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Employee Involvement in Decision-Making: European Attempts at Harmonization

Ruth A. Harvey*

Two critical issues face the European Community today—rising unemployment and increasing industrial decline.¹ In order to properly address these concerns, the Community must take an active role in the formation of a Community industrial strategy.² This strategy cannot be successful unless it includes measures harmonizing the rights of Community employees in the management of the enterprise.

The Community's status as a supranational organization requires a different approach to industrial planning than the approach of a sovereign state. The Community maintains only the power delegated to it by the Treaty of Rome and subsequent interpretation of the Treaty.³ It does not have complete control over the industrial policies of the Member States and, because there is no effective enforcement mechanism, the Community must rely upon legitimacy and respect to ensure that its policies are adopted and implemented. The differing legal, historical, and social backgrounds of the Member States require that the Community take a variety of interests into account when implementing an industrial strategy.⁴

Incentives to develop a comprehensive industrial policy are strong, however. Research and development, and the restructuring of basic industries are more

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1. COMM'N OF THE EUROPEAN COMMUNITIES, PROGRAMME OF THE COMMISSION FOR 1983-1984, at 5-27 (1983) (Address by Mr. Gaston Thorn, President of the Commission of the European Communities to the European Parliament on 8 February 1983).

2. OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, THE EUROPEAN COMMUNITY'S INDUSTRIAL STRATEGY 22 (1983).

3. Treaty Establishing the European Economic Community, *done* March 25, 1957, 298 U.N.T.S. 11 (1958) [hereinafter cited as Treaty of Rome]. This note uses the term European Community in accordance with the resolution of the European Parliament. *Resolution on a single designation for the Community*, 21 O.J. EUR. COMM. (No. C 63) 36 (1978). The six original Member States were the Belgium, the Federal Republic of Germany (FRG), France, Italy, Luxembourg, and the Netherlands. Denmark, Ireland, and the United Kingdom joined the Community on January 1, 1973. Greece became the tenth Member State on January 1, 1981.

4. *See generally* COMM'N OF THE EUROPEAN COMMUNITIES, EMPLOYEE PARTICIPATION AND COMPANY STRUCTURE IN THE EUROPEAN COMMUNITY, BULL. EUR. COMM. SUPP. 8/75 (1975) [hereinafter cited as THE GREEN PAPER].

effective if promoted at the Community level.⁵ In addition, the Community is stronger economically if its industries compete together against foreign markets such as the United States (U.S.) and Japan rather than against each other.

The economic and commercial measures taken by the Community have promoted the development of Community-wide markets and consequently have increased the need for a Community industrial policy. Because of past Community efforts, capital, goods, and workers are moving with increasing regularity throughout the Community. Community enterprises are increasing in size and impact, and many enterprises operate in more than one Member State.

Because of increased Community-wide economic development, Member States are less able to control corporate activity at a national level. Unions have also been unable to exert a powerful influence over transnational corporations. Thus, the Community must bear the burden of ensuring that economic and technological progress does not have a detrimental impact on Community workers.

The Commission of the European Communities⁶ has recognized that Community policies must protect workers from the adverse impact of common market policies.⁷ Since 1971 the Commission has concerned itself with the protection of Community workers.⁸ The Commission promulgated a comprehensive program for the implementation of a Community social policy in 1974.⁹

5. OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, THE EUROPEAN COMMUNITY'S INDUSTRIAL STRATEGY 37 (1983). See generally Gormley & Marchipont, *Aspects of the European Community's Industrial Policy*, 6 MICH. Y.B. INT'L LEGAL STUD. 79 (1985).

6. See *infra* note 19.

7. See COMM'N OF THE EUROPEAN COMMUNITIES, REPORT ON THE DEVELOPMENT OF THE SOCIAL SITUATION IN THE COMMUNITY IN 1971, at 8-13 (1972). The introduction to the report focuses on the need for a Community industrial policy in the area of employment. The Commission identifies five factors connected with the implementation of the common market which have had an important impact upon employment. (1) An integrated market and increased competition have resulted in major structural changes in industry. This, in turn, has resulted in changes in the distribution of work throughout the Community. (2) Increasing world competition and the establishment of the Common External Tariff have had serious repercussions on industries which are sensitive to international trade. (3) An integrated market and increased competition have speeded up technological progress and the evolution of employment. The Commission advocates a common industrial policy in order to better distribute the benefits of this progress. (4) The rise in the standard of living has altered the character of private consumption. It has increased employment opportunities in areas such as tourism. (5) The increased prevalence of multinationals has increased the need for multinational regulation of these enterprises. The report concludes that the integration process has given employment problems a European dimension which must be addressed at the Community level in a comprehensive manner. See *id.*

8. In 1971, the European Social Fund was reorganized in order to transform it into "an instrument of a more active employment policy and to link it more effectively with Community policy objectives." COMM'N OF THE EUROPEAN COMMUNITIES, SECOND ANNUAL REPORT ON THE ACTIVITIES OF THE NEW EUROPEAN SOCIAL FUND, 1973, at 5 (1973). See also Council Decision 71/66/EEC of Feb. 1, 1971, 14 J.O. EUR. COMM. (No. L 28) 15 (1971).

Also, a Standing Committee on Employment was established in March 1971. The committee's function was to coordinate the employment policies of the Member States by harmonizing them with the policies of the Community. See COMM'N OF THE EUROPEAN COMMUNITIES, *supra* note 7, at 7.

See also Comm'n of the European Communities, *Provisions Protecting Workers in Case of Dismissal in Legislation in the Member Countries of the European Communities*, 4 BULL. INST. LAB. REL. 171 (1973).

9. COMM'N OF THE EUROPEAN COMMUNITIES, SOCIAL ACTION PROGRAMME, BULL. EUR. COMM. SUPP. 2/74 (1974) (outlining a comprehensive program for the Community in social policy

The Commission's proposals fall into two distinct categories. The first, emphasizing security in employment, calls for the approximation of the laws of the Member States to resolve specific problems. Using this approach, the Community has granted workers the right to consultation with management at critical times such as when jobs are immediately threatened. This approach does not further the formulation of a comprehensive Community policy. It merely aids Member States and workers in planning for structural change.

The second approach advocates fundamental change in the employment relationship by requiring that employees be continuously represented in corporate decision making at its highest levels. This would give employees a voice in decisions made at a supranational level. This participatory approach does not require that the Community directly intervene in the employment relationship. Rather, the Community would establish procedures for transnational consultation and increase the bargaining power of Community employees, thereby permitting management and employees to agree between themselves on policy.

Part I of this note examines the sources of Community power over employment policy. Part II analyzes two Community directives approximating laws regarding employee involvement in dismissal procedures. It also examines the impact of these Community directives on two Member States, the Federal Republic of Germany (FRG or West Germany) and the United Kingdom. The note focuses on the FRG because its statutes have served as the model for Community directives, and because the harmonization of laws throughout the Community will provide unique benefits to the FRG.¹⁰ The note examines the United Kingdom because its government has historically had a limited impact upon worker-management relations, and compliance with Community directives often involves significant alteration to existing statutes. Part III focuses on Community proposals that would directly involve employees in the management of the enterprise. It considers the obstacles to implementation of these proposals and the potential for adoption. The note argues that the directives which have been adopted illustrate the concern of the Community and its awareness that further action is necessary. It concludes, however, that the directives do not offer significant protection to Community workers. Although the proposals for participation in management are promising, political obstacles are likely to block implementation.

I. SOURCES OF COMMUNITY POWER OVER EMPLOYMENT POLICY

The European Economic Community was founded in 1957 to establish a common market and to promote the harmonious development of economic activities in its Member States.¹¹ The Treaty of Rome, the source of power for all

areas). For current developments, see COMM'N OF THE EUROPEAN COMMUNITIES, REPORT ON SOCIAL DEVELOPMENTS, published annually in conjunction with the *General Report on the Activities of the European Communities*. The REPORT includes chapters on employment, vocational guidance, industrial relations, and working conditions and labor law.

10. Worker participation in decision-making is a cost to the employer. As long as worker participation legislation is more extensive in the FRG than in other Member States, investors have an incentive to locate plants outside of the FRG. Once these laws are harmonized, the FRG will no longer be at a disadvantage in attracting investment.

11. Treaty of Rome, *supra* note 3, at art. 2.

activities of the Community, functions similarly to a constitution. In contrast to the Constitution of the United States, which sets out the structure and power of the federal government with broad guidelines, the Treaty of Rome is detailed and specific. Its 246 articles provide precise information concerning the power and scope of Community activities.¹²

Although the predominant activities of the Community focus on economic development, the preamble of the Treaty of Rome explicitly states that the ultimate goal of the Community is the betterment of the living and working conditions of Community citizens.¹³ These two areas of Community concern, economic policy and social policy,¹⁴ are discussed in separate sections of the Treaty and are sharply distinguished throughout the document. The drafters do not appear to have considered economic development dependent upon or interrelated with social development. As a result, the Treaty of Rome does not explicitly require the consideration of worker interests in the development of economic policy.

A. *Explicit Sources of Power*

Despite the Treaty of Rome's comprehensive character and resemblance to a constitution, it does little to protect the civil rights of Community nationals.¹⁵

12. Treaty of Rome, *supra* note 3, at art. 3 sets forth the envisioned activities of the Community. It states:

[t]he activities of the Community shall include . . .

(a) the elimination, as between Member States of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;

(b) the establishment of a common customs tariff and of a common commercial policy towards third countries;

(c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital;

(d) the adoption of a common policy in the sphere of agriculture;

(e) the adoption of a common policy in the sphere of transport;

(f) the institution of a system ensuring that competition in the common market is not distorted;

(g) the application of procedures by which the economic policies of Member States can be coordinated and disequilibria in their balances of payments remedied;

(h) the approximation of the laws of Member States to the extent required for the proper functioning of the common market;

(i) the creation of a European Social Fund in order to improve employment opportunities for workers and to contribute to the raising of their standard of living;

(j) the establishment of a European Investment Bank to facilitate the economic expansion of the Community by opening up fresh resources;

(k) the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social development.

13. Treaty of Rome, *supra* note 3, at Preamble ("Affirming as the *essential* objective of their efforts the constant improvement of the living and working conditions of their peoples . . .") (emphasis added).

14. Social policy includes all matters directly relating to the treatment of workers. *See generally* Treaty of Rome, *supra* note 3, at arts. 117-128 (empowering the Community to take actions aimed at improving the standard of living of Community workers).

15. *But see* Treaty of Rome, *supra* note 3, at art. 7 (prohibiting discrimination), art. 48 (guaranteeing the free movement of workers), and art. 119 (guaranteeing equal pay for men and women).

The Treaty does not contain provisions guaranteeing individual rights, and only two sections specifically consider labor issues. The first outlines policies encouraging the free movement of workers throughout the common market,¹⁶ and the second delineates the Community's social policy.¹⁷

The chapter on social policy guarantees workers a number of specific rights¹⁸ but does not grant the Community the power to directly regulate social policy in the Member States. The Commission of the European Communities¹⁹ is granted the authority to administer the European Social Fund²⁰ and may study and report on the state of social policy in the Community.²¹ The Commission is not, however, explicitly delegated the power to implement its findings regarding social policy.

B. Implicit Sources of Power

The lack of explicit power in the Treaty of Rome does not preclude Community intervention in matters concerning employment policy. Article 100 is a broad and far-reaching provision which can be used for this purpose.²² It requires the Council of Ministers for the European Community to issue directives in order to approximate the laws of the Member States.²³ There are no subject matter limita-

16. See Treaty of Rome, *supra* note 3, at arts. 48–51 (concerning the free movement of workers throughout the Member States). Much has been written on the free movement of workers throughout the Community. See generally T. HARTLEY, *EEC IMMIGRATION LAW* (1978); O'Keeffe, *Practical Difficulties in the Application of Article 48 of the EEC Treaty*, 19 COMMON MKT. L. REV. 35 (1982).

17. See Treaty of Rome, *supra* note 3, at arts. 117–128.

18. See, e.g., Treaty of Rome, *supra* note 3, at art. 119 (requiring "the application of the principle that men and women should receive equal pay for equal work"). This right has been held to be directly applicable in the Member States. See *Defrenne v. Sabena*, 1976 E. Comm. Ct. J. Rep. 455, 18 COMMON MKT. L. Rep. No. 2, at 98 (1976).

19. The governing bodies of the European Community are the Commission, the Council of Ministers, and the European Parliament. For a discussion of the powers and functions of these Community organs and their relationships with each other, see T. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* (1981); P. MATHIJSSEN, *A GUIDE TO EUROPEAN COMMUNITY LAW* (3d ed. 1980).

20. See Treaty of Rome, *supra* note 3, at arts. 123–128. The European Social Fund has "the task of rendering the employment of workers easier and of increasing their geographical and occupational mobility within the Community." *Id.* at art. 123.

The Fund is presided over by a committee of representatives from governments, trade unions and employers' organizations. It funds projects proposed by the Member States. These projects target groups hurt by current economic conditions. See generally COMM'N OF THE EUROPEAN COMMUNITIES, *TWELFTH REPORT ON THE ACTIVITIES OF THE EUROPEAN SOCIAL FUND* (1984).

21. See Treaty of Rome, *supra* note 3, at art. 118. See also *id.* at art. 122.

22. Treaty of Rome, *supra* note 3, at art. 100 provides:

The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.

The Assembly and the Economic and Social Committee shall be consulted in the case of directives whose implementation would, in one or more Member States, involve the amendment of legislation.

23. A directive is one of five types of actions which the Council of Ministers is authorized to take under the Treaty of Rome. Treaty of Rome, *supra* note 3, at art. 189. Once a directive is adopted, the national authorities of each Member State are required to enact their own laws and/or regulations giving effect to the directive. This procedure allows Member States to implement directives in a manner that takes into account their own national institutions and political processes.

tions for the use of Article 100 as long as the proposed directive "directly affect[s] the establishment or functioning of the common market."²⁴ Article 100 is regularly used in conjunction with Article 117 to promote improved working conditions for Community citizens.²⁵ The major barrier to enacting a directive under Article 100 is the requirement that directives be adopted by unanimous consent of the Council.²⁶

A second provision, Article 235, delegates to the Council potentially unlimited authority to issue directives or regulations affecting all facets of working life in the Community.²⁷ This article may only be invoked when the Treaty of Rome has not otherwise provided the necessary powers. When such a situation occurs, the Council may, acting unanimously on a proposal from the Commission, take whatever action is necessary to promote the objectives of the Treaty.²⁸ Since one objective of the Treaty of Rome is the improvement of the living and working conditions of Community citizens,²⁹ Article 235 could legitimately be used to regulate activity in this area.

Community authority over employment policies can also be inferred from narrower provisions of the Treaty of Rome. In pursuit of the abolition of restrictions on freedom of establishment, the Council has the authority under Article 54(3)(g) of the Treaty of Rome to issue directives that make equivalent safeguards enabling freedom of establishment throughout the Community.³⁰ It is not obvious that this provision includes powers over labor policies since employ-

If a Member State does not take appropriate measures to comply with a directive, the Commission may first deliver an opinion on the matter and, if this does not resolve the issue, bring the matter before the European Court of Justice. Treaty of Rome, *supra* note 3, at art. 169. If the Court of Justice finds for the Commission, it will require the Member State to take the measures necessary to comply with the directive.

Directives are sometimes ineffective as a tool for harmonization. Widely differing procedures can be used to implement the provisions of a directive. As a result, the laws of the Member States can remain quite different even after the implementation of a directive.

24. Treaty of Rome, *supra* note 3, at art. 100.

25. Treaty of Rome, *supra* note 3, at art. 117 ("Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained . . .").

26. The unanimity requirement substantially restricts the content of directives adopted by the Council of Ministers. The Council consists of representatives of the governments of the Member States. Treaty of Rome, *supra* note 3, at art. 146. These representatives are directly responsible to the heads of the states from which they come and represent the views of their state. As a result, the process leading to agreement on a proposed directive is highly politicized.

27. Treaty of Rome, *supra* note 3, at art. 235 provides:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.

28. Article 235 of the Treaty of Rome, *supra* note 3, does not specify what type of action the Council may take. Presumably, any of the five types of action specified by Article 189 of the Treaty of Rome would be permissible. See generally *supra* note 23.

29. See *supra* note 14.

30. See Treaty of Rome, *supra* note 3, at art. 52 ("[R]estrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished in progressive stages in the course of the transitional period . . .").

See also Treaty of Rome, *supra* note 3, at art. 54, providing that:

ment is not necessarily dependent upon corporate structure. Nevertheless, the Commission has offered, and the Council is currently debating, a proposal based on Article 54(3)(g).³¹ An advantage of implementing measures under Article 54(3)(g) is that the Council may adopt directives by a qualified majority, thus avoiding the unanimity requirement of Articles 100 and 235.³²

Although the Treaty of Rome grants the Community little direct power over employment policy, a well-developed policy is not beyond the scope of the Treaty. Articles 100, 235 and 54(3)(g) of the Treaty of Rome can legitimately be used to implement Community employment policies. The primary obstacle to a Community policy is not the lack of authority under the Treaty of Rome, but disagreement among the Member States as to the proper form and content of this policy.

II. HARMONIZATION OF LAWS REGARDING EMPLOYEE INVOLVEMENT IN DISMISSAL PROCEDURES

The Community has to date adopted two directives harmonizing the employment policies of the Member States. Both directives require the harmonization of laws relating to the dismissal of large numbers of employees. The purpose of the directives is to increase the protections available to employees in the Member States. Neither directive grants the Community a policy-making role in the field of employment security.

A. *The Directive on Collective Redundancies*³³

Community Directive 75/129 on collective redundancies,³⁴ adopted in 1975 and based on Articles 100 and 117 of the Treaty of Rome,³⁵ is the most ambitious

1) [T]he Council shall . . . draw up a general programme for the abolition of existing restrictions on freedom of establishment within the Community.

3) The Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

(g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms . . . with a view to making such safeguards equivalent throughout the Community.

31. See *infra* notes 120–147 and accompanying text.

32. See Treaty of Rome, *supra* note 3, at art. 148. Article 148 sets out the procedure for determining a qualified majority. The votes of each country are weighted so that it is impossible to obtain a qualified majority unless at least three of the four major Community powers (the FRG, France, Italy, and the United Kingdom) support the measure.

33. Redundancy is a British term signifying a worker who is dismissed because the needs of the employer have changed and not because of any wrongdoing on the part of the worker. Collective redundancies take place when several employees are laid off, as when a plant closes or there is a major change in the workforce due to technological advances. The statutory definition of redundancy is included in the Employment Protection Consolidation Act, 1978, ch. 81(2) (United Kingdom). See generally C. GRUNFELD, *THE LAW OF REDUNDANCY*, ch. 5 (1980).

The European Community has adopted the term but defines it in relation to the number of employees to be laid off in an establishment. See *infra* note 36.

34. Council Directive of 17 February 1975 on the approximation of laws of the Member States relating to collective redundancies, 75/129/EEC, 18 O.J. EUR. COMM. (No. L 48) 29 (1975) [hereinafter cited as *Directive 75/129*].

35. See *supra* text accompanying notes 22–26.

measure the Community has adopted to unify employment policy throughout the Member States. The Directive provides that, in the event of collective redundancies,³⁶ the representative of the affected workers must be notified thirty days in advance of dismissal.³⁷ In addition, the employer must consult with workers' representatives when contemplating redundancies.³⁸ The consultations must include ways and means of avoiding or reducing redundancies and ways of mitigating their effects.³⁹ The Directive also requires the employer to notify the proper public authority thirty days before the dismissals take effect.⁴⁰ Member States are not prohibited from passing legislation more favorable to workers.⁴¹

The adoption of Directive 75/129 was a significant first step toward harmonization of Community employment policy. By requiring Member States to statutorily mandate that an employer consult with his or her employees and notify the state of impending redundancies, the Community asserted its authority to approximate laws relating to the terms and conditions of employment. Directive 75/129 is the first to recognize that social issues such as employment security meet the criterion set forth in Article 100 of "directly affect[ing] the establishment or functioning of the common market."⁴²

Directive 75/129 increases the responsibility of both the state and the employer when mass dismissals are threatened. Its requirements are not, however, as far-reaching as they might have been or as far-reaching as those in the draft first promulgated by the Commission.⁴³ The initial proposal called for compulsory consultations with employee representatives, compulsory notification of public authorities, and for powers on the part of public authorities to postpone or prohibit dismissals.⁴⁴ Extensive disagreement between the Member States re-

36. Directive 75/129, *supra* note 34, at art. 1. Directive 75/129 defines collective redundancies in relation to the percentage of the labor force that is to be laid off. It applies in establishments normally employing 20 to 100 workers if the employer dismisses 10 or more workers within 30 days. In establishments with 100 to 300 employees, it applies if the employer dismisses 10 percent of the work force within 30 days. In establishments employing 300 or more workers, Directive 75/129 applies if the employer dismisses 30 workers within 30 days. In addition, Directive 75/129 applies to any employer who dismisses 20 or more employees within 90 days. The Directive does not apply to establishments employing less than 20 workers. Employees contracted for a limited time, public employees, crews of sea going vessels, and workers affected by termination of an establishment's activities where that is the result of a judicial decision are not protected by Directive 75/129. *See id.*

37. Directive 75/129, *supra* note 34, at art. 3(2).

38. Directive 75/129, *supra* note 34, at art. 2(1).

39. Directive 75/129, *supra* note 34, at art. 2(2). In order for the employee representatives to effectively participate, Directive 75/129 requires the employer to provide in writing the reasons for the redundancies, the number of employees to be made redundant, the number of employees normally employed at the establishment, and the time period over which the redundancies are to be effected. *See id.* at art. 2(3).

40. Directive 75/129, *supra* note 34, at art. 4. The public authority is required to seek solutions to the problems raised by the projected collective redundancies. *Id.*

41. Directive 75/129, *supra* note 34, at art. 5.

42. Treaty of Rome, *supra* note 3, at art. 100.

43. *See* Freedland, *Employment Protection: Redundancy Procedures and the EEC*, 5 INDUS. L.J. 4, 27 (1976).

44. Comm'n of the European Communities, *Draft directive of the Council concerning the harmonization of Member States' legislation relating to collective dismissal*, 4 BULL. INST. LAB. REL. 205, 208-210 (1973).

sulted in a final draft which eliminated the right of Member States to forbid dismissals, leaving the Member States in an advisory capacity only.

In its final form Directive 75/129 grants procedural rights to workers caught in a redundancy situation but is void of substantive standards. The employer must consult with the employee representatives but the Directive does not contain provisions which ensure that the discussions will be fruitful. Although consultation must be with a "view towards reaching an agreement,"⁴⁵ Directive 75/129 does not require the employer and the employee representatives to reach an agreement. Nor does the Directive state who represents the employees or how the representatives are to be chosen. Moreover, Directive 75/129 permits the employer rather than the employees to choose the representatives. Once consultation has taken place, neither the employer nor the employee representatives are required to inform the affected employees of the impending dismissal. Since Member States cannot prohibit redundancies, the state has no leverage over the employer. As a result, the Directive provides the employer with no incentive to make concessions regarding redundancy benefits or retraining opportunities.

Similarly, the state is not required to take an active role in the redundancy process. The state receives notification and must seek solutions to the problems raised by projected collective redundancies.⁴⁶ Yet, Directive 75/129 does not guide the Member States as to what types of actions should be taken or what solutions might be appropriate. Directive 75/129 does not require Member States to guarantee that selection for dismissal will be carried out equitably or that redundant workers will be compensated. The state may not forbid dismissals and the Directive does not indicate what type of planning should be undertaken when redundancies are imminent.

Thus, although Directive 75/129 approximates the consultation procedure used to handle collective redundancies, it fails to create a Community policy for handling redundancies. It establishes the right of both Member States and the Community to be concerned about redundancies but does not set guidelines for the resolution of a redundancy situation.

1. Implementation in the FRG

As with much Community legislation, the Directive on collective redundancies is modelled after statutes which have previously been adopted in one or more Member States. In this instance the Directive is based on statutes previously enacted in the FRG.⁴⁷ Under West German law, the Works Constitution Act⁴⁸ and

45. Directive 75/129, *supra* note 34, at art. 2(1).

46. Directive 75/129, *supra* note 34, at art. 4(2).

47. Consultation of the Economic and Social Committee on a proposal for a Council Directive on the harmonization of the laws of the Member States relating to collective dismissals, 16 O.J. EUR. COMM. (No. C 100) 11, 14 (1973).

48. Betriebsverfassungsgesetz [BetrVG], 1972 Bundesgesetzblatt [BGBl] I 13 (FRG). Translations appear in: 1) FEDERAL MINISTER OF LABOUR AND SOCIAL AFFAIRS, CO-DETERMINATION IN THE FEDERAL REPUBLIC OF GERMANY 103 (INT'L LAB. ORG. trans. 1980); 2) German Works Council Act 1972 (CCH) (1972); 3) INDUSTRIAL RESEARCH UNIT, THE WHARTON SCHOOL, UNIVERSITY OF PENNSYLVANIA, SHOP CONSTITUTION LAW OF JAN. 15, 1972 (1976). The 1972 Act substantially revised the 1952 Works Constitution Act. Betriebsverfassungsgesetz [BetrVG], 1952 BGBl I 681. Translation appears in: THE FEDERAL MINISTER OF LABOUR AND SOCIAL AFFAIRS, *supra*, at 93.

the Protection Against Dismissals Act⁴⁹ work together to provide protections similar to those implemented by Directive 75/129.

Although Directive 75/129 necessitated minor revisions to the Protection Against Dismissals Act, when viewed in its entirety, the law of the FRG requires more from an employer than does Directive 75/129.⁵⁰ According to the Works Constitution Act, the employer must consult with the employee representatives to the Works Council⁵¹ before every termination decision.⁵² In addition, the West German statutes presume that the dismissal of an employee who has worked at least six months for an employer is socially unjustified.⁵³ In order to effectuate a dismissal the employer must provide the Works Council with the reason for the dismissal.⁵⁴ If the reason does not meet the standards established by law or guidelines previously adopted with the consent of the employees at the plant, the dismissal is not justified.⁵⁵ The employer has the burden of proving that the dismissal is justified.

49. Kündigungsschutzgesetz [KSchG], 1969 BGBl I 1317. The 1969 Act substantially revised the 1951 Protection against Dismissals Act. KSchG, 1951 BGBl I 499.

50. See KSchG (1969), *supra* note 49. The Protection against Dismissals Act was amended in 1978. KSchG, 1978 BGBl I 550. It now provides that an employer must notify the employment office before dismissing five workers from a plant normally employing 20 to 60 workers, 10 percent of the workforce or at least 25 workers from a plant normally employing 50 to 500 workers, or 30 workers from a plant normally employing at least 500 workers. KSchG, 1978 BGBl I 550 at § 1. See Marschall, *Neuregelung der Anzeigepflicht bei "Massenentlassungen,"* DER BETRIEB 981 (19. Mai 1978). Cf. note 36 (defining the number of employees which must be dismissed for Directive 75/129 to apply).

51. Works councils are an established institution in the FRG. The first works council was established by law in 1920, Betriebsrätegesetz [BRG], Reichsgesetzblatt [RGBl] 147 (4. Februar 1920) (Plant Council Act), to represent employee interests in labor and social affairs arising in the workplace. The procedure was abolished with the rise of the Nazi State in 1933, but was reinstated in some industries after the FRG was established in 1949. See Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie, 1951 BGBl I 347. (Co-determination Law for the Coal, Iron and Steel Industries). Translation appears in: THE FEDERAL MINISTER OF LABOUR AND SOCIAL AFFAIRS, *supra* note 48, at 73. See also BetrVG (1952), *supra* note 48. See generally Richardi, *Worker Participation in Decisions Within Undertakings in the Federal Republic of Germany*, 5 COMP. LAB. L. 23, 23-31 (1982).

The 1972 Works Council Act expanded the role of the works council in West German industry. See BetrVG (1972), *supra* note 48. The works council functions at the plant level. Its members are elected to three year terms, BetrVG (1972), *supra* note 48, at § 21, by secret vote. BetrVG (1972), *supra* note 48, at § 14(1). The number of representatives varies according to the number of employees working at the plant. BetrVG (1972), *supra* note 48, at § 9. In addition to its role in the hiring, firing and transfer of employees, the works council negotiates with management on wage and salary issues, occupational safety and health matters, and is kept informed on general matters having to do with operation of the plant. BetrVG (1972), *supra* note 48, at § 87. For an overview of the works council in West German labor law, see G. MURG & J. FOX, 2 LABOR RELATIONS LAW 740-833 (1978); Ramm, *Federal Republic of Germany*, in 5 INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS 168-191 (R. Blanpain ed. 1979).

52. BetrVG (1972), *supra* note 48, at § 102(1).

53. KSchG (1969), *supra* note 49, at § 1, as amended BetrVG (1972), *supra* note 48, at § 123.

54. BetrVG (1972), *supra* note 48, at § 102(1).

55. BetrVG (1972), *supra* note 48, at § 95. The employer and the works council must jointly adopt guidelines for selecting personnel who are to be hired, transferred, regrouped or dismissed. BetrVG (1972), *supra* note 48, at § 95(1). In plants with more than 1,000 employees, the works council may

When a dismissal is based on urgent operational requirements, the burden of proof shifts and the employee must establish that the dismissal is not justified.⁵⁶ The employer, however, must continue to follow all guidelines previously agreed to between it and the employees, and must meet all other standards provided by law. Worker demands for a suitable explanation by the employer are supported by the threat of settlement by a mediation committee⁵⁷ or an action in a labor court.⁵⁸

The powers of the Department of Employment in the FRG are virtually identical to those envisioned by Directive 75/129.⁵⁹ The employer must notify the Department of Employment four weeks before the redundancies are scheduled to take place if five or more employees are involved.⁶⁰ The Department of Employment reviews the information and determines when the layoff is to become effective. The Department of Employment may not prohibit dismissals but may delay them until two months after it has received notification.⁶¹

The most effective protections against dismissal are provided through consultations with the Works Council rather than with the Department of Employment. The employer must follow established guidelines and must specifically show that retraining, transfer, or modification of the contractual arrangement is not possible, even when the dismissals are carried out for urgent operational requirements. Since these protections are not embodied in Directive 75/129, it is unlikely that implementation of the Directive in other Member States will provide protections equivalent to those existing in the FRG.

2. Implementation in the United Kingdom

The government of the United Kingdom strongly opposed the adoption of Directive 75/129, and at one stage of the discussions vetoed the entire proposal.⁶² Nevertheless, once Directive 75/129 was adopted by the Council, the United Kingdom enacted the Employment Protection Act of 1975 to comply with the

demand that these guidelines stipulate the qualifications, personal conditions and social aspects which are to be taken into account. BetrVG, *supra* note 48, at § 95(2).

See also BetrVG (1972), *supra* note 48, at § 102(3). The works council may object to a dismissal if: 1) the employer did not sufficiently consider social aspects; 2) the employer did not follow guidelines stipulated to under § 95; 3) the employee could be transferred to a different job in the same plant or in another plant of the company; 4) the employer could retrain the employee; or 5) further employment is possible under modified contract terms and the employee has agreed thereto.

56. KSChG (1969), *supra* note 49, at § 1(3). Rationalization measures are included in this category. See A. HUECK, KÜNDIGUNGSSCHUTZGESETZ, KOMMENTAR 104-105 (9th ed. 1974).

57. KSChG (1969), *supra* note 49, at § 76.

58. *But cf.* KSChG (1969), *supra* note 49, at § 9 (A labor court may award an improperly dismissed employee damages but not reinstatement.).

59. France and the Netherlands grant the state more extensive authority to prohibit dismissals than does the FRG. See Hepple, *The Protection of Workers against Dismissal*, 14 COMMON MKT. L. REV. 489, 492 (1977). The protections in the FRG, by contrast, focus on negotiations between the employer and the employees rather than on direct state intervention.

60. KSChG (1969), *supra* note 49, at § 17. *Cf.* Directive 75/129, *supra* note 34, at art. 1 (requiring 30 days notification before dismissals may take effect).

61. Special restrictions prohibit the dismissal of handicapped workers and pregnant women in most circumstances. See *Schwerbeschädigte Gesetz* [SchwerbeschG] §§ 14-18, 1961 BGBl I 1233; *Mütterchutz Gesetz* [MuSchG], § 9, 1968 BGBl I 315.

62. See Freedland, *supra* note 43, at 27.

Directive's requirements.⁶³ Although the British legislation complies with the letter of the law, it enacts only the minimum standards required by Directive 75/129.⁶⁴

The British statute fails to carry out the intent of Directive 75/129 in several ways. First, the provisions enacted by the Employment Protection Act make it unlikely that the consultation between the employees and the employer will be effective. The Act requires the employer to consult with an official trade union representative.⁶⁵ If there is no trade union, the consultation requirement does not apply.⁶⁶ If the employer consults with a representative of the employees, the statute does not require that the two parties actually negotiate to reach a compromise.⁶⁷ Mailing the union a notice of impending dismissals fulfills the consultation requirement.⁶⁸ As a result, employers are generally not interested in compromise or in seeking the alternatives envisioned by Directive 75/129.

The statute also fails to grant the state the authority to properly plan for redundancies. The employer must notify the Secretary of State at least thirty days before the dismissals are to take effect,⁶⁹ unless it is "not reasonably practicable" for the employer to do so.⁷⁰ The statute gives no guidance as to what might or might not be reasonably practicable. Once notified, the Secretary of State is not required to seek solutions. Even if the Secretary of State would like to resolve the issue, the Secretary does not have the authority or bargaining power to do so. The statute does not grant the Secretary of State the authority to delay the contemplated redundancies.

Finally, the entire consultation and notification procedure required by the statute may be avoided if there is a collective bargaining procedure which establishes a satisfactory alternative.⁷¹ The statute does not require the alternative procedure to be as favorable to individual employees. This provision can be used

63. Employment Protection Act, 1975, Part IV, §§ 99–107 (United Kingdom). The provisions of the Employment Protection Act do not extend to Northern Ireland. *Id.* at § 129(6).

64. If a Member State does not implement the provisions of a directive it may be sued by the Commission. *See* Treaty of Rome, *supra* note 3, at art. 169. Such a suit was brought against Italy for failure to implement Directive 75/129, *supra* note 34. *See* Commission of the European Communities v. Italian Republic, 1982 E. Comm. Ct. J. Rep. 2133, 35 Common Mkt. L. Rep. No. 3, at 468 (1982).

65. Employment Protection Act, *supra* note 63, at § 99(1).

66. Employment Protection Act, *supra* note 63, at § 99(2) (restricting the employer to consultation with "an official or other person authorised to carry on collective bargaining with the employer in question by that trade union").

67. Employment Protection Act, *supra* note 63, at § 99(8). *See also* GRUNFELD, *supra* note 33, at 39–47 (arguing that, although consultation and negotiation are closely related, "[i]n the case of negotiation, management's commitment to achieving an agreed outcome is undoubtedly greater than in the case of consultation only." *Id.* at 43.).

68. Employment Protection Act, *supra* note 63, at § 99(6). The Act sets forth how the information is to be conveyed. A face-to-face meeting is not required.

69. Employment Protection Act, *supra* note 63, at § 100(1). The original notification period was 60 days. A 30 day notification period was introduced in 1979 as a concession to employers by The Employment Protection (Handling of Redundancies) Variation Order 1979, Stat. Inst. 1979 No. 958 (United Kingdom), *noted in* GRUNFELD, *supra* note 33, at 34, n.51. If more than 100 employees are to be laid off, the employer must notify the Secretary of State at least 90 days before the dismissals take effect. Employment Protection Act, *supra* note 63, at § 100(1).

70. Employment Protection Act, *supra* note 63, at § 100(6).

71. Employment Protection Act, *supra* note 63, at § 107.

by unions to bargain away the individual's right to consultation in return for additional union rights.⁷²

3. *The Impact of Directive 75/129*

The effects of Directive 75/129 are largely symbolic. The Directive imposes a consultation procedure that involves both employees and the State but does not include guidelines necessary to guarantee employees substantive rights. The Directive follows the West German model but does not incorporate its more farsighted provisions. The West German statute is forceful because of the strong bargaining position of the Works Council, the statutory requirement that the employer seek alternatives to dismissing employees, and the continued participation of employees in plant decisions.

None of these provisions appear in Directive 75/129 or in the British statute implementing the Directive. Moreover, the British statute leaves individual employees without a forum for objecting to dismissals or a means of ensuring that dismissals are equitably enacted. As a result, Directive 75/129 can have little impact on Community workers.

Directive 75/129 signifies the Community's increased interest in the need of employees for security in terms and conditions of employment. It also demonstrates the Community's hesitancy to impinge upon the ability of enterprises to implement structural changes. With Directive 75/129 the Community has attempted to approximate the laws of the Member States in one narrow area of employment policy. The Community has also taken a small step towards reform. The Directive's applicability is, however, confined to a limited set of circumstances and does not permit the development of a Community plan for industrial development.

B. *The Directive on the Transfer of Undertakings*

Two years after enactment of Directive 75/129, the Community adopted a second directive increasing the rights of Community workers. Directive 77/187 grants workers rights in the event of transfers of undertakings, businesses or parts of businesses.⁷³ Like Directive 75/129, Directive 77/187 is based on Articles 100 and 117 of the Treaty of Rome.⁷⁴

Directive 77/187 goes beyond Directive 75/129 in that it grants employees both procedural and substantive rights. When a transfer takes place, the transferee automatically takes on all rights and obligations arising from the employment

72. The Secretary of State may approve an alternative procedure only if all parties to the agreement approve the procedure. Since individual employees are not a party in a collective bargaining agreement, their approval is not required. See Employment Protection Act, *supra* note 63, at § 107.

73. Council directive of 14 February 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, 77/187/EEC, 20 O.J. EUR. COMM. (No. L 61) 26 (1977) [hereinafter cited as Directive 77/187].

74. See *supra* text accompanying notes 22–26.

relationship of the previous employer and his or her employees.⁷⁵ The transferee must continue to observe collective bargaining agreements between the employees and the transferor.⁷⁶ Member States may further provide that the transferor will continue to be liable for obligations arising from the employment relationship.⁷⁷

A second substantive right granted by Directive 77/187 is a prohibition against dismissals. The Directive forbids the transfer or merger of an undertaking from constituting grounds for dismissal.⁷⁸ This provision expands the protection granted to employees in Member States against dismissal without just cause.⁷⁹ The protection is limited since Directive 77/187 states that the provision does not prevent dismissals for economic, technical, or organizational reasons.⁸⁰ As a result, when a transfer takes place, the employees automatically retain their jobs. As soon as the new employer implements rationalization measures, however, the employees are no longer protected.

Directive 77/187 also grants employees procedural rights. Both the transferor and the transferee must inform the employee representatives of the reasons for the transfer, the legal, economic, and social implications of the transfer for the employees, and the measures envisaged in relation to the employees.⁸¹ The employees must receive this information "in good time" before the transfer is carried out, or at least before they are directly affected by the transfer.⁸² The extent of this right is not explicitly stated in the Directive. It will vary since Member States are free to define the terms and adopt whatever procedures they wish to implement the Directive's requirements.

Directive 77/187 attempts to balance the conflict between the interests of business and workers. It recognizes the necessity for the transfer of undertakings and seeks to implement rules that will permit transfers to take place in an orderly fashion. On the other hand, the Directive is evidence of the Community's concern that if proper protections are not implemented, workers alone will bear the brunt of the changing Community economy.⁸³

75. Directive 77/187, *supra* note 73, at art. 3(1)[1].

76. Directive 77/187, *supra* note 73, at art. 3(2)[1]. *But cf.* Directive 77/187, *supra* note 73, at art. 3(2)[2] (permitting Member States to limit the period for observing such terms and conditions to a period of not less than one year).

77. Directive 77/187, *supra* note 73, at art. 3(1)[2].

78. Directive 77/187, *supra* note 73, at art. 4(1).

79. All Member States have legislation protecting workers from discharge without just cause. *See International Dismissal and redundancy pay in 10 countries*, EUR. INDUS. REL. REV., April 1980, at 14.

80. Directive 77/187, *supra* note 73, at art. 4(1).

81. Directive 77/187, *supra* note 73, at art. 6(1)[1].

82. Directive 77/187, *supra* note 73, at art. 6(1)[2 & 3].

83. *See Opinion of the Economic and Social Committee*, 18 O.J. EUR. COMM. (No. C 255) 25, 26 (1975). General comment 1.2 states:

The Committee reaffirms . . . that a merger, takeover or amalgamation is the right course in some circumstances, subject to certain criteria laid down in the interests of the Community economy and the interests of employees. . . . [T]he Committee believes that many harmful consequences for the workers could be forestalled if the implications of reorganization operations for the workers were considered carefully well before the operations were actually carried out. For it can happen that while such operations may be very beneficial for the

It is doubtful that the balance sought by the Directive will be obtained. In most situations, businesses undergo significant technical or organizational changes when a transfer takes place. Since Directive 77/187 provides no protection in this situation, its provisions are largely illusory.

1. Implementation in the FRG

As with Directive 75/129, implementation of Directive 77/187 in the FRG did not involve major statutory changes. Since 1972 the FRG has held the transferee liable for all the rights and obligations arising out of the employment relationship between the transferor and the employees.⁸⁴ Collective bargaining agreements must be honored by the new employer for one year.⁸⁵ In addition, the normal dismissal procedures of the plant must be observed, ensuring that the new employer considers alternatives such as retraining or transfer before dismissing employees.⁸⁶ These provisions guarantee West German workers rights similar to those envisioned in Directive 77/187.

Prior to the adoption of Directive 77/187 the FRG also enacted legislation guaranteeing information and consultation rights regarding major operational changes. These provisions go beyond the requirements of Directive 77/187. The Works Council Act of 1972 established an Economic Committee in plants with 100 or more employees.⁸⁷ The Economic Committee is entitled to information and consultation in a variety of areas including the economic and financial situation of the company, rationalization plans, the merger of plants, and any other event or plan which may affect the employees of the company.⁸⁸ In addition, the Works Council is entitled to receive advance information concerning all

profitability of the companies, the adverse effects are borne by the workers alone. The Committee accordingly attaches special importance to this Commission proposal, as it does to all Community proposals designed to prevent or compensate for damage inflicted on workers. *The present proposal aims to ensure that workers alone do not bear the cost of achieving technological progress or alone make the sacrifices that may be necessary in the short run to achieve improved living standards in the longer run.* (emphasis added).

84. Bürgerliches Gesetzbuch [BGB] § 613a, as amended by BetrVG (1972), *supra* note 48, at § 122.

[I] When a plant or part of a plant passes by legal transaction to another owner, that owner shall take on the rights and duties of the employments existing at the time of the transfer.

[II] The previous employer and the new owner shall be jointly and severally liable for obligations in accordance with Subsec. 1 insofar as they arose prior to the time of the transfer and become due prior to the expiration of one year after that time. If such obligations become due after the time of the transfer, the previous employer shall be liable for them only to the extent that corresponds to the part of their assessment period prior to the time of the transfer.

[III] Subsec. 2 shall not be applicable if a juridical person ceases to exist because of merger or reorganization . . .

85. *Id.* at § 613a[III].

86. BetrVG (1972), *supra* note 48, at § 102.

87. BetrVG (1972), *supra* note 48, at §§ 106-110.

88. BetrVG (1972), *supra* note 48, at § 106(3). The employer must fully inform and consult with the Economic Committee about the economic affairs of the plant, including the "merger of plants" and "other events and plans which may appreciably affect the interests of the employees of a company." *Id.*

changes which might have a detrimental effect on the employees.⁸⁹ The statutory provision does not specifically refer to the transfer of an undertaking. The required consultations cover, however, virtually all situations where Directive 77/187 would apply.

Thus, it is evident that, prior to the adoption of Directive 77/187, the FRG protected workers in the event of a transfer of an undertaking. These protections are provided by a complex set of procedures backed up by statutory provisions guaranteeing workers certain presumptions and rights. Since Directive 77/187 requires Member States to enact only a portion of this comprehensive program, it is doubtful that the protections guaranteed in the FRG will be guaranteed to workers in other Member States. Moreover, Directive 77/187 neither broadens the scope of rights which West German workers possess nor creates a mechanism for the development of a Community-wide policy.

2. Implementation in the United Kingdom

Despite the ambivalent language of Directive 77/187 with regard to structural change upon the transfer of an enterprise, the Directive necessitated substantial changes in the United Kingdom's employment protection laws. It required alteration of the common law rule that an employment contract is personal and therefore automatically terminated when management changes.

Compliance with the requirements of Directive 77/187 was slowed by the change in government administration in 1979.⁹⁰ Only in 1981, two years after the deadline for adopting provisions complying with the provisions of the Directive,⁹¹ were The Transfer of Undertakings (Protection of Employment) Regulations promulgated.⁹² The regulations implement the minimum measures necessary to comply with Directive 77/187.⁹³

The regulations effectuating Directive 77/187 state that the transfer of an undertaking will not terminate a contract of employment⁹⁴ and that collective

89. BetrVG (1972), *supra* note 48, at § 111. Changes which might have a detrimental effect are defined as follows: "1. reduction and shutdown of the entire plant or essential parts thereof; 2. relocation of the entire plant or essential parts thereof; 3. merger with other plants; 4. fundamental changes in the plant's organization or objective or of the plant facilities; 5. introduction of basically new work methods and manufacturing processes." *Id.*

90. See Elias, *The Transfer of Undertakings: A Reluctantly Acquired Right*, 3 COMPANY LAW 147 (1982); Hepple, *The Transfer of Undertakings (Protection of Employment) Regulations*, 11 INDUS. L.J. 29 (1982). In 1979, the Conservative Party came to power in Great Britain. The Conservatives were far less enthusiastic about Directive 77/187 than was the Labour Party. Directive 77/187 was finally implemented in 1982, more than three years after the expiration of the two year grace period. The impetus for adoption of the regulations was the Commission's decision to bring suit against the United Kingdom for failing to implement the provisions of Directive 77/187. See Elias, *supra*, at 147; Hepple, *supra*, at 29.

91. Member States were granted a two year grace period, until February 14, 1979, to adopt laws, regulations, or administrative provisions complying with Directive 77/187. *Directive 77/187, supra* note 73, at art. 8(1).

92. Stat. Inst. 1981 No. 1794 (United Kingdom).

93. See Elias, *supra* note 90; Hepple, *supra* note 90. Hepple maintains that "[a]rguably, the Regulations are not in full compliance with the spirit and intent of the Directive." Hepple, *supra* note 90, at 29.

94. Stat. Inst. 1981 No. 1794, *supra* note 92, at § 5(1).

bargaining agreements will have the same effect as if the transferee were a party to the agreement.⁹⁵ Where an employee is dismissed either before or after the relevant transfer, the regulations presume that the dismissal was unfair unless economic, technical, or organizational reasons were the principal reasons for the dismissal.⁹⁶ The regulations also impose a duty on the employer to inform and consult with trade union representatives prior to the dismissal.⁹⁷ Like the Employment Protection Act of 1975, the regulations are weakened by a provision exempting employers from this duty insofar as notification and consultation are not reasonably practicable.⁹⁸ Even when the failure to consult is adjudicated unreasonable, the regulations impose only a small penalty.⁹⁹ Thus, the exceptions to the regulations and the absence of an enforcement mechanism lessen their impact.

It is doubtful that the procedural right to information and consultation in advance of a transfer will have a significant impact on corporations doing business in the United Kingdom. As with Directive 75/129, the procedural requirements do not in themselves strengthen the rights of the employees. The success of the employees in obtaining concessions from the employer continues to depend largely upon the bargaining strength of the unions.¹⁰⁰

3. *The Impact of Directive 77/187*

Directive 77/187 represents a second attempt to harmonize the laws of the Member States for the express purpose of improving the working conditions and standard of living for Community workers. Here again the Community has attempted unsuccessfully to extend protections to Community workers which are already enjoyed by workers in the FRG.

Directive 77/187 goes beyond Directive 75/129 in that it contains substantive as well as procedural requirements. As with Directive 75/129, it directly intervenes in a narrow issue concerning the rights of Community workers, and imposes specific duties. Directive 77/187 does not attempt to create a policy that is applicable throughout the Community or to regulate employee rights upon the transfer of an undertaking at the Community level.

Although the language of Directive 77/187 appears to grant Community workers significant rights, such is not the case. As demonstrated by the case of the United Kingdom, the implementation process in the Member States can ensure

95. Stat. Inst. 1981 No. 1794, *supra* note 92, at § 6(a) (establishing that rights and obligations negotiated by a recognized trade union are transferred to the new employer).

Because collective agreements are generally unenforceable under British law and the regulations do not alter this presumption, the new rights can have little effect. See Trade Union and Labour Relations Act, 1974, § 18 (United Kingdom).

96. Stat. Inst. 1981 No. 1794, *supra* note 92, at § 8.

97. Stat. Inst. 1981 No. 1794, *supra* note 92, at § 10.

98. Stat. Inst. 1981 No. 1794, *supra* note 92, at § 10(7).

99. Stat. Inst. 1981 No. 1794, *supra* note 92, at § 11. The employee may be awarded up to two weeks pay. This amount will then be deducted from any redundancy payment or other remuneration due the employee. *Id.*

100. See generally Hepple, *Community Measures for the Protection of Workers Against Dismissal*, 14 COMMON MKT. L. REV. 489 (1977) (exploring the potential impact of Directives 75/129 and 77/187 in the United Kingdom).

that a directive does little to reform or even harmonize the laws of a Member State.

An examination of the implementation process of Directive 77/187 also brings to light the political compromises that take place at the Community level when a directive is adopted. The implementation of Directive 77/187 demonstrates how the Community has been unable to resolve the conflict between the promotion of structural change and the rationalization of industries, and the desire to ensure that workers benefit from technological progress. The Directive sends contradictory messages to the Member States regarding both the extent to which workers should be protected when an undertaking is transferred, and the role which the Community seeks to play in the area of employment policy.

III. PROPOSALS FOR THE HARMONIZATION OF WORKER PARTICIPATION

Parallel to the trend granting employees rights in a redundancy situation, a movement to increase the role of employees in the management of the enterprise has emerged. Rather than focusing on specific instances when the security of workers may be threatened, worker participation proposals attempt to grant Community workers consultation and negotiation rights at top levels of corporate decision making. By providing a forum for discussions among workers and by increasing the interaction between workers and management, the Commission hopes to empower workers in the daily functioning of the enterprise.¹⁰¹ The Commission believes that participation will increase industry's ability to adopt substantial structural changes with the consent and understanding of its workers, thus reducing the potential for conflict.¹⁰² If these proposals are adopted, Directives 75/129 and 77/187 might no longer be necessary. Employees would be involved in corporate decision making throughout the entire process rather than just before dismissals take place.

Despite the hopes of the Commission, none of the worker participation proposals discussed in this note have been adopted by the Council. Vigorous opposition has arisen from a variety of sources, including the government of the United Kingdom.¹⁰³ This opposition has arisen because the proposals are so extensive. Their adoption would require significant changes in the laws of most Member States.

The three proposals to be discussed briefly in this part are: the Statute for a European Company; the Fifth Directive to coordinate the laws of Member States regarding the structure of public limited companies; and the Vredeling proposal on employee information and consulting procedures. All three proposals would involve employees in top level management decisions affecting employees throughout the Community.

101. See, e.g., THE GREEN PAPER, *supra* note 4, at 9.

102. See THE GREEN PAPER, *supra* note 4, at 9.

103. See *infra* notes 145-146, 159-161 and accompanying text.

A. The Statute for a European Company

The earliest Community proposal providing for worker participation in management is the proposed Statute for a European Company.¹⁰⁴ It was presented by the Commission to the Council in 1970 as a regulation based on Article 235 of the Treaty of Rome.¹⁰⁵ A revised version was published in 1975.¹⁰⁶ If adopted, the Statute would create a comprehensive framework for the incorporation of an enterprise at a Community rather than national level.

The Statute requires extensive employee participation in the functioning of the enterprise. It proposes that one-third of the representatives to the supervisory board be employees of the company and one-third be shareholders, with the remainder to be jointly elected by the two groups.¹⁰⁷ In addition, it provides for the establishment of a European Works Council¹⁰⁸ which would be responsible for representing the interests of the employees at an international level.¹⁰⁹ The proposal grants the European Works Council broad information and consultation rights,¹¹⁰ and requires management to obtain the Council's approval before implementing rules relating directly to the employees.¹¹¹ In order to protect local groups of employees, the Statute for a European Company provides that the activities of the European Works Council may not conflict with collective bargaining agreements covering purely national matters.¹¹²

104. COMM'N OF THE EUROPEAN COMMUNITIES, PROPOSAL FOR A COUNCIL REGULATION EMBODYING A STATUTE FOR EUROPEAN COMPANIES, BULL. EUR. COMM. SUPP. 8/70 (1970).

105. See *supra* text accompanying notes 27-29.

106. COMM'N OF THE EUROPEAN COMMUNITIES, PROPOSAL FOR A COUNCIL REGULATION ON THE STATUTE FOR EUROPEAN COMPANIES, BULL. EUR. COMM. SUPP. 4/75 (1975) [hereinafter cited as STATUTE FOR A EUROPEAN COMPANY]. The changes take into account the opinions of the European Parliament, 17 O.J. EUR. COMM. (No. C 93) 22 (1974) and the Economic and Social Committee 15 J.O. EUR. COMM. (No. C 131) 32 (1972). Changes were also necessitated by the entry of the United Kingdom, Ireland, and Denmark into the Community. See generally Pipkorn, *Employee Participation in the European Company*, 8 BULL. COMP. LAB. REL. 23 (1977).

107. STATUTE FOR A EUROPEAN COMPANY, *supra* note 106, at art. 74a(1).

108. STATUTE FOR A EUROPEAN COMPANY, *supra* note 106, at arts. 100-129.

109. STATUTE FOR A EUROPEAN COMPANY, *supra* note 106, at art. 119.

110. STATUTE FOR A EUROPEAN COMPANY, *supra* note 106, at arts. 120-127.

111. STATUTE FOR A EUROPEAN COMPANY, *supra* note 106, at art. 123(1) provides:

Decisions concerning the following matters may be made by the Board of Management only with the agreement of the European Works Council:

- a) rules relating to recruitment, promotion and dismissal of employees;
- b) implementation of vocational training;
- c) fixing of terms of remuneration and introduction of new methods of computing remuneration;
- d) measures relating to industrial safety, health and hygiene;
- e) introduction and management of social facilities;
- f) the establishment of general criteria for the daily times of commencement and termination of work;
- g) the establishment of general criteria for preparing holiday schedules.

112. STATUTE FOR A EUROPEAN COMPANY, *supra* note 106, at art. 119(2) provides:

The competence of the European Works Council shall extend to matters which concern more than one establishment not located in the same Member State and which cannot be settled by the national employees' representative bodies acting within their own establishment.

Although commentators agree that some form of employee participation on supervisory boards is advisable,¹¹³ there is disagreement as to the best form of employee participation within the European Company.¹¹⁴ The current proposal permits the employees to approve two-thirds of the representatives to the supervisory board. The result is a governing board on which employee representatives would have a major impact and would often provide the decisive votes in decision making.¹¹⁵

The establishment of a European Works Council would alter the employment relationship for corporations established under the Statute. The Works Council's transnational focus would facilitate communication between labor organizations in different Member States and encourage multinational collective bargaining. This would give employees an incentive to overcome national divisions and oppose corporate flight to countries outside the Community. The existence of the Works Council would also lessen competition between Member States for plants and jobs. Structural changes affecting workers could be agreed upon at a Community level, based upon input from workers throughout the Community.

In theory, adoption of the Statute for a European Company would promote corporate mobility throughout the Community. It would free a corporation from many legal intricacies of transnational operations since the corporation would no longer have to comply with the corporation code of each Member State.¹¹⁶ The Statute would directly apply to the Member States¹¹⁷ and would thus be interpreted in the same manner in each Member State. The diverse implementation possible with Community directives, as exemplified by Directives 75/129 and 77/187, would no longer burden Community corporations. This would lessen the financial and legal burden on transnational corporations and permit these corporations to move freely throughout the Community.

Despite the potential benefits of a corporation code that is applicable throughout the Community, several Member States oppose the proposed Statute. The progressive features of the Statute such as the transparent corporate structure it

Matters shall not fall within the competence of the European Works Council in so far as they are settled by collective agreement.

The European Works Council may not conclude agreements nor conduct negotiations regarding the working conditions of employees unless a European collective agreement expressly authorizes the conclusion of supplementary agreements by the European Works Council.

113. See THE GREEN PAPER, *supra* note 4, at 21.

114. See generally THE GREEN PAPER, *supra* note 4.

115. The Statute for a European Company would permit employees greater influence than provided for in the equivalent West German statute. Cf. Mitbestimmungsgesetz [MitBG], 1976 BGBl I 1153 (Codetermination Act). Translations appear in: THE FEDERAL MINISTER OF LABOUR AND SOCIAL AFFAIRS, *supra* note 48 at 7; and INDUSTRIAL RESEARCH UNIT, THE WHARTON SCHOOL, UNIVERSITY OF PENNSYLVANIA, *supra* note 48. The Codetermination Act grants the chairman of the board, who is elected by management, the tiebreaking vote when there is disagreement. *Id.* at § 29(2).

116. See COMM'N OF THE EUROPEAN COMMUNITIES, THE EUROPEAN COMPANY STATUTE: INFORMATION MEMO (1975), reprinted in E. STEIN, P. HAY & M. WAELEBROECK, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE 648 (1976).

117. Regulations are directly applicable in the Member States. See Treaty of Rome, *supra* note 3, at art. 189.

requires,¹¹⁸ and the obligations to shareholders and employees,¹¹⁹ make Member States hesitant to support its adoption. If the Statute introduces too many reforms, corporations will continue to incorporate under the corporation codes of the Member States and not under the Statute. Since the Commission does not have the political clout to require corporations to incorporate under its Statute, corporations would be left with a choice. They could incorporate under the laws of their principal place of business or under the Community Statute. Leaving this choice to the corporation decreases the likelihood of success for the Statute.

The Statute for a European Company is a radical proposal. Its adoption would strengthen the authority of the Community in matters concerning corporate governance. In addition, it would significantly increase the role of Community workers in corporate decision making. Presently, however, the Statute is not a realistic proposal. It includes significant reforms that corporations, when given a choice, will not choose to abide by. If the Statute omits these reforms, it can not achieve its purpose. It is, therefore, unlikely that the Statute will be implemented until greater protections are available to employees and shareholders through the corporation codes of Member States.

B. The Fifth Directive

The Fifth Directive is one of a series of directives, based on Article 54(3)(g) of the Treaty of Rome,¹²⁰ which seeks to harmonize the corporate structures of the Member States.¹²¹ The proposed Fifth Directive reflects the Community's desire

118. The Statute for a European Company includes extensive reporting and publication requirements. See STATUTE FOR A EUROPEAN COMPANY, *supra* note 106, at arts. 148–222.

119. See STATUTE FOR A EUROPEAN COMPANY, *supra* note 106, at arts. 90 and 120; see also COMM'N OF THE EUROPEAN COMMUNITIES, THE EUROPEAN COMPANY STATUTE: INFORMATION MEMO (1975), reprinted in STEIN, HAY & WAELBROECK, *supra* note 116, at 650.

120. See *supra* text accompanying notes 30–32.

121. *Amended Proposal for a Fifth Directive founded on Article 54(3)(g) of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs*, 26 O.J. EUR. COMM. (No. C 240) 2 (1983), reprinted and analyzed in COMM'N OF THE EUROPEAN COMMUNITIES, THE STRUCTURE OF PUBLIC LIMITED COMPANIES: AMENDED PROPOSAL FOR A FIFTH DIRECTIVE, BULL. EUR. COMM. SUPP. 6/83 (1983) [hereinafter cited as FIFTH DIRECTIVE]. See generally Welch, *The Fifth Draft Directive—A False Dawn?*, 8 EUR. L. REV. 83 (1983).

The proposal is one of ten directives based on Article 54(3)(g) which seek to harmonize company structure throughout the Community. The first eight were presented by the Commission to the Council in the 1960s and early 1970s. All but the Fifth Directive have been adopted. The First Directive regulates the legal capacity of the company and the publication of information, 68/151/EEC, 11 J.O. EUR. COMM. (No. L 65) 8 (1968); the Second Directive regulates the formation of public limited companies and the maintenance of capital, 77/91/EEC, 20 O.J. EUR. COMM. (No. L 26) 1 (1977), the Third Directive regulates internal mergers between joint stock companies, 78/855/EEC, 21 O.J. EUR. COMM. (No. L 295) 36 (1978); the Fourth Directive regulates annual accounts, 78/660/EEC, 21 O.J. EUR. COMM. (No. L 222) 11 (1978); the Sixth Directive regulates the division of companies, 82/89/EEC, 25 O.J. EUR. COMM. (No. L 378) 47 (1982); the Seventh Directive regulates group accounts 83/349/EEC, 26 O.J. EUR. COMM. (No. L 193) 1 (1983) and the Eighth Directive regulates the professional qualifications of auditors of company accounts, 84/253/EEC, COMMON MKT. REP. (CCH) ¶ 1431 (April 10, 1984).

The Ninth Directive will deal with the conduct of groups of companies. It will define parents and subsidiaries, and their relationship. The Tenth Directive will cover company liquidations. The Com-

to encourage cross-frontier economic activities¹²² and the need to facilitate transnational operations,¹²³ as well as its interest in promoting employee involvement in decision making. The greatest obstacle to adoption of the Fifth Directive is the inability of the Member States to agree upon a type of corporate organization and a level of employee involvement that would be acceptable throughout the Community. The draft Fifth Directive has been modified and made more flexible regarding corporate form and employee involvement. These changes decrease, however, the likelihood that the Fifth Directive will effectively harmonize the role of employees in decision making.

The draft presently before the Council sets out two permissible forms of corporate structure, a two-tiered¹²⁴ and a one-tiered¹²⁵ structure. If the proposal is adopted, Member States will have to enact laws permitting corporations to incorporate with a two-tiered form of corporate structure.¹²⁶ Member States will also be permitted to offer corporations the opportunity to incorporate under a one-tiered system.¹²⁷ The requirement that Member States offer the two-tiered system furthers the goal of harmonization while the one-tiered option allows for the differing cultural, legal and historical backgrounds of the Member States.¹²⁸

The Fifth Directive provides for employee representation under both forms of

mission has not yet submitted an official proposal for either the Ninth or Tenth Directive to the Council. There is some discussion in the literature regarding the Ninth Directive. See Guyon, *Examen critique des projets européens en matière de groupes de sociétés (le point de vue français)*, in *GROUPS OF COMPANIES IN EUROPEAN LAWS* 155 (K. Hopt ed. 1982); Schneebaum, *The Company Law Harmonization Program of the European Community*, 14 *LAW & POL'Y INT'L BUS.* 293, 317-321 (1982).

122. FIFTH DIRECTIVE, *supra* note 121, at 20.

123. FIFTH DIRECTIVE, *supra* note 121, at 22.

124. FIFTH DIRECTIVE, *supra* note 121, at arts. 3-13. These articles describe the operation and functioning of the two-tiered system. This form of corporate structure is modelled after the FRG's Codetermination Act for the Coal and Steel Industry, *supra* note 51, and the 1976 Codetermination Act, MitBG, *supra* note 115.

125. FIFTH DIRECTIVE, *supra* note 121, at arts. 21a-21t. These articles describe the operation and functioning of the one-tiered system. The one-tiered system was added to the proposal to make the Fifth Directive more palatable to Member States such as the United Kingdom whose corporations are structured with a single corporate board.

The actual structure of the administrative board required by the Fifth Directive is, however, similar to that required by the two-tiered system. One administrative board, composed of both executive and non-executive members, *id.* at art. 21a(1)(a), divides the administrative tasks. The non-executive members act similarly to members of the supervisory board under the two-tiered system, while the executive members act similarly to the members of the management board. As a result, Member States that wish to maintain the one-tiered system would still have to make significant changes in their corporation laws.

126. FIFTH DIRECTIVE, *supra* note 121, at art. 2(1).

127. FIFTH DIRECTIVE, *supra* note 121, at art. 2(1).

128. See, e.g., THE GREEN PAPER, *supra* note 121. The Green Paper argues that the two-tiered system is the more efficient and best structure for the harmonization of company law. *Id.* at 40. It concludes that the Fifth Directive might stand a greater chance of adoption if it permits incorporation under the one-tiered system for those Member States which historically have used this system. *Id.* at 41.

corporate structure.¹²⁹ Four alternative methods of participation are permitted. The preferred method is through direct participation on the policy-making body of the corporation.¹³⁰ Under no circumstances would employees be involved in the daily management decisions of the corporation.¹³¹ Nor would they ever provide the decisive votes in general policy decisions.¹³²

A second method of participation, which is provided for only when the two-tiered system of management is used, is through a cooptation process.¹³³ Under this system, employees would not elect representatives to the supervisory board. They would, instead, have an automatic veto power which could be overruled only if their objection were declared unfounded by an independent organization.¹³⁴

The Fifth Directive also permits representation through a board composed solely of employee representatives.¹³⁵ This option would be permitted regardless of whether the one or the two-tiered system were implemented. The board of employees would not have a formal connection with the administrative or supervisory board. Nor would it have the right to veto decisions of these boards. It would, however, possess rights equivalent to those of employees sitting directly on the supervisory or administrative board.¹³⁶

Additionally, the Fifth Directive allows Member States to adopt legislation permitting employee participation to be regulated by collective bargaining agreements.¹³⁷ The agreement would have to implement procedures analogous to those required by the other three options.¹³⁸ This option adds flexibility to the Fifth Directive because a collective bargaining agreement could combine the three

129. FIFTH DIRECTIVE, *supra* note 121, at arts. 4(2) and 21b(2). Corporations are required to provide for participation only when the company employs 1,000 or more workers. *Id.* at arts. 4(2) and 21b(2). The number of workers is determined by including the number of employees working for subsidiary undertakings. *Id.* at arts. 4(1) and 21b(1).

130. FIFTH DIRECTIVE, *supra* note 121, at Preamble. If the two-tiered system is used, one-third to one-half of the members of the supervisory organ are to be appointed by the employees of the company. *Id.* at art. 4b(1). If the one-tiered system is used, one-third to one-half of the non-executive members of the administrative organ are to be appointed by the employees of the company. *Id.* at art. 21d(1).

131. FIFTH DIRECTIVE, *supra* note 121, at arts. 3(1)(a) and 21a(1)(a). If the two-tiered system is used, the management board of the corporation directs the activities of the company. The supervisory board receives regular reports from the management board, *id.* at art. 11, makes policy decisions, *id.* at art. 12, and determines who shall sit on the management board, *id.* at arts. 3(1)(b) and 13. If the one-tiered system is used, the same decisions are made by the executive members of the administrative board. *See id.* at arts. 21r, 21s, 21a(1)(b), and 21t(1).

132. FIFTH DIRECTIVE, *supra* note 121, at arts. 4(b)(2) and 21d(2).

133. FIFTH DIRECTIVE, *supra* note 121, at art. 4c.

134. FIFTH DIRECTIVE, *supra* note 121, at art. 4c. The general meeting of shareholders or a committee of shareholder representatives may object to the appointment of members of the supervisory board in the same manner as the employees. *Id.*

135. FIFTH DIRECTIVE, *supra* note 121, at arts. 4d and 21e.

136. FIFTH DIRECTIVE, *supra* note 121, at arts. 4d(1) and 21e(1).

137. FIFTH DIRECTIVE, *supra* note 121, at arts. 4e and 21f.

138. FIFTH DIRECTIVE, *supra* note 121, at arts. 4g and 21h.

procedures for employee representation.¹³⁹ Member States may also adopt provisions providing that employee participation does not have to be implemented when a majority of a company's employees oppose participation.¹⁴⁰

In attempting to appease various Member States by creating these options, the Commission has proposed a directive that does little to approximate the laws of the Member States. The current proposal provides the Member States with far more leeway than the proposal that was originally presented to the Council in 1972.¹⁴¹ The initial draft imposed a uniform two-tiered system with only two alternative forms of participation on the Member States.¹⁴² The current proposal, which permits Member States to offer both the one and two-tiered forms of corporate structure, does not harmonize corporate structure in the Member States. The variety of methods for participation also prevents the harmonization of corporate structure. Corporations will still have to adjust to different procedures for employee representation in each Member State.

In the FRG, a country with a long history of state management of industrial relations, the Fifth Directive would have little effect.¹⁴³ Implementation of the Fifth Directive would, however, force other Member States to adopt standards similar to those of the FRG. This, in turn, would facilitate transnational operations and make corporations less hesitant to incorporate under the FRG's restrictive code. In the United Kingdom, on the other hand, implementation of the Fifth Directive would involve major statutory changes. Current British law makes no provision for employee participation on supervisory boards. The drafters of the proposal currently before the Council have attempted to take into

139. FIFTH DIRECTIVE, *supra* note 121, at 8.

140. FIFTH DIRECTIVE, *supra* note 121, at arts. 4(2) and 21b(2).

141. Proposition d'une cinquième directive tendant à coordonner les garanties qui sont exigées dans les États 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. EUR. COMM. (No. C 131) 49 (1972), *translated and analyzed in* COMM'N OF THE EUROPEAN COMMUNITIES, PROPOSAL FOR A FIFTH DIRECTIVE ON THE STRUCTURE OF SOCIÉTÉS ANONYMES, BULL. EUR. COMM. SUPP. 10/72 (1972).

France, Italy and the United Kingdom (after it joined the Community in 1973), raised vocal objections to the proposal. They objected to the required participation of employees within company structure and to the substantial changes the proposal would require in the structure of national corporations.

In response to these criticisms, the Commission published a report in 1975. See THE GREEN PAPER, *supra* note 4. The Green Paper emphasized the need for Community legislation in the area and attempted to raise the issues important for a "constructive debate." *Id.* at 46.

The Green Paper achieved its purpose in that it sparked a lively debate among governments, employers, trade unions, and scholars. See generally *Workers' Participation in Management*, 10 BULL. COMP. LAB. REL. 233 (Blanpain, ed. 1979); Conlon, *Industrial Democracy and EEC Company Law: A Review of the Draft Fifth Directive*, 24 INT'L & COMP. L.Q. 348 (1975); Daübler, *The Employee Participation Directive—A Realistic Utopia?*, 14 COMMON MKT. L. REV. 457 (1977).

142. COMM'N OF THE EUROPEAN COMMUNITIES, PROPOSAL FOR A FIFTH DIRECTIVE ON THE STRUCTURE OF SOCIÉTÉS ANONYMES, BULL. EUR. COMM. SUPP. 1/72 (1972) at art. 4(1). The original proposal called for a supervisory board, two-thirds of whose members would be elected by shareholders and one-third of whom would be elected by the employees. *Id.* at art. 4(2). Day to day management decisions would be made by a management board that was appointed by members of the supervisory board. *Id.* at arts. 2(1)(1) and 3(1).

143. See *supra* note 51.

account British concerns,¹⁴⁴ but the Fifth Directive has not gained the support of the government of the United Kingdom.¹⁴⁵

The extent to which the Fifth Directive will actually increase the role of Community workers in the management of the enterprise is unclear. Its implementation might actually decrease the power of unions. If employee interests have been represented at the initial decision-making stage, it is more difficult for labor interests to rely upon the adversary relationship between business and labor to attack management decisions. Employee representatives may feel compelled to defend management decisions. In addition, the reasoning behind the proposal presupposes that major corporate decisions affecting the lives of employees are made at a highly centralized level. Employers claim that this presumption is not accurate.¹⁴⁶ If the employers are correct, the proposal fails in its attempt to give workers influence over decisions made by the company.

In any case, adoption of the Fifth Directive would provide Community workers with regularized access to management and the potential to influence corporate decision making. Although employees would not be able to outvote management, their input would be obtained during the decision-making process rather than after the fact. This should facilitate Community-wide planning by corporations and workers, as well as the flow of information about corporate activity throughout the Community.

The Community has debated the proposal for a Fifth Directive for over ten years. The Fifth Directive is an attractive option because it creates a uniform system and method, providing suitable protections to worker interests, and yet does not reduce the ability of Member States to regulate corporate activity.¹⁴⁷ The presentation of the amended version of the Fifth Directive to the Council in July, 1983 rekindled interest in the Fifth Directive. While it is too early to predict the Council's response to the new proposal for a Fifth Directive, it is clear that the Fifth Directive continues to face stiff opposition.

C. The Vredeling Proposal

The Vredeling Proposal¹⁴⁸ on employee information and consultation procedures represents a third attempt to increase the rights of employees in their

144. See REPORT OF THE COMMITTEE OF INQUIRY ON INDUSTRIAL DEMOCRACY, DEPARTMENT OF TRADE, CMD. 6706 (1977) (commonly referred to as The Bullock Report). The Bullock Report undertakes a thorough analysis of the need for and possible effects of worker participation in the United Kingdom. It favors worker participation as a means of decreasing conflict and increasing productivity. Specifically, the report recommends a one-tiered system of unitary boards rather than the two-tiered system used in the FRG. In addition, it recommends that participation be implemented gradually and only if a sufficient majority of employees indicate that they desire representation. See *id.* at 160-162. The amended proposal for a Fifth Directive incorporates this concern by permitting Member States to allow enterprises to incorporate under a one-tiered system. See FIFTH DIRECTIVE, *supra* note 121, at art. 2(1).

145. See *United Kingdom: The Participation Debate*, EUR. INDUS. REL. REV., March 1984, at 13.

146. See Blanpain, *Transnational Regulation of the Labor Relations of Multinational Enterprises*, 58 CHI.-KENT L. REV. 909, 911-912 (1982).

147. *But cf.* STATUTE FOR A EUROPEAN COMPANY, *supra* note 106 (delegating control of corporate activity to the Community).

148. The proposal is named after its proponent, Hendrick Vredeling, former Commissioner for

jobs.¹⁴⁹ The Proposal addresses issues raised by the increasing number of transnational undertakings operating in the Community. The Proposal is based on Articles 100 and 117 of the Treaty of Rome,¹⁵⁰ and builds on policies begun with Directives 75/129 and 77/187, and the Fifth Directive.¹⁵¹ Its supporters argue its adoption is necessary because the earlier directives do not cover all situations likely to affect the interests of Community employees.¹⁵²

Implementation of the provisions of the Vredeling Proposal would require extensive legislative changes in most Member States. Although the changes would promote Community-wide decision making, the particular changes required might not always benefit individual Member States. For this reason, it appears unlikely that the Vredeling Proposal will soon be adopted.¹⁵³ Member States are hesitant to support a proposal that would limit their ability to determine what role employees should play in corporate governance.

The Vredeling Proposal would not implement worker participation in the traditional sense by establishing a board of employees directly involved in decision making as required by the Fifth Directive.¹⁵⁴ Instead, employee involvement would be achieved through the development of a regularized relationship between management and workers. The Vredeling Proposal mandates two types of ac-

Social Affairs of the European Community. See Blanpain, *Introduction to R. BLANPAIN, F. BLANQUET, F. HERMAN & A. MOUTY, THE VREDELING PROPOSAL* 17 (1983).

149. COMM'N OF THE EUROPEAN COMMUNITIES, AMENDED PROPOSAL FOR A COUNCIL DIRECTIVE ON PROCEDURES FOR INFORMING AND CONSULTING THE EMPLOYEES OF UNDERTAKINGS WITH COMPLEX STRUCTURES, IN PARTICULAR TRANSNATIONAL UNDERTAKINGS, BULL. EUR. COMM. SUPP. 2/83 (1983) [hereinafter cited as VREDELING PROPOSAL]. See generally Pipkom, *The Draft Directive on Procedures for Informing and Consulting Employees*, 20 COMMON MKT. L. REV. 725 (1983); R. BLANPAIN, F. BLANQUET, F. HERMAN & A. MOUTY, *supra* note 148; *EEC—"Vredeling" Revised: A Commentary*, EUR. INDUS. REL. REV., August 1983, at 7.

The draft presently under consideration is an amended version of the original Vredeling Proposal. See *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) reprinted and analyzed in COMM'N OF THE EUROPEAN COMMUNITIES, PROPOSAL FOR A COUNCIL DIRECTIVE ON PROCEDURES FOR INFORMING AND CONSULTING THE EMPLOYEES OF UNDERTAKINGS WITH COMPLEX STRUCTURES, IN PARTICULAR TRANSNATIONAL UNDERTAKINGS, BULL. EUR. COMM. SUPP. 3/80 (1980). See generally Note, *Multinational Regulation of MNE Labor Relations*, 4 B.C. INT'L & COMP. L. REV. 409 (1981).

150. See *supra* text accompanying notes 22-26. The Vredeling Proposal is based on the same provisions of the Treaty of Rome as Directive 75/129 and Directive 77/187.

151. VREDELING PROPOSAL, *supra* note 149, at Preamble.

152. The Preamble of the VREDELING PROPOSAL, *supra* note 149, states that: "these information and consultation requirements [Directives 75/129 and 77/187, and the Fifth Directive] do not aim to cover all situations likely to affect the employees' interests and, in particular, do not extend specifically to decisions taken at parent company level rather than independently by the employing subsidiary."

153. The Council tabled discussion of the Vredeling Proposal in December 1983, noting that its adoption will not be possible until there is a change of administration in Great Britain. At present, only France and Greece favor implementation of the Vredeling Proposal. The FRG favors legislation in the area but believes the present plan may have a detrimental impact upon industrial relations. See *Council Refers Vredeling Back*, 11 INDUS. REL. EUR., December 1983, at 1; *European Labor Ministers Fail to Approve Plan for Employees of Multinational Firms*, DAILY LAB. REV., BUREAU NAT'L AFF., CURRENT DEVELOPMENTS, December 13, 1983, at A-2.

154. See *supra* text accompanying notes 129-132.

tivity, the provision of information to employees and consultation with employees. These activities would become part of the normal decision-making process of the corporation.

The information prong is satisfied if the parent undertaking, at least once a year, provides employee representatives with a clear picture of the activities of the parent undertaking and its subsidiaries.¹⁵⁵ The information conveyed must include all relevant facts regarding the economic and financial situation of the company, as well as information regarding the employment situation and probable trends.¹⁵⁶

The consultation prong of the Vredeling Proposal requires the management of the parent undertaking to inform the employee representatives whenever management decisions may have serious consequences for workers employed by subsidiaries of the company located in the Community.¹⁵⁷ Once the information is passed to the employee representatives, the employer must, within thirty days, consult with the representatives "with a view to attempting to reach agreement."¹⁵⁸ The Vredeling Proposal does not require that management and the employee representatives reach agreement.

The most controversial feature of the Vredeling Proposal is its treatment of subsidiary undertakings. The Proposal requires corporations to report to the employee representatives of each subsidiary on the activities of the entire corporation.¹⁵⁹ By treating parent undertakings and their subsidiaries as one unit, the Commission hopes to facilitate Community-wide planning and employee involvement in decision making.¹⁶⁰ Both corporations and employees would have to make decisions based on the effects of the decision throughout the Community rather than on the effects in a particular Member State.

The Vredeling Proposal has been sharply criticized by employers and Member States precisely because of its Community oriented approach.¹⁶¹ Although propo-

155. VREDELING PROPOSAL, *supra* note 149, at art. 3(1).

156. VREDELING PROPOSAL, *supra* note 149, at art. 3(2).

157. VREDELING PROPOSAL, *supra* note 149, at art. 4(1). Examples of relevant management decisions include the closure or transfer of a business, restrictions or substantial modifications to the activities of an undertaking, major modifications with regard to organization, working practices or production methods, including modifications resulting from the introduction of new technologies, the introduction or cessation of long-term cooperation with other undertakings, and the implementation of measures relating to workers' health or industrial safety. *Id.* at art. 4(2). Management must inform the employee representatives of the grounds for the proposed decision, the legal, economic and social consequences of the decision for the employees and the measures planned that would affect the employees. *Id.* at art. 4(1).

158. VREDELING PROPOSAL, *supra* note 149, at art. 4(3). Both employers and trade unions have criticized the use of this phrase because of its ambiguous language. See *United Kingdom: the participation debate continued*, EUR. INDUS. REL. REV., June, 1984, at 16-17.

159. VREDELING PROPOSAL, *supra* note 149, at art. 3(1).

160. See, e.g., COMM'N OF THE EUROPEAN COMMUNITIES, PROPOSAL FOR A COUNCIL DIRECTIVE ON PROCEDURES FOR INFORMING AND CONSULTING THE EMPLOYEES OF UNDERTAKINGS WITH COMPLEX STRUCTURES, IN PARTICULAR TRANSNATIONAL UNDERTAKINGS, BULL. EUR. COMM. SUPP. 3/80, at 5 (1980).

161. See, e.g., R. BLANPAIN, F. BLANQUET, F. HERMAN & A. MOUTY, *supra* note 148, at 75-99; Kolvenbach, *EEC Directive on Information and Consultation of Employees (Vredeling-Proposal)*, 10 INT'L BUS. LAW. 365 (1982).

nents of the Vredeling Proposal state that management's final decision-making powers are not diminished by the draft Proposal,¹⁶² the purpose of the Vredeling Proposal is to permit workers to receive more information about the activities and plans of the corporation.¹⁶³ Corporations, fearing the leak of vital information, believe that the benefit to employees is outweighed by the burden placed on the corporation.

As with the Statute for a European Company and the Fifth Directive, the Vredeling Proposal attempts to regulate employee involvement in decision making at the Community level. Through Community regulation, employees would have access to the decision-making process, regardless of the nationality of the company. This internationalization of the decision-making process would increase the power of the Community and facilitate industrial planning at a Community level. Despite this potential benefit, some Member States, including the United Kingdom, are unwilling to risk any loss of power to either the Community or its workers and refuse to support the Proposal.¹⁶⁴

IV. CONCLUSION

The formation of a common market and the establishment of a common commercial policy in the European Community have increased the movement of capital and sources of production among the Member States of the Community. Community enterprises are becoming larger and more centralized. These developments have decreased the ability of employees to effectively protect their interests at a local level.

The European Community has responded by taking an increasingly active role in employment policy. The Treaty of Rome does not explicitly grant this power to the Community but it may properly be implied. One focus of the Community has been the harmonization of the laws of the Member States regarding redundancy. Two directives, Directive 75/129 on collective redundancies and Directive 77/187 on the transfer of undertakings, businesses, or parts of businesses, have been adopted. Directive 75/129 requires the Member States to place procedural restrictions on the dismissal of employees in a redundancy situation. Directive 77/187 requires Member States to adopt provisions placing procedural restrictions in the form of notification and informational rights to employees when there is a transfer of an undertaking. It also grants limited substantive rights in that employees may not automatically be dismissed when an undertaking is transferred.

Both of these directives were modelled after West German statutes and had virtually no effect within the FRG. The FRG, however, supports the directives since they bring all Member States closer to West German standards, thereby lessening the threat of investment leaving the FRG for other Member States.

162. See *Opinion of the Economic and Social Committee on the proposal for a Directive on procedures for informing and consulting the employees of undertakings with complex structures, in particular transnational undertakings*, 25 O.J. EUR. COMM. (No. C 77) 6, 9 (1982).

163. VREDELING PROPOSAL, *supra* note 149, at Preamble.

164. See, e.g., *United Kingdom: The Participation Debate* (pts. 1 & 2), EUR. INDUS. REL. REV., March, 1984, at 13, EUR. INDUS. REL. REV., June, 1984, at 16.

The United Kingdom enacted legislation to implement both directives. The procedural restrictions of the directives have been implemented in such a way that they will have little effect; the substantive restrictions required by the directives are minimal and are also unlikely to have any effect.

The Community's second approach to employment policy is to grant workers a broader right to participate in the management of the enterprise. Although this approach appears more promising, the Community has not successfully implemented any directives or regulations mandating worker participation. Several factors, primarily political, have made this process exceedingly difficult. The unanimity requirement contained in Articles 100 and 235 of the Treaty of Rome requires agreement that can rarely be reached on issues so controversial. The differing historical, legal, and cultural backgrounds of the Member States make agreement even more difficult.

It seems then that neither approach has worked particularly well. The directives harmonizing dismissal procedures have had little effect and the worker participation proposals have met with such resistance that they have not been adopted. The inability of the Community to effectively require Member States to adopt and implement provisions harmonizing laws regarding employee involvement in decision making has a detrimental impact on the Community as well as its workers. Living and working conditions vary greatly throughout the Member States and prevent the Community from operating as one economic unit. This, in turn, hinders the development of a successful Community industrial strategy.