings. It claims that the effectiveness of the traditional measures of the public authorities and trade unions has been cast in doubt because national rules are inadequate to address the problems to be confronted. Therefore, the Commission proposes to introduce suitable counterweights at the Community and international levels.

One of the proposals for the protection of workers is the amended proposal for a Fifth Directive,<sup>39</sup> which concerns the structure of public limited companies and the power and obligations of their organs. The Commission states that

it is aware of the legal problem raised by the need for appropriate representation of employees' interests vis-à-vis a company which no longer makes its decisions independently but complies with those of the group [to which it belongs]. In the course of the coordination of the law on groups of companies

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36. Jackson, *Transnational Enterprises and International Codes of Conduct*, in *CODES OF CONDUCT FOR TRANSNATIONAL CORPORATIONS—SIGNALS OF PUBLIC EXPECTATION?*, *supra* note 24.

37. BULL. EUR. COMM. Supp. (No. 15) (1973).

38. *Id.* at 7.

39. BULL. EUR. COMM. Supp. (No. 6) (1983).

which it is at present undertaking, the Commission will examine the question as to what measures will have to be adopted in this field.

The provision of information for, and the participation of employees in cases where either the parent company or any of the member undertakings of the group are situated outside the Community raise substantial problems to which the Commission's departments are seeking adequate solutions.<sup>40</sup>

On January 21, 1974, the Council of the European Communities passed a resolution containing a Social Action Programme which had been presented by the Commission. Participation and industrial democracy are considered to be important in this program in view of the rapid changes which are "due in particular to technological progress and to the size of firms, including development of multi-national companies."<sup>41</sup> The report of the Commission on multinational undertakings and Community regulations has been discussed in the Economic and Social Committee.<sup>42</sup> The final report, referred to as the Cahorn Report, was adopted by the European Parliament (EP) in its session of October 13, 1981.<sup>43</sup>

#### THE DIRECTIVE ON INFORMATION AND CONSULTATION OF EMPLOYEES

Despite the various demands for more information concerning employees in multinational enterprises, it came as a surprise when the proposal of the then responsible member of the Commission for Social Affairs, the Dutch socialist Henk Vredeling,<sup>44</sup> was passed on October 1, 1980. This was a proposal for a directive on procedures for informing and consulting the employees of undertakings with complex structures, in particular transnational undertakings<sup>45</sup> (the Vredeling initiative). Few proposals for directives of the Commission have encountered such unanimous opposition from the industries of the Common Market and the non-member states. Since the EP demanded substantial changes in the first draft submitted by the Commission and, therefore, the Commission completely reworked its first proposal, it would not be useful

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40. BULL. EUR. COMM. Supp., *supra* note 37, at 11.

41. BULL. EUR. COMM. Supp. (No. 2) 19 (1974).

42. O.J. EUR. COMM. (No. C116) 14 (Sept. 30, 1974).

43. Verbatim Report of European Parliament Proceedings of Oct. 13, 1981 (including P.E. 74.856).

44. It is ironic that Vredeling can be literally translated into English as "man" or "bringer of peace."

45. The explanatory memorandum to the Council of Ministers has been published in O.J. EUR. COMM., C.O.M. (80) 423.

to explain in detail the content of the first draft and the proposals made thereafter.<sup>46</sup>

The proposed directive is important because it would open the way for the first internationally binding legislation regulating TNCs. The OECD Code of Conduct and the ILO Tripartite Declaration are not binding and thus cannot provide for legal sanctions when they are breached. The Commission is of the opinion that its initiative is not in conflict with the two codes previously mentioned, but that it is a further step toward achieving, on the Community level, a binding regulation for multinational undertakings. Criticism of the draft was based upon the argument that many provisions illustrate an incomplete understanding of corporate decisionmaking processes and industrial relations practices. It has been pointed out by numerous commentators that the directive could create an adverse relationship between employers and employees. Instead of promoting more harmonious industrial relations, the competitiveness of the Community and its industries would be reduced due to obligations which competitors in non-member states do not have to observe. The proposed information procedure would therefore create delays and difficulties in the planning and implementation of the measures contemplated. One argument is that there is no necessity at all for community legislation in this area because the OECD and ILO guidelines are widely adopted and observed and therefore sufficient under the present circumstances. Not only UNICE (Union des Industries de la Communauté Européenne), but also United States industrial organizations and the Japanese industrial organization *Keidanren* protested against the efforts of the Commission to reword its first draft after the comments of the EP became known.

Despite continuing protests the Commission adopted on June 15, 1983, its amended proposals for the "Directive on Information and Consultation of Employees" and submitted it to the Council of Ministers for approval.<sup>47</sup> This proposal includes, in part, the amendments demanded by the EP. In the preamble the Commission refers to the Social Action Programme of the Council and points out that "[p]rocedures for informing and consulting employees as embodied in legislation or practised in the member states are often inconsistent with the complex structure of the entity which makes the decisions

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46. For the discussions up to September 1982, see Kolvenbach, *EEC Directive on Information and Consultation of Employees (Vredeling Proposal)*, 10 INT'L BUS. LAW. 365 (1982).

47. 26 O.J. EUR. COMM. (No. C217) 3 (1983) (Directive on Information and Consultation of Employees).

effecting them,"<sup>48</sup> and indicates that this may lead to unequal treatment of employees affected by the decisions of the undertaking.

The directive is described as part of a series of directives and proposals for directives in the area of company and labor law. It is the aim of the proposed directive "to ensure that workers employed by a subsidiary in the community are kept informed as to the activities and prospects of the parent undertaking and the subsidiaries as a whole, so that they may assess the possible impact on their interests."<sup>49</sup> The directive covers the information and consultation procedures for employees of organizations which, as a whole, employ at least 1,000 workers in the Community, regardless of whether the organization operates in one or in several member states. Where the decisionmaking center of the undertaking is outside the Community, the disclosure and consultation requirements have to be undertaken either by an authorized agent in the Community designated by the outside parent company or, in the absence of such an agent, by the management of each subsidiary. At least once a year, the management of a parent undertaking has to give explicit information with a clear picture of the activities of the parent undertaking and its subsidiaries as a whole to the management of each subsidiary in the Community. In addition, it must give specific information on the sector of production or geographical area in which the subsidiary is active. Article 3 points out that this information shall relate in particular to the structure of the operation, the economic and financial situation, the probable development of business, production and sales, the employment situation and trends, and investment prospects.<sup>50</sup>

The management of the subsidiary has to communicate the information without delay to the employee representatives who may ask the management for all relevant explanations. It is up to the management to state what information is to be treated as confidential.

If the management does not give the information required to its employees' representatives, these representatives may, in writing, approach the management of the parent undertaking. In that case the parent undertaking has to communicate the information to the management of the subsidiary. This right of employee representatives to be permanently informed is further supplemented by their right to be consulted when central management plans to make a decision "concerning the whole or a major part of the parent undertaking or of a subsidiary in the community, which is liable to have serious conse-

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48. *Id.* at 3.

49. *Id.* at 5.

50. *Id.* at 8.

quences for the interests of the employees of its subsidiaries in the community."<sup>51</sup> In this situation the grounds for the proposed decision, the legal, economic and social consequences of the decision for the employees concerned and the measures planned with respect to such employees must be relayed to the employees' representatives. The text also illustrates the type of decisions which create consultation requirements, namely the closure or transfer of the whole or major parts of the establishment; restrictions or substantial changes to an undertakings' activities; major changes affecting organization, working practices or production methods (including modifications resulting from the introduction of new technologies); measures relating to employees' health and safety; and the start or termination of long-term cooperation arrangements with other undertakings. The list of intended decisions is not complete, but it expressly states that these are the decisions which "in particular" may lead to consultation procedures.<sup>52</sup>

One of the clauses which has drawn especially strong criticism from industry provides that in the consultation process the management of the subsidiary has to communicate such information, in writing and without delay, to employee representatives, giving the employee representatives at least thirty days to respond. This permits the employee representatives to hold consultations with local management "with a view to attempting to reach agreement on the measures planned in respect of the employees."<sup>53</sup> As soon as the opinion of the employee representatives has been received, the management decision may be implemented. If after thirty days no opinion is submitted or an opinion differing from the intended decision is rendered, management nevertheless can implement its own decision. In other words, the directive does not give rights of codetermination—rights which can be found in many European laws. The Commission expressly mentions this in its comments to the revised draft. Employee representatives are, according to article 1, the employee representatives provided for by law or practice of the member states.<sup>54</sup>

Article 5 introduces a new element into employee representation in the EEC, giving management and employee representatives the right to conclude agreements establishing a single body representing all employees of the parent undertaking and its subsidiaries within the Community.<sup>55</sup> Thus, a kind of international works council for all subsidiaries in the Community may be established. For trade unions this

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51. *Id.* at 9.

52. *Id.*

53. *Id.* at 10.

54. *Id.* at 6.

55. *Id.* at 11.

clause makes it possible to insist on agreements which create "supra-national" works councils. The internationalization of employee representative bodies on the basis of collective agreements has been a long-standing request of trade unions. Multinational trade union representation is demanded as a counterweight to the power of TNCs.<sup>56</sup>

Article 7, pertaining to secrecy and confidentiality, is both important and controversial. In the revised draft the management of an undertaking is authorized to withhold secret information. Secret information is defined as that which, upon disclosure, could substantially damage the undertaking's interests or lead to the failure of its plans.<sup>57</sup> According to the Commission, the term "interests of the undertaking" means not only the interest of the subsidiary but also those of the parent undertaking. The interests of an undertaking may be damaged when a particular state's legislation—whether the state is a Community member or not—to which the enterprise is subject prohibits communication to third parties of certain secret information. The violation of this rule is considered to be damaging to the interests of the undertaking.<sup>58</sup>

Disputes concerning the secret character of any information are to be settled by tribunals or other competent national authorities. Em-

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56. "It is beginning to look as though the real pressure on multinationals—the breakthrough which the unions have been seeking all these years—could come not as a result of international shopfloor solidarity but through political lobbying by trade union bureaucrats." Tyler, *International Solidarity on Trial*, *Fin. Times*, Jan. 21, 1981, at 13. See generally D. HERSHFIELD, *THE MULTINATIONAL UNION CHALLENGES THE MULTINATIONAL* (1975); R. ROWAN & H. NORTHRUP, *MULTINATIONAL UNION ORGANIZATIONS IN THE MANUFACTURING INDUSTRIES* (1980); R. ROWAN, *The Socio-Economic Environment and International Union Aspirations*, *COLUM. J. WORLD BUS.*, Winter 1978, at 111.

57. 26 O.J. EUR. COMM., *supra* note 47, at 14.

58. Obviously the Commission has taken into account legislation existing in various countries. Parent undertakings domiciled in the Community cannot violate local laws by submitting to the demands of the information obligation. For instance, under article 273 of the Schweizerisches Strafgesetzbuch [STGB], Switzerland punishes those who give a foreign authority, organization or private business entity or their agents access to business secrets. STGB art. 273 (1937). Whether this regulation is relevant for the new proposed directive must be considered. The Business Records Protection Act of the Canadian Province of Ontario prohibits the disclosure of certain information to jurisdictions outside of Ontario. ONT. REV. STAT. ch. 56, § 1 (1980). The Australian Foreign Proceedings (Prohibition of Certain Evidence) Act of 1976 is another relevant nondisclosure act. See AUSTL. ACTS, No. 121 (1976). United States companies subject to stock exchange or securities regulations may be required to disclose to the general public information on future plans which they have published to workers in their EEC subsidiaries, in order to avoid possible liability for insider trading or other offenses. Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1934); SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1982). These examples of legislative efforts in various countries show how the directive may conflict with local laws.



ployees, their representatives and the experts to whom they refer shall not reveal to third parties information which has been given in confidence. The member states must implement appropriate penalties for failure to comply with these obligations.

As with all EEC directives, this one must be transferred into the national law of its member states. Under article 9, the member states have until July 1, 1987, to comply with the directive, provided the directive is passed by the Council of Ministers within a reasonable time.<sup>59</sup>

The draft provides for review in certain situations. Article 10 obligates member states, two years after the directive has come into effect in their country, to forward to the Commission information to enable the Commission to make a report upon the application of the directive in the various member states.<sup>60</sup>

It is interesting to note that the Commission has also changed the title of the directive. The new title is the "Directive on Procedures for Informing and Consulting Employees," which deleted from the old title "undertakings with complex structures, in particular transnational undertakings." The intention of this change is to diminish criticism that the directive discriminates against TNCs working within the EEC.

Since the proposed directive attempts to create a legal framework in which the multinational enterprise must operate, it has been attacked because of its extraterritorial implications. The EEC authorities have defended their position with the argument that TNCs operate in different legal systems and, therefore, it is necessary to find an answer to the nonexistence of coordination between the different legal systems. The EEC is attempting for the first time to create Community legislation embracing all local legislation under which TNCs operate within the Common Market. Common Market legislation, of course, does not apply *per se* to undertakings domiciled in a third country. In the past, the EEC as a whole, as well as some member states, have vigorously opposed attempts to broaden the extraterritorial effect of United States antitrust legislation. Some EEC member states made special provisions to protect corporations from such extraterritorial requirements.<sup>61</sup> In his address to the American Society of International

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59. 26 O.J. EUR. COMM., *supra* note 47, at 15.

60. *Id.* at 15-16.

61. One example is the British Protection of Trading Interests Act, 1980, ch. 11 (enacted Mar. 20, 1980). The French law, No. 80-528, July 16, 1980, J.O. 1799, addresses the same problem. The international implications of extraterritorial application of foreign legislation are explained in Petit & Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697 (1982). See also Jacobs, *Asserting Control over the Conduct of Foreign Companies: The Main Issues*

Law in Washington, D.C. on April 15, 1983, Deputy Secretary of State Kenneth W. Dam referred to the Vredeling proposal as an example of the fact that the United States "is not alone in applying its law to foreign entities or transactions."<sup>62</sup>

The Vredeling directive is an attempt to establish concurrent jurisdiction of states over the activities of multinational enterprises. The problem to be addressed in the future will be to coordinate this concurrent jurisdiction.

After a fierce battle over the Vredeling proposal and the creation of the new compromise draft by the Commission, all parties involved are still not satisfied. The original promoter, Henk Vredeling, has stated that the revised proposal has been weakened considerably by the Parliament and the Commission. He hopes, however, that this measure will "pave the way [to] European-wide collective bargaining between trade unions and corporate management and to new patterns in industrial relations."<sup>63</sup>

The European Trade Union Confederation (ETUC) is also not satisfied with the present draft. It considers the original proposal of October, 1980, as a feasible compromise between worker and employer interests in the EEC.<sup>64</sup> ETUC believes that a directive of the Common Market authorities "must not introduce any deterioration in the legislative situation in the Member states in which there is a high level of workers' rights, and that it should bring improvements for countries where the level is lower."<sup>65</sup> The directive in its present form could be regarded as an important step towards promoting the rights of workers, especially in view of its binding nature and multinational scope.

The British Trade Union Congress (BTUC) has changed its opinion on the Vredeling draft and is prepared to support it. This is surprising in view of the fact that the British Government itself strongly opposes legislative efforts by the Commission because it maintains that employee involvement should be introduced by voluntary means and, therefore, there is no need for EEC legislation in this field. The British Government also mentioned the issue of extraterritoriality and claimed

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*Involved*, 13 SWISS REV. INT'L ANTITRUST L. 3 (1981).

62. Dam, *Extraterritoriality and Conflicts of Jurisdiction*, DEP'T ST. BULL., June 1983, at 48, 49.

63. Fouquet, *Henk Vredeling Talks About the Proposal He Originally Formulated*, MULTINATIONAL INFO., Oct. 1983, at 2, 3.

64. EUR. TRADE UNION CONFEDERATION, RECOMMENDATIONS ON THE EUROPEAN COMMISSION'S AMENDED PROPOSAL FOR AN EEC DIRECTIVE ON PROCEDURES FOR INFORMING AND CONSULTING EMPLOYEES, reprinted in 165 MULTINATIONAL SERV. § V, at 1, 2 (Oct. 21, 1983).

65. *Id.* at 8.

that the draft is not accurate in its definitions.<sup>66</sup> At the first debate in the Council of Ministers, the United Kingdom delegation explained its view that the proposed directive is unnecessary and counterproductive. To the contrary, France, which held the presidency in the Common Market organizations in 1984, considers the draft a good basis for progress in the field of *espace social*.<sup>67</sup>

It will be interesting to see how this debate continues in the Council of Ministers, where a unanimous decision is required. The attitude of the Government of the United Kingdom will be of considerable importance.<sup>68</sup>

#### THE FIFTH EEC COMPANY LAW DIRECTIVE CONCERNING THE STRUCTURE OF COMPANIES

On July 28, 1983, the Commission submitted to the Council the revised proposal for a Fifth Directive concerning the structure of public limited companies.<sup>69</sup> The first draft of this directive was submitted in 1972 and caused ten years of intensive discussion, comment and criticism because it included not only regulations concerning the structure of publicly limited companies, but also codetermination mechanisms. The discussion is important in relation to existing codetermination regulations in a number of the EEC member states, as compared to the absence of such legislation in other member states, especially the United Kingdom. In sum, the debate on this particular proposal has been as intensive and fierce as the debate on the Vredeling proposal. Both draft directives must be considered in a similar context; the Vredeling proposal would give employees of European companies a wider range of information, while the Fifth Directive would enable the employees to participate in decisionmaking processes at the board level.

The harmonization of company law in the EEC has been discussed since the enactment of the Treaty of Rome.<sup>70</sup> An important part of this

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66. BRITISH DEPT. EMPLOYMENT & DEPT. TRADE & INDUSTRY, DRAFT EUROPEAN COMMUNITIES DIRECTIVE ON PROCEDURES FOR INFORMING AND CONSULTING EMPLOYEES—DRAFT EUROPEAN COMMUNITIES FIFTH DIRECTIVE ON HARMONISATION OF COMPANY LAW (1983).

67. *Neue Zürcher Zeitung*, Dec. 10, 1983, at 13.

68. One official of the Commission, Mr. R.J. Coleman, stated that "no company or labour law directive that reached this stage in the past has not been adopted after two or three years meticulous negotiation in the council." Statement of R.J. Coleman, INT'L B.A. Conference, Toronto, Oct. 1983.

69. O.J. EUR. COMM. (No. C240) 2 (Sept. 9, 1983).

70. Treaty of Rome, Mar. 25, 1957, 298 U.N.T.S. 11 (treaty establishing the EEC). See also OFF. OFFICIAL PUB. EUR. COMMUNITIES, TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 113 (1983); J. GRENVILLE, THE MAJOR INTERNATIONAL TREATIES 1914-1973

discussion involves the decisionmaking structure of companies and the role employees of the undertaking can play in this structure. At a fairly early stage the Commission encouraged studies on employee representation in a European limited company.<sup>71</sup> These studies were incorporated into the first draft of the Fifth Directive, which the Commission passed on September 27, 1972.<sup>72</sup>

This first draft recommended that in all member states of the Community the decisionmaking center of the shareholding company should be structured according to the dualistic principle, i.e., that a division of power between the supervisory board and the management board (as executive of the company) should prevail. Furthermore, the draft required certain minimum guaranties for the participation of employees in decisionmaking processes at the board level.

The proposed draft was heavily criticized in Anglo-Saxon countries,<sup>73</sup> and the EP demanded substantial changes. The legal committee of the EP temporarily halted discussion of the draft in order to wait for a new proposal from the Commission. In 1975, in order to reply to the widespread criticism and to explain its intentions more fully, the Commission presented the "Green Book."<sup>74</sup>

In the introduction, the Commission raises the rhetorical question as to why it has proposed community legislation in relation to "the undeniably controversial and difficult issue of the role of employees in relation to the decision-making structures of companies? Is this not an issue which should be left to the member states to handle in their own particular ways as an essentially domestic matter?"<sup>75</sup> Subsequently, the Commission points out that Community laws are necessary to make the Common Market effective. The role of employees in decision-making structures of companies is of central importance for the companies themselves, their employees, their representative organizations

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412 (1974).

71. Lyon-Caen, *Beitrag zu den Möglichkeiten der Vertretung der Interessen der Arbeitnehmer in der Europäischen Aktiengesellschaft*, REIHE WETTBEWERB-RECHTSANGLICHUNG (No. 10) (1970). This piece is also available in French as *Contribution à l'Étude des Modes de Représentation des Intérêts des Travailleurs dans le Cadre des Sociétés Européennes*, 10 SERIES CONCURRENCE RAPPROCHEMENT DES LEGISLATIONS (1970). These periodicals are not available in English.

72. O.J. EUR. COMM. (No. C131) 49 (Dec. 13, 1973).

73. See Malawer, *Labor Law in the Common Market—Worker Participation and Other Recent Developments*, 11 NEW ENG. L. REV. 55 (1975); Conlon, *Industrial Democracy and EEC Company Law: A Review of the Draft Fifth Directive*, 24 INT'L & COMP. L.Q. 348 (1975).

74. *Employee Participation and Company Structure*, BULL. EUR. COMM. Supp. (Aug. 1975).

75. *Id.*

and society at large. The existing differences between codetermination structures in the member states are an obstacle to rational reorganization of the legal structures of enterprises across national frontiers. The Green Book discusses in detail the existing codetermination systems in the member states and suggests that one-third of the board members should be elected by employees. Alternatively, it recommends the adoption of the Dutch co-optation model.<sup>76</sup>

Despite the attempt of the Commission to explain its attitude in the Green Book, criticism of the draft continued.<sup>77</sup> The general opinion in the United Kingdom was adverse to company structures considered to be typical of German *Aktiengesellschaften*. In the United Kingdom, the dualistic system and codetermination were deemed inappropriate institutions, not suitable for transfer into British existing labor relations. On December 3, 1975, the British Secretary of State for Trade appointed the Committee of Inquiry on Industrial Democracy, with Lord Bullock as chairman, to study questions of employee representation. When the committee submitted its report containing proposals for limited codetermination, the discussion became highly emotional and included the Fifth Directive.<sup>78</sup>

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76. 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 board nominates candidates for co-optation to the board. The basic idea behind this principle is that the supervisory board is a team which has to safeguard the interests of capital and labor and which assists management. It has co-responsibility for general problems of the company. The shareholders' assembly, the works council and the management may make recommendations for appointment, but the supervisory board is not bound by these recommendations. A person cannot be co-opted as a member of the supervisory board if either the shareholders' assembly or the works council objects. The reason for objection can 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." Dutch company law was changed on July 26, 1976, and these regulations were included in the *Burgerlijk Wetboek* (Dutch Civil Code). For an English translation of articles 64-284, see S.W. VAN DER MEER, *CORPORATE LAW OF THE NETHERLANDS AND THE NETHERLANDS ANTILLES* (1979). See also van de Veen, *Corporate Developments in the Netherlands*, *BUS. LAW.* 863 (1972); Sanders, *The Reform of Dutch Company Law*, *J. BUS. L.* 194 (1973).

77. Constas, *The Developing European Law of Worker Participation in Management*, 11 *N.Y.U. J. INT'L L. & POL.* 93, 126 (1978); Daubler, *The Employee Participation Directive—A Realistic Utopia?*, 14 *COMMON MKT. L. REV.* 457, 461 (1977); Schmitthoff, *Company Structure and Employee Participation in the EEC—The British Attitude*, 25 *INT'L & COMP. L.Q.* 611, 616 (1976); Kolvenbach, *The Evolving Concept of European Labor Relations Legislation*, 3 *Nw. J. INT'L L. & BUS.* 535, 552 (1981).

78. *The Report of the Committee of Inquiry on Industrial Democracy* (Cmd. 6706) (Her Majesty's Stationery Office 1977). This Report is commonly referred to as the Bullock Report. See also 14 *COMMON MKT. L.R.* 130 (1977) (editorial comments).

The intention of the Commission to generate discussion on codetermination questions in the Common Market has been fulfilled, but the debate illustrates that the proposal did not sufficiently take into consideration historical traditions, social systems and the existing relationship between undertakings and employees in the member states. It is, therefore, not surprising that the EP deliberations with regard to the Fifth Directive moved slowly and exhibited more opposition to the draft than agreement. It is obvious that countries familiar with historical codetermination mechanisms were better prepared to accept European participative proposals than countries where codetermination remains unknown.<sup>79</sup>

The difficulties in coordinating employee participative structures in the member states are vividly shown by the report on the Green Book of the subcommittee of the Economic and Social Committee, passed in 1978.<sup>80</sup> The subcommittee states that the Green Book was drafted in English and that the original English text uses the term "participation" as the general term for all types of participation by employees and trade unions. In the German version, "participation" has been translated as *Mitwirkung*. This term embraces all forms of employee involvement and includes the specific German term *Mitbestimmung* (codetermination in English). This caused a certain amount of confusion in the discussion. The report shows the range of different opinions existing in the member states. The British representatives have pointed out that in some member states the trade unions and the employees are not willing to accept co-responsibility. This explains the position of the British public in opposing all participative systems for Great Britain and the EEC.

The report of the legal affairs committee of the EP<sup>81</sup> refers to the amended Statute for European Companies,<sup>82</sup> which proposes the following supervisory board composition: one-third, representatives of the capital owners; one-third, representatives of the company's employees and one-third, persons to be elected by both groups. The report states that the co-option model "does not constitute 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

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79. *Europe Divided on Participation*, Fin. Times, May 18, 1976, at 3.

80. 22 O.J. EUR. COMM. (No. C94) 2 (1979).

81. 1979-1980 EUR. PARL. DOC. (No. 136) 1 (1979).

82. 8 BULL. EUR. COMM. Supp. (No. 4) (1975). Article 74(a) of this draft is the result of a compromise reached in the EP in 1974. Practically, it goes further than the German codetermination legislation for the coal mining, iron and steel industries in 1951, which had an equal number of representatives of shareholders and employees, plus one "neutral member." The proposal of the EP enlarges this to a "neutral bench."

employees are free to elect candidates who enjoy their confidence."<sup>83</sup> Following the dissolution of the EP due to its first direct elections, a new *rapporteur*, Aart Geurtsen, was appointed.<sup>84</sup> Mr. Geurtsen's report criticized various points in the plans of the Commission and recommended equality in the protection of interests of the firms affected by the directive. He also suggested that only larger firms with at least 2,000 employees should be covered by the new directive.<sup>85</sup> The report demands that all employees, whether members of a trade union or not, have a vote in the election of their representatives for the board. This statement provoked heavy opposition, especially in Great Britain.<sup>86</sup> The discussion in the EP on the Fifth Directive has received attention not only in the member states of the EEC, but also in countries which do not practice institutionalized codetermination.<sup>87</sup>

On January 15, 1982, the legal committee submitted its second report to the EP.<sup>88</sup> In the final vote on May 11, 1982, the proposed changes were accepted by a vote of 159 to 109. Thus, after almost ten years of parliamentary battles, the EP sanctioned the Fifth Directive, albeit with substantial changes to the first draft submitted by the Commission. The draft that emerged from this parliamentary battle contained a proposal to set up a minimum requirement of employee participation, upon which governments of the member states can implement national legislation taking into account national traditions. This proposal makes the draft more palatable to countries where codetermination is widely practiced, for instance the Federal Republic of Germany, the Netherlands, Denmark, France, Belgium and Italy.<sup>89</sup>

The changes demanded by the EP<sup>90</sup> were disappointing for the trade union movement. In Great Britain, strong opposition was voiced

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83. EUR. PARL. DOC., *supra* note 81, at 8.

84. The following newspaper reports illustrate the difficulties in finding a compromise. Wood, *Worker participation: the fifth directive goes into the shredder*, *The Times* (London), Feb. 21, 1980, at 21, col. 5; Elliott, *Industrial democracy: Brussels grinds towards a compromise*, *Fin. Times*, Mar. 11, 1980, at 10, col. 6.

85. For the draft report, see EUR. INDUS. REL. REV., Apr. 1980, at 26 (P.E. 62.045).

86. J. Elliott, *U.K. Employers Oppose EEC Proposals on Worker Directors*, *Fin. Times*, Dec. 8, 1980, at 3; Birds, *The Law Society Takes a Position on Employee Participation*, *COMPANY LAW*. No. 2, 1980.

87. See, e.g., Horton, *Current Developments in the Law of Codetermination: Manesmann and Beyond*, 16 *TEX. INT'L L.J.* 433 (1981); Schneebaum, *The Company Law Harmonization Program of the European Community*, 14 *L. & POL'Y INT'L BUS.* 293 (1982).

88. See 1981-1982 EUR. PARL. DOC. (No. 862) 1 (1981).

89. For a survey of existing codetermination regulations, see W. KOLVENBACH, *COOPERATION BETWEEN MANAGEMENT AND LABOR* (1982).

90. 25 O.J. EUR. COMM. (No. C149) 20 (1982).

as well.<sup>91</sup> In a statement in reply to the opinion of the EP, presented to the EP on September 16, 1982, the Commission accepted most of the EP's suggestions.<sup>92</sup> Despite this adoption of most of the proposals of the EP, it came as a general surprise when the Commission approved a revised version of the proposed Fifth Company Law Directive on July 28, 1983.

#### THE PROPOSAL OF THE COMMISSION OF JULY 28, 1983

The Commission premised its proposal for the harmonization of company legislation on the fact that codetermination structures in the member states have become part of company laws.

In general, the Commission's latest draft is more flexible in regard to board structure and employee participation. The practical operation shall be reviewed on the basis of a report by the Commission, to be made not more than five years after the commencement date of the directive. Thus, the flexibility demanded by the EP and the Economic and Social Committee has now been incorporated in the draft. Regarding board structure, the member states now have a choice: they may implement either supervisory and management boards for public limited companies or the monostructure of a single board.

Employee participation for all companies that employ more than 1,000 employees either directly or through subsidiaries can be regulated by the member states in accordance with one of four alternative models. The member states may decree that employee participation under the Fifth Directive shall not be introduced in companies if the majority of the employees vote against such participation. Similar provisions exist in Scandinavian codetermination models, which also give employees the option to vote against employee membership in the decisionmaking organ of the corporation. Under the German codetermination system of 1976,<sup>93</sup> employees appoint one-half of the

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91. See E. HUTCHINSON & R. THOMAS, *THE FIFTH DIRECTIVE AND THE HARMONIZATION PROGRAMME* (1982). This opposition is understandable because the proposed legislation would be radical for the United Kingdom, Ireland and Greece. The member states with one executive board would be compelled to have worker directors on the board, and would have to give them the same information currently given to the other directors. Since the United Kingdom and Ireland do not have legislation on works councils they would find it difficult to live with many of the new obligations.

92. See *EUR. INDUS. REV.*, Nov. 1982, at 24-25.

93. The German trade unions have attacked this proposal, claiming that its intention is to rescind the German coal and steel codetermination system. Participation in ultimate decisions by the shareholder representatives is a part of the 1976 codetermination legislation, which the trade unions do not regard as being true employee participation.



members of the supervisory organ pursuant to voting procedures which ensure that decisions are made by shareholder representatives.

The four alternative models for employee participation from which the member states may choose are participation through employee representatives on the supervisory board, participation through co-optation by the supervisory board, participation through employee representative bodies and company level boards and participation through collective agreement procedures. This ensures a great degree of flexibility and gives member states the option to include in their national legislation participative structures which have proven to be effective.

Article 4(a) provides that a minimum of one-third, but not more than one-half, of the members of the supervisory board shall be appointed by the employees of the company. The draft enables members of the supervisory board to be appointed by third parties who, according to the explanation of the Commission, can refer to the benefit of particular shareholders or creditors, or representatives of general interest. The Commission limits this possibility by stating that not more than one-third of the board members may be appointed in this manner. The seats so appointed shall not be taken from the seats allocated to the employees. This provision takes local conditions into account, such as those affecting the German steel system. In France, the clause on employee participation in the recently nationalized French corporations provides for such a "third bench," who are representatives of consumer interests or the public.<sup>94</sup>

With regard to the second alternative, article 4(c) is modeled along the Dutch co-optation system, which provides that the members of the supervisory organ are co-opted by that organ. The employee representatives may object to the appointment of a proposed candidate either on the ground that he lacks the ability to carry out his duties or, if he were to be appointed, the supervisory organ would be improperly constituted with regard to the interests of the company, the shareholders and the employees. In such cases the appointment shall not be made unless the objection has been declared unfounded by an independent body existing under public law. This clause implements the Dutch model into the Fifth Directive.

The third model is employee participation by a separate, representative body, which has the right to receive regular information and the right to consultation with regard to the company's administration, business prospects, competitive position, credit situation and investment plans. These rights must be the same as the information rights of the

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94. Loi de nationalisation No. 82-55, Feb. 11, 1982, art. VII, 1982 J.O. 566; 1982 D.S.L. 91.

members of the supervisory organ appointed by the general assembly. In the cases listed in article 12 (in which the approval of the supervisory board is required for decisions of the management organ), the body representing company employees must be consulted before the supervisory organ grants such approval. The supervisory board has to give its reasons for its intended decision to the employee representative body. The employee body meets prior to each supervisory board meeting, and has to be given all documentation and information related to the agenda of the supervisory board meeting required for its deliberations. At the request of the employee body, the chairman of the supervisory board and of the management organ shall attend these meetings. This employee body could be called a "replacement-supervisory" body. It can be assumed that the Commission, upon request of the EP, has included this system in order to make it easier for Great Britain and Ireland to introduce codetermination into their company legislation.

A similar form of employee board exists in Norwegian company law (*Bedrifts forsamling*).<sup>95</sup> This term may be translated as "corporate assembly." Two-thirds of the members are elected by the general assembly and one-third by the employees. The board appoints the management, which has legal control and supervisory functions.

The fourth alternative provides for employee participation through collective agreements. This alternative has been designed to make it easier for countries without codetermination experience to accept one of the systems, and is included at the behest of the EP. The Commission seeks equality in the application of these alternatives, and the provisions of each other system regarding the appointment of employee representatives are also to be applied where collective agreements govern.

European discussion regarding codetermination focuses on the maintenance of sufficient participation and democracy, particularly in the election procedures. This is especially important in countries where competing trade unions have quarrelled about the influence they will have on the selection of candidates for workers' representatives.

The EP has insisted on certain principles for the appointment or election of employee representatives. The Commission followed these demands because the principles are designed to guarantee the democratic character of all employee participation systems. The member states are free to prescribe specific rules in accordance with their national laws and practice, but the following principles must be observed:

- (a) The relevant members of the supervisory organ and repre-

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95. Lov av June 4, 1976, No. 59 om aksjeselskaper, 7 *Lov Og Rett (Norsk Juridisk Tidsskrift)* 336 (1976).

sentatives of the employees shall be elected in accordance with systems of proportional representation ensuring that minorities are protected.

- (b) All employees must be able to participate in the elections.
- (c) The elections shall be by secret ballot.
- (d) Free expression of opinion shall be guaranteed.

These principles will certainly play an important role in further discussions of the proposed directive, particularly in Great Britain.

The draft also attempts to introduce participative systems into the so-called monistic system, that is, the *Conseil d'Administration* in Belgium, France, Italy and Luxembourg and the Board in the United Kingdom and Ireland. From a legal point of view, this is one of the most complicated and difficult parts of the directive because elements must be introduced into the company legislation of countries which are unusual to those countries' legal systems. Within one administrative organ, the board of directors, executive members shall manage the company while non-executive members shall supervise the executive members. The division of responsibility is such that the executive members shall be appointed by the non-executive members. In order to make it possible to have employee directors, the number of non-executive members shall be divisible by three and shall be greater than the number of executive members. Thus, with the exception of the co-optation system (which according to the EP is not suitable for boards of directors), all three types of codeterminative systems can also be applied to the single board structure. It is obvious that the directive attempts to make the one-tier board structure as equivalent as possible to that of the two-tier structure.

#### CONCLUSION

It has already been stated that an overlap between the draft Vredeling Directive and the Fifth Directive may occur because certain companies will be subject to both directives. Trade unions are discontent because the draft presently being submitted by the Commission to the Council of Ministers is less stringent than the original proposal. Industry representatives have stated that this directive establishes codetermination systems, especially in countries which do not have a historical background in this area. The member states have commenced their study of the draft and strong opposition is expected, primarily from the United Kingdom. Presumably, intensive studies by expert groups of the member states are underway. In the end, a compromise might be possible. In any case, the principles laid down in the Commission draft shall to a certain extent influence national legis-

lation and agreements of the member states. If the draft directive comes into effect, a number of principles regarding industrial relations, especially principles concerning co-decision rights of employees in enterprises, will become part of the company laws of the EEC member states. The flexibility which can be observed in this latest draft will certainly make it easier to arrive at such a compromise solution. It cannot be doubted that in the course of these deliberations the Vredeling proposal will somehow be combined with the proposal for the Fifth Directive.

