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The European Commission's Proposals on Worker Participation in the European Economic Community

*Marc-Hubert Battaille**

The current trend toward greater worker participation in business decisions is reflected in European Economic Community developments. In this article, Mr. Battaille examines recent European Commission measures which attempt to harmonize national company law legislation in the Member States. The author focuses particularly on the Commission's proposal for a Council Directive to ensure the right to information and consultation for workers of enterprises exercising their activities in more than one establishment or subsidiary in one or several Member States.

INTRODUCTION

Throughout the democratic world the demand is growing for greater public participation in government decision-making processes. People are increasingly aware that if they want to protect their interests in society, they need to involve themselves in the processes that govern. Therefore it is no surprise that in many countries this desire for participation has carried over into the workplace. In a wage-earning society, well-being is intrinsically bound up with employment in its broadest sense, including rates of pay, hours and conditions of work, leisure time and job satisfaction.

In the past, decision-making in industry has tended to reflect the interests of management and shareholders, despite the fact that these decisions often have far-reaching consequences for employees and their families. Worker participation, often labelled industrial democracy,

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provides a method for ensuring that workers' interests are respected in the decision-making process.

The ten EEC Member States have varied structures for industrial decision-making¹ as a result of their divergent economic, social and legal development. In some Member States, wage-earners enjoy extensive rights and legal status within their firms, while in others, workers' rights remain no more than embryonic.² This disparity undermines the Community's stated aim of improving living and working conditions within the Member States.

As part of the Community objective to create a common market with a single industrial base, one of the tasks of the European Commission is to work towards the harmonization of national company law legislation. The Commission's proposal for a European company statute, for example, embodies a completely new EEC-wide order of company law.³ In drawing up its company law proposals, the Commission examined the roles of those individuals within a firm representing shareholders' interests (capital) and those representing workers' interests (labor). Reform of these roles has become all the more urgent since there has been a development in public companies towards concentration of real power in the hands of a few top men, while shareholders, and often directors, are no longer in a position to exercise supervision.⁴

A number of the Member States are in the process of drawing up plans establishing supervisory boards containing workers' representatives to assert a degree of control over management. The introduction of a supervisory board, however, is only one of several possible forms of participation. Although it is often difficult to categorize them, there are, broadly speaking, four possible means of worker participation:

¹ See generally Grossfeld & Ebke, *Controlling the Modern Corporation: A Comparative View of Corporate Power in the United States and Europe*, 26 AM. J. COMP. L. 397 (1978), for an overview of the laws of corporate organization in several of the EEC countries.

² A useful summary of the schemes of employee participation found in the EEC countries is *Employee Participation and Company Structure in the European Community*, 1975 BULL. E.C., Supp. no. 8, at n.21 [hereinafter cited as *Green Paper*]. See also W. KOLVENBACH, *EMPLOYEE COUNCILS IN EUROPEAN COMPANIES* (1978) [hereinafter cited as W. KOLVENBACH (1978)]; W. KOLVENBACH, *WORKERS PARTICIPATION IN EUROPE* (1977); Conlon, *Industrial Democracy and EEC Company Law: A Review of the Draft Fifth Directive*, 24 INT'L COMP. L.Q. 348 (1975).

³ See Proposal for a Council Regulation on the Statute for European Companies, (amended proposal presented by the Commission to the Council on May 13, 1975, pursuant to the second paragraph of article 149 of the EEC Treaty), 1975 BULL. E.C., Supp. no. 4 [hereinafter cited as S. E. Proposal].

⁴ For an attempt by two authors to evaluate the traditional legal devices for corporate control in light of the trend toward the concentration of power in management, see Grossfeld & Ebke, note 1 *supra*.

1) collective agreements; 2) worker representation in consultative bodies; 3) appointment of worker directors; and 4) granting of capital shares to worker-employees.

The European Economic Community has adopted a number of measures more limited than any of the above listed plans, but nevertheless these measures reflect a trend toward greater worker participation within the company decision-making processes. For example, as part of its social action program, the Community drew up a Draft Directive on collective dismissals of workers, which was adopted by the Council of Ministers (hereinafter referred to as Council) in February, 1975.⁵ Employers planning such dismissals in the future must first consult with workers' representatives on the possibility of avoiding or reducing lay-offs and mitigating their consequences. Workers' representatives must be fully informed of the circumstances surrounding redundancies and plans to eliminate positions must be communicated in advance to the competent public authority.⁶ Dismissals generally may not take effect until a period of 30 days has elapsed from the employer's announcement, during which time the public authority is empowered to seek solutions to the situation.

The Commission has likewise drawn up a Directive to safeguard employees' rights in the event of mergers and takeovers, which was adopted by the Council on February 14, 1977.⁷ Under this Directive, before a merger takes place, workers' representatives must be informed of the reasons for the merger, the consequences it will have for wage earners and measures to be taken on their behalf.⁸ If the workers concerned request, discussions must be opened "in good time" with a view to seeking agreement regarding any measures to be taken on their behalf.⁹ When no agreement can be reached, an arbitration body may, in some Member States, rule on the arrangements to be made for the workers.¹⁰

The trend toward greater worker participation in business decisions is reflected in recent Community developments. A European

⁵ Council Directive of Feb. 17, 1975 on the approximation of the laws of the Member States relating to collective redundancies, 18 O.J. EUR. COMM. (No. L 48) 29 (1975).

⁶ *Id.* at 29, 30, arts. 2, 3.

⁷ Council Directive of Feb. 14, 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, 20 O.J. EUR. COMM. (No. L 61) 26 (1977).

⁸ *Id.* at 27, 28, art. 6, para. 1.

⁹ *Id.* at 28, art. 6, para. 2.

¹⁰ This is the case in Member States whose laws, regulations or administrative provisions provide that "representatives of the employees may have recourse to an arbitration board to obtain a decision on the measures to be taken in relation to employees. . . ." *Id.* at art. 6, para. 3.

card index of collective agreements is presently under preparation. In addition, joint sectoral committees have been set up to allow representatives of employers and labor in certain industrial sectors to meet for the purpose of concluding Community-wide collective agreements. The joint committees will also provide a channel through which to deal with certain problems posed by multinational companies.

As part of its policy to harmonize company law in the Community, the Commission has proposed that any firm employing more than 500 persons be required to establish a supervisory board on which employees are represented. The supervisory board would be charged with appointing, controlling, and if necessary, dismissing, the members of the board of management. In addition, it would be required to approve decisions of major importance to the company.¹¹ This same mechanism would also apply to firms which, by reason of their international activities, elect the status of "European Company" along the lines of the proposed European Company Statute.¹²

INFORMING AND CONSULTING THE WORKERS

The composition and powers of worker-represented bodies vary enormously among the Member States. Generally workers are informed and consulted on management decisions within their own firms through locally represented councils.¹³ However, in some cases, worker-represented bodies within a firm also have a right of codetermination, in that such bodies must be called upon to approve or disapprove management decisions.¹⁴ The various means by which workers are informed, consulted and sometimes induced to accept or reject management proposals involve issues in the "social" field which directly affect the individual worker.¹⁵

¹¹ Proposition d'une cinquième directive tendant à coordonner les garanties qui sont exigées dans les Etats membres, des sociétés, au sens de l'article 58 paragraphe 2 du traité, pour protéger les intérêts, tant des associés que des tiers en ce qui concerne la structure des sociétés anonymes ainsi que les pouvoirs et obligations de leurs organes. 15 J.O. COMM. EUR. (No. C 131) 49 (1972).

¹² S. E. Proposal, *supra* note 3, at 42.

¹³ See authorities cited in note 2 *supra*.

¹⁴ See, e.g., discussion of German *Betriebsverfassungsgesetz* in W. KOLVENBACH (1978), *supra* note 2, at 117.

¹⁵ 15 J.O. COMM. EUR. (No. C 131) 49 (1972). The Commission has subsequently indicated that a transition period may be needed for the eventual adoption of this proposal. See *Green Paper*, *supra* note 2, at 40. This appears also to be the opinion of the Economic and Social Committee. See Opinion on the employee participation and company structure in the European Community, 22 O.J. EUR. COMM. (No. C 94) 2 (1979) and the subsequent Report, *id.* at 4. See also Conlon, note 2 *supra*. The social field includes such matters as changes in production methods, machinery changes, workshop rules, safety and health measures, and pension rules.

Worker participation generally operates at the local plant level. Worker representation at the local level is essential for both labor and management if decisions affecting workers are to be applied with a minimal amount of friction. Furthermore, worker representation at the local level is important for the economic decision-making process, since this mechanism is particularly suitable for acquainting management with the concerns and ideas of the workers and vice versa. The effectiveness of worker participation in the decision-making process seems to depend largely upon the existence of institutions able to centralize the views and wishes of the people they represent while retaining their close links with those people.

Despite the advantages of worker representation at the local level, these bodies tend to have only a fragmentary view of decisions which affect the firm as a whole. Thus, worker participation at the plant level is particularly unsuited for decisions affecting the whole firm. It is possible to envisage the creation within a firm of a committee composed of workers' representatives elected directly or indirectly within the representative institutions at the works or plant level. Since such a committee would be distinct from the company's decision-making bodies, however, its effectiveness is open to question. If, on the other hand, such a committee were given major legal powers over the firm's economic decision-making process, as, for example, a right of veto, there would be a danger of paralyzing the firm. Thus, if workers are to have an opportunity to influence the decision-making process of an entire firm, representative bodies must be backed by other institutions.¹⁶

The Community has already adopted and proposed a number of measures requiring governing bodies of companies employing a given number of persons to inform and consult workers' representatives and, if possible, to negotiate agreements with them. The Draft European Company Statute, for example, contains provisions requiring the information and consultation of the European Works Council on a number of questions and, in some cases, a decision may be taken by the governing bodies only with that Council's consent.¹⁷ Directives which contain provisions regarding workers' representative bodies include: a Directive regarding mass dismissals,¹⁸ a recently-adopted Directive on acquired rights of workers,¹⁹ and a Draft Directive on the protection of the interests of members and other parties in mergers of joint-stock

¹⁶ See, e.g., the institutions discussed in the *Green Paper*, *supra* note 2, at 21-31.

¹⁷ S. E. Proposal, *supra* note 3, at 62-65.

¹⁸ See Directive of Feb. 17, 1975, *supra* note 5, at 29-30.

¹⁹ See Directive of Feb. 14, 1977, *supra* note 7, at 27-28.

companies.²⁰

PROCEDURES FOR INFORMING AND CONSULTING THE EMPLOYEES OF
UNDERTAKINGS WITH COMPLEX STRUCTURES, IN
PARTICULAR TRANSNATIONAL FIRMS: PROPOSAL
FOR A COUNCIL DIRECTIVE

At the instigation of former Commissioner for Social Affairs Henk Vredeling, the Commission approved a proposal for a Council Directive aimed at ensuring the application of satisfactory procedures for informing and consulting employees in undertakings operating several establishments or more than one subsidiary in a Member State (hereinafter referred to as the "proposal to inform employees").²¹ This proposal also covers transnational firms whose decision-making center lies outside the Community.²² Employees covered by the Directive would have the right to be informed and consulted regarding management decisions affecting the work force as a whole.²³

The text of the proposed Directive, which was drawn up after consultation with industry-wide groups reflecting labor and management (the ETUC²⁴ and UNICE²⁵), will be sent to the European Parliament

²⁰ See Proposition relative à une troisième directive tendant à coordonner les garanties qui sont exigées dans les Etats membres des sociétés au sens de l'article 58 paragraphe 2 du traité pour protéger les intérêts, tant des associés que des tiers, en ce qui concerne les fusions des sociétés anonymes, 15 J. O. COMM. EUR. (No. C 129) 53, 55 (1972), which amends an earlier proposal published at 13 J. O. COMM. EUR. (No. C 89) 20 (1970).

²¹ Proposal for a Council Directive on procedures for informing and consulting the employees of undertakings with complex structures, in particular transnational undertakings, 23 O. J. EUR. COMM. (No. C 297) 3 (1980) [hereinafter cited as Proposal]. These articles apply specifically to "undertakings with complex structures whose decision-making centre is located in the country in which the employees work." *Id.* at 6-7, arts. 10-14. In addition to the Community measures mentioned in the preceding paragraph of the text, the proposal supplements, see the Directives of Mar. 9, 1968 (first directive on company law), 11 J. O. COMM. EUR. (No. L 65) (1968); Dec. 13, 1976 (second directive on company law), 20 O. J. EUR. COMM. (No. L 26) 1 (1977); Oct. 9, 1978 (third directive on company law), 21 O. J. EUR. COMM. (No. L 295) 36 (1978); July 25, 1978 (fourth directive in company law), 21 O. J. EUR. COMM. (No. L 222) 11 (1978); and Mar. 17, 1980 (directive on listing particulars), 23 O. J. EUR. COMM. (No. L 100) 1 (1980), which require certain companies established under the law of a Member State to disclose information on their affairs. See also the proposal for a seventh directive (amended proposal for a seventh directive concerning group accounts), 22 O. J. EUR. COMM. (No. C 14) 2 (1979), and the proposal concerning publication of information on a regular basis (proposal of Jan. 19, 1979 for a directive on information to be published on a regular basis), 22 O. J. EUR. COMM. (No. C 29) 5 (1979).

²² See Proposal, *supra* note 21, at 4-6, arts. 4-9.

²³ *Id.* at 4, 6, arts. 5, 11.

²⁴ For a study of the European Trade Union Confederation, see E. KIRCHNER, TRADE UNIONS AS A PRESSURE GROUP IN THE EUROPEAN COMMUNITY (1977).

²⁵ The Union of Industries of the European Community (UNICE) is a Belgian-based group which is composed of the central employers' and industrial federations of seventeen European countries.

and the Economic and Social Committee for their opinions. The Commission will maintain contact with these bodies and will clarify, or, if necessary, amend its proposal in the light of the opinions expressed. The Commission will most likely participate actively within the framework of the Organization for Economic Cooperation and Development and the International Labor Organization to ensure that multinationals originating outside the Community are subject to the same obligations as those whose decision-making centers lie within the Community.

Problems the Proposed Directive Must Address

The procedures for informing and consulting employees often do not keep pace with the changing structures of the firms. Despite the increasing complexity within multinational firms, their employees continue to be informed and consulted only at the lowest organizational unit (e.g., shop, sector of activity or works). Thus, decisions which may have serious repercussions for employees at the local level may well have been considered and adopted at a much higher level within the same country or even abroad. Local management may be ignorant of the motives behind many such decisions. Disclosure of information to employees, however, generally is still confined to the affairs within a local business entity, resulting in the workers' obtaining only a partial or even incorrect picture of the affairs of the firm as a whole.

This situation has particularly serious implications for employees of firms operating in several countries, since the application of labor laws—particularly laws relating to employees' representative bodies—is usually confined to the territory of a given country. The powers of these employee bodies, similar to those of a trade union, do not normally extend beyond national frontiers. Thus, procedures by which employees in a given country are informed or consulted only have effect within the legal framework of that country.

Information should be supplied to employers in each Member State concerning their company's transnational operations so that employees have a picture of the performance of the concern as a whole. There is a need for provisions within the Directive enabling employees' representatives to approach company managers in another country when that management alone is in a position to inform and consult with the representatives.

Similar information and consultation problems can arise within firms operating exclusively at the national level when procedures for informing and consulting employees are inconsistent with the structure of the entity whose decisions affect the employees' interests. For exam-

ple, a firm which expands its business operations by opening a number of establishments throughout the country will experience information problems with its employees if the bodies representing its employees continue to operate only at the local level. More typically, a dominant undertaking may have several subsidiaries in the same country while the bodies representing its employees are organized exclusively at the local level. There is a need for provisions requiring managers of these subsidiaries to inform and consult their employees about decisions taken at a higher level which affect the employees' interests. There should be channels available whereby employee representatives can approach central management if that management alone is in a position to inform and consult the employees in accordance with the provisions of the Directive.

In a Community in which national economies are closely inter-linked and in which undertakings are undergoing structural changes by availing themselves of the right of establishment guaranteed by the EEC Treaty, it is essential that all undertakings with a sizeable work force and a relatively complex structure, in particular those operating on a transnational basis, should operate under identical legal rights and obligations. A legal framework for the disclosure of information and the consultation of employees would, therefore, constitute a stepping stone for the creation of a uniform operating environment for all undertakings within the Community. The current economic climate, which has necessitated far-reaching and difficult structural changes in industry therefore resulting in serious social repercussions, highlights the importance of a Community initiative in this field. Against this background, the requirement that all firms should inform and consult their employees on the basis of their overall operations assumes particular importance.

In order to eliminate any discrimination in practice the Commission should take steps to ensure the imposition of similar obligations on undertakings from non-member countries that apply to Community undertakings. This proposal to inform employees should be examined in light of the Council Directives of February 17, 1975 and February 14, 1977,²⁶ which include provisions establishing compulsory procedures for informing and consulting employee representatives within individual Member States in the event of collective redundancies or transfers of businesses.

²⁶ See Directive of Feb. 17, 1975, *supra* note 5, at 30, art. 2; Directive of Feb. 14, 1977, *supra* note 7, at art. 6.

Provisions of the Proposed Directive

The proposed Community rules fall into two distinct parts: one is intended to apply to transnational undertakings,²⁷ and the other will cover undertakings which have several establishments and/or subsidiaries within a single country.²⁸ The two parts are parallel in substance, distinguishing between the decision-making center or dominant undertaking on the one hand, and establishments or subsidiaries subject to the former's authority on the other.

At least bi-annually, the management of the dominant undertaking will be required to forward to the management of its Community subsidiaries relevant information regarding activities which concern the firm as a whole. Specifically, management must convey information regarding: structure and manning; the economic and financial situation; the probable development of the business, production and sales; employment trends; production and investment programs; rationalization plans; manufacturing and working methods, in particular the introduction of new working methods; and all procedures and plans liable to have a substantial effect on the employees' interests.²⁹ This itemization is the same list proposed by the Commission in its Draft Regulation establishing a statute for European companies,³⁰ and furthermore, corresponds to the provisions of national legislation in Member States which are most advanced in this field.³¹

The management of each subsidiary employing at least one hundred people, under the proposal, is obligated to communicate information received from the dominant undertaking without delay to the employees' representatives. If the management of a subsidiary is unable to supply the required information, then employees' representatives may request this information directly from the dominant undertaking's management.³² Employee representatives will be under a duty under the proposed Directive to take account of the interests of the undertaking in communicating information to third parties and to refrain from divulging secrets regarding the undertaking or its business.³³

The proposed Directive provides for consultation procedures when

²⁷ Proposal, *supra* note 21, at 4-6, arts. 4-9.

²⁸ *Id.* at 6-7, arts. 10-14.

²⁹ *Id.* at 4, 6, arts. 4, 11.

³⁰ See S. E. Proposal, *supra* note 3, at 62, art. 120.

³¹ See, e.g., *Green Paper*, *supra* note 2, at 49 (Belgium), 86 (Luxembourg).

³² Proposal, *supra* note 21, at 5 (art. 5, paras. 3, 4), 6 (art. 11, paras. 3, 4).

³³ *Id.* at 8, art. 15.

the dominant undertaking or subsidiary makes a decision likely to have a substantial effect on the interests of its workers. In such cases, management of the dominant undertaking is required to forward precise information to the management of each of the firm's subsidiaries within the Community forty days before implementing the decision, providing details of the basis for the proposed decision and the legal, economic and social consequences of the decision for the employees concerned.³⁴ Decisions falling under this provision include: (a) the closure or transfer of the whole or major parts of an establishment; (b) restrictions, extensions or substantial modifications to the activities of the undertaking; (c) major modifications with regard to organizations; (d) the introduction of long-term cooperation with other undertakings or the cessation of such cooperation.³⁵

The management of each subsidiary employing at least one hundred people under the proposal is required to communicate this information without delay to the representatives of its employees and further, must ask for the employees' opinion within a period of not less than 30 days. If, in the opinion of the employees' representatives, the proposed decision is deemed likely to have a direct effect on terms of employment or working conditions, then the management of the subsidiary is required to hold consultations with the employees' representatives in an effort to reach an agreement on the firm's plans. In the event that the subsidiary's management fails to arrange such consultations, the employees' representatives are authorized to open consultations with the management of the dominant firm through mandated delegates.³⁶ When management of a transnational undertaking whose decision-making center is located outside the Community fails to ensure that at least one person within the Community can fulfill requirements regarding disclosure of information and consultation laid down by the Directive, then management of the subsidiary employing the largest number of workers within the Community will be held responsible for fulfilling these requirements.³⁷

The proposed Directive provides for the disclosure of information to, and consultation with, an organization representing all the employees of the dominant undertaking and its subsidiaries within the Community as established by means of agreements concluded between

³⁴ *Id.* at 5 (art. 6, para. 1), 6-7 (art. 12, para. 1).

³⁵ *Id.* at 5 (art. 6, para. 2), 7 (art. 12, para. 2).

³⁶ *Id.* at 5 (art. 6, paras. 3-5), 7 (art. 12, paras. 3-5).

³⁷ *Id.* at 5-6, art. 8.

central management and the employees' representatives.³⁸ The Member States have the authority to decide how employees' representatives are appointed. The nature of the organization responsible for representing employees will also be determined by the Member States' discretion. The representative body might take the form of a central or group works council, a local works council, or a shop stewards committee. The proposal does, however, stipulate that within a Member State if a body representing employees exists at a level higher than that of the individual subsidiary or establishment (for example, at the level of the firm as a whole), then the employees concerned must be informed and consulted at this higher level.³⁹ Member States under the proposal are obligated to recognize a body representing all the employees of the dominant undertaking and its subsidiaries in the Community which is established by means of agreements concluded between management, at the level of the decision-making center, and the employees' representatives.

PRELIMINARY POSITION OF THE AMERICAN CHAMBER OF COMMERCE IN BELGIUM

Business circles in Europe are concerned by the sweeping nature of the proposed Directive. UNICE⁴⁰ and the American Chamber of Commerce in Belgium (hereinafter referred to as "AMCHAM") are presently engaged in discussion with representatives of the Commission regarding areas of concern. AMCHAM, an organization composed of large American corporations conducting business in Belgium has expressed the following concerns regarding portions of the proposed Directive.⁴¹

Necessity for Commission Action

American business is firmly committed to the principle of good "corporate citizenship." It has often supported the existence of voluntary guidelines concerning various areas of corporate activity in order both to determine a framework for its own activities and to strengthen the basis of mutual confidence between enterprises and other interests. Nonetheless, American business is concerned that unnecessary duplication of legislation may adversely affect the conduct of its operations and thus should be avoided.

³⁸ *Id.* at 5, 7, arts. 7, 13.

³⁹ *Id.*

⁴⁰ *See* note 25 *supra*.

⁴¹ *See* Proposal, *supra* note 21, at 4-6, arts. 4-9.

The voluntary Guidelines for Multinational Enterprises adopted in 1976 by the Organization for Economic Cooperation & Development (OECD), recommend extensive public disclosure regarding the international structure and operations of multinational enterprises.⁴² These guidelines also recommend that management of such firms give reasonable notice to the workers regarding decisions which would adversely affect their welfare and further consult with labor to mitigate the effects of such decisions.⁴³

In their 1979 review of the first three years of operation of the OECD Guidelines,⁴⁴ the OECD members (including EEC Member States) concluded that the initial results under the voluntary guidelines were encouraging, that their application should be continued, and furthermore, that they may well prove successful. Implementation of obligatory rules would only conflict with the previously expressed desires of the OECD members and therefore jeopardize the success of the promising voluntary programs.

Obligatory rules would also be imposed without the consensus of either labor or management, which in AMCHAM's view is imperative for harmonious cooperation and ultimately a successful result. Up to this time there has been no effort to obtain such a consensus. In addition, American business questions the utility of this particular Commission initiative because the Community has either already acted in the major areas of concern or will do so shortly.

Information

Many of the disclosure obligations contained in this proposed Directive are already covered by the proposed Seventh Council Directive Concerning Group Accounts, as amended.⁴⁵ Many of the points raised in the AMCHAM memorandum of September 13, 1979 concerning the Seventh Council Directive received a favorable response from the Commission. Although there are still a few technical questions which remain (for example, whether group accounts as required for U.S. pur-

⁴² See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DECLARATION BY THE GOVERNMENTS OF OECD MEMBER COUNTRIES AND DECISIONS OF THE OECD COUNCIL ON GUIDELINES FOR MULTINATIONAL ENTERPRISES (1976) 14 (Disclosure of Information) [hereinafter cited as OECD GUIDELINES]. For a preliminary assessment of the effect of the Guidelines, see Maher, *Supranational Regimes for Multinationals: The New Order With a New Face?*, 4 DEL. J. CORP. L. 289 (1979).

⁴³ See OECD GUIDELINES, *supra* note 42, at 16-17 (Employment and Industrial Relations).

⁴⁴ Article V of the 1976 Declaration required the OECD members to review the effectiveness of the Guidelines within three years of their publication. See *id.* at 9.

⁴⁵ See Amended proposal for a Seventh Directive pursuant to Article 54 (3)(g) of the EEC Treaty Concerning Group Accounts, 22 O. J. EUR. COMM. (No. C 14) 2, *passim* (1979).

poses will be sufficiently "comparable" for EEC use), by and large American business now supports the adoption of the proposed Seventh Directive, with the belief that it will obviate the necessity for most of the disclosure requirements envisioned by this new proposal.

Virtually all of the EEC Member States currently have legislation requiring disclosure regarding certain information to the workers. Similarly, many American corporations are required under U.S. law to disclose substantial information regarding their worldwide activities to various regulatory agencies, in particular the Securities and Exchange Commission. Such information is available to workers, and indeed to the public in general. If adopted, Article 5 of the proposed Directive⁴⁶ will mandate additional disclosure. In actuality, however, the information that the proposed Directive will require corporations to disclose is already available in a different form. Thus, particularly when complex corporate structures are involved, this will result in a greater cost of compliance and little benefit to the public or employees.

Most large American corporations presently transmit firm-wide data to the management of their subsidiaries for their personnel although such reports may not concern all subsidiaries every time. Thus, most transnational firms are voluntarily complying with the proposed mandate of Article 5, paragraph 1 which would require management at the dominant firm every six months to provide "relevant information" to all subsidiaries.⁴⁷ However, this requirement raises questions regarding enforcement since it would appear difficult legally to compel a parent company to communicate information on the activities of its subsidiaries located outside the EEC.⁴⁸

Article 5, paragraph 2(b), imposes vague and possibly excessive requirements by requiring the dominant firm to relate financial and economic information to all subsidiaries.⁴⁹ Annual reports are already communicated firm-wide by both European and American companies. Quarterly activity reviews are organized by many American companies for the firm personnel, and in addition are provided to U.S. regulatory agencies.

Paragraph 2(c) of Article 5 also poses problems in that it requires

⁴⁶ See text accompanying note 28 *supra*.

⁴⁷ "At least every six months, the management of a dominant undertaking shall forward relevant information to the management of its subsidiaries in the Community giving a clear picture of the activities of the dominant undertaking and its subsidiaries taken as a whole." Proposal, *supra* note 21, at 4.

⁴⁸ One should perhaps revise the definition of "subsidiary" in Article 3, para. 2.

⁴⁹ "[The information required by Article 5, para. 1] shall relate in particular to: . . . (b) the economic and financial situation." Proposal, *supra* note 21, at 4.

the release of probable development trends for production and sales.⁵⁰ Businesses may reasonably object to divulging "prospects" of matters such as business, production and sales. Matters of this sort are in the domain of expectation or even speculation, and their premature publication might generate unfortunate results for persons relying upon the information. Furthermore, this requirement could conceivably violate U.S. securities laws concerning the manipulation of securities markets through means of issuing speculations or projections. Business matters regarding production and sales are often considered highly confidential and generally are not disclosed to anyone outside management.

Article 5, paragraph 2(d), directly concerns personnel and requires the release of information regarding probable employment trends.⁵¹ As previously mentioned, information regarding probabilities can present difficulties when personnel treat the information as fact or misinterpret the predictions. Thus, such information may generate conflicts and tensions within an enterprise at a time when the problem is still too indefinite to require a firm solution.

Article 5, paragraph 2(e), requires the disclosure of production and investment plans.⁵² Production and investment programs are generally considered confidential and therefore are not disclosed to anyone in advance. Thus this requirement is particularly disturbing since such plans reveal sensitive information about the firm's competitive position.

Manufacturing methods, as well as the introduction of new working methodology,⁵³ involve questions of timing. Workers are of necessity informed regarding any new method, but the question is how far in advance should the workers be notified. The Proposed Draft Directive offers no guidance regarding this question.

In conclusion, to the extent already contained in other national and European measures, the disclosure requirements contained in Article 5 seem unnecessary. The remaining measures are vague, ill-conceived, and contain no constructive guidelines. Before such measures are enacted, if at all, various interested parties should negotiate a system which is workable, in that it provides useful information while at the same time is not unduly burdensome.

⁵⁰ This provision requires management to disclose "the situation and probable development of the business and of production and sales." *Id.*

⁵¹ Management must disclose "the employment situation and probable trends." *Id.*

⁵² Management must disclose "production and investment program[s]." *Id.*

⁵³ Article 5, para. 2 (g), requires disclosure of information concerning "manufacturing and working methods, in particular the introduction of new working methods." *Id.* at 4-5.

Consultation

The major changes in corporate activity which are of particular interest to personnel have already been the subject of consultation as a result of Council Directive No. 75/129 of February 17, 1975 regarding Collective Dismissals⁵⁴ and Council Directive No. 77/187 of February 14, 1977 concerning the Transfers of Undertakings, Businesses, or Parts of Businesses.⁵⁵ Thus, it is the view of American business that the proposed legislation contains little which is not already dealt with in existing or pending Community legislation.

AMCHAM is opposed to any duplication of controls (for example, this proposal would impose EEC controls in addition to similar national measures), since this would merely add to the cost of compliance without providing any overriding benefit to the public. In this regard, the reports required under Article 6, paragraphs 2(a) and (b)⁵⁶ of the proposed Directive would result in needless duplication. Furthermore, for those changes in corporate activity which are not covered by the existing Directives, consultation would be required under Article 12(1) of the Proposed Fifth Directive Concerning the Structure of Corporations and the Powers and Obligations of their Organs.⁵⁷ Even without further legislation, substantial changes in organization⁵⁸ or working conditions⁵⁹ are already dealt with under the collective bargaining process. From the comments of British Labor representatives at the recent hearings held by the Socialist Group of the European Parliament, it appears that some labor representatives prefer to rely on national collective bargaining rather than on joint consultation, agreement, and responsibility.

Article 6, paragraph 4, of the proposed Directive requires "consul-

⁵⁴ See note 5 *supra*.

⁵⁵ See note 7 *supra*.

⁵⁶ The decisions [about which management must forward information to employees] shall be those relating to:

- (a) the closure or transfer of an establishment or major parts thereof;
- (b) restrictions, extensions or substantial modifications to the activities of the undertaking.

⁵⁷ See Proposition, *supra* note 11, at 52. This provision would require management (*l'organe de direction*) to obtain the approval of the supervisory board (*l'organe de surveillance*) for decisions nearly identical to those discussed in the text accompanying note 34 *supra*.

⁵⁸ Article 6, para. 2(c), of the proposed directive would require that management give advance notice to workers of "major modifications with regard to organization." Proposal, *supra* note 21, at 5.

⁵⁹ Article 6, para. 4, would give workers the right to consult with management on decisions which the workers feel would be "likely to have a direct effect on employees' terms of employment or working conditions." *Id.*

tation,"⁶⁰ but in no way defines the concept. Experience indicates that it is not easy to know when the duty to consult has been fulfilled. To avoid conflicts on this crucial point, some definition of the term "consultation" should be provided.

One major question remains regarding Article 6 paragraph 5 of the proposed Directive which internationalizes the ultimate collective bargaining process beyond what appears to be either management or labor union desires.⁶¹ AMCHAM's position is that the most acceptable path to reform is by means of voluntary guidelines and through the harmonization of Member States' corporate laws. These methods leave in place the supremacy of national laws and customs without forcing on business an international consultation to which there is considerable resistance in both management and labor circles.

Discrimination

The desire to ensure neutral treatment of all companies, and thus avoid discrimination, is an essential benefit which international codes of conduct can confer on multinational corporations. It is indisputable that nondiscrimination and national treatment are among the fundamental tenets of the Community order.

The proposal for a European Company contains requirements for consultation similar to those in the proposed directive. However, the present proposal would result in obligatory requirements for all multinational and multi-site companies. Such is not the case with the European Company Statute,⁶² which is a voluntary organizational plan. Once this Proposal becomes effective, then companies can weigh the consultation requirements in their decision to opt for status as a European Company. Under the proposed Directive all firms would be required to meet consultation requirements.

In the Proposed Directive, single unit companies, regardless of size, escape the necessity to produce information which otherwise must be disclosed. In addition, it may prove impossible to enforce Articles 8 and 5(4),⁶³ which require the subsidiary to provide information when

⁶⁰ See note 59 *supra*.

⁶¹ "Where the management of the subsidiaries does not communicate to the employees' representatives the information required . . . or does not arrange consultations as required . . . , such representatives shall be authorized to open consultations, through authorized delegates, with the management of the dominant undertaking with a view to obtaining such information and, where appropriate, to reaching agreement on the measures planned with regard to the employees concerned." Proposal, *supra* note 21, at 5.

⁶² See S. E. Proposal, *supra* note 3, at 63-64, art. 125.

⁶³ Article 8 states that:

the "dominant company" refuses to comply, thus resulting in discrimination against those subsidiaries and dominant companies which voluntarily comply.

Effect as Precedent

The principle of voluntary compliance is a key element of the OECD Guidelines.⁶⁴ Abandonment of this principle by the EEC might serve as a precedent for third world countries to include mandatory codes of conduct. Such obligatory codes of conduct could make it considerably more difficult for EEC-based companies to do business in the developing world and furthermore could have adverse effects on manpower requirements and the number of jobs provided by such companies within the Community.

Confidentiality

To extend the requirement of disclosure and consultation to confidential management information could pose serious security problems. Article 15, paragraph 1 of the proposed Directive refers to the possible breach by labor representatives of confidential information which they may obtain;⁶⁵ in certain recent experiences involving Member State legislation, this has been more than a theoretical problem. The proposed Directive leaves it to Member States to propose sanctions.⁶⁶ Prior to enacting such a Draft Directive, specific guidelines regarding sanctions should be discussed and inserted. Article 15, paragraphs 2 and 3, are wholly insufficient as drafted.⁶⁷

CONCLUSION

Although the development of social legislation is an important

Where the management of the dominant undertaking whose decision-making centre is located outside the Community and which controls one or more subsidiaries in the Community does not ensure the presence within the Community of a [sic] least one person able to fulfill the requirements as regards disclosure of information and consultation laid down by this Directive, the management of the subsidiary that employs the largest number of employees within the Community shall be responsible for fulfilling the obligations imposed on the management of the dominant undertaking by this Directive.

Proposal, *supra* note 21, at 5-6.

⁶⁴ See OECD GUIDELINES, *supra* note 42, at 12, para. 6.

⁶⁵ See Proposal, *supra* note 21, at 8.

⁶⁶ *Id.* at art. 15, paras. 2, 3.

⁶⁷ Article 15, paras. 2 and 3, read as follows:

2. The Member States shall empower a tribunal or other national body to settle disputes concerning the confidentiality of certain information.
3. The Member States shall impose appropriate penalties in cases of infringement of the secrecy requirement.

Id.

Community initiative, the Commission must recognize that legislating broad social provisions which affect the operations of national and multinational corporations is a responsibility which must be carefully exercised to arrive at a plan which takes into consideration the many possible ramifications of the legislation. If past labor experience in the United States and other industrialized countries outside the EEC is indicative of future trends, then the Community program may well serve as a frame of reference in this area. It is of utmost importance that the steps taken at this point do not become stumbling blocks in years to come.

The proposed Directive as now presented seems ill-advised in that it brings very little which is not already provided by existing or proposed legislation. Furthermore, the proposal is discriminatory, technically incomplete, and could serve as an unhappy precedent for legislation in other areas.