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Employee participation and company structure in the European Community

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contents

Part I

Part I

Introduction

The need for Community legislation

Throughout the Community, a debate has been taking place for some time concerning the laws applicable to enterprises, and to companies in particular. The debate has been broad in scope, but the recurrent central theme has been the decision making structure of enterprises, and especially the role of an enterprise's employees in relation to that structure. In each of the Member States, these issues have been the subject of political discussion, often animated, and of proposals for reform, sometimes of a far reaching character. At the Community level, proposals have been made which have played an important part in the debate, notably the original proposal for a Statute for the European Company,[1] the proposal for a fifth directive to coordinate the laws of Member States as regards the structure of 'sociétés anonymes',[2] and the amended proposal for a third directive on coordination of safeguards in connection with mergers between 'sociétés anonymes'.[3]

At the outset, certain fundamental questions require an answer. Why has the Commission proposed Community legislation in relation to the undeniably controversial and difficult issue of the role of employees in relation to the decision-making structures of companies? Is this not an issue which should be left to the Member States to handle in their own particular ways as an essentially domestic matter? Certainly, there has been no shortage of critics challenging the need for Community legislation.

The answer to these questions involves a consideration, first, of the reasons for proposing Community legislation creating a common market for companies at all, and second, of the Commission's role as regards the development of economic and social policy in the Community.

If progress is to be made towards a European Community in the real sense of the words, a common market for companies is an essential part of the basic structure which must be created.

The corporation with limited liability and a share capital is the typical form adopted by the majority of the Community's most important industrial and commercial enterprises. They have become the principal buyers and sellers of goods, the major borrowers and lenders of capital, and the most significant developers and users of new technology. They are the main producers of wealth, and as employers, they have an immediate impact on the lives of large numbers of the Community's citizens. In sum, they are institutions of strategic importance in relation to the economic and social systems of the Community.

At the present time, these companies are incorporated under the separate laws of the nine Member States. There are substantial differences between these national laws, relating, in particular, to the internal structure of companies, the powers of directors, the rights of shareholders and of the employees. This situation constitutes a real barrier to cross-frontier activities, both for those who might deal with a company and for the companies themselves.

Those invited to deal with or invest in a company incorporated under foreign laws with which they are not familiar will naturally be reluctant to do so because at present no common legal standards, even on matters of great importance, can be relied upon for the prevention of loss or hard- ship. Moreover, a company trading in a foreign State through a branch often does not offer those doing business with the company the same assurances and guarantees in

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[1] Submitted to the Council on 30 June 1970. Supplement to Bull. EC 8-1970.

[2] Presented by the Commission to the Council in October 1972. Supplement 10/72 — Bull. EC. The approximate equivalents are the 'société anonyme' in Belgium, France and Luxembourg, the 'aktieselskab' in Denmark, the 'Aktiengesellschaft' in Germany, the 'società per azioni' in Italy, the 'naamloze vennootschap' in Belgium and the Netherlands, and the 'public limited liability company' in Ireland and the United Kingdom.

[3] Submitted to the Council on 4 January 1973. Bull. EC 1-1973, point 2113.

fact as a company incorporated in the State in question. On the other hand, if a company seeks to overcome these problems by setting up a subsidiary incorporated in another Member State, the subsidiary will have a different structure from the parent. For an enterprise which wishes to operate in all Member States, the result is a complex, expensive and inefficient organization. Admittedly, enterprises are able to operate internationally under these conditions, particularly if they have ample resources, but only at a cost which is substantially higher than it need be.

Moreover, since every company is incorporated under a particular national system, serious barriers prevent the rational restructuring of enterprises to take advantage of markets which are Community-wide rather than national. For example, a company cannot normally transfer from one Member State to another without a drastic dissolution and reconstruction. More seriously, a company is in virtually all cases incapable of merging with a company incorporated in another Member State. Each company is in a sense imprisoned within its national system and cannot expand or combine with another company beyond its national frontiers in the same way and with the same freedom as it can inside the Member State in which it is incorporated.

Approximation of national laws applying to companies, through the adoption of suitable directives, and the creation of wholly new Community company law, such as the European Companies Statute[1] and the Convention on International Mergers,[2] will enable these obstacles to be overcome. Enterprises will then be able to pursue their affairs throughout the Community with a facility similar to that which they enjoy within the boundaries of a single Member State. As a result, industrial and commercial activity will be free to develop fully across the boundaries of the Member States, and the present free trade area will have an opportunity to mature into a robust commercial and industrial Community.

The question of why there should be Community legislation concerning the role of employees in relation to the decision making structures of companies is in part answered by these same arguments. In view of the central importance of this issue, for the companies themselves, for employees and their representative organizations, and for society at large, the arguments in favour of a convergence of national laws and the creation of Community law have special force. In particular, a greater degree of convergence between the laws regulating the role of employees in the decision making structures of companies will facilitate the restructuring of enterprises within the Community on an international basis. Up to the present, the differences between the systems in force in different Member States have constituted a particularly serious obstacle to the rational reorganization of the legal structures of enterprises across national frontiers, which has been overcome only with considerable difficulty and by the use of relatively complex legal devices, such as the arrangements adopted by Hoesch AG and Koninklijke Nederlandsche Hoogovens en Staalfabrieken NV to form Estel NV and its two operating companies.

In addition, the establishment of a common market for companies should not be approached as if it were a politically neutral, essentially technical matter. The way in which a legal system structures industrial and commercial enterprises is intimately connected with fundamental elements in the general social and economic policies adopted by the society in question. At the Community level, it is necessary, in order to construct a common market for companies, to ensure that the Community framework will take proper account of the way in which relevant social and economic policies are developing in the Member States. Furthermore, the

[1] Supplement 4/75 — Bull. EC.

[2] Work is currently proceeding in a working group under the Chairmanship of Mr Berthold Goldman, Professor at the University of Law, Economics and Social Sciences of Paris, to adapt the Draft Convention on the International merger of 'sociétés anonymes' (Supplement 13/73 — Bull. EC), following the enlargement of the Community in 1973.

creation of a common market for companies is not an end in itself. It is only one means of achieving the Community's fundamental objectives which include a harmonious development of economic activities, including a fairer distribution of economic activity between the various regions of the Community, an increase in stability, and the improvement of the living and working conditions of the Community's citizens. Accordingly, in constructing the common market, the Community must necessarily take steps to approximate relevant economic and social policies in a way which will ensure that sufficient progress is made as to the realization of the Community's fundamental objectives in all Member States.

In the view of the Commission, it is clear from the developments which have been and still are taking place in many Member States, that the time is ripe for the reform of certain social institutions, companies included, to take account of some important evolutions which have been gathering momentum for some time.

The first evolution is the increasing recognition being given to the democratic imperative that those who will be substantially affected by decisions made by social and political institutions must be involved in the making of those decisions. In particular, employees are increasingly seen to have interests in the functioning of enterprises which can be as substantial as those of shareholders, and sometimes more so. Employees not only derive their income from enterprises which employ them, but they devote a large proportion of their daily lives to the enterprise. Decisions taken by or in the enterprise can have a substantial effect on their economic circumstances, both immediately and in the longer term; the satisfaction which they derive from work; their health and physical condition; the time and energy which they can devote to their families and to activities other than work; and even their sense of dignity and autonomy as human beings. Accordingly, continuing consideration is being given to the problem of how and to what extent employees should be able to influence the decisions of enterprises which employ them.

The second is a growing awareness of the need for institutions which can respond effectively to the need for change. This awareness is based upon the perception that the present era is one characterized by change, and that this feature may well become more pronounced in years to come. Changes in the economic environment, sometimes of a radical nature, like the recent sharp rise in energy prices, are bound to confront the Community in the future, probably with increasing frequency. As far as industrial affairs are concerned, the difficult situations which have arisen in several Member States as a result of the impact of basic technological changes on long established industries and their associated communities have dramatically emphasized the trend. And it is clear that the completion and operation of the European Community will itself involve structural changes of a substantial kind. All Member States without exception are thus faced with the prospect of having to implement changes, sometimes of a radical nature, as regards their economic and social structures, both immediately and for the foreseeable future.

In some ways, there is a degree of tension between these two developments. Changes which are desirable from a broad economic and social point of view may appear to be more difficult to implement if those concerned, particularly those with a vested interest in existing systems and structures, are to participate in the decision making. However, for sophisticated, industrial societies, there is no alternative, if they are to retain a democratic character. Difficult problems of industrial relations will be easier to solve properly, fairly and with a minimum of wasteful confrontation, if there are mechanisms which involve those closely affected in the process of finding solutions. For while such mechanisms cannot always produce complete agreement, they can at least help to ensure a reasonable degree of understanding, and an adequate level of acceptance.

Accordingly, in all Member States, and in the Community, different methods exist and are being considered for bringing about a dialogue between the social partners and, where appropriate, with public authorities, at various levels

of the economy. The enterprise, being an institution in which fundamental decisions are taken, cannot escape this re-organization of the relationships between those who have the power to make decisions and those who must carry them out. And the reform of laws relating to the decision making structures of companies inevitably involves consideration of these broad and fundamental issues of human and social relations.

In making its proposals aimed at creating a common market for companies, the Commission must necessarily take account of these developments, and ensure that proposed Community legislation adequately reflects them. It must also seek to ensure that measures taken in the Member States are not so divergent that they themselves become obstacles to the development of a genuine industrial, commercial and social Community.

In addition, the Commission has its responsibility to ensure that its proposals will make a contribution to the realization of the Community's fundamental objectives. In particular, the Commission must seek to ensure that proposed legislation will tend to improve living and working conditions throughout the Community. Too great a divergence in the laws regulating the role of employees in relation to the decision making structures of companies constitutes not only a barrier to cross-frontier movements of companies, capital and employees, but, more fundamentally, it is also a denial of the idea of a Community as far as employees are concerned. If the Community is to be a reality for employees, as well as for companies and the holders of capital, then the rights and legal status of a company's employees cannot be allowed to remain well developed in some Member States, but limited or rudimentary in others. A degree of convergence is required which will ensure that an employee, wherever he is employed, enjoys a legal status in relation to the company which employs him which is not radically inferior to that enjoyed by employees elsewhere in the Community. Accordingly, the Commission must seek to ensure that the laws of the Member States regulating the rights of employees in relation to the decision making structures of companies develop within a Community framework which guarantees an adequate degree of convergence between the systems in force in different parts of the Community.

A sufficient convergence of social and economic policies and structures in these areas will not happen automatically as a consequence of the integration of Community markets. Conscious political decisions are required to ensure that reforms decrease present disparities and that a common market for companies is created in a way which takes proper account of the manner in which economic and social institutions and policies are evolving. Action taken at the national level which does not take account of the European dimension may well be harmful to the development of the new European industrial society. In this field as in others however, the goal is not instant uniformity for uniformity's sake, nor is it desired to place a restraint on positive developments which are in progress in certain countries. The objective is the gradual removal of unacceptable degrees of divergence between the structures and policies of the Member States.

The current period of profound economic and social change in the world, characterized by the need to pay several times more for basic energy supplies, emphasizes the necessity for action. Enterprises must produce more efficiently, both in order to ensure their own survival and to help the Member States' balance of payments. Consequently, the need for industrial reorganization to establish rational and efficient industrial structures has been greatly increased. At the same time, economic expansion has slowed, and in certain areas come to a halt or even been replaced by contraction. The scope for real increases in incomes has diminished or disappeared, and unemployment continues to grow. As a result, industrial relations have been placed under stress. Conflicts of interest are more acutely felt not only as to wage increases, but also of course in relation to industrial reorganization, in the interests of efficiency, competitiveness and future prosperity.

Furthermore, the current economic situation, with its reduced possibilities for growth, has emphasized the need for mechanisms which will adequately ensure the pursuit of goals other than economic growth, such as the improvement of the quality of life and working conditions, the protection of the environment and the interests of the consumer. The pursuit of such goals can probably be secured only by the existence of decision making processes in enterprises which have a broader, more democratic base than such processes often have at present.

On the other hand, it is also clear that adequate allowance must be made for the fact that existing structures differ from one Member State to another because of the varied development of their economic and social histories, and their diverse legal traditions. Community legislation must seek to assist convergent developments in the future, while recognizing that the divergent developments of the past impose certain limitations, as regards both the definition of Community objectives, which must be as broad as possible, and also the speed with which those objectives can be approached.

For this reason, the draft Statute for European Companies, which has recently been amended in accordance with the opinion of the European Parliament[1] and presented to the Council,[2] does not, in the view of the Commission, constitute a prototype for a directive approximating national laws. The Statute proposes to create, for the benefit of certain companies with a transnational character, an entirely optional alternative to the use of different national laws. Accordingly, it contains a single, comprehensive set of rules, with advantages and also obligations not known to national systems. That is essentially different from a directive which, since it will apply to nine national laws under which companies are already constituted, will necessarily have to be more flexible. The requirement is for a framework, which will be viable, both now and in the long term, and which will be elastic enough to include those developments which are convergent within a broad range of mutually compatible solutions. There is also a clear need for adequate transitional arrangements for certain changes which are required, since they concern the operation of institutions firmly anchored in their particular traditions.

By publishing a 'green paper' at this time, the Commission intends to make a new contribution to the debate in progress. The publication has two main functions. The first is to give an account of the principal positions and trends, political and legal, which are discernible in the Community. The second is to focus attention on what appear to be the fundamental questions which must be answered, and the possible answers to those questions, if the current debate is to be brought to a useful conclusion for the time being at the European level. In particular, it is hoped that the publication will facilitate the preparation of the Opinion of the European Parliament on the Proposal for a fifth directive on the structure of 'sociétés anonymes', in order to adapt the Proposal to current circumstances, and make it more flexible.

The first part of the paper will begin with a brief summary of relevant Community programmes to date. The heart of the report consists of a general account and analysis of the principal positions and trends discernible in the Community with regard to the issues of company structure and employee participation. This concludes with a consideration of the concrete problems to which this situation presently gives rise at the Community level, and of certain possible approaches to those problems. The second part of the report is a country-by-country survey giving a picture of the situation in each of the Member States of the Community, being a summary of the information which formed the factual basis for the preceding general account

[1] Opinion on the proposal for a Regulation embodying a Statute for the European Company, OJ C93 of 7.8.1974, p. 22.

[2] Amended Proposal for a Council Regulation on the Statute for European Companies. Submitted by the Commission to the Council on 13 May 1975. Supplement 4/75 — Bull. EC.

and analysis. Finally, the special problems posed by the implementation of employee participation in groups of companies have been treated in Appendix I, and the functions of a European Works Council, as proposed in the European Companies Statute,[1] are considered in Appendix II.

To summarize, in the view of the Commission, the development of Community legislation in this field constitutes an important guarantee of a necessary degree of convergence in the social and economic progress of our time. While not inhibiting further developments, it will constitute an important part of a common structural foundation upon the evolution of which the prosperity of each of the Community's citizens in large part depends. The legislation must therefore create a framework which takes proper account of current developments, social, economic and political, and of the diverse traditions of the Member States.

The political importance of such an evolution for all Member States can hardly be denied, both as regards their relationships with each other, and their relationships with the rest of the world. If there is not a sound economic and social structure for the Community as a whole, there is a serious danger that, sooner or later, the needs and interests of certain parts of the Community will be so different from those of other parts, that the existing Community arrangements will be insufficient to to take the strain. Similarly, only by developing a common structural foundation can the Member States hope to adopt more united policies as to the world outside. If the underlying structure is made up of elements which are disparate and even inconsistent, then so will be the policies pursued by the Member States. Failure to make progress in constructing a common economic and social foundation will not only make it impossible to contemplate economic and monetary union, but will constitute a continuing threat to what has already been achieved. The Community's foundation must be completed for otherwise it may well collapse.

[1] Supplement 4/75 — Bull. EC.

Community programmes and proposals

Up to the present, Community initiatives have been taken concerning the decision making structures of enterprises and the employees' role in relation thereto in two main areas: first, in connection with the social action programme adopted by the Council in its resolution of January 1974[1] and second, in the context of the approximation of company laws and the creation of European company law. In the near future, new initiatives will be taken in the particular context of the special problems posed by the activities of multinational enterprises.[2]

As for the social action programme, the Council resolved in January 1974 that measures should be taken in the immediate future to involve workers or their representatives in the life of undertakings in the Community.[1] In this connection, in February 1975 the Council adopted a directive on collective redundancies[3] which requires the Member States to oblige employers contemplating large scale dismissals of their employees to enter into consultations with the employees' representatives with a view to reaching an agreement. These consultations are to cover ways and means of avoiding collective redundancies or of reducing the number of employees affected, and mitigating the consequences. The employees' representatives must be supplied with all relevant information concerning the redundancies. Furthermore, projected collective redundancies are to be notified in advance to a competent public authority, and

[1] Council Resolution of 21.1.1974 concerning a social action programme, OJ C13 of 12.2.1974, p. 1, Supplement 2/74 — Bull. EC.

[2] The problem of the role of employees in relation to multinational enterprises has already been considered in *Multinational undertakings and Community Regulations*. Communication from the Commission to the Council, presented on 8 November 1973, Supplement 15/73 — Bull. EC.

[3] Council Directive on the approximation of the laws of the Member States relating to collective redundancies (75/129/EEC), OJ L48 of 22.2.1975, p. 29.

will not normally take effect until a period of thirty days has expired during which time the public authority is to seek solutions to the problems raised by the projected redundancies.

The Commission has also proposed a directive on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations generally.[1] The proposed directive would apply to international mergers taking place under the terms of the proposed convention on international mergers to which reference has already been made, and to all internal mergers, takeovers and amalgamations involving a change of employer, other than those covered by the third directive on the coordination of safeguards in connection with mergers between 'sociétés anonymes'.[2] The proposal, as amended, requires each enterprise concerned, before carrying out a projected operation, to inform the representatives of their respective employees of the reasons which led them to consider such an operation, and also of the legal, economic and social consequences which it entails for the employees, indicating what measures are to be taken on their behalf. If the employee representatives so request, negotiations shall take place immediately concerning these measures.

In addition, if the employees' representatives consider that the operation entails prejudice to the employees' interests, the enterprises concerned must engage in negotiations for the establishment of a social plan consisting of measures to be taken on the employees' behalf. If no agreement is forthcoming on this matter, either party can put the matter before an arbitration authority which will decide in the last resort on the measures to be taken in favour of the employees. This authority is to be composed of equal numbers of members designated by each of the parties who in turn are to co-opt a president.

These provisions are in harmony with the views expressed by the European Parliament on 8 April 1975.[3]

Similar rules have been included in the revised proposal for a European Companies Statute, and in the third directive on mergers between 'sociétés anonymes' in the form approved by the European Parliament, both of which are discussed in the context of Community legislation on companies below.

Furthermore, work is proceeding to encourage the development of collective bargaining at European level. The European Card Index of Collective Agreements is being compiled, and joint sectoral committees have been set up to bring the two sides of particular industrial and economic sectors together at the Community level. Developments in this area probably cannot be particularly rapid owing to the difficult organizational problems and the need to respect the autonomy of each of the parties. But it is hoped that in the long run these programmes will facilitate the conclusion of collective agreements at the European level. In particular, the conclusion of such agreements constitutes an essential part of the solution to the problems posed by the multinational enterprise.[4]

Reference should also be made at this point to those programmes of the Community which are not concerned directly with the role of employees in relation to the decision making of enterprises, but which seek to involve employers and employees in decision making at the Community level, such as the consultative function of the most general kind performed by the Economic and Social Committee and the more specific

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[1] Proposal for a Directive of the Council on harmonization of the legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations. Submitted to the Council by the Commission on 21.6.1974. OJ C104 of 13.9.1974, p. 1. Amended proposal submitted to the Council by the Commission on 18.8.1975, Bull. EC 7/8-1975, point 2235.

[2] Bull. EC 1-1973, point 2113, see also below.

[3] Opinion on the proposal for a Directive on harmonization of the legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations, OJ C95 of 28.4.1975, p. 17.

[4] *See Multinational undertakings and Community Regulations.* Communication from the Commission to the Council, presented on 8.11.1973, Chapter IIIB. Supplement 15/73 — Bull. EC.

consultative functions of such institutions as the European Social Fund Committee, the Standing Committee on Employment, and the joint sectoral committees. Participation in the enterprise and participation in Community decisions, together with national programmes which seek to promote participation in governmental decision making within Member States, are complementary responses at different levels to the same requirements of economic and social policy. Accordingly, Community measures and proposals concerning participation in relation to enterprises should not be considered in isolation, but as an important part of a broad range of developments which have the same fundamental purposes.

As for the future, preparatory work has been commenced, in accordance with the Council's resolution of January 1974,[1] to establish an action programme for employees aimed at 'humanization of their living and working conditions' which will have an undoubted impact on the role of the employee in relation to the decision making of enterprises. Employee participation in the decision making of companies has an obvious relevance to such programmes, and for this reason, these matters should not be considered completely separately from each other.

Turning to the approximation of company laws and the creation of Community company laws, the most important initiatives taken to date with regard to the decision making structures of enterprises and the employees' role in relation thereto, are the proposals to which reference has already been made, namely for a European Companies Statute, for a third directive on coordination of safeguards in connection with mergers between 'sociétés anonymes', and for a fifth directive to coordinate the laws of Member States as regards the structures of 'sociétés anonymes'. Preparatory work has also begun in relation to takeovers and groups of companies which will probably result in the making of further proposals having an effect on the decision making structures of enterprises, and the role of employees in relation thereto. The difficult problem posed by groups of companies in relation to employee participation, namely the need to ensure both effective central control and at the same time, real employee influence on decision making, is discussed in Appendix I.

The proposed European Companies Statute will constitute the directly applicable Community law under which enterprises which wish to engage in certain kinds of cross-frontier activity will be able, if they wish, to form European companies and thereby adopt legal forms appropriate to the scale and requirements of the European market in which they wish to operate.

The structure which the Statute provides is sophisticated and comprehensive. European companies would have in addition to the shareholders' general meeting, a two tier or dualist board system with a management body responsible for managing and representing the company, and a supervisory body responsible for appointing, supervising and if necessary, removing the management body. The management body would be obliged to obtain the prior consent of the supervisory body to certain matters of major importance to the company, such as programmes of expansion and contraction, organizational changes and long term arrangements with other enterprises. Further specific matters requiring the supervisory body's prior consent could be specified by the terms of the company's articles. Moreover, provision has been made for the employees of a European company to influence the decision making of the enterprises in a number of ways.

First, the conditions of employment which are to apply to the employees of the European company may be regulated by European collective agreements made between the company and the trade unions represented in its establishments.

Second, a European works council is to be formed in every European company having establishments in more than one Member State, which is to be responsible for representing the interests of all the employees of the company on

[1] OJ C13 of 12.2.1974, p. 1.

matters which concern the company as a whole or several establishments. This Council will have the following rights: to be informed on the company's affairs, to discuss those affairs with the management body, to be consulted by the management body before the making of certain important decisions, and to give or withhold its consent as regards certain other aspects of the company's affairs which affect employees very closely, such as the settlement of social plans to deal with the consequences of contractions in the enterprise.

However, in general, employee representative bodies formed in the establishments of a European company under national laws are to continue to exercise their existing functions and powers. Likewise, trade unions will continue to play their customary role as far as the representation of their members is concerned, and indeed the primacy of all collective agreements has been specifically guaranteed.

Finally, the employees are to have the right to participate in the appointment of the members of the company's supervisory body. The original proposal required that the employees should appoint at least one third of the members of the supervisory body, the remainder being appointed by the shareholders' general meeting. Following the opinion of the European Parliament given in July 1974,[1] the Commission has amended its proposal which now requires that the shareholders should elect one third of the members, the employees the second third, and that these elected members should together co-opt the remaining members, who are to be independent of both employees and shareholders, and to represent general interests.[2]

The proposal for a third directive on the coordination of safeguards in connection with mergers between 'sociétés anonymes' and analogous companies, as it will be amended in the near future, following a resolution of the European Parliament,[3] will embody principles concerning the participation of employees in relevant decision making similar to those of the proposed directive on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations generally.

As stated above, the proposed fifth directive, in contrast to the European Companies Statute, will not provide an optional company structure, but will bring about a coordination of the laws of Member States as regards the structures of 'sociétés anonymes' and analogous corporate forms. The original proposal, like the proposed European Companies Statute, requires that all companies within the scope of its provisions would have to have, in addition to the shareholders' general meeting, a two tier system with a supervisory and management body. Certain important transactions would require the supervisory body's prior consent, and national law or a company's articles could add to the list of operations requiring prior authorization.

Furthermore, for all such companies with five hundred or more employees, the Member States would have to require that the employees should be able to participate in the appointment of the members of the supervisory body. The Member States are given the choice of providing either that at least one third of the members are to be appointed by the employees or their representatives, or that the members of the supervisory body must be acceptable to the employees. Under the latter system, the members of the supervisory body are to be co-opted, but either the general meeting or the employees' representatives can object to the appointment of a proposed member on the ground that the proposed candidate lacks the ability to carry out his duties or that his appointment would cause an imbalance in the supervisory body's composition having regard to the interests of the company, the shareholders and the employees. The proposal would also permit Member States which choose a system of direct appointment by the employees

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[1] Opinion on the proposal for a Regulation embodying a Statute for the European Company, OJ C93 of 7.8.1974.

[2] Amended Proposal for a Council Regulation on the Statute for European Companies, Supplement 4/75 — Bull. EC.

[3] Resolution on the amended proposal for a third Directive on coordination of safeguards in connection with mergers between 'sociétés anonymes', OJ C95 of 28.4.1975, p. 12.

or their representatives to further provide that some of those members of the supervisory body who are not appointed by the employees should be appointed otherwise than by general meeting, for example to represent the general interest.

The task ahead is to ensure that the proposal for a fifth directive is amended so that Community objectives can be defined and approached in a way which takes proper account of the manner in which, in each Member State, the relevant laws, practices and policies have become established, and are developing.

Company structure

The problem

The distinctive characteristic of large and medium-sized commercial companies throughout the Community is that such companies are normally owned by a disparate and relatively numerous group. In fact, one of the fundamental economic purposes which the 'société anonyme' and analogous corporate organizations have fulfilled is the bringing together of capital from numerous sources for the mutual benefit of those who have contributed and of society as a whole. In the interests of efficiency however, such contributors of capital must necessarily hand over the management of the company's affairs to a smaller group capable of relatively quick and continuous decision making. This also permits the company's affairs to be placed in the hands of those who are equipped with the special abilities and skills which are necessary for effective management and which many shareholders may not themselves possess.

However, having handed over the management of the company's affairs to a small group, the shareholders have had to have some way of ensuring that the 'managers' act in the interests of the shareholders as a whole and not in their own or some other extraneous interest. The managers must be aware that their conduct is subject to scrutiny. The legislations of all the Member States have grappled with this problem of designing company structures which provide for the managers to be controlled. An examination of these solutions and their evolution, varied in some respects as they are, reveals certain common features and trends which can serve as useful guidelines for the development of Community legislation on companies.

Approaches to the problem

The board of directors and the general meeting

The early solution to the problem adopted in several countries was for the law to permit the

management of the company's affairs to be handed over normally to a 'board' or 'council' and to make the board directly answerable to the shareholders in general meeting. The underlying assumptions of the legislators appear to have been that the members of the board would be personally involved in the management of the company's affairs and that the shareholders, astute in the pursuit of their own interests, would scrutinize the progress of the company's business and if necessary be able and willing to call their managers to account through the power of the general meeting to replace them. Where these assumptions have been justified, a simple structure of this kind has worked effectively and in all probability still can. However, while these assumptions were once justified perhaps, they are justified increasingly rarely as companies' shares become widely distributed in a society, and as their operations become complex and technical.

The increasing complexity of business affairs tends to produce situations in which the directors or some of them delegate their functions, perhaps extensively. The company laws of several Member States at a certain stage of their development reflected this requirement and began to provide for delegation by the board of its functions to committees, managing directors, executive directors and others. Thus, in the United Kingdom, one finds first the recognition of a power for the board of directors to delegate its functions to committees,[1] followed by recognition of a power to delegate to managing and executive directors.[2] Similar powers were granted by French and Italian law.

The strength of the underlying forces which have stimulated this kind of delegation can be gauged by considering the position in Belgium and Luxembourg. According to the law, the 'conseil d'administration' can delegate only the management of day to day affairs, but this limitation is in fact widely ignored, particularly in larger enterprises, and extensive powers are delegated to an executive committee of the 'conseil d'administration'. The improper delegation is tolerated by all interested parties since it enables the company to operate effectively in modern conditions.

However, delegation by the board or council, necessary as some of it may be, can have negative consequences as far as shareholders' control is concerned, for the non-executive directors are no longer so intimately involved in the company's affairs. Moreover, the extent to which the non-executive directors effectively supervise the managing or executive directors may well be limited. This will be particularly the case if the managers are in a position where the other members of the board are for various reasons dependent on them and not primarily interested in vigorously protecting the interests of the shareholders as a whole. In fact, in this situation, the notion that the executive directors are the delegates of the board or council as a whole, and operate under its supervision, no longer represents the reality. The executive directors are running the company essentially on their own. Moreover, even where a non-executive or passive director is truly independent of the managers, he may well find it difficult to supervise adequately the activity of managing or executive directors who are at the strategic centre of the enterprise and therefore enjoy advantages as to access to information, company resources and, possibly, effective proxy machinery.

As for the assumed willingness and ability of shareholders to scrutinize the company's affairs and to call the managers to account, the problem becomes more difficult as the number of the shareholders increases. A large, disparate group of shareholders will not be able to intervene as effectively as a small, coherent group. Moreover, the effectiveness of their supervision depends on the expertise and time which they can devote to the company's affairs. Small shareholders in a large modern enterprise often lack sufficient time and expertise to ensure adequate, continuous control on their behalf.

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[1] Companies Clauses Act 1845, section 95.
[2] Companies Act 1948, 1st Schedule, Table A, Art. 107.

The laws of all the Member States contain attempts to solve this problem. Emphasis has sometimes been placed upon the need to inform shareholders fully of the progress of the company's affairs, and upon formal requirements for the directors to seek the approval of the shareholders in general meeting before taking specific actions of great significance, such as issuing new shares or disposing of the company's assets. Such principles are to be found in the laws of several Member States, for example the laws of France[1] and Germany.[2] Recent proposals to strengthen the law along these lines have been made in the United Kingdom.[3] However, this kind of approach, though a desirable attempt to reinforce the traditional role of the shareholders and the general meeting,[4] does have limitations. On the one hand, it would not be efficient to burden those managing a company with obligations to inform the shareholders or to secure their consent on an impossibly wide range of matters. On the other hand, as we have seen, the small shareholder has limited time and ability in any event to devote to supervision of the company's affairs. The approach needs to be complemented by other techniques.

A separate supervisory function

Accordingly, legislators in many Member States have attempted to solve the problem of supervision more radically by introducing into the company's structure a new element: a body distinct from either the general meeting or the managing board or council which has as its function the supervision and control on behalf of the shareholders of those managing the company.

The earliest form which this solution took may well have been the commissioners ('commissarissen') of Dutch law and practice, who might be appointed by the shareholders to supervise the executive directors' conduct. In forms more limited in practice, the idea was also given expression in Belgium, France, Italy and Luxembourg. In these countries, the law has required the appointment of commissioners ('commissaires' or 'sindaci'), but their function has normally been limited to controlling the accuracy of the company accounts and the legality of the company's activities. The Scandinavian shareholders' committee is also the same basic concept.

However, it is in Germany and the Netherlands that the idea has received its fullest development in the form of mandatory 'dualist' structures for certain kinds of company. The German law on stock companies ('Aktienrecht', 'Aktiengesetz') since 1870 has required the stock company ('Aktiengesellschaft') to have two bodies in addition to the general meeting: a supervisory council ('Aufsichtsrat') and a management board ('Vorstand'). The members of the supervisory council with the exception of those members who represent the company's employees, are today normally appointed by the shareholders in general meeting and can be removed by them. The supervisory council in turn appoints a management board, the members of which it can replace for good cause. A member of the supervisory council may not be simultaneously a member of the board of management.

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[1] Loi N° 66-537, Article 170 (right of shareholders to 'documents sociaux') and Articles 180 and 215 (right of shareholders to determine increase and reduction of capital).

[2] Aktiengesetz 1965, paragraph 175(2) (annual financial statements, management report, report of supervisory board, proposal as to retained earnings to be made available for inspection by shareholders) and paragraph 119 (shareholders to determine *inter alia* raising or reduction of capital).

[3] Companies Bill 1973, clauses 54 and 55.

[4] Such requirements have been incorporated both in the proposed Statute for European Companies (see e.g. Articles 83 and 90), Supplement 4/75 — Bull. EC, and in the proposals for Directives concerned with the approximation of company laws (see e.g. Article 30 of the Proposal for a Fifth Directive on the Structure of Sociétés Anonymes, Supplement 10/72 — Bull. EC, and Articles 16 and 22 of the Proposal for a Second Directive on the Formation of Public Companies and the Maintenance and Alteration of their Capital, OJ C48 of 24.4.1970).

As for the division of function between the two bodies, the board of management directs and is responsible for the management of the company, while the supervisory council supervises the management. Accordingly, the board of management has specific and detailed obligations as regards reporting on the company's affairs to the supervisory council. The law requires a relatively continuous flow of information to be transmitted by the management to the supervisory council on the state of the company and on envisaged management policy. Moreover, the supervisory council has the right to investigate the company's affairs on its own initiative and in so doing, it may inspect the company's books and records, and require the management board to make specific reports and answer specific questions. The supervisory council cannot be charged with management functions, but the company's articles, or the supervisory council itself may require that specified measures of the management board receive the prior consent of the supervisory council. If consent is refused, then the management board can only proceed if it can secure a three quarters majority of the votes at a shareholders' meeting.

In the Netherlands, the law of 1971 on the structure of companies prescribes a somewhat similar system for most large public companies. The companies must have a supervisory council ('raad van commissarissen') and a management board ('bestuur'), the latter being appointed and removed by the former. The supervisory council is self perpetuating, but the shareholders and the employees have the right to challenge a proposal to nominate a member on the ground that the appointee is not qualified or that the council would not be properly composed if he were nominated.

The division of function prescribed by law is that the management board carries out and is responsible for the management of the company's business under the supervision of the supervisory council. The supervisory council must be kept informed by the management, and management decisions closely affecting the life of the enterprise cannot be carried out without the approval of the supervisory council. Such decisions include, for example, large new investments on the one hand, and closures on the other.

Moreover, even when a Dutch company is not required to have a dualist structure of the type described, it is a Dutch practice of long standing for companies of substantial size to have a dualist structure under the terms of their statutes. Normally in such cases both the supervisory and management bodies are appointed and removable by the shareholders' general meeting.

Similar systems have been made available on an optional basis in France, and may become available in Luxembourg. In Belgium, a commission of experts has completed a draft law for the Ministry of Justice which provides for a mandatory dualist system, consciously derived from the law in force in Germany, for Belgian 'sociétés anonymes'. The Council of State ('Conseil d'État') has approved the draft save for certain matters of detail. The recent Danish law on stock companies ('Aktieselskaber') imposes on larger stock companies a structure which is similar in many ways, though the management body is given a less autonomous role, and the board of directors ('bestyrelse') has management functions.

The distinctive feature of these systems is that the shareholders have an opportunity to influence the composition of a body which has as its function the exercise of general and relatively continuous control and supervision over the activities of those managing the company's affairs. The members of the supervisory body have the opportunity of scrutinizing the management of the company on behalf of the shareholders in a way that shareholders themselves, particularly small shareholders, normally cannot.

Obviously, there are limitations. Persons holding substantial blocks of shares or perhaps exploiting proxy machinery may be able to secure the election of members of the supervisory board whose first allegiance may not be to the shareholders as a whole but to a particular group of shareholders. Conversely, where shares are widely distributed among a very large number of

small shareholders, the members of the management board may succeed in proposing for election to the supervisory board persons whose role is to give expert advice to the management board rather than to exercise an independent supervisory function.[1] Analogous problems can arise under one board systems. A possible solution, at least in part, would be to require companies to operate systems which guarantee a degree of representation to minorities instead of relying upon simple majority voting which is the normal practice at present throughout the Community.

Despite such limitations, however, the separation of the supervisory function, by making those responsible for supervision of management more visible, obviously tends to reinforce their independence. On the other hand, separation of the management function emphasizes where responsibility for that function lies and thereby promotes management efficiency.

Even when companies do not have a formal dualist structure, the division of directors into executive and non-executive groups can operate so as to produce a similar separation of function, with the non-executive directors exercising a supervisory function in relation to the conduct of the executives. This phenomenon has been observed in France, Italy, Ireland and the United Kingdom. However, it is clear that an informal separation of function does not provide the same guarantees as a formal separation. Moreover, in many cases non-executive directors do not have supervisory functions at all, and would find it very difficult to exercise such functions even if they wished to do so, by reason for example of their minority position, their lack of time and information, or their dependence in fact upon the executive directors' good-will.[2]

Finally, there appears to be a connection between the emergence of a separate supervisory body for companies and the development of techniques whereby employees can participate in the appointment of members of the decision making bodies of companies. The connection is certainly not inevitable, for supervisory bodies have existed without employee participation, and on the other hand, such employee participation has occasionally been organized within the context of single board systems. But as we shall see, the development of employee participation in relation to the decision making bodies of companies appears to have been most marked in Member States which require companies to have a dualist or two tier system. An important part of the explanation may well be that a formal separation of function enables the representation of a plurality of interests to be combined with a homogeneous management in a way which unitary systems find it difficult to duplicate. Further discussion of this matter will be found in the part of this paper dealing with employee participation in companies' decision making bodies.[3]

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[1] See Part III, section 9 of the Report of the Commission of Experts charged by the government of the German Federal Republic in 1968 with a study of co-determination, published in 1970 under the title 'Mitbestimmung im Unternehmen', Deutscher Bundestag, 6. Wahlperiode, Drucksache VI/334 (hereafter called the *Biedenkopf Report* after its chairman).

[2] See *The Board of Directors*, Management Survey Report No 10 carried out by Political and Economic Planning (PEP) for the British Institute of Management, 1972.

[3] p. 30.

Employee participation

General

Defined generally as the various ways in which employed persons influence the decisions of the enterprises for which they work, employee participation is a political, legal or social reality throughout the Community. There seems also to be a fairly broad measure of consensus that in this general sense participation is desirable. On the other hand, as will become clear subsequently, participation takes a great number of forms both in the Community as a whole and in individual Member States. These forms vary in many ways, and in particular, as to the nature of the decisions which are influenced and as to the means whereby the influence is exercised. It is accordingly necessary to examine carefully the main approaches which exist and are developing in the Community. Once the general characteristics of the various forms have been isolated, the question of what action should be taken in relation to company law at the European level will become clearer and easier to answer.

This paper will examine the main approaches to employee participation under four headings: negotiation of collective agreements; representative institutions which are informed, consulted and approve certain measures; participation in a company's decision making bodies; and share participation. However, the use of four headings should not be thought to imply either that there are four separate and alternative methods in the Community of achieving precisely the same objectives, nor on the other hand that there are four forms with entirely distinct objectives and characteristics. In practice, as we shall see, the approaches are often to be found employed together in various combinations, while what is achieved by one approach in one country or enterprise may on occasion be achieved by another approach elsewhere. Indeed, it may be difficult to assign a particular institution exclusively to one category or another, for example, the Italian works council ('consiglio di fabbrica') or the British shop steward, both of which act as collective bargaining agents and also as representative institutions. Nevertheless, consideration of the broad, complex field of employee participation under these four headings enables certain useful generalizations to be made which can serve as guide lines for the development of sound, practical Community policies.

The main approaches

Negotiation of collective agreements

In all Member States, the negotiation of collective agreements, defined broadly as any agreement between one or more employers and a group of employees, is an obvious, and in some the most important manner in which employees influence the decisions and conduct of the enterprises in which they work.

As far as the substance of collective agreements is concerned, traditionally in all Member States they have dealt for the most part with matters which affect employees very directly. Typically, collective agreements have dealt with issues such as remuneration, hours of work and holidays, or they have established procedures for negotiating further such agreements or for dealing with disputes. However, in recent years in some Member States, the scope of collective bargaining has been increasing substantially. In particular, in these countries, bargaining is increasingly taking place concerning the economic policies of enterprises and their methods of organizing their industrial and commercial affairs.

In Italy, from the late 1960s collective agreements, negotiated at plant and enterprise level, began to lay emphasis on the improvement of the total working environment, including for example provisions as to the intensity and quality of work. More recently, agreements have been concluded which also deal with the investment and development policies to be followed by certain enterprises, notably by major industrial employers such as Fiat, Montedison and Olivetti. The Montedison agreements of April 1973 and 1974, for example, contained clauses committing the company to extensive investments

and to the maintenance of employment levels in the context of a continuing reorganization and modernization scheme. The growing difficulties resulting from the energy crisis led Fiat and the Metal Workers' Federation (FLM) to conclude a collective agreement in November 1974 which contemplates, among other things, that management and the union will jointly examine the continuing effects of the crisis on the transport sector with a view to reaching specific agreements on such matters as investments in the South, hours and methods of work, volume of production, and re-allocation of the work force. Once again, the company also gave an undertaking to maintain employment levels at least until the end of 1975. These agreements with major industrial employers are much more sophisticated than the average collective agreement in Italy. But they are part of the general pattern of development in the scope of collective bargaining and will probably influence the general development of Italian collective agreements in the future.

In the United Kingdom, the most significant trend in recent years has also been the growing scope of enterprise and plant level agreements. In many sectors, since the second world war, local employees' representatives have been in a position to bargain effectively not only as to remuneration and the like, but also concerning conditions and methods of work. During the 1960s, a number of enterprises engaged in what became know as 'productivity bargaining' whereby employees agreed to changes in working practices, such as overtime, interchange of tasks between work groups, manning or shift working, in return for increases in pay or other benefits. Such productivity bargaining has become less common, but the scope of bargaining at enterprise and plant level has often remained broad, and where it has become very developed, it is sometimes referred to as 'joint regulation', and is increasingly accompanied by the negotiation of a formal 'status quo' clause in a collective agreement according to which the management agrees not to take decisions affecting employees' interests until agreement is reached or certain negotiating procedures have been exhausted.

In Ireland, developments similar to those in the United Kingdom have occurred, though probably not to quite the same degree.

In other Member States, the scope of collective bargaining has not been subject to development in the same way. In particular, bargaining at enterprise and plant level has not developed so obviously. In Belgium and France, development has occurred at the national and industrial levels with the negotiation of agreements covering a large number of enterprises and employees, and normally dealing with matters which affect employees generally, such as guaranteed incomes, pensions, training and education. Elsewhere in the Community, developments in the scope of collective bargaining have been much less pronounced.

To turn from the substance of collective bargaining, to the means whereby the employees' influence is exercised, the universal feature to be found wherever collective bargaining occurs is of course some organization representing the employees. Normally, this is a trade union, and increasingly in these countries which have seen a substantial increase in the scope of collective bargaining at enterprise and plant level, the local representatives of a trade union who are employed in the enterprise or plant in question. A growing role of this kind has been played in Italy by the members of the works councils ('consiglio di fabbrica') and in the United Kingdom and Ireland by shop stewards. In other Member States, the full-time union officials operating at the national, regional or sectoral level have retained a more prominent role, with the result that in those countries collective bargaining as a process is somewhat more remote from the average employee, though of course the results of such collective bargaining frequently have a direct impact upon him. In several such Member States, fairly elaborate institutional structures have been set up to facilitate the bargaining process, for example in Belgium, Denmark and the Netherlands.

Further development of collective bargaining, both as to its scope and as to the machinery whereby agreements are reached, seems very

likely. The desire of employees to increase the degree of control which they have over the industrial and commercial environment in which they live and upon which they depend, has been a relatively constant feature of the development of industrial relations in all Member States. Employees and their organizations everywhere have insisted upon increasing recognition being given to the human aspects of the production process. There is no reason to believe that this insistence will weaken. On the contrary, higher levels of general education in particular are likely to lead to its strengthening. When conditions permit, employees and their organizations will no doubt seek to further this development through the exercise of their bargaining power at various levels of the economy. Such development will occur whether or not legislation is passed to promote employee participation, though of course reliance upon collective bargaining in relation to certain issues may be less frequent in countries in which employee participation as to those issues has already been secured in some other way.

In the future, collective bargaining is also likely to be adapted to meet the requirements of the systems whereby the governments of some Member States seek to direct the development and modernization of their economies. The participation of employees through their representative organizations in the formulation of planning objectives or economic policy at national, regional and sectoral levels is already known in several Member States, for example in France, Belgium and the Netherlands among others. Such practices can often be fairly described as multi-lateral bargaining between employers' organizations, trade unions, the State and sometimes other interest groups as well. Further developments in this area seem likely. Recently, in the United Kingdom, for example, the government has proposed legislation which would go substantially further. Employees and their organizations would be intensively involved in the negotiation and up-dating of planning agreements between the State and particular enterprises. It seems probable that in so far as State intervention in the development of industry and commerce becomes more common, there will also be an increasing involvement of employees and their organizations through techniques which will include adaptations of traditional collective bargaining.

Similar developments have also taken place at Community level. The main initiatives taken to date to promote participation in decision making at Community level, such as the Economic and Social Committee and the joint sectoral committees, have been noted already. In the future, these institutions will continue to operate and develop, permitting trade unions and employers' organizations to participate actively in the formation of the Community's economic and social policies.

However, as we have seen, there is a wide variation between Member States as to the contents of collective agreements. This variability is equally apparent within the boundaries of a single Member State. Even in States where collective bargaining is well developed, there are often sectors of the economy where collective bargaining achieves relatively little, if it occurs at all. Moreover, despite the recent developments in the scope of collective bargaining in some Member States, there appear to be limitations on the scope of collective bargaining which are difficult to overcome. The General Council of the Trades Union Congress in Great Britain has acknowledged that despite the developments which have taken place in the United Kingdom, major decisions such as decisions on investment, location, closures, takeovers, mergers and the product specialization of an enterprise are normally taken unilaterally and not subjected to collective bargaining.[1]

The variability of collective bargaining, and the limitations on its scope can be related to a number of factors including, for example, the levels at which the agreements are concluded and the traditions prevailing in particular industries,

[1] *Industrial Democracy.* Report by the TUC General Council to the 1974 Trades Union Congress, July 1974. Paragraphs 84 and 85.

regions or countries. But a more fundamental explanation often appears to be limitations on the bargaining power of employees' organizations in particular situations. A labour organization's ability to bargain on a given matter often depends on the credibility of the organization's perhaps unspoken threat to impose a cost on the employer by taking industrial action if a bargain is not concluded. But in certain situations, the organization's threat is not credible enough to produce a substantial result. The credibility of the threat appears to depend in turn on a number of factors, including the nature of the issue, the general economic situation, the nature of the enterprise, and the sophistication of the employees' organization and of the employees themselves.

Situations of plant closures, of which there have been a growing number recently, provide a particularly clear example of how restrictions on bargaining power limit the effective scope of collective bargaining. It is also notable that on several occasions in recent years, the employees, in cases in which a closure of their establishment is threatened, have organized a 'sit in' rather than take industrial action in the form of a straightforward withdrawal of labour. In addition, it may be observed that in certain cases, a well-developed union organization has also led the employees to seek the cooperation of employees in other parts of the enterprise not threatened with closure, in order to influence decisions of this kind. However, in practice, the employees' ability to bargain through their union often remains limited.

Restrictions on bargaining power can also explain some of the limitations of collective bargaining when a multinational enterprise is involved, or in times of economic concentration.

Similar if somewhat more complex reasoning can explain the limited role which collective bargaining has often played in relation to investment decisions, take-overs and mergers. A relevant factor is that certain decisions, which may in fact have important consequences for employees, are often not readily or immediately reducible to issues which can be included in a labour organization's list of demands, or expressed as an obligation in a concluded agreement. For example, a decision to invest in and develop a new technology may have, in the medium or long term, serious implications for an enterprise's employees, but until the implications are obvious to them, it may be difficult for a union to insist upon bargaining about the matter. For under normal circumstances, a union may bargain only about matters which have obvious and direct effects on its members. In so far as a decision has more remote or complex implications for the employees, a union often finds it difficult to inform them properly and as a result to win support for pursuing a claim in relation to the decision in question. Moreover, even if the enterprise is willing to discuss the development, it may be some time before it is possible to formulate rights and obligations appropriate for inclusion in a collective agreement in relation to the problem.

Experience thus suggests that, under certain conditions, there are constraints on the capacity of collective bargaining to extend to particular aspects of the decision making of enterprises. Where these conditions have not applied, or where well-developed union organizations have existed, often associated with a union membership which is relatively sophisticated, these constraints have not been felt, or have been overcome, notably in certain important industrial sectors in Italy and the United Kingdom. Such developments will no doubt continue to occur in the future, but development will not be uniform, and collective agreements will continue to vary greatly depending on the context in which they are made.

In addition, since collective agreements are the product of a bargaining process, it is inevitable that from time to time the strength or sincerity of one side or another is put to the test, and industrial confrontation occurs. While industrial confrontation has causes, other than the internal dynamics of bargaining situations, which may often be more important, such as

deep-seated social and political conflicts, the expansion of the scope of collective bargaining necessarily increases the number of issues which may lead to confrontation. But industrial confrontation is also wasteful, and if it occurs too often in a society, every member of that society is the poorer including those who are employees.

Finally, collective bargaining, being a social process based on the freedom and power of the parties to achieve the best terms which they can, may be made the subject of a direct legal obligation only with difficulty. Indirect regulation or strengthening of the collective bargaining process, for example by the creation of legal obligations to release relevant information to the other party, is not particularly difficult. But to legislate for the central obligation to bargain, either generally or on specific topics, is much more problematic. The content of the obligation is relatively uncertain, and if an attempt were made to impose general obligations at Community level, their interpretation would be bound to produce difficulties in practice.

Provision for independent arbitration in the event of failure to agree is a partial solution to the problem, but is only practicable in relation to a limited number of issues which are of a relatively clear and defined nature, such as the terms of a 'social plan' to meet the needs of employees affected by a concentration, or measures to promote industrial safety, health and hygiene. To apply arbitration procedures to broader issues like the economic forward planning of the enterprise would be to ask far too much of them. Moreover, a general use of arbitration would probably entail the creation of extensive and costly bureaucracies. In any event, such a development would be unlikely to meet with the approval of the social partners, not least because of the possibility that they could lose ultimate control over important issues which might be decided by persons with no long term relationship with either the enterprise or the employees. In fact, a system which relies upon the extensive use of arbitration mechanisms is in many ways the antithesis of free collective bargaining.

Representative institutions: information, consultation and approval

Procedures whereby employees are informed and consulted about management decisions are to be found in many Member States. The same machinery is often used to enable the employees to exercise rights of co-determination, that is, rights to approve or disapprove proposed decisions. As we shall see, however, the procedures adopted for the exercise of rights of co-determination vary considerably, particularly as regards the composition of the body which exercises the rights. This variation constitutes an important qualitative distinction between forms of employee participation which are superficially similar. Moreover, in some Member States, these procedures are clearly distinguished from collective bargaining, for example in Germany, whereas in others like the United Kingdom, there is no neat division. This distinction also relates to procedures and institutions, rather than to the substance of the decisions which are subject to the procedures.

As far as this substance is concerned, rights of information and consultation, whether conferred by law or by agreement, tend to be broader than rights of approval and apply in many cases to primary economic decisions such as closures and major investment decisions. The relevant Belgian law, for example, gives the enterprise councils ('conseils d'entreprise') to which it applies, the right to detailed information on the progress of the enterprise, including, for instance, details as to production costs and plans concerning future investments. Further, the enterprise council has the right to be consulted on any measure which might alter working conditions, the structure of the enterprise, or output.

Broadly similar rights are conferred by law in Germany, France, Luxembourg, and the Netherlands, and by national agreement in Denmark

and Italy. There are of course differences in the choice and definition of the matters which are subjected to the regime and with regard to other matters, not least the extent to which the law is observed in practice. These distinctions are more fully developed in Part II of this paper, and it suffices to say here that the effectiveness of such systems can depend in part on the existence of other forms of employee participation, and in particular on effective employee participation in the decision making bodies of the company. The Bidenkopf Report[1] noted that there appeared to be a relationship in Germany between the participation of employees in the supervisory board on the one hand, and on the other, the amount of cooperation between the management and the works council. The scope of the latter appeared to be related to the efficacy of the former. Indeed, as a matter of principle, it seems reasonable that effective employee participation in the body which appoints and supervises the management should have a positive effect on the management's attitudes to other forms of employee participation in the life of the enterprise. For example, management's willingness to impart information due to employees and their representatives is likely to be reinforced if the managers know that their discharge of these obligations may be scrutinized by a supervisory board some of the members of which have been appointed by or subject to the approval of the employees themselves. The inter-relationship between different forms of employee participation is a matter of importance to which references will be made subsequently in this paper.

In the United Kingdom and Ireland, the giving of information by an employer and general consultation of this kind is also practised in many sectors, though it is not required by law or a generally applicable national agreement.[2] Consultation on safety is a special matter which is the subject of more formal obligations in Ireland, and has just been made the subject of legal obligation in the United Kingdom. Normally, however, consultation is a relatively informal aspect of the relationship between an employer and his employees, sometimes represented by their trade unions.

Rights of approval, when granted by law, are defined relatively precisely and limited to matters which affect employees very immediately, and are for the most part aptly described as 'social matters'. Thus German law gives the works council ('Betriebsrat') the right to approve or disapprove management proposals concerned with job evaluation, piece rates, wages structures, working times, holidays, personnel policies, social plans in the case of redundancies, training, safety, health, housing, and employees' conduct in the work place.

In Luxembourg and the Netherlands, the range of decisions subject to approval is somewhat less extensive, while in Belgium, France and Italy, it is even narrower. In Belgium, for example, the enterprise council settles the works regulations and administers the social facilities.

In Denmark, the national agreement to which we have already referred, provides for a right of approval as to the principles relating to local working conditions, safety, welfare and staff policy. Furthermore, exceptionally in the Danish context, legal powers have been conferred in the field of safety which permit the enforcement, subject to a State investigation, of safety regulations.

In Italy and the United Kingdom, trade union activity in particular enterprises and plants has led to situations developing in which management's freedom to act unilaterally has as a matter of fact been restricted as to a wide range of decisions. Moreover, in the United Kingdom, the situation will sometimes receive formal recognition in a 'status quo' clause in a collective agreement according to which management agrees not to alter existing practices until agreed

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[1] *op. cit.*, Part III, section 62.

[2] Such an agreement is currently under discussion in Ireland. In the United Kingdom, the government has proposed the enactment of an Employment Protection Bill which will place a general duty on employers to disclose to trade union representatives information requested for collective bargaining purposes, and, in redundancy situations, will oblige employers to inform and consult those representatives.

negotiating procedures have been followed. As with collective bargaining however, the decisions which are subject to this kind of procedure in practice do not often include economic decisions of a strategic kind such as investment and closures, but are normally confined to matters which affect employees' interests quite closely such as work methods, for example.

There is a clear functional similarity between such situations and the formal legal rights of approval or co-determination to be found elsewhere in the Community, though there are also important distinctions to be drawn as regards the procedures and institutions appropriate to each.

Turning to consider the methods, procedures and institutions to be found in the Community, those Member States which grant rights of information, consultation and co-determination by law, also provide normally for the setting up of institutions to represent the employees in particular establishments.

In Germany, for example, the members of the works council are directly elected by the employees in a particular establishment, and in larger establishments through a system of proportional representation. The members appoint their own president. Enterprises with more than one establishment must also set up a central works council to which other works councils send delegates and which deals with matters concerning the enterprise as a whole or several establishments.

In the Netherlands, enterprise councils ('ondernemingsraden') are directly elected by the employees in all establishments of more than a certain size and they have as their president a member of a company's board of management. Special provision is made for enterprises having a number of establishments, enabling a central enterprise council also to be formed for the enterprise as a whole.

In France, personnel delegates ('délégués du personnel') have been required for some time even in quite small enterprises. They are directly elected and have a more limited role than the enterprise committees which are required in all enterprises employing more than fifty persons. The members of the enterprise committee ('comité d'entreprise') are directly elected by the employees, but the chief executive ('chef d'entreprise') or his representative is also a member and presides at meetings.

In Belgium, the members of the enterprise council are first elected by the employees of enterprises of more than a certain size from lists of candidates presented by nationally recognized trade unions. But the chief executive is a member of the council and can designate delegates to assist him up to the point at which the council has an equal number of employees' and employer's representatives.

Luxembourg has recently instituted mixed committees ('comités mixtes') consisting of an equal number of employer's and employees' representatives, the employees' representatives being elected according to a system of proportional representation. These committees operate in addition to 'personnel delegates' who have been established since the end of the first world war and are endowed with essentially limited consultative and representative functions.

In Germany, in the Netherlands and in Luxembourg as regards the mixed committees, the law provides for arbitration machinery to resolve deadlocks between management and the employees' representatives. In Belgium and France, no such provision is made. There is an obvious connection, in these countries between the procedural arrangements and the substance of the decisions which are subject to the procedures. The decisions in question are not of such a kind that failure to reach a compromise will result in paralysis of the enterprise as a business organization.

In Denmark, the national agreement provides for cooperation committees ('samarbejdsudvalg') which consist of equal numbers of representatives, appointed by the management on the one hand, and elected by the employees on the other, with the proviso that elected shop stewards are *ipso facto* members of the committees. Provision is made for failure to agree to result in an arbitration.

In Ireland and the United Kingdom, where rights of information, consultation and approval are not generally established by law or by a nationally applicable collective agreement, such works councils as are to be found have been established either informally or, occasionally, under the terms of a collective agreement. Though the systems vary, the employee representatives have normally been elected by all the employees of the establishment or enterprise in question. The functions of these works councils have been almost totally consultative with one or two isolated exceptions.

Recently, however, there has been a tendency for consultation machinery to be union based and also for there to be a single channel for consultation and for negotiation. This channel often begins with the local representatives of the union who are employed in a particular establishment or enterprise. Known as shop stewards, these representatives are normally chosen by the union members in particular establishments under election systems of varying formality according to the rules and practices of the union in question. The shop stewards' committee at plant level has in many sectors tended to become the focal point of an enterprise's industrial relations. When this occurs, the distinction between consultation and collective bargaining tends to become blurred. This is particularly obvious where there is a broadly drafted 'status quo' agreement. Failure to agree does not of course lead to some form of arbitration, though it may lead to traditional kinds of industrial action.

Italy presents a complex picture. Three kinds of separate but overlapping institutions may have a potential role in a single enterprise or establishment: the obsolescent, directly elected internal commissions ('commissioni interne'), the union delegations ('delegazioni sindacali'), and the directly elected works councils ('consigli di fabbrica'). However, it appears that in many important enterprises the works council is emerging as the pre-eminent instrument of consultation and negotiation at plant level similar to the shop stewards' committees in the United Kingdom. Its powers, like the powers of shop stewards, have their basis not in law, but in the bargaining strength of effective labour organizations.

Finally, a few Member States make specific legal provision for trade union representation at establishment or plant level, or for certain categories of information to be supplied to trade unions which represent an enterprise's employees. Thus in Italy and France, the law provides that unions may establish delegations in establishments to represent union employees. In the Netherlands, the Merger Code of the Social-Economic Council requires representative trade unions to be informed in advance of any measure constituting a concentration of an enterprise. In the United Kingdom, the Employment Protection Bill will when enacted, impose general obligations on employers to inform and, in redundancy situations, to consult trade union representatives. However, this kind of legislation is at present the exception rather than the rule.

Participation in decision making bodies

In several Member States, the law provides that companies' decision making bodies must include members who are appointed by or subject to the approval of the employees. Thus in Germany for over twenty years, stock companies ('Aktiengesellschaften'), unless they are family companies employing less than five hundred persons, have had to have one third of the members of their supervisory councils elected by the companies' employees. A form of employee participation based on similar principles is also required for companies with limited liability ('Gesellschaften mit beschränkter Haftung'), but only if they employ five hundred or more persons. In the coal and steel sector, companies employing more than one thousand persons must have a supervisory council normally composed of eleven members, five of whom represent the shareholders, five the employees, the eleventh being co-opted by the shareholders' and employees' representatives. Further, the management board of these coal and steel com-

panies must include a labour director who can be appointed and dismissed only if the employees' representatives do not object, and whose responsibility is for industrial relations and personnel matters. In all cases, members of the supervisory council are subject to the same legal duties regardless of the manner of their appointment.

Following the publication of the Biedenkopf Report[1] in 1970, recent discussion by all major political groups in Germany has been concerned with possible methods of extending the amount of participation in companies outside the coal and steel sector to achieve a degree of participation more approximate to that found within the coal and steel industry. In February 1974, the federal government proposed the enactment of a new law to require equality of representation on the supervisory councils of companies and groups having more than two thousand employees outside the coal and steel sector. At the present time, the Bill is still being considered by the legislature.

In the Netherlands, since 1973, the members of the supervisory councils of most public and closed companies ('naamloze en besloten vennootschappen') with substantial capital employing at least one hundred persons have been required to be appointed by a process of co-optation, with both the enterprise council and the shareholders' meeting having the right to object to a proposal for a nomination taking effect on the ground that the nominee is not qualified or that the nomination will lead to an improper board composition. Once such an objection has been made, the nomination will take effect only if a committee of the Social and Economic Council of the Netherlands (Sociaal-Economische Raad), after consulting all parties involved, resolves to overrule the objection.

In Denmark, since the beginning of 1974, all companies employing fifty or more persons must permit their employees, if they so desire, to elect at least two members of the board of directors ('bestyrelse') in addition to those elected by the shareholders, but the latter's representatives are always to constitute a majority. The employees' representatives have the same rights and duties as other directors.

In Luxembourg, a recently enacted law provides that the employees will elect one third of the members of the council of administration ('conseil d'administration'), or in the future, of the supervisory council ('conseil de surveillance') if a company has one, in all companies having one thousand or more employees, or receiving the benefit of twenty five per cent or more of State financial participation, or benefiting from a State concession relating to their principal activity. The legal responsibility of the employee representatives is the same as that of the other members.

In France, the law provides that in public companies ('sociétés anonymes') having more than fifty employees, delegates from the enterprise committee shall be present in a consultative capacity at the meetings of the council of administration, or where appropriate, the supervisory council. Depending on the composition of the company employees, a delegate may represent a particular group of employees such as the executive staff ('cadres').

In February 1975, a commission of experts, appointed under the chairmanship of Mr Sudreau following the presidential election in 1974 to study the problem of reform of the enterprise, recommended that French law be amended to permit employee representatives to exercise a function of joint supervision ('co-surveillance') on the council of administration or supervisory council of French companies. It saw joint supervision as the ultimate element in the reform of the enterprise to be approached through a period of experimentation. The commission was unanimous that such regimes should be optional for small and medium-sized enterprises, but could not agree as to whether the regime should be made obligatory for large enterprises after the period of experimentation.

In other Member States, participation in the decision making bodies of companies in the

[1] *op. cit.*

private sector is not normally required or practised. However, throughout the Community it is more common for enterprises in the public sector to be required to have a degree of employee or trade union representation on their decision making bodies.

As for the substance of the decisions influenced through this kind of participation, by placing the employees' representatives on the decision making bodies which are at the top of a company's decisional hierarchy, the existing systems involve the representatives in the general decision making of the enterprise. This involvement necessarily extends to matters of general economic policy such as expansion and contraction of the business. On the other hand, it is less likely to extend to relatively detailed matters of day-to-day management. In many cases, participation relates to a body with supervisory as opposed to management functions. But even when there is participation in a body with management functions, the decision making will normally relate to less detailed matters than those for example which are the concern of a works council or plant bargaining. In this sense, it appears that different forms of employee participation are to an appreciable extent complementary, rather than equivalent alternatives.

Moreover, experience in Germany suggests that participation in a supervisory body at the summit of the decisional hierachy does normally not produce serious conflicts of interest for employee representatives, probably because of the nature of its functions. There is here an obvious connection between the issues of company structure and employee participation. A company with a unitary board which is heavily involved in day-to-day mangement will probably find that employee representatives on the board are placed in a more difficult position than their counterparts on a board with a supervisory role, or which confines itself to more general issues of long term policy.

Turning to the methods and institutions by which the employees exercise their influence, the systems in force generally permit the whole work force of a company to participate in one way or another in the processes by which the representatives are selected. With one or two limited exceptions, no special role is granted by the law to labour organizations, though of course where trade unions are active, they can and do take legitimate advantage of the laws and normally ensure that members are selected who are acceptable to them.

As far as the proportion of representatives elected by employees is concerned, all the relevant systems in force, with the exception of the system required for German coal and steel companies, give the workers a right to a minority of seats on the decision making body. Moreover, in France, the employee representatives are present only in a consultative capacity. Minority representation, and to a much lesser extent presence in a consultative capacity, constitutes a two way channel for information and argument connecting the effective controllers of an enterprise in a direct and intensive way with the employees. There is no fundamental shift in the ultimate balance of power as regards decision making. On the other hand, a situation of parity, or indeed any situation in which the shareholders' representatives cease to hold an absolute majority, produces such a shift.

Finally, reference should be made to the fact that in each of the Member States which have implemented employee participation schemes of this kind, provision has also been made in one way or another for systems of general application whereby employees' representatives are informed, consulted and may give or withhold their approval of certain measures. As we have seen, the effectiveness of these representative institutions appears to be related in part to the effectiveness of the employees' participation in the decision making bodies of the companies concerned. The converse of this proposition is probably also true. Representative systems with their foundations at plant level operate as a support for employee participation in companies' decision making bodies. For example, members of a supervisory board who have been elected by the employees in a large enterprise might well find it difficult on their own to remain in

sufficient contact with the views of the employees throughout the enterprise. They are likely to become isolated, and as a result somewhat ineffective. The existence of active representative systems, of whatever kind, makes it far easier for them to remain in contact with the employees' feelings and concerns, while at the same time they are probably in a position to take a more general view than the representatives of particular plants or groups of workers. Moreover, active representative institutions provide an important opportunity for the employees to become informed and experienced as to the affairs and problems of the enterprise so that there is a reservoir of qualified people available for appointment to the supervisory board. They also provide an opportunity to evaluate the performance of those who are involved in the representative institutions so that potential candidates for board membership can be chosen on the basis of a certain amount of knowledge of their characteristics and abilities.

Share participation schemes

Participation by employees in the capital and the profits of enterprises is to be found to a limited extent in many Member States, sometimes encouraged by tax incentives, and is required by law in France. But with a very few exceptions, none of the existing systems in practice gives employees any real influence over the decision making of the enterprises in which they work. They are for the most part in the nature of bonus, production incentive and personal saving schemes, whether they are the result of a management initiative, collective agreement or legal obligation.

Recently, proposals have been made in several countries, notably Denmark, for systems intended to give employees or unions real influence over the conduct of enterprises, but no Member State has put such a system into effect at the present time. Such proposals frequently involve the creation of a fund of some kind which would hold shares on behalf of employees and build up holdings of increasing size in the equity of companies, which would ultimately give employees a real voice in how the companies were to be run. But up to the present, organizational difficulties, and in particular the problem of how and by whom the shares are to be voted, have prevented the implementation of any such schemes.

Convergences

The common features and trends disclosed by the preceding analysis of company structure and employee participation in the Community can be summarized as follows.

Company structure

The systems of all Member States appear to have relied in part on the concept of supervision through institutions other than the general meeting itself.

The Italian 'collegio sindacale'; the 'commissaires' whether of the Belgian, French or Netherlands variety; the Danish shareholders' committee and the German 'Aufsichtsrat' are all legislative responses of varying degrees of effectiveness and sophistication embodying the same basic idea. The shareholders appoint persons who have the function of supervising those who are responsible for managing the company's affairs. Moreover, even when the law has not required the existence of separate supervisory mechanisms, the division of directors into executive and non-executive groups has on occasion operated to produce a similar phenomenon. The fifth directive on the structure of 'sociétés anonymes' in its present form incorporates this basic idea and proposes to take advantage at the European level of the experience gained by those countries such as the Netherlands and Germany which have developed the most sophisticated applications of the concept.

However, while one can discern a general consensus in the Community as to the need to assure effective supervision of management decision making, a significant number of interested parties will undoubtedly stress that an instrument of supervision need not necessarily be an entirely separate organ of the company. A board of directors could indeed be constituted in such a way that it provided equivalent safeguards to a system based on two formally separated bodies. An important element in such a system would be the establishment of a clear separation of function between the 'managers' and the 'supervisors' on the board. The principal advantage of permitting such a solution would be that greater allowance would be made for the particular legal traditions and business practices of certain Member States. It might also more obviously preserve some of the virtues claimed for a unitary system such as its coherence and its capacity for cross fertilization of ideas and easy communication. On the other hand, a dualist system need not entail difficulties in these respects. It is indeed common practice in Germany for the management and supervisory organs to meet together. Furthermore, in practice, an equivalent system relying on supervisory members of a unitary board would probably operate in virtually the same way as the dualist system. For this reason, the Commission has not up to the present thought it necessary to propose such an alternative.

Some have however suggested that a legal solution to the problem of supervision is in any event unnecessary when there is an informed market dealing in the securities in which a shareholder has invested, for such a market provides a powerful mechanism for the protection of shareholders' interests. The protection which may be provided by an informed market is undeniable, but it is only partial. First, an informed market does not always exist for the shares of all large and medium-sized companies in the Community. Second, in the event of mismanagement, the shareholders' remedy is to sell his shares. Perhaps however, the shareholder would prefer to retain his interest and see an improvement in management efficiency. A supervisory mechanism helps to provide an option of this kind. Finally, the small shareholder may well be at a disadvantage as regards expertise and information in relation to other more professional participants in the informed market. His power to sell shares in a badly managed company is cold comfort if the first indication given to him of mismanagement is a sharp drop in the value of his shares. Reliance on the market cannot be a complete substitute for some legal measures of protection. A supervisory mechanism can constitute a useful part of such protection.

Separate instruments of relatively continuous and general supervision are not an absolute guarantee of management efficiency and responsiveness, but the concept has a firm basis in the trend towards separate instruments of supervision discernible throughout the Community and also appears to be the most effective technique developed to date. Finally, as has already been observed, the existence of a separate supervisory body seems particularly useful if employee or other interests are to participate in the appointment of members of companies' decision making bodies since it facilitates the drawing of a relatively sharp distinction between the function of management on the one hand, and the supervision or control of management on the other. The managers can then be left free to manage, subject only to the powers of the supervisory body to replace them in the event of a basic difference of opinion, or to disapprove certain proposals of an important kind. Conversely, the members of the supervisory body can be given the power to ensure that the managers are adequately performing their functions without being caught up in the actual administration of the company's affairs.

Employee participation

Negotiation of collective agreements

Collective bargaining will continue to develop throughout the Community, though more in some countries and industrial sectors than in others. Where conditions are appropriate, collective bargaining is likely to take place increasingly in relation to the economic policy of enterprises, and to their methods of organizing their industrial and commercial affairs. This development may be stimulated in some countries by increasing State intervention in the planning of economic and industrial development, and perhaps also by legislation requiring enterprises to release certain categories of information to employees' organizations. At the Community level, developments as to the participation of the social partners in decision making are also to be expected.

Accordingly, from time to time collective bargaining will cover topics which come within the normal competence of an enterprise's supervisory body on which employees are represented. This is not surprising, since both forms of participation are based at least in part on the same aspiration of employees to increase their degree of control over the economic organizations in which they work and upon which they depend.

However, for a number of reasons, collective bargaining does not seem to form a suitable general basis for Community legislation on employee participation in the decision making of large and medium-sized corporations. Collective bargaining frequently occurs at levels which are somewhat remote as far as employees are concerned. Also, the content of a legal obligation to bargain is too uncertain and the provision of independent arbitration is appropriate only for a limited number of relatively well defined issues.

Moreover, since the results of collective bargaining depend ultimately on the relative bargaining power of the parties, there is an inherent variability in these results which renders collective bargaining inappropriate as a general means of achieving equivalent standards and safeguards in the various countries which constitute the Community. Indeed, certain circumstances appear sometimes to prevent effective collective bargaining in relation to issues which may be of great importance such as closures or major investments. Finally, to some extent collective bargaining will inevitably continue to be associated with industrial confrontation.

However, there is no doubt that collective bargaining has an important role to play at the Community level in relation to employee participation in the decision making of enterprises, even if it probably cannot form the general basis for Community legislation. First, in relation to a limited number of relatively well defined issues,

legal obligations can and probably should be imposed upon enterprises to reach agreements with their employees' representatives. This topic will be further considered in the more appropriate context of Community policy with regard to representative institutions.[1] Second, the development of collective bargaining at the Community level can have important beneficial effects particularly in relation to the problems of the multinational enterprise. The Community must continue to do what it can to promote this development, though it must also be recognized that the primary responsibility for the development of a trade union counter-weight to the multinational enterprise rests with the trade unions themselves.

Share participation

As far as share participation schemes are concerned, in no Member State have such schemes been developed to the point where employees generally can exert substantial influence on the decision making of large and medium-sized companies. Proposals which may in time have such an effect are under discussion in several Member States, and possibly in the future some form of Community legislation will be appropriate. That time has not yet come. However, it should be noted that in the more general context of Community action to promote a fairer distribution of income and wealth, the Commission will shortly present to the Council a report on systems in the Member States which create incentives for asset formation by employees, as indicated in the Commission's 'Guidelines for a social action programme'.[2]

Representative institutions

The various systems whereby employees are informed, consulted and on occasion approve and disapprove proposed management decisions, present a more complicated problem. These forms of participation tend to be concerned primarily with the representation of employees' interests and views in relation to management, and therefore with matters which have a direct impact on the employees, for example, those matters sometimes described as 'social matters'. They operate mostly at plant or establishment level. Representative institutions of the works council type do exist at enterprise or group level, often for the purpose of coordinating employee representation in relation to matters which affect all employees of the enterprise or group equally. But to give such institutions a major direct say in the economic decision making of large enterprises is not easy.

Plant level institutions tend to have local and partial perspectives which render them inappropriate for employee participation in decision making which affects the enterprise as a whole. A committee of employees' representatives from various plants can be formed at enterprise level to permit certain employees' representatives to be informed of the enterprise's economic position and to discuss with management proposed decisions and programmes. Such a committee can be directly appointed by the employees, or indirectly through plant level representative institutions. However, in view of the fact that such committees are external to the decision making bodies of the company, their effectiveness may well be questioned. On the other hand, to give strong legal powers to such institutions in relation to the enterprise's economic decision making, for example rights of veto, is to risk paralyzing the enterprise as a business organization. Representative institutions alone thus do not appear to be the most suitable for giving employees a real say in an enterprise's economic decision making. To give the employees of an enterprise the opportunity to influence the decision making of the enterprise taken as a whole, they need to be complemented by other institutions.

This is not, however, to deny the importance of representative machinery which is based on the

[1] See below.
[2] Presented by the Commission to the Council on 19 April 1973, Supplement 4/73 — Bull. EC.

shop floor. Effective machinery of this kind is essential both for employees and for management, if decisions which affect the employees immediately ar to be properly considered and smoothly implemented. Even in relation to the enterprise's economic decision making, such machinery has a part to play in communicating local concerns and ideas to the management, and the central management's concerns and ideas to the employees in particular plants. And in so far as emphasis must be placed on the human aspects of the production process, these institutions have a vital part to play. Finally, the effectiveness of employee participation at board level appears to depend in part on the existence of effective representative institutions which focus employee concerns and prevent those on the board from becoming too isolated.

Accordingly, there seems to be a strong case for arguing that Community legislation concerned with the role of the employee in the decision making of enterprises should deal with the question of representative institutions, given the important functions which they perform. Indeed, some of the Community measures described in the chapter on Community programmes and proposals already contain provisions relating to the question. The proposals for a European Companies Statute, a third directive on mergers, and a directive on the retention of the rights and advantages of employees, together with the directive on collective redundancies recently adopted, all contain such provisions, the most comprehensive being those in the European Companies Statute. Moreover, while there are differences between the systems prevailing in Member States, particularly as between those States having a highly developed legal system and those relying on less formal, extra-legal relationships between enterprises and employees, all Member States do appear to have systems whereby employees' representatives are informed, consulted and on occasion approve or disapprove proposed decisions. If it is accepted that these systems are an important part of the way in which employees influence the decision making of large and medium-sized public companies, it follows that Community legislation concerned with bringing about a desirable convergence of law and practice in this area should contain provisions relating to these systems.

While there may be limits as to the degree of convergence which can be realized, it should be possible to provide that the management bodies of public companies employing more than a specified number of persons should have certain legal obligations to inform, consult and possibly reach agreement with the representatives of the employees. Such a regime would in a sense be a generalization of the principles contained in the directives and proposed directives mentioned in the preceding paragraph. The proposed European Companies Statute's provisions as to the topics upon which the European Works Council must be informed, consulted, and give its agreement form a useful starting point for consideration of what matters should be included in provisions to be contained in an amended fifth directive. The proposed provisions, as revised on the basis of the opinion of the European Parliament, have accordingly been summarized in Appendix II of this paper. Some of these provisions may well be more appropriate than others for inclusion in a directive which will have an effect on the laws of each Member State.

The argument sometimes heard that all provisions of this kind are in principle not suitable for inclusion in legislation on company law is fundamentally unpersuasive. Indeed, such provisions have not traditionally been included in 'company law', but if at all, in laws with other titles. However, to argue that company law can therefore never include such provisions is to urge that legislators bind themselves to formalism. Moreover, behind the formalist objection, there lies an important issue of substance. Company laws of the traditional pattern have not contained such provisions in the past precisely because they were based on economic and social policies which saw employees' relationships with companies as essentially contractual. In so far as economic and social policies come to regard the company as an enterprise in which labour and capital combine in their own and society's

interests, then the laws relating to companies will sooner or later have to reflect this change of underlying philosophy and include provisions expressly dealing with relationships between the providers of capital, the management and the employees, irrespective of whether they are formally deemed to be 'company law' or not.

Finally, it may be felt that the obligations to inform, consult and secure the approval of employees' representatives should not be confined to employers having a legal form analogous to the 'société anonyme' in the interests of fairness, both as between employees who may work for enterprises having a different legal form, and as between enterprises themselves. There is of course nothing to prevent such obligations being applied more generally, just as the provisions of Article 6 of the proposed third directive on mergers of 'sociétés anonymes' may be given broader application in the proposed directive on the retention of rights and advantages of employees in the case of mergers, takeovers and amalgamations generally. But the possibility of such a generalization should not prevent the adoption of a directive on the decision making structure of 'sociétés anonymes' which responds comprehensively to the requirements of economic and social policy concerning the role of employees in relation to the companies for which they work.

Participation in decision making bodies

A study of the laws of the Member States reveals that in the recent past a growing number of States have adopted systems permitting employees to participate in the decision making bodies of enterprises. Until 1971, Germany and France were the only Member States where the law gave employees a say, to very different degrees, in the decision making processes of companies, though several Member States provided for limited forms of employee or trade union participation as to the decision making of enterprises in the public sector. By 1974, the Netherlands, Denmark and Luxembourg had adopted legislation providing for employee participation in the appointment of members of the decision making bodies of companies, particularly as regards larger companies.

Moreover, in those Member States which have had such systems for some time, in recent years there has been a growing debate as to whether and how the systems should be developed. In Germany, all major political parties appear to be agreed in principle on a further development of the law as to participation in the supervisory councils of large companies which are not subject to the regime prevailing in the coal and steel sector. Discussion currently centres around the Bill tabled by the government in February 1974 which seeks to give equal rights ('Gleichberechtigung') and equal weight ('Gleichgewichtigkeit') to both production factors, labour and capital, in the decision making processes of such large companies and groups of companies. At the same time, the opportunity was taken in 1972 to strengthen the position of German works councils. In France, in recent years several leading political figures have suggested that the two employee representatives admitted to company councils in a consultative capacity should be given full voting rights. The Sudreau commission in its recent report[1] regards joint supervision through the representation of employees on the decision making bodies of French companies as the ultimate element in the reform of the enterprise to be approached in France through a period of experimentation.

In Ireland and the United Kingdom too, which in general have in the past provided only for somewhat limited forms of trade union representation in the public sector, proposals have been made recently which would implement systems of employee participation in the decision making bodies of enterprises much more extensively. In Ireland, the government has announced that employee representation on the boards of public enterprises will be introduced progressively. It is seen as an essential component of any comprehensive approach to worker participation. The development of works councils is also to be

[1] *Rapport du Comité d'étude pour la réforme de l'entreprise*, February 1975, La Documentation française.

encouraged. It is hoped that progress in the public sector will promote greater employee participation in private enterprises. In the United Kingdom, both the Trades Union Congress and the working group of the Labour Party's sub-committee on industrial policy have published reports which propose the introduction of two tier boards for British companies with equal numbers of employee and shareholder representatives, the employee representatives being appointed through trade union machinery. The government has announced that legislation to put worker directors on the boards of companies will be introduced during the Parliamentary session of 1976 and 1977, and has set up a committee of inquiry to advise on the best method of doing so.

It should also be observed that in several European countries which are not members of the Community, there have been important developments concerning employee participation in the decision making bodies of enterprises. Systems have been introduced by law in Austria, Norway and Sweden for example, and a serious political debate has commenced in Switzerland.

Of course, there is more than one view as to the desirability of these systems. They are opposed by important socio-economic groups mainly in Belgium, France, Italy, Ireland and the United Kingdom, and to a lesser degree in other Member States.

Certain trade unionists are opposed because they consider that these systems will substitute class collaboration for the class struggle. Others fear that they will at least compromise the independence of trade unions as bargaining organizations. They wish to be fully informed, to be consulted, and to be able to bargain over as wide a range of issues as possible on behalf of their members, but they do not wish to be involved in the management of privately owned enterprises, or to be in any sense responsible for the decisions taken by such enterprises. They are also critical of the creation of machinery for the representation of employee interests which is independent of the trade union movement, for they fear that it will be used to undermine their own influence with employees and consequently to limit their effectiveness as representative organizations. Certain industrial, commercial and financial interests are also opposed, for reasons which are in many ways the converse of the trade union fears. They consider that the systems will be used to further the class struggle, perhaps decisively, or that at least enterprises will be seriously weakened in their dealings with organized labour. They also fear that employee participation will have an adverse effect on the long term viability of privately owned enterprises. Their concern as to the efficiency and strength of enterprises is particularly strong as regards proposals for employee participation which would give employees' representatives the power to block unilaterally the implementation of important economic decisions. They point out that such regimes are still wholly exceptional phenomena, having their origin in special historical circumstances, and that it is unsafe, or at least premature, to apply such systems generally by law to enterprises operating in very different contexts.

Most of these critics favour reforms which will not involve employees or trade unions directly or substantially in the administration of private enterprises though they are of course not agreed on what the reforms should be. On the contrary, the policies suggested by these trade unions and industrialists are frequently poles apart. Certain trade unionists tend to favour programmes of 'worker control' which at their most developed amount to State ownership combined with a radical decentralization of decision making. Less developed programmes involve the 'conditioning' of private enterprise through the extensive exercise of bargaining power or perhaps through the granting of legal veto powers to employees on important matters. An important element in most trade union proposals is the creation of legal obligations requiring enterprises to give employees and their representatives extensive information as to the affairs of the enterprise. Such information is regarded as an important guarantee in itself of effective consultation and bargaining. The industrial, commercial and financial interests seem to be

thinking generally in terms of developing more sophisticated forms of consultation.

However, these dissenting voices notwithstanding, there is clearly a trend towards greater employee participation in the decision making bodies of enterprises which can hardly be ignored. Moreover, since several Member States already make provision for such participation, while others do not, to make no provision at all for the matter at the European level would be to fail in a significant degree to ensure that the laws of the Member States provide for equivalent safeguards and obligations.

Furthermore, the introduction of a system of employee representation need not interfere adversely with other forms of employee participation existing or planned in Member States. A minimum requirement would ensure the introduction of the system throughout the Community without restricting those Member States who wish to have more stringent requirements. The introduction of a system in Member States where none existed before need not inhibit the continued development in that State of more traditional forms of employee participation such as collective bargaining or representative institutions such as works or enterprise councils, as recent reforms in the Netherlands, Luxembourg and Germany have shown. On the contrary, by complementing these institutions, employee representation on company boards may well contribute to their effective operation and development.

Indeed, an important part of the attractiveness of employee participation in company boards is that such participation appears to have a generally positive effect on the other forms of employee participation existing in relation to the companies in question. The manner in which employee participation at board level both reinforces and is reinforced by effective representative institutions with their foundations at plant level has already been the subject of comment. Similarly, employee participation at board level, by increasing the amount of information available, and improving the experience and understanding of those affected, is also likely to have a positive, if indirect, effect on the process of collective bargaining. Finally, social programmes aimed at emphasizing the human aspect of the production process, whether at national or Community level, are likely to be easier to implement and develop if employees participate in the appointment of those who are sitting on the company's board, and influencing the manner in which its policies evolve.

Participation in the body which supervises a company's decisional hierarchy gives the employees as a whole an opportunity to participate generally in the decision making of an enterprise, including the decision of economic questions of a strategic nature such as programmes of expansion and contraction. Moreover, it is the only existing form of employee participation which necessarily provides this opportunity, though other methods may do so exceptionally. Further, the opportunity to participate is available to the employees of enterprises subjected to the regime regardless of limitations on their ability to bargain arising from economic or other circumstances beyond their control.

Finally, employee representation on company boards, alone among existing forms of employee participation, provides an opportunity for the employees of an enterprise to be involved on a relatively continuous basis in the process of strategic decision making at the highest level of the enterprise by which they are employed. This is clearly distinguishable from participation whether through collective agreements which are the product of a process of bargaining at arms' length, or through representative institutions which, being organized primarily for the representation and defence of employees' interests at plant level, tend to have more limited preoccupations and perspectives.

The argument is sometimes made that the introduction of employee participation will necessarily have adverse consequences as regards industrial efficiency, and therefore on the ability of the companies concerned to attract investment. Employee representation, it is said, will lead to emphasis being placed on the preserva-

tion of existing structures and jobs rather than on innovation and improvements in efficiency, which, by increasing profits, attract investment. However, if one compares the positions in different Member States, it certainly cannot be said that there is an apparent correlation between regimes of employee participation and situations of low efficiency, low profits and inadequate investment. If anything, these problems seem more closely associated with the existence of industrial relations systems in which there is little or no formal employee participation, and a relatively high incidence of industrial confrontation. Though a causal connection cannot be scientifically established, this observation would suggest that social conflict, resulting in part from the exclusion of employees from decision making, is a greater threat to efficiency and investment than a degree of employee participation.

Moreover, in this connection, a somewhat broader definition should be taken of the concept of efficiency than the traditional concept of relative financial returns on the capital invested in particular enterprises. From the point of view of society as a whole, other elements need to be included in the calculation, as regards both inputs and outputs, not least the cost of industrial confrontation, not just for the enterprise in which it occurs, but for the social and economic system as a whole. As the calculus is extended in this fashion, the argument that increased employee participation will necessarily lead to decreased efficiency appears to be ill-founded. However, it must be admitted that the problem of efficiency may become more acute if employee participation is organized in a way which permits the employees' representatives unilaterally to block the implementation of major economic decisions.

To suggest that the introduction of systems of employee participation in the supervisory bodies of enterprises will instantly and completely solve the present problems of damaging and unnecessary industrial confrontation would be to claim too much. But experience of the operation of such systems of employee participation suggests that, as part of a broad programme which also embraces effective representative institutions and encourages the development of collective bargaining, they can make a unique contribution to improved industrial relations through the elimination of unnecessary confrontations in enterprises, and the resolution without undue damage of those confrontations which necessarily occur in healthy societies. They appear to offer a useful basis for Community legislation which seeks to establish common structures which will be a step towards a more integrated, democratic society, in which employees as well as the providers of capital and managers can influence the decision making of those industrial and commercial enterprises which play such an important role in the economies of the Community and the lives of its citizens.

Flexible approaches

Although the convergent developments just summarized appear to constitute the proper basis for Community legislation in this field, adequate allowance must also be made for real divergences in existing systems deriving from variations in the evolution of the social and economic histories of the Member States.

Company structure

On two occasions, the Commission has proposed the general introduction for public companies, in addition to the shareholders' general meeting, of a management body and a supervisory body: first, in the proposal for a Statute for European Companies in 1970, and then, in the proposal for a fifth directive on the structure of 'sociétés anonymes' in 1972. It has just reaffirmed this choice for the European Companies Statute in presenting its amended proposal to the Council.

At the present stage of the debate in the Member States and in the Community's institutions, it still considers that this model is the best adapted both to the needs of large, modern enterprises, and to the requirements of society in general as regards such enterprises. Furthermore, for different motives, a number of governments have begun to reflect seriously on the advantages of this system.

However, one has to recognize the difficulty that there would be for those States, with strong industrial and commercial traditions, all of whose companies have one-board systems, to introduce with immediate application, a reform of such importance. The fact that the reluctance of those concerned may be attributable more to fears deriving from their present lack of knowledge of the system proposed than to any actual disadvantages of the system, does not substantially alter the difficulty confronting governments.

In this situation, it seems to the Commission that during the examination of its proposal for a fifth directive, there may be less discussion of the principle of the dualist system itself,[1] than of the need for a period of co-existence of one-board and dualist systems in any Member State wishing to maintain a one-board system for the time being. Accordingly, it seems advisable to study approaches which would permit, during a first stage, the co-existence of the one-board and dualist systems in those States that would like to leave open a choice for a transitional period, but which would ensure the realization of the ultimate objective, the dualist system. Certain Member States might also consider whether, during this period, a progressive implementation of a mandatory dualist system, for example according to the size of companies, would not be desirable.

Defining the length of the transitional period will be a delicate but important task. Transitional arrangements of an appropriate length will provide a period of experimentation, apprenticeship, and gradual adaptation without losing sight of the ultimate objective, namely the existence of comparable structures in the Member States: shareholders' general meeting, supervisory body, and the management body.

Employee participation

The essential difficulty confronting the Community is the reality of divergent historical development in the Member States in relation to social traditions, and in particular, the trade unions. Granted that all trade unions seek to influence, more and more distinctly, decision making at different levels of the economy, they nevertheless differ as to their choice of methods. In those situations where the trade unions have sought and obtained participation in the supervisory or management bodies of companies, they are frequently asking for a strengthening of the degree of employee representa-

[1] See p. 32 however, for a discussion of the possibility of including a supervisory instrument within a unitary board.

tion. Elsewhere, certain unions are in favour of the introduction of such systems for the first time, while others would be prepared to participate once the systems were enacted by law. For still others, however, even the principle of representation is, purely and simply, opposed. To a certain extent, this situation has an effect on the position both of employers, and of the State in question.

For the Commission, the overall objective, if not the specific approaches of the proposal for a fifth directive, remain valid and reasonably realistic, namely, employee representation, not merely presence in a consultative capacity, on the supervisory bodies of public companies. The task is to bring about a situation which will permit the introduction, in all the Member States, of such employee representation, while making proper allowance for their divergent social traditions.

There should however be no doubt as to one fundamental issue. The representation of employees on a company's supervisory body is only one form among others for participation in the economic and social affairs of the enterprise. It is additional to the negotiation of collective agreements, and to action, normally at establishment level, through employees' representative institutions, whether works councils or shop stewards. It complements these possibilities of intervention. Representation on a company's supervisory body adds a dimension otherwise lacking: an institution not only for the provision of information, and consultation on every important event, whether economic or social, but also the opportunity to influence effectively the decision making of the company on a continuing basis. Accordingly, the introduction of such representation will in no way restrict the possibilities for action which already exist.

Furthermore, in view of the divergent structures and attitudes presently prevailing in the Community, a sufficient degree of convergence in this field can be achieved only after a considerable period of time. In this situation, it is unrealistic to assume that the fifth directive can fix in advance the precise limits which will ultimately prevail. What is important at present is that Community legislation be adopted establishing as a Community objective the adoption of certain minimum standards as to company structures, which are as flexible as circumstances permit, and which themselves may be approached gradually. Once these standards have been achieved, and, as a result, companies throughout the Community all have structures which incorporate, in one form or another, the basic principle of employee participation, then it may well prove possible to go further and adopt legislation which will ensure the appropriate degree of convergence as regards the intensity of employee participation. At present, only the first step can be taken. Thus, the harmonization of the various legislative provisions of the Member States in this field will not, at present, impose restraints upon the approach of those who wish to develop their systems of participation. Accordingly, only minimum equivalence can be contemplated. In fact, the fifth directive in its present form already contains two basic formulas of a very different kind and thus is characterized by great potential flexibility.

It remains to determine the content of the provisions for a common Community framework, and to consider how, in certain cases, these provisions can be approached through a programme of steps.

The content of a Community framework

The question arises as to whether the formulas of the present proposal constitute the only possible provisions for a Community framework, or are simply certain possibilities among others. This is an issue which the debate on the green paper can clarify, and the Commission will carefully consider any suggestion made as to the matter.

In this connection, one major question that requires examination is how flexible the directive should be as regards the methods by which employees may appoint and remove members of the supervisory body. Certain interests consider that a Member State should be able to provide

that employees may participate in the appointment of members through trade union organizations. The case for providing for such systems is clearly strongest when trade unions represent the overwhelming majority of the employees in a particular enterprise, and are therefore closely connected with it. However, problems arise as regards employees who are not union members, enterprises in which a number of unions are represented, and enterprises in which trade union representation is not particularly strong. These problems would require national legislatures to draw difficult lines, but in itself, that is no reason for not leaving a Member State to do so. On the other hand, there are those who consider that for reasons of principle, as well as for the practical reasons just stated, all systems chosen should include democratic guarantees of a legal nature. Proportional representation is also suggested in order to ensure a degree of representation for minorities.

The Commission considers that while a directive cannot seek to impose uniform rules as to the methods whereby employees' representatives are appointed, it should contain certain general provisions which will ensure that all systems adopted incorporate the common principles that employee representatives are truly representative of the employees of the enterprise in question, and that all employees of the enterprise should be able to participate in the process whereby the representatives are appointed, according to procedures guaranteeing a free expression of opinion, in a way which will provide reasonable protection for minorities.

An important associated issue is the question of the legal duty which should be placed upon members of a supervisory body. The suggestion is sometimes made that representatives chosen by or on behalf of employees should not be under the same kind of duty as the other members of the board, but owe their duty primarily to the employees. However, certain critics of this suggestion observe that to differentiate between the duties owed by the members according to their method of appointment is in effect to create two boards and place them in an uneasy and probably unworkable relationship with each other. They argue that the basic idea underlying employee representation on company boards is a broadening of the accepted purposes of the enterprises to include the interests of both employees and shareholders. Accordingly, there seems to be a strong argument for a provision that the members of the supervisory body should owe a duty to the enterprise as a whole, and therefore have regard to the interests of both groups. Legal rules to that effect exist in all Member States where employee representation on supervisory bodies is organized.

Consideration should also be given to the possibility that a large proportion of the employees of a particular enterprise will not wish to be represented on a company's supervisory body. If such is the case, there indeed seems little point in imposing any of these systems by law. Indeed, Danish law requires half or more of the employees to vote in favour of representation on a company's board before it is implemented. Similarly, the European Companies Statute in its amended form provides that employees shall not be represented on the supervisory board if a majority so decide. Such rules have the virtue of realism and it would not be difficult to incorporate a similar idea into the fifth directive if it were thought advisable.

A transitional solution

As for the realization through a programme of steps of the representation of employees on the supervisory bodies of companies, certain Member States are not simply unwilling to implement employee representation to the degree which would be required by a Community framework, but they are unable to adopt, in the immediate future, the principle of employee representation itself. Accordingly, a study must be made of systems which, though distinct from the chosen system, will be likely to provide such Member States with an avenue of approach: transitional substitutes, which can perform some of the functions of representation on the supervisory

bodies of companies and constitute a bridge leading towards such representation.

An examination of the laws and practices of the Member States reveals that in many of them, some of the objectives of employee participation in supervisory boards are achieved by representative institutions of one kind or another. An example is provided by the Belgian use of enterprise councils which have in recent years been granted extensive rights to information concerning the economic situation, development, and prospects of the enterprise. The law requires that the information given must permit the committee to understand the effect of the prevailing economic and financial conditions on the enterprise in relation to organization, employment and personnel. It also deals with precise items of information to be provided, which include details as to the costs of production, and plans concerning future investments.

Though there are significant differences, systems having characteristics in common with that existing in Belgium, are to be found established by law in Germany, France, Luxembourg, and the Netherlands. In Denmark, the matter is regulated by a nationally applicable collective agreement. In Ireland, Italy and the United Kingdom, there is no comparable general regime, but in particular cases, shop stewards and works councils do participate in extensive and intense discussions with management, which can involve a fairly large measure of disclosure of information by management.

Such systems of consultation and discussion, unsupported by participation in the supervisory board are open to the criticism that since the representative institutions are external to the decision making bodies of the company, their role, and their effectiveness may be limited. While this criticism is probably sufficiently well founded to prevent the acceptance of such systems as equivalent and therefore permanent alternatives to participation in supervisory boards, it is not a decisive objection to the use of such systems as transitional arrangements for Member States which cannot immediately impose a general obligation to adopt employee participation in supervisory boards. Any transitional arrangement will probably be less satisfactory than the regime which constitutes the objective.

Accordingly, consideration must be given to the possibility of providing, in an amended fifth directive, that those Member States which cannot immediately adopt mandatory employee participation in supervisory boards should be free for a transitional period, to release all or certain categories of the companies concerned, from the obligation in question, but should impose upon those companies which do not choose to implement employee representation in the board, an obligation to adopt a system based on an institution representing the employees at enterprise level.

The possible Community provisions relating to such systems will have to be carefully considered, however. For the various systems whereby employees' representatives are informed and consulted, be they works councils or shop stewards' committees, constitute an important and sensitive part of the living body of industrial relations in the Member States. The task is to extract certain principles from the existing systems, so that any Community legislation will be based on experience. An attempt must be made to build upon the existing systems, where necessary, so that they may perform some of the functions of participation in supervisory boards.

In this connection, it should be observed that, while in the majority of Member States, the constitutions of employees' representative institutions are based on laws, in Denmark, Ireland, Italy and the United Kingdom, they are based on arrangements of varying degrees of formality. Moreover, in France, even though the law prescribes a system of general application, collective agreements may modify the system in relation to a particular enterprise, significantly enough in relation to the manner in which different groups of employees are to be represented.

The level which is appropriate for a representative institution which is to involve employees in

the decision making of the enterprise, including decisions concerning the economic progress of the enterprise taken as a whole, seems necessarily to be the level of the enterprise itself. In the context of laws relating to the decision making of public companies, this means company level, though further provision may be necessary in an appropriate context to accommodate group situations. However, in view of the fact that in several Member States existing representative institutions operate at establishment level, it will probably be necessary to leave Member States free to choose whether the institution should be indirectly constituted, being appointed by establishment level institutions, as in the Netherlands, or directly appointed, as in France. In a Member State having a developed system of establishment level institutions, the former process might well be preferable.

As for the composition of the representative body and methods of appointment, it is of basic importance that all systems guarantee a substantial degree of independence to the employees' representatives. For example, provision could be made for an institution, consisting entirely of employees' representatives, endowed with rights and obligations to meet and discuss together and with the representatives of management. On the other hand, a body of which the chief executive of a company is a member, or even one which is composed of equal numbers of employee and management representatives, may perhaps ensure a sufficient degree of independence, provided that certain powers and rights are conferred upon the employees' representatives. For example, they should be allowed adequate time and facilities for meeting together to discuss and arrange matters on their own, without management representatives being present. They should have an adequate opportunity to express their views fully to the management in general, and to the chief executive in particular. Finally, they must be in a position to take action to enforce performance of any obligation imposed on the management, and in particular of obligations to disclose certain kinds of information.

In view of the complexity of the situation which can arise, as has already been suggested in relation to the appointment of employee representatives to supervisory boards, Community provisions must probably be limited to general principles which will have to be given more concrete application in the laws of the Member States, and in the arrangements actually adopted by enterprises. Similar principles to those already discussed would seem to be desirable in this context too, and specifically, representatives should fairly represent all the employees of the company.

It should be possible to adopt Community legislation which obliged a Member State to enact a regime applying generally to public companies, but which also left it free to enact that the system could be modified by agreement between the company and the employees' representatives, provided that the system still complied with the principles contained in the directive, and possibly, provided also that the modifications were approved by the relevant government department. Such a directive would permit the use for transitional institutions of systems having a contractual character, while at the same time ensuring a necessary degree of consistency, and compliance with minimum standards. However, it poses some problems in relation to companies with establishments in more than one Member State, discussed in greater detail subsequently.

Finally, as far as composition and methods of appointment are concerned, throughout the Community, the members of representative institutions are, almost invariably, employees of the company. It would accordingly seem sensible to retain this characteristic in this context.

Turning to the functions of these bodies, the essential requirement is that they should be informed about and have ample opportunity to discuss both among themselves and with management, the same broad range of matters as employee representatives on a company's board, and in particular, the economic life of the company. They should therefore be entitled to receive as much information as is practicable concerning the economic progress of the compa-

ny and of any associated enterprises, and also concerning the general development of the sectors of the economy in which these enterprises operate. For example, the information should relate to future expectations and plans, as well as to past and present facts and situations. Specific transactions of importance which are being considered should be brought to the attention of the employees' representatives, and discussed, as soon as possible, and certainly in advance of the transaction being concluded. This should apply, for example, to any closure or transfer of the whole or a substantial part of the enterprise; to any substantial curtailment or extension of the activities of the enterprise; to substantial organizational changes within the enterprise; and to the establishment or termination of long term cooperation with other undertakings. The relevant provisions of the revised proposal for a European Companies Statute, summarized in Appendix II, can serve as a useful point of departure for consideration and discussion of the matter, although it must be stressed that the Commission does not suggest that the system proposed for the European Works Council should constitute the transitional solution for the whole Community.

For the reason already mentioned in the general discussion of representative institutions, to give institutions representative of the employees powers to approve or veto proposed management decisions of an economic nature does not seem possible without running the risk of paralysing the enterprise as a business organization. As to social matters, the arguments in favour of rights of approval and disapproval are more persuasive. The Commission has indeed proposed the granting of such rights in relation to the drawing up of social plans to deal with the consequences of concentrations.

However, the use of representative institutions as a transitional approach to representation on the board is a distinct question, being concerned essentially with employee involvement in the economic progress of the enterprise. For this reason, rights of approval and disapproval in the social field are more appropriately considered in the context of legislation to apply generally and indefinitely to representative institutions,[1] and not in the context of a design for a transitional approach to participation in supervisory boards.

Given that a representative institution of the kind described must be entitled to receive a broad range of information concerning, in particular, the economic life of the enterprise, possible solutions to the problem of sensitive information require some consideration. For example, a right to receive information the publication of which might reasonably be expected to harm the enterprise, would appear to require the imposition of an associated obligation to preserve its secrecy. This approach is adopted by the revised European Companies Statute, and no great difficulty seems to arise as to the application of such principles in the context of national legal systems. Consideration must also be given to the question of whether, and if so, in what circumstances, management should be able to withhold information from a representative institution. Such provisions are incorporated in the systems in force or proposed in several Member States. In any event, independent machinery would appear to be required to resolve disputes as to whether or not information is sufficiently sensitive for it to be disclosed subject to an obligation of secrecy, or withheld.

The particular problems of the company which has establishments in more than one Member State remain to be considered. Up to the present, the generally accepted view has probably been that the law relating to institutions representing employees is the law of the State in which an establishment is located. It is however open to question whether, in the context of the Community, particularly as regards the representation of employees at company level, such doctrines can continue to regulate the matter. For the employees of a company should have the same opportunity to influence the decision making of that company whether they are employed at an establishment in the Member

[1] See p. 34.

State in which the enterprise has been incorporated, or in some other Member State.

A similar problem arises with regard to the possibility of permitting a Member State to maintain a contractual element in its system, in particular as regards the composition and methods of appointment of a company level representative institution. If the company has employees in another Member State, an agreement will be of an international nature, and the question arises as to what legal system is to regulate it.

However, since most companies operate abroad through subsidiary companies, the problem of the company with a branch in another Member State may be sufficiently marginal to be left unsolved, at least in the immediate future. The question of the representation of employees in group situations, discussed in Appendix I, is in many ways a similar problem, and it may be more convenient to deal with both problems in the context of Community legislation on groups.

Conclusion

The Commission considers that the basic principles of the original proposal for a fifth directive on the structure of 'sociétés anonymes', namely the dualist board system and employee participation in the supervisory board, remain valuable and realistic objectives. However, it considers that the Member States must be free to adopt these principles with the maximum degree of flexibility possible, and that certain Member States must be permitted to allow their public companies to approach the objectives in stages. Action should also probably be taken on the associated issue of employees' representative institutions.

The main task therefore is to construct a framework which provides for the objectives to be reached in a way which leaves discretion to the Member States as to the precise models which they may adopt, and which further defines certain transitional arrangements which can be adopted in the near future by the public companies of those Member States which cannot realize the two objectives immediately. For the dualist system, a transitional period is probably required during which the companies concerned can choose between the dualist and one-board systems. As far as employee participation is concerned, the Commission considers that a company level representative institution with appropriate rights and obligations may well provide companies with the best possibility for a successful transitional solution. Such institutions would enable the employees' representatives to be informed about and influence the conduct of the company's affairs, including major decisions of economic policy, without being directly involved in the supervisory body itself.

In addition, the creation of a transitional period for the application of the dualist system in certain Member States would appear to necessitate in turn certain consequential provisions as to employee participation for the duration of the transitional period. Thus it seems necessary to provide that employee representation on the boards of companies which choose to continue to operate under a one-board system may constitute an acceptable transitional alternative. Conversely, any transitional arrangement adopted for employee representation on company boards will have to be available for both dualist and one-board systems. Accordingly, during the period in which the dualist and the one-board systems may co-exist, in a particular Member State, there might be four alternative structures available to a company: the dualist system with employee representation on the supervisory board; the dualist system with a transitional arrangement for employee participation; the one-board system with employee representation on the board; and the one-board system with a transitional arrangement for employee participation.

To conclude, the Commission hopes that this green paper will produce a constructive debate which will enable the Community institutions to find solutions which can be accepted by a broad majority of those concerned, though it recognizes that in this field there are few solutions which will receive the unqualified support of everyone.

Part II

Summary of the main features of the situations and developments in the Member States occurring prior to 6.8.1975.

Belgium

Employee participation

Collective bargaining

Traditionally, the most significant collective agreements have been negotiated at industry level in joint committees known as 'commissions paritaires' set up by royal decree. These committees have an equal number of representatives from employers' organizations and trade unions, and an independent chairman and deputy chairman appointed by the government. Together they cover almost the total Belgian working population. National collective agreements are concluded for particular industries and are legally binding on all employers represented and their employees. They can even be extended by order to cover all enterprises within the industry if the committee makes a unanimous declaration to this effect.

Since 1960 however, important multi-industrial agreements have been concluded aimed at general improvements in the standard of living of employees. These agreements, know as 'social programming', are negotiated by the FEB ('Féderation des entreprises belges') and the three most representative trade unions. They apply to all branches of industry. Moreover, since 1968, the National Labour Council, composed of representatives drawn equally from the representative trade unions and employers' associations, has been able to conclude certain agreements of a general kind. For example, an agreement has been concluded for a guaranteed income for incapacitated manual workers.

The scope left for plant and company level bargaining by the fairly well developed industrial and national bargaining is not particularly great. But such bargaining does occur, though more in some sectors than others. It should perhaps also be observed in passing that the rights of recognized union delegates are themselves based not on law but on a collective bargain concluded in 1971 in the National Labour Council.

Representative institutions: Information, consultation and approval

Present law and practices

Three institutions must be considered in this context: enterprise councils, safety and health committees and union delegations.

Enterprise councils have been required by law since 1948 in certain private sector enterprises. At present, all such enterprises employing one hundred and fifty persons or more must set up such a council. An enterprise is defined for the purposes of this law as the 'technical unit of production' ('unité technique d'exploitation'). The original law contemplated an extension of the system to firms with fifty employees. This is not proposed at the present time, but under a law and decree of 1975, an enterprise is obliged to have a council even though it employs on average only fifty persons provided that a council was in existence at the time of the last election of members.

The councils are made up, on one side, of representatives of the employees elected by secret ballot. The most representative trade unions have the exclusive right to nominate lists of candidates. On the other side, the head of the enterprise ('chef d'entreprise') is also a member and chairman of the council, and has the right to appoint further representatives to assist him, though the size of the management's representation must not be greater than the employees'.

The head of the enterprise must provide the council with information concerning the situation, development and prospects of the enterprise and of any legal, economic or financial entity of which the enterprise forms a part. Under a royal decree of November 1973, the nature and amount of this information was considerably extended. In particular, information must now be given as to the competitive position of the enterprise and as to plans for the raising of finance and for investments.

Further, the enterprise council has the right to be consulted on any measure which might alter

working conditions, the structure of the organization or output. It examines the general criteria for recruitment, and determines the general criteria to be followed for lay-offs. Finally, the council also has power of decision with regard to work rules ('réglement du travail') and welfare matters.

Committees for safety, health and the improvement of work places have been required by law since 1952 in all enterprises employing more than fifty people. The committees are in principle composed in the same way as enterprise councils. Their role is purely consultative.

Union delegations are to be found in enterprises employing more than twenty persons on the basis of a nationally applicable, interprofessional collective agreement concluded in the National Labour Council in 1971, and of collective agreements particular to certain industrial sectors and sub-sectors concluded in national joint committees. Certain of these collective agreements have been ratified by royal decree. They confer on union delegations certain rights to represent union members individually and collectively. To this end, they must be informed of proposed changes in wages and labour conditions, and they must be given an opportunity to make their representations.

The three institutions described above have in part overlapping functions and often overlapping personnel. The resulting situations can be complex with a particular issue being acted upon by more than one of the institutions in a complementary fashion.

Policy

In general, the trade unions are not satisfied with the enterprise councils in their present form, though they appear to value the right of the councils to receive extensive information as to financial and economic matters. However, the joint composition of the councils is regarded as a serious limitation on their potential role. The CSC (Confédération des syndicats chrétiens) would accordingly like to see the councils transformed into employee councils representing employees exclusively and endowed with enlarged powers, in particular a power of veto in relation to work rules, lay-offs, closures, and personnel policy.[1] The FGTB ('Fédération générale du travail de Belgique') is at the present time discussing what reforms of the enterprise councils should be proposed in order to adapt the councils to the new situation created by the recent reform concerning the councils' rights to information. The federation is considering whether the councils should not become instruments of control as well as channels for consultation.[2]

In the discussions leading to the reform of 1973, the employers in Belgium took the position that enterprise councils must not encroach upon the powers of management, the responsibility for which had in their view to remain with the head of the enterprise. However they stated that they were always ready to ensure that as much information as possible be provided in order to ensure a harmonious climate in enterprises. The FEB is also reported as being in favour of the simplification of the present situation so that there would be one representative institution rather than three.[3]

Participation in decision making bodies

Present law and practices

At the present time, there is no provision for representation on the boards of companies in the private sector in Belgium. In the public sector, the twenty-one member council of administration of the railway company must include three

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[1] *Du conseil d'entreprise au conseil des travailleurs*, CSC March 1974.

[2] *La participation des travailleurs aux décisions dans l'entreprise en Belgique*; by J. Gayetot, national secretary of the FGTB. Paper delivered at the ILO Symposium on Workers' Participation in Decisions within Undertakings, August 1974.

[3] *Worker Participation and Collective Bargaining in Europe*, Commission on Industrial Relations, Her Majesty's Stationery Office 1974, p. 83.

employee representatives nominated by the minister of transport. An enterprise in which there is public participation, namely the inter-communal transport company in Brussels, has a council of administration some members of which are designated by the company's employees.

Policy

The FEB is in principle unfavourable to such forms of representation in the private sector believing that it would have undesirable effects on the liberty of decision which is necessary for the sound administration of an enterprise. The issue is however still under discussion within the Federation at the present time.

The FGTB is opposed on the ground that such systems entail too great a risk that unions will become integrated in the mechanisms of a capitalist society to which they are fundamentally opposed. They prefer policies which will promote 'workers control' by which is meant systems whereby the unions are informed in advance of proposed measures, and can on significant matters prevent their implementation and make proposals of their own.

As we have seen, the CSC favours at the present time a change in the role of the enterprise council so that it would become an employees' council with significant powers to veto certain major decisions. However, the CSC regards this proposal as requiring a complementary reform in company law to give labour a real and preponderant voice in the decisions of companies in relation to economic and financial policy, particularly as regards large enterprises.[1] The precise manner in which it is proposed that this preponderant voice should be ensured is still under consideration.

Company structure

Present law

The provisions of the Belgian Commercial Code applying to 'sociétés anonymes' prescribe a system whereby the company's affairs are administered by a council of administration under the supervision of commissioners. The council of administration ('conseil d'administration') consists of at least three members who are normally appointed and can be removed without compensation by the shareholders in general assembly. The members need not be shareholders but must provide a guarantee of good administration in the form of shares in the company which can be owned by someone else. The commissioners ('commissaires') are appointed and can be dismissed at any time by the general meeting of shareholders. Companies making a public offer of their shares ('faisant ... publiquement appel à l'épargne') must include a qualified accountant ('commissaire-reviseur') among their commissioners.

The division of function and responsibility prescribed by the law is that the administration of the company is entrusted entirely to the council of administration. It has full power to manage and represent the company and the company statutes are free to determine the precise powers of the council, but the statutes cannot attribute to the council powers which the law expressly gives to the general assembly and they cannot take away from the council powers conferred on it by the law, such as drawing up the annual accounts. The council exercises its powers as a body and can delegate only the management of day-to-day affairs to others.

The commissioners are responsible for the supervision of the company's affairs. They can exercise no other function in the company. They have an unfettered legal right to supervise and control the company's affairs and to that end, they have a broad power to scrutinize the company's books and records. Furthermore, the council must submit a balance sheet to the commissioners at least every six months, and the commissioners must in turn report to the general meeting on the results of their activities.

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[1] *Du conseil d'entreprise au conseil des travailleurs, op. cit.* Introduction, p. 4.

Present practices

The limitations on delegation by the council are widely ignored, particularly in larger enterprises, and extensive powers are in fact delegated to an executive committee of the council. The council itself meets only at intervals and confines itself to exercising a form of control over the management of the executive committee. Accordingly, there is a functional division of the council itself into two tiers which is not in conformity with the law, but which enables the company to operate effectively in modern conditions. For this reason, the improper delegation is tolerated by the interested parties.[1]

As for the commissioners, they confine their supervision to financial and legal control, ensuring that the accounts are properly kept and that there have been no infringements of the law or the company statutes. They do not concern themselves with the merits of the executive committees' decision making. There is thus a similarity between the actual roles of the commissioners in Belgium and the 'collegio sindacale' in Italy.

Policy

In 1968, a commission of experts completed a draft law for the Ministry of Justice which contains substantial reforms aimed principally, as regards the structure of 'sociétés anonymes', at bringing the law into a closer relationship with commercial practice. The draft law is also consciously derived from the concepts which have been developed in Germany with regard to the 'Aktiengesellschaft', or public company. The administration of the company is to be divided between two distinct organs: a management board or a single manager entrusted with the effective and continuous management of the company's affairs, and a supervisory board charged with supervising and controlling the management.

The managers will be appointed by the supervisory board and will have a measure of security of tenure; though of course the supervisory board will be able to dismiss a manager for good cause. An improper dismissal will give rise to an action for damages. Managers will not be able to become members of the supervisory board, the two bodies being clearly distinguished from each other. The members of the supervisory board will normally be chosen by the shareholders in general meeting. There will be at least three members, but no legal maximum. The Members will be removable by the shareholders at any time without compensation. They will also be forbidden to perform any other function for the company in order to preserve their independence.

The division of function and responsibility between the two organs is drawn with some specificity. Management of the company's affairs is entrusted to the managers and the supervisory board is expressly forbidden to interfere directly except in the case of an action brought by the company against a manager. The managers will have detailed obligations as to keeping the supervisory board informed. They will also have to obtain the consent of the board in advance to transactions and decisions which will have a substantial effect on the life of the company. The statutes of the company will be able to specify more concretely particular examples of such transactions and decisions, and also to require that other specified measures be submitted for prior approval. The supervisory board will also be able to specify particular measures which require their prior approval.

The supervisory board members will be able to investigate the affairs, books and other records of the company and, at any time, at least two of the members of the board will be able to require a report from the managers on any matter concerning the company's affairs. The managers will be able to participate in the meetings of the supervisory board in a consultative capacity, unless the board decides otherwise.

The commissioners are to be retained but it is proposed to confine their role expressly to finan-

[1] *Projet de loi modifiant les lois coordonnées sur les sociétés commerciales*, p. 38.

cial control though not in a very narrow sense.[1] It is contemplated that they will perform an auditing function in the broader sense of the term.

In 1972, the Council of State ('Conseil d'État') gave its opinion on the draft law which approved its main features.[2]

[1] *Projet de loi modifiant les lois coordonnées sur les sociétés commerciales*, p. 72.
[2] *Avis du Conseil d'État* of 22.11.1972.

Denmark

Employee participation

Collective bargaining

In Denmark, collective agreements are first and foremost concluded at the national level. Both general and specific questions are negotiated. The parties, the Danish Employers Confederation ('Dansk Arbejdsgiverforening') and the Danish Federation of Trade Unions ('Landsorganisationen i Danmark') jointly choose at the beginning of the bargaining a number of general questions relating to all trade unions and all sectors of industry. These questions normally deal with such matters as, for example, minimum rates of remuneration, holidays, and certain social contributions. Specific questions are those which are related to a single sector of industry. But these agreements too are national. They relate, for example, to such questions as training, welfare and safety.

Collective agreements of a procedural nature constitute a fairly well developed framework for Danish industrial relations, for example with regard to the system for cooperation and consultation.

Special reference should be made to the conciliation procedure in the event of disagreement which is regulated by law.[1] The Minister of Labour appoints conciliators who have the task of assisting in the settlement of conflicts between employers and employees. The conciliators have a right to intervene when parties cannot agree, to help them to reach an agreement. They also have power to suspend industrial action such as strikes for limited periods to enable negotiations to continue.

[1] 'Lovbekendtgørelse nr. 559', of 21.12.1971 on the conciliation procedure in the event of labour conflicts.

Representative institutions: Information, consultation and approval

Present law and practices

Consultation and cooperation, as it is known in Denmark, has its basis not in legislation, but in an 'Agreement on cooperation committees' concluded by the Danish Employers' Confederation and the Danish Federation of Trade Unions in October 1970.

The agreement provides for cooperation committees in industrial and craft enterprises. These consist of an equal number of representatives of management and employees, with the supervisory staff being represented on the management side, and elected shop stewards being *ipso facto* employee representatives. In establishments employing fifty or more workers, a cooperation committee must be set up when recommended either by the employer or by a majority of workers. In smaller establishments, the management and employees are recommended to find their own appropriate machinery for achieving the aims and objects set out in the agreement.

The objects of the cooperation committees are to secure good conditions of work and to increase the employees' job satisfaction, their security and their interest in improving the efficiency and competitiveness of their enterprises.

The committees are entitled to receive information from management relating to the enterprises' economic situation and future prospects. They exercise 'co-influence' on general policy in relation to day-to-day production and work planning and on the implementation of major alterations in the enterprises. They exercise 'co-determination' in formulating principles in relation to local work and welfare conditions and in relation to staff policy.

'Co-influence' implies, according to the official comments made by the contracting partners, that the management shall afford the cooperation committee good opportunities for the exchange of ideas and suggestions prior to taking decisions. 'Co-determination' implies an obligation for both parties to strive for an agreement. If one party defaults on this obligation, an arbitration procedure is provided. A cooperation board set up by the Danish Employers' Confederation and the Danish Federation of Trade Unions is responsible *inter alia* for adjudicating in such cases.

Policy

Since 1969, with the approval of the Danish Employers' Confederation and the Danish Federation of Trade Unions, experiments in cooperation have been taking place in several Danish companies, taking the existing agreement on cooperation as their starting point. The typical trend has been in the direction of utilizing semi-autonomous work groups.[1] The results of these experiments, which appear generally to have had favourable effects,[1] will probably be reflected in time in the agreement on cooperation. The present agreement comes to an end in 1976 if either party gives requisite prior notice.

Participation in decision making

Present law

The Danish Companies Act No 370 of 13 June 1973 ('Lov om aktieselskaber') for joint stock companies and No 371 of 13 June 1973 for private companies ('Lov om anpartsselskaber') give to the employees of all companies employing at least fifty employees the right, but not the duty, to elect to the board of directors two members in addition to those elected by the shareholders meeting.

The articles of association may provide for a larger number of employees' representatives or for one or more representatives appointed by

[1] *Industrial Democracy in Denmark*, by B. Bordrup and P. Roos. Paper delivered at the ILO Symposium on Workers' Participation in Decisions within Undertakings, August 1974.

public authorities or by others. The majority of the members of the board of directors are always to be elected by the shareholders meeting, however. The employees' representatives are elected for a term of two years from among the employees who have been employed by the company for one year prior to election. Their rights and obligations are the same as those of the other members of the board of directors.

These new laws were conceived as the starting point for employee participation which would then be developed by employee representatives joining the boards of directors through the operations of the Wage Earners' Investment and Profit Fund proposed by the former Danish Government in January 1973.[1] The purposes of the new Companies Acts were to give the workers proper information on their company's affairs and to enable them to express their viewpoint within the decision making process prior to their representation through the machinery of the Wage Earners' Investment and Profit Fund.[2]

Parallel to these developments, action has also been taken recently with regard to representation of the public interest on the boards of companies with activities of great importance for the economy of the State. On 28 March 1974, the Danish Parliament adopted a law requiring the boards of directors of Danish banks to include a representative appointed by the State.

Practice and policy

Since these new laws have not been long in operation, it is too soon for an evaluation of their operation in practice. For the same reason, fresh proposals have not yet been made. It does appear, however, that employees have been interested in exercising their right to elect representatives to the board.

Share and profit participation

In January 1973, the then Social Democratic Government of Denmark proposed legislation to set up a Wage Earners' Investment and Profit Fund.

The funds were to be provided by contribution from all employers. The contributions were at the beginning to be 0.5% of the payroll, increasing by 0.5% per year until the contribution at the end would be equivalent to 5% of the employer's payroll.

In joint stock companies employing more than fifty persons, two thirds of the annual contribution was to remain in the firm by being converted into share capital with a provision that the fund could not own more than half of the company's issued share capital. For companies employing less than fifty persons, there was to be a possibility for a similar conversion of contributions into share capital if the company so chose. Furthermore, companies other than joint stock companies employing at least ten persons were to have the right to claim that two thirds of the annual contributions were to remain in the firm as a loan.

Employee capital not reinvested according to the provisions mentioned above was to be invested according to directives laid down by the Committee of the Wage Earner's Investment and Profit Fund. The Committee, however, was to be obliged to take care that the funds, to the highest possible degree, were invested as risk capital in enterprises: in shares, though always only half of a company's issued share capital at most, as capital in limited partnerships, or in any other way, as capital.

Voting rights attached to share capital resulting from conversion were to be exercised by the employees in the enterprise in question. The same was in principle the case for the voting rights attached to the shares bought by the fund. However, the management board of the fund could under special circumstances decide

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[1] See below.

[2] Statement of the Danish member of Parliament, Christensen, within the Committee on Social Affairs and Employment of the European Parliament, Doc. PE 32.691.

that the voting rights should be exercised by the fund administration.

All employees were to receive the same amounts from the fund. Certificates would be credited with the employees' share of the profit once a year. The certificates could be redeemed after the passage of a number of years but, could not be sold or pledged.

The purpose of the proposed legislation was 'to bring about an important condition for economic democracy through a more equitable division of wealth, income and influence'.[1] Employees were to be ensured of participation in the capital growth of business enterprises and greater voice in their affairs. However, no broad consensus could be reached on the proposal in the form in which it was proposed. With the resignation of the Government in December 1973 and the subsequent dissolution of Parliament, the proposal has to be re-submitted to Parliament. This has not yet occurred, though political discussion of this and other schemes continues.

Company structure

Present law

The Danish Law on Joint Stock Companies[2] of 1973 prescribes a system of administration with two decision making bodies for all such companies having a share capital of more than DKr 400000 and permits such a system for other joint stock companies.

The company normally must have a board of directors ('bestyrelse') consisting of at least three members elected by shareholders in a general meeting.[3] The board of directors appoints a board of management consisting of one or more members, each of whom the board of directors can remove from office. In companies having a share capital of more than DKr 400000 the majority of the members of the board of directors must consist of persons who are not managers.[4] A manager cannot be elected chairman of the board of directors.

The board of directors is responsible for the proper management of the company and takes part in the management together with members of the management board. The members of the board of management take care of current management according to the guidelines and instructions laid down by the board of directors. Transactions which, in relation to the general circumstances of the company, are of an unusual class or importance cannot be effected by the management unless the board of directors has issued a special authorization, except in cases where the decision of the board of directors cannot be awaited without causing essential inconvenience to the company's activities.

Either a member of the board of directors or a manager may request that a meeting of the board of directors be convened and a manager, notwithstanding that he may not be a member of the board of directors, shall be entitled to be present and to state his opinion at board meetings, unless the board of directors resolves to the contrary in individual cases.

The articles of association may contain provisions to the effect that in addition to the board of directors there shall be a committee of shareholders consisting of at least five members, the majority of whom shall be elected by shareholders in general meeting. This committee may be given the power to appoint and remove the

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[1] Documents issued by the Joint Committee of the Social Democratic party and the Danish Federation of Labour on 'Economic Democracy', 9.11.1972.

[2] These companies are the Danish companies which come closest to the French 'sociétés anonymes'. A separate law applies to companies which can be compared to 'société à responsabilité limitée' based on similar principles, discussed below.

[3] Sections 49 and 50. Companies with a share capital of less than DKr 400000 in certain circumstances need only have one director, and a management board is not obligatory in joint stock companies having a share capital of less than DKr 400000.

[4] The Act contains transitional provisions which permit persons who, at the time when the Act came into operation, occupied seats on both the board of directors and on the board of management to continue doing so and the same applies to persons who are both members of the management board and chairman of the company.

board of directors. Directors and managers cannot be members of the shareholders' committee. The function of the shareholders' committee is to supervise the administration of the directors and managers. To this end, the articles may provide that specified important measures be notified in advance to the committee. No other powers may be vested in the committee.

A management system consisting only of a board of directors or a single director, having total responsibility and power with regard to a company's affairs may be chosen for small companies having a share capital of less than DKr 400000, unless the company is subject to the provisions on election of employees' representatives to the board.

As a part of the recent company law reform, there is now also a possibility of forming private companies: 'anpartsselskaber'[1] (GmbH/SARL). These companies are envisaged for situations in which the number of capital holders is much smaller than in a large joint stock company. A management board consisting of one or more managers is compulsory for all such companies, whereas they need not have a board of directors unless the capital is at least DKr 400000, or the company is subject to the provisions on the employees' right to representation on the board. If this is the case, the provisions for private companies are the same as for joint stock companies.

Present practices

An analysis of the structure of joint stock companies shows that the smaller the company, the greater the identity in practice between the board of directors and the board of management. In fact, for the smallest companies, it is often the case that the board of directors consists of the businessman in question, who is normally the company's sole manager, his wife or some other relative, and his lawyer. The company is effectively a 'one-man' company. For this reason the 'one tier with one director' system for companies having a share capital of less than DKr 400000 was introduced as an alternative in 1973. It is hoped that gradually the 'one man' companies will adopt this form or the private company form, thereby achieving a coincidence of law and fact which has long been absent. Since these options have only been available from 1 January 1974, it is too early to say whether the hope shows signs of being justified.

Table 1 — *Companies with less than 10 shareholders*

Share Capital DKr	Number of Companies	Number of Companies having general manager on the board of directors
Under 300000	1 642	1 088
300000 to 1000000	421	317
1000000 to 2000000	477	357
Over 2000000	352	229

Table 2 — *Companies with more than 10 shareholders*

Share Capital DKr	Number of Companies	Number of Companies having general manager on the board of directors
300000 to 1000000	143	84
1000000 to 2000000	64	37
More than 2000000	147	52

As companies grow larger the influence of the managers on the board gradually declines. A study[2] published in 1973 of companies registered in Copenhagen produced the figures in Tables 1 and 2.

[1] 'Lov om anpartsselskaber' No 371 of 13.6.1973.

[2] *'De fleste direktorer sidder også i bestyrelsen'*, by B. Posner, in: *Management* 1.11.1973.

It can be seen that among companies having a share capital of more than DKr 2000000 or with more widely distributed shareholdings, there is a noticeably smaller proportion having the general manager on the board than among companies with a smaller or more concentrated share capital. The trend continues as companies grow larger though it remains true that the general manager is normally on the board of a company except for the very largest companies of all. Thus, although the system has two tiers, there is an element of considerable overlap between them.

The other directors on the board of larger companies will normally include representatives of the larger shareholders in the company, and often a lawyer who will not necessarily be a shareholder.

The shareholders' committee is extremely rare. Some banks have a committee. Otherwise they are very unusual and make their appearance in the law largely as a result of its attempt to adopt structures in common with other Scandinavian countries. In Norway, such committees play a much larger role.

Policy

No substantial proposals are being made at the present time as to company structure.

Germany

Employee participation

Collective bargaining

The Constitution guarantees both the right of the individual to belong to a trade union and the right of the trade union to develop freely. One of the most important tasks of the trade unions is to shape the working and economic conditions of employees by means of collective agreements. Actual working conditions are in large part established not by law, but by collective agreements. The form, content and effects of these collective agreements are however defined more closely by legislation. Collective agreements are binding on the employees and employers who accede to them. In practice about 8 000 collective agreements are concluded each year between trade unions and employers' associations. The trade unions are mostly organized according to sectors of industry; therefore a collective agreement applies without exception to all employees in the sector concerned. Geographically speaking, regional collective agreements are the rule, whereas collective agreements valid for more than one region or for the Federal Republic as a whole are the exception.

The responsibility and tasks of the trade unions in the field of collective agreements are not affected by employee participation under the Works Constitution Law ('Betriebsverfassungsgesetz'). Under this Law collective agreements take precedence, as regards basic working conditions, over agreements concluded at works level. The Works Constitution Law strengthens the presence of the trade unions in the establishments and regulates cooperation between trade unions and works councils.

Representative institutions: Information, consultation and approval

Present law and practices

The Works Constitution Law of 1972 regulates in particular the rights of employees' representa-

tive bodies to participation. A works council ('Betriebsrat') must be set up in every private industrial establishment with five or more employees. Its members are elected by secret ballot by all employees of the establishment. In establishments with more than 20 employees, voting usually takes place on a proportional basis, and separately for workers and staff, unless it is decided to hold a joint ballot. Although the right to vote and to be elected to the works council is not dependent on trade union membership, well over 80% of the members of works councils elected at the last election belong to trade unions. In undertakings with several establishments, a central works council must be set up, to which the works councils of the individual establishments normally send two representatives. The central works council has responsibility for matters concerning the undertaking as a whole or several of its establishments.

In a group of companies, a group works council can be set up by qualified majority decision of the central works councils of the individual companies in the group.

Every quarter the works council must call a works meeting, that is a meeting of the employees of the establishment. This takes place during working hours. The works council must present it with a progress report. The works meeting can neither dissolve the works council nor remove individual members thereof. This is possible only by a decision of the labour court, which must be applied for by one quarter of the employees of the establishment who are eligible to vote, or by a trade union represented in the establishment, in cases in which the works council, or individual members thereof, have infringed statutory obligations.

The members of the works council enjoy special protection and numerous facilities aimed at making them independent and efficient in their tasks. Normally, a member of a works council cannot be dismissed from his employment while holding office or for one year thereafter. By way of exception, he may be dismissed with the approval of the works council or on the basis of a decision of the labour court. The costs arising from the activity of the works council are borne by the employer. He must make premises, materials and office staff available. The members of the works council must be released from their employment obligations without any reduction in remuneration whatever and to the extent necessary in order for them to perform their tasks. In larger establishments with 300 employees or more, individual members of the works council must be released completely from their employment obligations. The number of members thus released depends on the size of the establishment.

The employer and the works council must work together in an atmosphere of trust, in compliance with the collective agreements in force and in collaboration with the trade unions and employers' associations represented in the establishment for the benefit of the employees and of the establishment. Where matters are in dispute, negotiations must be held with the aim of reaching an agreement. Industrial disputes between the employer and the works council are prohibited. Differences of opinion are to be settled sometimes by decision of the labour court, but more often by decision of an arbitration board. This is composed of members appointed in equal numbers by the employer and by the works council and a chairman on whom the employer and the works council must agree. If no agreement is reached regarding the appointment of a chairman, he is appointed by the labour court. Where the works council has the right of co-determination, the decision of the arbitration board is binding on the employer and the works council. In other cases, the decision of the arbitration board is binding only if both parties have agreed to abide by it.

The works council has far-reaching rights of participation in social, staff and economic matters. To enable it to carry out its tasks, it is entitled to receive from the employer, information and the necessary documents. The works council has the right of co-determination regarding the following social matters: organization of the establishment and of the conduct of the employees within the establishment, working hours, holiday arrangements, technical installa-

tions to supervise the conduct or output of employees, social facilities within the establishment, company-owned dwellings, questions relating to the wages structure within the establishment, the fixing of piecework and bonus rates, and rules to prevent industrial accidents and illnesses and to safeguard industrial hygiene.

The works council has rights to information and consultation regarding the layout of the place of work, the work flow and the working environment. If employees are particularly affected by changes in these areas, the works council can request that appropriate measures be taken. Where there are differences of opinion, the decision of the arbitration board is binding.

In all matters relating to vocational training the works council has the right to consultation, while as regards the implementation of training measures in the establishment it has the right of co-determination.

In principle the employer may take individual measures affecting staff, such as appointments, groupings and re-grouping and transfers, only with the approval of the works council. The latter is entitled to oppose such a measure within one week on the grounds set out in the law. If the employer wishes to implement the measure in spite of the opposition of the works council he must normally appeal to the labour court. The employer must consult the works council before any dismissal. Dismissals made without such consultation are void. Normally, the works council can oppose dismissals on certain grounds set out in the law. If the employer carries out the dismissal in spite of such opposition, the employee can appeal to the labour court on the grounds alleged by the works council. If these are upheld, the dismissal is void.

Provision is made for an economic committee at enterprise level to deal with economic matters. Such committees must be set up in enterprises with more than 100 employees; their members are appointed by the works council or the central works council. The economic committee discusses economic matters with the employer and reports to the works council. Accordingly, the employer must inform the works council of any planned changes in the establishment which could have fundamental disadvantages for the employees, and must consult it regarding the proposed changes. Changes in the establishment include, for instance, the contraction, closure or transfer of the whole establishment or of considerable parts thereof, amalgamation with other establishments, fundamental changes in the organization of the establishment, its objectives or premises and the introduction of new working and manufacturing procedures. The employer and the works council should strive in their consultations to reach a compromise regarding the proposed change as well as an agreement to offset or to reduce the economic disadvantages suffered by employees as a result of changes (social plan). The works council has no right of co-determination with regard to the employer's decision on the change as such. The arbitration board can make a proposal in this case also, but it is not binding on the employer. The works council, however, does have the right of co-determination when dealing with the social effects of changes on the employees. If the employer and the works council cannot agree on the drawing up of a social plan or on its contents, the decision of the arbitration board is binding.

Policy

Generally, the system of employee representation through works councils, operating normally at establishment level, is regarded as a form of employee participation which has been successful within its proper field of action. The law having been revised and modernized as recently as 1972, there are no proposals currently being made for its modification. It is regarded by the government parties as being essentially distinct from and complementary to employee participation through representation on an enterprise's decision making body. In defending the proposed law in the Bundestag in 1971, the then Minister of Labour was careful to stress that the two forms of participation are not equivalent

institutions but fulfil different functions in a complementary way.[1]

On the other hand, it has been pointed out that the developed form of employee representation at plant level necessarily has an effect on the proper scope which ought to be given to participation through representation on an enterprise's decision making body.[2]

Employee participation in decision making bodies

Present law and practices

Employee representation on the decision making bodies of German companies is governed by three laws: the Co-determination Law ('Mitbestimmungsgesetz') of 1951, the Co-determination Amendment Law ('Mitbestimmungsergänzungsgesetz') of 1956, and the Works Constitution Act ('Betriebsverfassungsgesetz') of 1952.

The Co-determination Law of 1951 applies to companies with their main activities in the coal and steel industry employing more than one thousand workers. The supervisory councils of these companies normally consist of eleven members. All of the members are appointed by the general meeting of shareholders but there are a number of restrictions as to whom they may appoint, the objective of which is to guarantee employee representation. Four shareholders representatives can be appointed by the general meeting without restriction, and one further member ('weiteres Mitglied') can be appointed provided he is independent of both shareholders' and employees and their respective organizations. In practice, these five members are known as the shareholders' representatives. Two employees' representatives must be appointed on the nomination of the works council, and two others on the nomination of the trade unions. One further member is appointed on trade union nomination who must be independent in the same way as the further member appointed by the shareholders. These five members, whom the general meeting is obliged to appoint, are in practice known as the employees' representatives. Both the shareholders' representatives and the employees' representatives may together nominate a neutral, independent eleventh member for appointment by the general meeting. When no agreement can be reached, the law provides for a conciliation procedure with an appeal to the ordinary appeal courts if the general meeting refuses to make an appointment in accordance with the recommendations of a conciliation committee composed of shareholders' and employees' representatives in equal numbers. If the refusal is held to be unjustified, the general meeting is obliged to make an appointment in accordance with the committee's recommendations. If the refusal is finally held to be justified, the general meeting is free to appoint the independent eleventh man itself.

The management board of these companies must include an Employees' Director ('Arbeitsdirektor') who may not be appointed against the wishes of the employees' representatives on the supervisory council and who is charged with industrial relations and personnel affairs.

The Co-determination Law of 1951 has its origin in the fact that the former owners of the coal and steel industry were severely limited in exercising their rights after the second world war. In 1947 the British military authorities in agreement with the trade unions introduced a regime which gave shareholders and employees an equal say in the

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[1] Deutscher Bundestag, 6. Wahlperiode, 150. Sitzung, Protokoll S. 8666 A, B.

[2] Professor Biedenkopf, in: *Der Betriebsberater* 1972, 1517. Since 1973 Professor Biedenkopf has been Secretary-General of the Christian Democratic Party, and was formerly chairman of the 'Commission of Experts to Evaluate the Experiences with Co-determination' which made an extensive study and held hearings on employee participation in Germany for the government. The study together with recommendations for legislative action was published in 1970 under the title *'Mitbestimmung in Unternehmen'*, Deutscher Bundestag, 6. Wahlperiode, Drucksache VI/334, referred to herein as the *Biedenkopf Report*.

administration of the industries. The owners, anxious to regain even a part of their former status did not oppose the regime.[1] When the time came for the Federal Republic to legislate for these industries the trade unions insisted on preserving their existing status.

The Co-determination Amendment Law of 1956 deals with coal and steel companies which are integrated in groups of companies. It provides for parity of shareholders' and employees' representatives with an eleventh neutral member on the supervisory council of the holding company if more than half the turnover of the group results from activities in the coal and steel industry. Employee representatives at group level are to be elected through an 'electors assembly' representing all the companies belonging to the group. This election machinery has provided the model for subsequent proposals to extend employee participation in Germany.

The Works Constitution Act of 1952 applies to all sectors of the economy not falling within the reach of the laws of 1951 and 1956. It provides for one third of the representatives of the supervisory councils of German public stock companies ('Aktiengesellschaften') to be elected by the employees unless the company is owned by a family and employs less than five hundred persons. It also provides for a similar form of employee participation for private limited liability companies ('Gesellschaften mit beschränkter Haftung') which have five hundred or more employees. The employee representatives are elected by all the employees of the company concerned and of subsidiaries integrated in a group. Employees and the works councils are entitled to nominate candidates, but not trade unions as such, though in practice there are 'union' lists of candidates.

In all cases, employee representatives or directors have the same general rights and duties as the other members of the board in question.

Policy

All the major political parties appear to be agreed that there should be an extension of employee representation on supervisory councils outside the coal and steel sector. Discussion has been going on for some time as to the precise manner in which this reform should be effected.

This general consensus and the debate which is now going on owe much to the findings of the Commission of Experts under the chairmanship of Professor Biedenkopf charged by the Christian and Social Democratic government in 1968 with a study of co-determination. The Commission reported in 1970 and concluded among other things that the supervisory council was indeed the appropriate body on which employees should be represented since such representation enabled a company to combine the representation of a plurality of interests with a homogeneous management.[2] The Commission proposed that the employees' representation on the supervisory council should be increased from the present minimum proportion of one third, but that the shareholders' representatives should still retain a numerical majority. The mechanism proposed was that in the case of a council of twelve members for example, six representatives elected by the shareholders and four representatives elected by the employees should together co-opt two final members on the proposal either of one of the elected representatives or of the management board.[3]

In the last few years, the different parties represented in the German Federal Parliament, the trade unions, the Protestant church and the Catholic employee and employer organizations have all presented particular proposals for reform as to employee representation on company councils.

The Social Democratic Party, has since 1968 proposed a straightforward extension of the Co-determination Law of 1951. Its proposal

[1] A statement of Dr Reusch (Gutehoffnungshütte AG) quoted in 'Mitbestimmung-eine Forderung unserer Zeit', DGB 1971, 8.

[2] Biedenkopf Report, *op. cit.*, pp. 31-32, paragraphs 7 and 8; pp. 71 to 74, paragraphs 38 to 45; and pp. 99 to 100.

[3] Biedenkopf Report, *op. cit.*, p. 96, paragraph 1, and pp. 103 to 104, paragraph 18.

corresponds generally to the claims of the German Trade Union Federation (DGB), except that the Social Democrats do not propose that the unions should appoint a proportion of the employee representatives.

The Free Democratic (Liberal) Party at their congress in 1971 backed, after a controversial discussion, a model with six shareholder representatives, four employee representatives and two representatives of the 'leitende Angestellte' (the supervisory staff).

Within the Christian Democratic Party, different models have been elaborated since 1970. Most of them aim at assuring the employees of a larger representation without affecting the predominance of the shareholders' representatives on the supervisory council. The Social Groups of the party (CDU-Sozialausschüsse) have however come out in favour of parity of shareholders' and workers' representatives on a 'council of the enterprise'.[1] But in November 1973, the Christian Democratic Party adopted a resolution which also proposes parity of representation on the supervisory council. However, the chairman of the council is to have a casting vote as to the appointment of the management board. He is elected by the other members of the council, but cannot be elected without the approval of the shareholders' representatives or the shareholders themselves.

In February 1974, the German government proposed a bill aiming at realizing equal rights ('Gleichberechtigung') and equal weight ('Gleichgewichtigkeit') of both production factors, work and capital, within the decision making process of big enterprises.[2] The draft law will apply to all companies and groups of companies employing more than two thousand workers which do not fall within the reach of the Co-determination Law of 1951 and the Co-determination Amendment Law of 1956.

According to the proposal, the supervisory councils of these companies will consist of an equal number of shareholder representatives elected by the shareholders' meeting, and employee representatives elected by an assembly of delegates from all the plants of the company or the group of companies directed by the company. Employee representatives will include at least one member of the supervisory staff.

The Bill does not provide for a neutral eleventh man as provided in the Co-determination Law of 1951. If the supervisory council does not reach agreement on the appointment of the management board even after a conciliation procedure, the final decision on the proposed candidates will lie with the shareholders' meeting. It is also worthy of note that the trade unions have not been given the right to make binding proposals as under the 1951 Law, but they have the exclusive right to nominate candidates as regards a minority of the representatives to be elected by the assembly of delegates.

The German employers' organizations ('Bundesvereinigung der Deutschen Arbeitgeberverbände' and the 'Bundesverband der Deutschen Industrie') have rejected the government's proposal on the ground that its implementation would upset the social balance necessary for a free society and produce a situation in which the trade unions became too dominant a group.[3] The German Trade Union Federation has rejected the proposal as well on the principal ground that the proposal differs in significant respects from the regime currently prevailing in the coal and steel sector.[4] The Federation wishes to see this regime given general application.

At the present time the proposal has not made a great deal of progress in the legislature. The Federal Government has announced that before the end of the present Parliamentary session, an amended proposal will be presented to the legislature.

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[1] Vorschlag der 15. Bundestagung der Sozialausschüsse, Bochum 20.5.1973.

[2] Entwurf eines Gesetzes über die Mitbestimmung der Arbeitnehmer, Bundesrat-Drucksache 200/74.

[3] See press declaration of 22.2.1974.

[4] See press declaration of 3.3.1974.

Share and profit participation

Present law and practices

A German law permits employees to acquire shares in the company which employs them under advantageous conditions.[1] The law allows employees to receive a premium from the State if they choose to make certain investments. The premium varies from 30% to 40% of the amount invested which is limited to DM 624 each year. Most employees choose to invest their amount in life insurance or a house, but about 10% of the total is used for the purchase on favourable terms of shares in the company by which the employee is employed.

Moreover, if a company allots its own shares to employees at a price lower than the market price, the resulting benefit to the employees is not taxed provided that the benefit does not amount to more than half the true market value and also provided that the employee agrees not to re-sell the shares for a period of five years.

These provisions have given companies the opportunity of encouraging shareholding by employees in different ways. Several companies have issued or purchased shares to sell to their employees on favourable terms, and the matter has frequently been made the subject of collective agreements. However, these schemes are essentially savings and incentive schemes and have not had a fundamental effect on the distribution of capital in society or the influence which employees have on the enterprises for which they work. Thus, in the case of one leading industrial enterprise, employees' shares amount to only 6% of the total.

Policy

In February 1974, the government proposed new legislation to ensure that employees generally will participate in the increased wealth of enterprises. According to the proposal, all enterprises making an annual profit after tax of DM 400000 will have to contribute a proportion of that profit to a fund for the benefit of employees. The proportion will be on a sliding scale reaching 10% on profits of DM 1000000 or more. A further payment of 15% of the basic contribution will be payable if a company contributes in a form other than its own shares or shares in companies controlled by the contributing company. All employees and self employed persons will benefit annually from the fund provided they earn less than certain amounts, namely DM 36000 per annum for single persons and DM 54000 for married persons. Annual allotments will be redeemable only after seven years.

There are divergent conceptions as to the administration of the fund, some favouring central administration, others administration through local financial institutions. No draft legislation has been prepared at present, and in view of the current economic situation, it is impossible to forecast when such draft legislation will appear.

The Confederation of German Industry ('Bundesverband der Deutschen Industrie') has rejected the proposed legislation on the ground that it is an unrealistic evaluation of how much enterprises can afford to divert from their profits. Contributions of the kind contemplated would result, it is feared, in a continual watering of capital to the prejudice of shareholders, particularly small shareholders, the enterprise itself and the economy as a whole. Raising new capital would become more difficult and accordingly there would be a restraint on new investments.[2]

Company structure

Present law

The German Stock Companies Act ('Aktiengesetz') of 1965 prescribes a formal two tier system of administration for the 'Aktiengesellschaft' or AG, which corresponds approximately to the

[1] Law for the encouragement of the formation of savings by employees of 27.6.1970.
[2] Press declaration No 9/74 of 11.2.1974.

French *société anonyme*. This two tier system was first made mandatory for AGs in 1870.

The supervisory council ('Aufsichtsrat') consists of a minimum of three members. The maximum permissible is twenty-one members in an AG with a share capital of more than DM 20000000. Except for special provisions for the participation of workers, the members of the supervisory council are elected by the shareholders' meeting or appointed by certain shareholders or holders of a certain class of shares. The members who have been elected by the shareholders can be removed from office by a three-quarters majority of the votes cast at a shareholders' meeting, unless the articles require a greater majority or the fulfilment of other conditions. Members of the supervisory council need not be shareholders.

The board of management ('Vorstand') consists of one or more persons appointed by the supervisory council for a maximum of five years. The supervisory council may also appoint a member of the board of management to be chairman. These appointments may be revoked by the supervisory council for a good reason. A member of the supervisory council may not be simultaneously a member of the board of management.

The division of function and responsibility established by the law is clear and establishes that the board of management directs and is responsible for the management of the company, while the supervisory council supervises the management. Thus, while the board of management is responsible for the management of the company and normally represents it in and out of court, it has specific and detailed obligations as regards reporting on the company's affairs to the supervisory council. The law requires a continuous flow of information to be transmitted by the management to the supervisory council on the state of the enterprise and on envisaged management policy.

Moreover, the supervisory council has the right to investigate the company's affairs and in so doing, it may inspect the company's books and records, and require the management board to make specific reports and answer specific questions. If the welfare of the company requires it, the supervisory council may call a shareholders' meeting.

The supervisory council cannot be charged with management functions, but the company's articles or the supervisory council itself may require that specified measures of the management board receive the prior consent of the supervisory council. If consent is refused, the management board can then only proceed if it can secure a three-quarters majority of the votes cast at a shareholders' meeting.

Present practice

Though the relationship between the board of management and the supervisory council varies considerably from one enterprise to another, certain generalizations can be made.

In practice, in many companies the supervisory council's decisions are prepared by committees of the council which then play a very important role. Use of such committees provides flexibility. Thus, the full council normally meets only every three months, unless special circumstances require more frequent meetings. Members of the management board normally attend the meetings of the supervisory council and its committees. It is also normal practice for the supervisory council to approve the company's annual accounts.

The variation in the roles played by the supervisory councils and management boards from company to company was established by the study made by a panel of experts under Professor Biedenkopf for the German government. If the company was in the hands of one or a few large shareholders, the supervisory council had in many cases not confined its role to supervision, but had played an active part in determining the general strategy of the enterprise. The legal power used to enable the council to play such a role was the power already noted which the supervisory council has to require certain management decisions to have its prior appro-

val. On the other hand, if the company's shares were widely distributed, the management board might have a decisive influence on the election of the supervisory council. In such cases, the supervisory council often confined its role to advice and did not interfere with management decisions.[1] Much may also depend on the personalities of the persons involved, and the extent of employee participation. In practice, it can be said that for most companies, the board of management's central position means that it is normally better informed and more able to take action than the supervisory council.

Policy

In 1972, the German government established a committee of experts within the Ministry of Justice to examine the question of whether company law required amendment in the context of a general law for commercial undertakings ('Unternehmensrecht'). It has not yet published its conclusions, but it seems that it will not propose that the established two tier system be abolished.

On the other hand, a proposal of the Social Groups of the CDU has suggested that the existing system be amended so that all important decisions affecting the enterprise would be decided by an 'Unternehmensrat' or company council composed of delegates representing the shareholders, the workers and the management.[2] This proposal has received favourable comment from within other political parties, but is not in conformity with the official policy of any political party in Germany at the moment.

It is notable that all the programmes being proposed by parties represented in the Bundestag to promote employee participation are based on the existing two tier structure and aim at improving employee participation on the supervisory council.

[1] Biedenkopf Report, *op. cit.*, pp. 32 to 33, paragraphs 7 to 10.
[2] Der Spiegel, 26.2.1973, p. 36. Interview with Mr Katzer, the leader of the group.

France

Employee participation

Collective bargaining

Present law and practices

The Collective Agreement Acts of 1950 and 1971 constitute a legal framework for collective agreements which are legally binding if in written form. The 1950 Act distinguished between collective agreements ('conventions collectives') and establishment or salary agreements ('accords d'établissement ou de salaires'). The contents of the latter were limited to the adaptation of regional or national agreements to a particular enterprise, or to fixing remuneration in the absence of regional or national agreements. This limitation appeared to constitute an obstacle to the conclusion of agreements at enterprise level and the 1971 Act removed the restriction.

The legislation in force distinguishes between collective agreements which apply only to the signatory enterprises and those which can be extended by order of the Ministry of Labour to other enterprises. The latter kind of agreement can only be concluded by the most representative employers' organizations and trade unions, and through a special negotiating procedure in which a government official participates. The extension procedure has been the subject of improvement in recent years.

A collective agreement accordingly applies to all signatories, to all enterprises which are members of a signatory organization or to which the agreement has been extended, and to all workers in these firms whether union members or not.

In the 1950's and early 1960's, wage agreements at national or regional levels were the most significant form of collective agreement, but since then, far reaching developments have occurred particularly after the social disruption

of 1968. There has been a substantial widening in the contents of agreements, combined with a trend towards 'multi-industrial' bargaining at the national level. This has produced some major agreements of great importance for a large number of enterprises, organizations and employees. These have included the agreements of 1969 on job security, of 1970 on training and of 1972 on guaranteed income for employees over 60 years of age without employment. At the present time, negotiations are proceeding for a national multi-industrial agreement on conditions of work.

Moreover, within particular industries and sectors the range of collective bargaining has greatly increased also, dealing for example with the introduction of salaried status for all employees, lay-offs, and retirement.[1]

On the other hand, plant and enterprise level collective bargaining, though more frequent than in the past is still not very common or very broad in scope. It has not yet become clear whether the change of law in 1971 has had a substantial effect on this kind of bargaining.

Policy

All current statements are linked with the publication of the report made by the Sudreau Commission.[2] This Commission had undertaken extensive consultation of all trade union and employer organizations after Mr Giscard d'Estaing charged it with the examination of the problem of the reform of the enterprise as a whole. According to this report, a larger field of application should be left to collective bargaining, since it is desirable that the representative organizations of employers and employees exercise their right to innovate by agreement. The trade union must be recognized as a real partner to whom the material means for action must be given. This is, however, not to mean that the authority of management ('autorité de la direction') should be adversely affected.

Mr Roccard of the Socialist Party has already indicated that the emphasis placed on the importance of contractual relations in enterprises seemed to him to be a good thing. Moreover, the reactions of trade unions and employers to these proposals were generally favourable.

Representative institutions: Information, consultation and approval

Present law and practices

At the present time, French law provides for three forms of representative institutions, all of which can and sometimes do co-exist in a given establishment. First there are the personnel delegates ('délégués du personnel') created by the Matignon Agreement of 1936 and now regulated by a law of 1946 subsequently amended in some respects. Then there are the enterprise committees ('comités d'entreprise') created by an ordinance of 1945 which has also been the subject of amendment. Finally, there are the union delegates ('délégués syndicaux') operating under a law of 1968.

The employees having representative functions in the enterprise (personnel delegates, members of the enterprise committee, union delegates) receive the benefit of a protective statute, in particular as regards dismissals. The evolution of the relevant case law continues to reinforce this protection.

The personnel delegates are to be elected annually in all industrial, commercial and agricultural enterprises with more than ten employees by a secret ballot of all employees divided into two electoral colleges: one for managerial, supervisory and technical staff, and the other for the remainder of the employees. The election is

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[1] See generally '*La Participation des travailleurs aux décisions dans l'entreprise en France*', by J. Chazal. Paper delivered at the ILO Symposium on Workers' Participation in Decisions within Undertakings, August 1974. Also *Workers Participation and Collective Bargaining in Europe*, Chapter 5. Commission on Industrial Relations, HMSO 1974.

[2] *Rapport du Comité d'étude pour la réforme de l'entreprise*, February 1975, La documentation française.

organized according to a system of proportional representation. Candidates are initially nominated by the most representative trade unions, but if less than half the electorate votes in this election, a second election must be held for which lists of candidates can be presented other than those of the unions. The number and composition of the electoral colleges and the allocation of seats between them can be made the subject of collective agreements. The number of delegates is fixed according to the number of employees.

The personnel delegates are by law given the function of representing the employees on all claims relating to the application of agreed wage rates and job classifications and of the labour laws. However, an employee is always entitled to present his own claim, if he wishes. The delegates must also inform the labour inspectorate of all infractions of the labour laws. When an enterprise committee exists, they are entitled to communicate to it the comments of the employees on all matters for which the committee is competent. When no committee exists, they may communicate suggestions for improvements in the organization of the enterprise to the employer. The delegates have a legal right to be received and heard by management.

Enterprise committees must be set up in all enterprises employing more than fifty workers. The committee is composed of delegates elected by the employees and of the chief executive ('chef d'entreprise') who presides at meetings. The number of employee delegates varies according to the number of employees from three to eleven, though the number can be increased by collective agreement. The delegates are elected by secret ballot through a system of proportional representation, the employees being divided in up to three colleges: one for the 'maîtrise', one for the supervisory and technical staff, and one for the remainder of the employees. The distribution of seats between the colleges and the composition of the colleges themselves is regulated by collective agreement between the chief executive and the trade unions concerned. If no agreement can be reached, the Director of Labour from the appropriate Department decides. The system of nomination by lists of candidates is similar to that for the election of the personnel delegates.

Each trade union recognized as representative in the enterprise can designate a non-voting representative from among eligible employees to participate in the meetings of the committee.

The committee's functions are entirely consultative except for the administration or supervision of the social welfare programmes in the firm. It must be informed and consulted on the progress of the enterprise and in particular about measures likely to affect the size or structure of the labour force or conditions of work. It must be consulted in good time about staff reductions and allowed to give its opinions on the proposed measures. The Act 75-5 of 3 January 1975 on redundancies for economic reasons provides that personnel delegates and enterprise committees must be consulted by the employer if the latter envisages making employees redundant for economic reasons, whether conjunctural or structural, when the redundancies affect a number of employees of at least ninety in a given period of thirty days.

The enterprise committee also has specific rights to information, including for example an annual report from the chief executive and, if desired, explanations from a company's commissioners of accounts ('commissaires aux comptes').

Finally, under an Act of 27 December 1968, trade unions have the right, in enterprises employing more than fifty persons, to set up a union section ('section syndicale'). The section is composed of delegates nominated by the union, and its function is to ensure that the interests of the union members are represented in the enterprise.

In practice, the personnel delegates do not appear to have played as significant a role in recent years as the enterprise committees and union delegates. It appears that the number of enterprise committees and union delegates has been increasing substantially, and furthermore, recent legislative texts and collective agreements

have added to the functions of enterprise committees.[1] Moreover, it seems clear that in practice there is an overlap between the operations of the enterprise committees and the union sections. In 1972, for example, the major union confederations between them controlled 54% of the seats on enterprise committees.[2] The resulting situations are complex and generalization is difficult. However, many trade unions claim that the law as to enterprise committees is not properly observed by many managements, particularly in relation to the disclosure of information.

Policy

According to the Sudreau Commission, it is necessary to strengthen the consultation which occurs within the enterprise committee for it expresses a true though imperfect recognition of the community of employees as a constituent part of the enterprise. The representative character of the committee has to be improved and its competences reinforced by way of full consultation, but not by way of co-decision which the social partners do not want. It is necessary to provide also for a personnel representation within groups of companies and in relation to holding companies, since, within such extensive structures, local enterprise committees could form the impression that they were not talking with the real holder of management power. Therefore, foreign multinational groups should be obliged to appoint a representative for each of their French subsidiaries to be answerable for the group's overall policy.

The CGT ('Confédération Générale du Travail') asked in its paper presented to the Sudreau Commission[3] for a true right to information on the economic situation of the enterprise, as well as on the group to which it may belong and, more generally, for strengthening the role of enterprise committees to the exclusion of every element of class collaboration. After the publication of the Sudreau report, the CGT remained sceptical about the capacity of the capitalist system to proceed to the reform of the enterprise, which in its opinion only the joint programme of the left ('programme commun de la gauche') would be able to achieve.

The CFDT ('Confédération Française Démocratique du Travail') expressed similar views prior to,[4] and after, the publication of the report.

On 2 July 1975, the assembly of the Economic and Social Council gave an opinion[5] which rejected the proposal, made by certain employers' organizations but not adopted in the Sudreau report, to open nominations for the first ballot in elections to enterprise committees to all employees, and not only to the representative trade unions. In putting in question the union monopoly once again, the employers hoped 'to achieve a distinction between the roles of confrontation ('contestation') and participation'. This thesis was deemed to be too tainted with anti-unionism to be retained. The demand of the CGT and CFDT for the granting of a right of veto to enterprise committees as regards plans for continual training ('formation permanente') was also rejected.

The report on the preliminary orientation of the seventh national plan, published on 12 July 1975,[6] reads as follows: 'Three approaches must be developed to enlarge the possibility of employees expressing their collective aspirations and influencing the decisions of the managements of enterprises: the first is to study and bring about the conditions for a more fruitful dialogue between trade unions on the one hand and responsible enterprises and their professional organizations on the other; the second is to develop full consultation taking fuller advantage of the possibilities offered by the existence of enterprise committees ...'.

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[1] *'La participation des travailleurs aux décisions dans l'entreprise en France'*, J. Chazal, *op. cit.*

[2] *Worker Participation and Collective Bargaining in Europe, op. cit.*, p. 50.

[3] *'Non à l'austérité — La CGT et la réforme de l'entreprise'* (*Le Peuple* of 15 to 31.10.1974).

[4] Hearing of the CFDT by the Study group on enterprise reform. Paris, 10.10.1974.

[5] Official Journal of the French Republic, 5.8.1975.

[6] Official Journal of the French Republic, 12.7.1975.

Participation in decision making bodies

Present law and practices

The preamble to the French Constitution contemplates the participation of employees in the administration of enterprises.

Moreover, the law makes concrete provision for employee representation on the decision making bodies of certain enterprises. Thus an ordinance of 1945[1] as amended provides that public companies ('sociétés anonymes') employing fifty or more persons must admit two delegates from the enterprise committee in a consultative capacity to all meetings of the council of administration ('conseil d'administration') or supervisory council ('conseil de surveillance') as the case may be. Since 1972, in enterprises in which the number of supervisory and technical staff is at least twenty five, then these employees constitute a special college, and the number of employee representatives is increased to four, one of whom represents the 'maîtrise', one the supervisory and technical staff and two the remainder of the employees.

In State-owned enterprises, representatives of the employees occupy one third of the seats on the council of administration and have the same rights and obligations as the other members of the council.

Policy

According to the Sudreau Commission, a new road for participation has to be opened up: co-supervision ('co-surveillance'), aimed at further satisfying the need for information and supervision felt by employees, through representation with a full right to vote on councils of administration or supervision. Such representation would, however, consist only of one third of the seats, so that the autonomy of decision ('autonomie de décision') of the chief executive remains unaffected. This co-supervision could only be established step by step, but companies wishing to establish it should be authorized by the law to do so. Such co-supervision could only be optional for enterprises with less than one or two thousand employees. The Committee was divided as to whether co-supervision should become compulsory for large companies, either immediately or in the future after a period of five years.

On 2 July 1975, the Economic and Social Council, issued the following statement: 'considering that the majority of organizations representative of employers and employees reject, in the clearest manner, any obligation to ensure a representation of employees, even as a minority, in the decision making of councils of administration or supervision, the Council does not accept the idea that such a reform could be imposed by law ... Accordingly, the law must confine itself to imposing structures and procedures as to information and full consultation, and to providing a statute for those bodies endowed with powers of negotiation'.[2]

Published on 12 July 1975, the report on the preliminary orientation of the seventh national plan,[3] under the heading 'To consecrate the place of man in the enterprise', stated that it was necessary 'to inquire into the methods of permitting the representatives of employees to participate in the bodies directing enterprises'.

On 18 July 1975, the first inter-ministerial council defined certain priorities and established a time-table which will lead to the presentation of a series of draft laws. The Sudreau Report will probably serve as no more than a background to the work on the reform of the enterprise, because its text has been overtaken by the proposals and reactions which it has provoked. The government will take into consideration the problem of the distinction between functions of confrontation ('contestation') and participation in the enterprise, and will examine the proposal for 'co-surveillance' made in the Sudreau Report, and the observations made by such

[1] Ordinance 45-280.
[2] Official Journal of the French Republic, 5.8.1975.
[3] Official Journal of the French Republic, 12.7.1975.

groups as Enterprise and Progress ('Entreprise et Progrès') or the Association for Participation ('l'Association pour la participation').

Mr Giscard d'Estaing has written recently to his Prime Minister 'I hope that a first round of reforms could be proposed to Parliament in the next session'. The social partners will be consulted between October and December 1975 concerning the draft laws, which will probably not be debated in Parliament until the spring of 1976.

Share and profit participation

Present law and practices

In France, share and profit participation has been made the subject of a number of legislative instruments in the fairly recent past.

An ordinance of 1959[1] instituted an optional system for permitting the employees of enterprises to participate in the profits of an enterprise, or in increases in productivity or capital, or operations of a self-financing nature ('opérations d'auto-financement'). The schemes are implemented through the negotiation of collective agreements either with the most representative unions in the enterprise or with the enterprise committee. Tax incentives are granted for the schemes, whether payments are made in cash or otherwise. At the present time, 232 companies have concluded agreements, and 135000 employees are benefiting from them.[2] The limited number of agreements is partly due to the fact that an ordinance of 1967[3] instituted a new, obligatory form of participation in the growth of enterprises employing more than one hundred persons.

Enterprises covered by the 1967 ordinance must create a special reserve for participation by employees, the amount of which depends on the enterprise's profits. The amounts paid in to the reserve cannot be paid out for a period of five years. During this period, the employees' rights in the reserve and the methods of its administration are determined by collective agreement as under the 1959 ordinance. These agreements can contemplate either the assignment of shares, or the deposit of funds constituting the reserve with bodies external to the enterprise, or the deposit of funds in blocked current accounts of the enterprise. At the end of the period, employees receive amounts which are calculated according to their relative salary levels during the relevant period, though in the interests of equity certain ceilings are imposed on the amounts by which individuals can benefit. As with the 1959 ordinance, the State grants substantial tax incentives for schemes of this kind.

By 1 March 1974, 8971 collective agreements had been concluded implementing the ordinance. They benefited four million employees[4] and covered a total of 10051 enterprises. Of this total, 15% of the enterprises had less than one hundred employees and therefore submitted voluntarily to a law which was not obligatory for them. More than 80% of the agreements were concluded by enterprise committees.

An attempt to achieve a measure of harmonization between the two systems just described, particularly as regards the application of the schemes through collective agreements, was made in 1973.[5]

In addition, in that year, legislative provision was made[6] to further promote share participation in the private sector. The law applies to companies the shares of which are quoted on a stock exchange or admitted to the market without a quotation where they are the object of transactions of sufficient importance and frequency. The law does not impose an obligatory

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[1] Ordinance 59-126, amended in 1973 (Act 73-1197).

[2] *'La participation des travailleurs aux décisions dans l'entreprise en France'*, by J. Chazal, *op. cit.*, pp. 11 and 12.

[3] Ordinance 67-693.

[4] *'La participation des travailleurs aux décisions dans l'entreprise en France'*, by J. Chazal, *op. cit.*, p. 15.

[5] Act 73-1197.

[6] Act 73-1196 of 27.12.1973 as supplemented in 1974 (Decree 74-319 of 23.4.1974).

regime but grants certain advantages in the expectation that such advantages will stimulate the growth of share participation.

Finally, it should be observed that in the public sector, share distribution schemes have been implemented for the employees of the Renault concern and the national banking and insurance enterprises. The schemes are not identical, but in general terms they provide for distributions of shares to employees, based on a minimum seniority in the enterprise, of up to one quarter of the enterprise's total capital.

Policy

The Sudreau committee considers that the financial participation of employees should be improved, in particular by the immediate payment of amounts acquired under the obligatory form of participation. It should also be extended progressively in various ways to all enterprises, because 'the progress of the enterprise, the work of all, must be a source of enrichment for all'.

The employers and the Christian unions have insisted upon the necessity of this form of participation. On the other hand, the political parties and unions of the left call these forms of association between capital and labour 'legal gadgets' ('gadgets juridiques') when they do not lead to the supplanting, or at least to the questioning of the established power structures ('lorsqu'elles ne tendent pas à supplanter ou au moins à contester la légitimité du pouvoir').

Company structure

Present law

The French Law of Commercial Companies of 1966 permits a 'société anonyme' to adopt one of two possible structures, namely a system with a council of directors ('conseil d'administration') as the sole decision making body, or a system with a supervisory council ('conseil de surveillance') and a management committee ('directoire'). Prior to 1966, only the former system was known in France.

The first system, often referred to as the 'classical system', specifies that the shareholders at a general meeting, whether constitutive or ordinary, appoint a council of directors of at least three and not more than twelve members. The directors can be removed by a general meeting at any time and must be shareholders in the company. An employee of the company can only become a director if his contract of employment began more than two years prior to his nomination and relates to a genuine employment ('emploi effectif').

The council of directors has full powers to conduct business on behalf of the company within the scope of the company's objects and subject to the powers given by the law to the general meeting of shareholders.

The council elects, and can at any time remove, a chairman who is responsible for the general management of the company and who represents it in relationships with third parties. On a proposal from the chairman, the council can also appoint a general manager ('directeur général'), or two in the case of a company with more than FF 500000 capital, to assist the chairman in the performance of his functions. Such managers can be removed at any time by the board acting on a proposal from the chairman. The extent and duration of the powers delegated to a general manager are determined by the council of directors in agreement with the chairman.

Apart from attendance allowances and fees received in their capacity as members of the council of administration, the chairman and the general manager receive a lump sum determined by the council. Other members of the council may receive, in addition to their attendance allowances and fees, only exceptional remuneration for specific missions and tasks.

The second, 'dualist', system specifies that the shareholders in general meeting, whether constitutive or ordinary, appoint a supervisory council which will normally consist of from three to twelve members. All of the members of the supervisory council must be shareholders of the company and no member can also be a member of the management committee. Furthermore, restrictions on the manner in which members of the supervisory council are remunerated mean that in practice no employee of the company can be a member. The members of the supervisory council can be removed by the general meeting at any time.

The supervisory council appoints a management committee of not more than five members and appoints one of these members chairman of the committee. If the company has a share capital of less than FF 250000, a single director-general can be appointed. The members of the management committee or the director-general can be dismissed by a general meeting of shareholders on a proposal from the supervisory council.

The management committee has full power to conduct business on behalf of the company within the scope of the company's objects and subject to the powers given by law to the supervisory board and to the general meeting of shareholders. The company is represented in its relations with third parties by the chairman of the management committee or the single director-general.

But the management committee exercises its functions under the continuous control of the supervisory council, to which it must report regularly. Furthermore, the supervisory council can impose such supervisory mechanisms as it thinks fit. In turn, the supervisory council must make observations on the reports and accounts submitted by the management committee to the annual general meeting of shareholders. Finally, the articles of the company may require that certain transactions receive prior authorization from the supervisory council, while certain contracts in the nature of guarantees are required by law to be authorized in advance.

Present practices

In practice under the classical system, there is a clear differentiation between the chairman on the one hand, and the remaining members of the board of directors on the other. The former, assisted as the case may be by one or two general managers, normally have active executive roles, the latter normally do not. Accordingly, even within the classical system, there is a separation of the executive and supervisory functions in practice. However, it must be recognized that the two functions overlap to some extent and that the system has a certain flexibility in practice because of the absence of an institutional barrier.

As for the acceptance of the dualist system, it should be noted that since 1966 the form has been adopted by companies of various sizes and kinds, but it does not appear that the dualist system has been so attractive that it will in the foreseeable future rival in popularity the classical form. The statististics show that after a period of growth from about 6.6% to 15% of registrations and re-registrations in the first three years after 1966, there was a decline back to 6% in 1972. Furthermore in 1970, the year following the most successful year for the dualist system, there was a notable leap in the number of companies reverting to the classical form.

The reason for these developments appears to be that friction and conflict have occurred in a significant proportion of dualist companies as a result of the supervisory councils having difficulty in confining themselves to control, and trespassing on management territory. It has often been difficult to resolve these conflicts because only the general assembly of shareholders has the power to remove the management committee which deprives the supervisory council of an important means of coercion.

Policy

According to the Sudreau report, co-supervision requires that the classical system of a council of administration be adjusted by separating clearly

the administrative and supervisory functions as is the case in the dualist system, which it is also necessary to render more attractive because its extension is desirable. To that end, it is proposed that the members of the management committee be removable by the supervisory council and not by the general meeting.

The CNJC ('Centre national des jeunes cadres'), the Democratic Centre ('Centre démocrate'), the Radical Party ('Parti radical') and 'Socialism and Enterprise' ('Socialisme et entreprise') call for a generalization of the dualist system.

The employers' organization Enterprise and Progress thinks that it is indispensable that the function of management and supervision are separated.[1]

[1] *'Les sept propositions d'Entreprise et Progrès'*, in Le Monde of 8.1.1975.

Ireland

Employee participation

General

The legal background to employee participation in Ireland is similar in many ways to that of the United Kingdom. Company law as such makes virtually no provision for the employees of companies, but does not prevent special provision being made by those constituting a company to take into account their interests. Moreover, there is a body of industrial relations and employment law which regulates the relationships of employees to employers, companies included. The Trade Union Acts enable trade unions to pursue their activities. Great emphasis is placed on the concept of voluntary agreement, be that agreement in the form of a collective bargain, an employment contract, or the statutes of a company.

Collective bargaining

Present law and practices

Collective bargaining forms the most obvious mode of employee participation. The right of workers to form unions is guaranteed by the constitution and while there is no legal obligation on employers to recognize and bargain with a union, in practice, employers usually negotiate with unions which are representative of a substantial proportion of their employees, or a section of their employees.

In recent years, however, Irish collective bargaining has in one respect been different from the collective bargaining in the United Kingdom, and this is with respect to the concept of the 'wage round'. The 'wage round' is the major re-negotiation of wage rates which has taken place since 1970 at national level in the context of an Employer-Labour Conference, a voluntary organization consisting of representatives of

employers and trade unions, with the government being included on the employer side in its capacity as a major employer. The general position with regard to these national procedures and agreements is reviewed towards the termination of each agreement and there is always the possibility of a return to the previous system of collective bargaining at company and industry level as regards all aspects of pay revisions.

The institution of the 'wage round' has emphasized the national aspects of collective bargaining, whereas in the United Kingdom greater emphasis has been on the development of plant and industry level bargaining. However, the contrast should not be exaggerated. The Irish national agreements are only a framework within which further more detailed bargaining can take place at industry and plant level in the same manner as in the United Kingdom. The national agreements provide for collective bargaining at company and industry level on such matters as productivity agreements, pay anomalies and other terms of employment. The procedures to be followed in dealing with such matters are prescribed in the national agreements, which reduce the scope for management to act unilaterally. Moreover, plant and industry bargaining occurs independently of national agreements in relation to a large number of topics such as recruitment, redundancy, training, plant location and many other matters, so that it may in fact be difficult for management to act unilaterally over quite a wide range of issues.

Policy

The development of collective bargaining is endorsed by a wide range of opinion in Ireland, for example the Federated Union of Employers, the Irish Congress of Trade Unions, and the main political parties: Fianna Fail, Fine Gael and the Labour Party. It is safe to say that the desirability of free collective bargaining is part of the conventional wisdom concerning industrial relations in Ireland at present. Discussion concerning the development of collective bargaining is concentrated on the question of how far employers should be required to disclose information to the trade unions for the purpose of facilitating meaningful negotiation, and on the problems resulting from the existence of a fairly large number of separate trade unions.

Representative institutions: Information, consultation and approval

Present law and practices

Consultation on a voluntary basis has played a part in Ireland and in certain parts of the private sector, works councils have been established usually as a result of joint action between management and unions concerned. Where unions have controlled the works council, it has often ceased to be a purely consultative organ and has combined the processes of consultation and collective bargaining quite effectively. Where the unions have not been active and consultation through works councils or otherwise has taken place, it has generally been less successful, and has often been regarded as being of limited value as a result.

The only form of consultation required by the law is required under the Factory Act 1955 which gives workers in factories the right to set up safety committees and employ safety delegates who have a consultative function with regard to safety matters. The experiment is not generally regarded as a success and has contributed to the view that purely consultative bodies in general are of limited value.

Policy

As for the future, the debate on consultation through bodies such as works councils has received a new stimulus. In 1973, a sub-committee of the Employer-Labour Conference recommended a national collective bargain establishing works councils as consultative organs in all places of work where twenty-five persons or more are employed. The election of worker representatives would be through trade union

machinery. Information relating to an enterprises's position should be made available to the councils subject to confidentiality, except where the provision of the information would be detrimental to the interests of the organization. Due regard is to be given to existing collective bargaining machinery and agreements.[1] Whether or not the recommendation is adopted, the fact that the sub-committee has made the proposal is likely to have a stimulating effect, and indicates that both management and labour are to some extent agreed on the desirability of promoting consultative machinery subject to certain limitations.

In this connection, it is also noteworthy that the Irish Congress of Trade Unions has accepted the proposals as to works councils in the European Companies Statute subject to the significant proviso that employee representatives should be elected through 'the appropriate trade union machinery in each establishment'.[2]

The Minister for Labour in the coalition government (Fine Gael and Labour Party) last year announced that while not proposing to legislate, he will encourage the development of works councils in State-run enterprises. These councils would probably be based on trade union structures and would meet and negotiate with management and receive reports from employee representatives on the boards of the enterprises in question.[3] Fianna Fail, the opposition party, has in the past expressed the view that new forms of employee participation should evolve from the working of normal processes of consultation and bargaining without interference by the State.

Participation in decision making bodies

Present law and practices

Irish law does not prevent those forming a company from making provision for employee representation, but, in practice employee representation on company boards is not found in the private sector. In the public sector, a few trade unionists have in the past been appointed to the boards of some State enterprises. While not employees of the enterprises, these members do represent the interests of labour in a general sense.

Policy

The Minister for Labour in the coalition government has also expressed approval in principle of the idea of employee representation as 'an essential component of any comprehensive approach to worker participation'.[3] He intends to introduce legislation to provide for such representation for certain public commercial enterprises. The main features of the proposals[4] are that one third of the members of the boards concerned will be elected from and by the workforce as a result of an election conducted by secret ballot under the proportional representation system. Only branches of trade unions and staff associations recognized for the purpose of collective bargaining within the enterprise will be entitled to nominate candidates. Each employee elected will have the same rights and responsibilities as other directors on the board.

As already noted, Fianna Fail has traditionally opposed legislation requiring employee participation for private enterprises, but like much of Irish industry itself, it is not opposed to the development of participation through collective bargaining and voluntary development of consultative machinery.

The Irish Congress of Trade Unions has approved the concept of employee representation

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[1] *Draft National Agreement on the Establishment of Works Councils*, Sub-Committee on Worker Participation of the Employer-Labour Conference, 1973.

[2] *Submission to Minister for Labour on Statute for the European Company proposed by the European Commission*, Irish Congress of Trade Unions, 1973.

[3] Address by the Minister for Labour to the Irish Congress of Trade Unions' second annual summer course on 14 July 1974.

[4] *Election of Employees to the Boards of State Enterprises*. Proposals by the Minister for Labour. July 1975.

on the supervisory boards of the proposed European Companies though it wishes to see half the supervisory boards appointed through trade union machinery. However, it has expressly stated that similar views will not necessarily be taken of the proposal for a fifth directive.[1]

Share and profit participation

These programmes play a minor part in Ireland at the moment being mostly in the nature of bonus and incentive schemes. Irish trade unions tend to be suspicious of them. However, Fine Gael has a commitment, announced in 1965, to promote profit sharing schemes in private enterprise.

Company structure

Present law and practices

In general, Irish law and practice as to company structure are similar to those to be found in the United Kingdom. For this reason, a detailed description is not required. It suffices to say that while no formal division of the board is required by law, in some companies there will be non-executive directors, though their independence and ability to supervise the executive directors may be limited.

Policy

No substantial proposals as to company structure are being made at the present time. However, in the context of a speech on industrial democracy, the Minister for Labour in the coalition government announced that he envisaged employee directors being elected to single tier boards as they are presently known in Ireland. In his view, it was not possible to divide policy and management decision making, which cast some doubt on the desirability of the two tier system. Moreover, effective power tended to pass to the management board, the employees being excluded from critical decision making. Accordingly, it was preferable to rely on a single tier structure, unless it were to appear subsequently that it was deficient in some way.[2]

[1] *Submission to Minister for Labour on Statute for the European Company proposed by the European Commission, op. cit.*

[2] Address by the Minister for Labour to the Irish Congress of Trade Unions' second annual summer course on 14 July 1974.

Italy

Employee participation

General

The grand design of the Italian Constitution on employee participation in the management of undertakings, prepared in a particular political, economic and social context has not been implemented to date. This does not mean, as will be shown within the limits of this general description, that Italian workers do not possess means to exert a more or less extensive and decisive influence over economic decisions taken by industrialists. Italian workers have been able to achieve significant results, at least so far as substantial influence on managerial economic policy is concerned, within the main production sectors, and particularly in large and medium-sized industrial undertakings.

The relevant constitutional provision in Article 46 states that: 'in order to improve the economic and social conditions of employees, and in harmony with production requirements, the Republic recognizes the right of employees to participate in the management of undertakings, in accordance with the procedures and to the extent laid down by law'. This statement of principle has remained such, since the social groups which might have been concerned did not seek to have it implemented; under present circumstances, it does not seem as if this attitude is likely to change.

With regard to industrial relations, the Constitution in Article 39 affirmed the principle of free trade union association, and, with a view to recognizing the trade unions, made registration compulsory and subject to the existence of internal rules with a democratic basis.

Registration would have included the possibility of drawing up collective agreements having 'erga omnes' effect that is, applying to all employees belonging to a particular industrial category. The unions were to be represented at the bargaining table in proportion to their membership. The constitutional design was not implemented because trade union organizations hold that if it were put into effect, it could restrict their freedom and lead to the system of industrial relations becoming inflexible. At present, trade union organizations are therefore *de facto* associations.

The Statute on Workers' Rights[1] provides for certain rules establishing a legal basis for industrial relations in enterprises. The aim of the law is, firstly, the protection of employees, and secondly, to legalize union activity on the shop-floor by trade union representatives in firms, and to develop their role. Trade unions have achieved *de facto* recognition, and provisions have been laid down to enable them to act under procedures freely chosen by them. Recognition has been accorded by reference to trade union organizations belonging to confederations which are most representative at national level, and to unions which sign national or provincial agreements which are applied in undertakings.

Collective bargaining

Present law and practices

Collective agreements operate at two levels in Italy, at national level and at the level of firms.

Until the begining of the sixties, collective negotiations were mainly conducted at national level. Besides general inter-union agreements, collective agreements for a specific sector and specific occupational category were also concluded. The agreements fixed the level of wages and the main working conditions. Plant and enterprise agreements were limited in application to the larger undertakings, and in content to piece-work, production bonuses and similar matters. Such agreements were virtually independent of the national agreements.

[1] Law of 20 May 1970.

With the signing of collective agreements for the metal and engineering industries in 1962 and 1963, a definite turning point was reached which, as a result of a radical change in the collective bargaining system, was to lead to a new phase of industrial relations in Italy. Trade union organizations maintained that the policy pursued up to that time no longer met the requirements of labour.

The economic conditions for industrial reconstruction and the situation on the job market had changed, and made it necessary to adjust collective bargaining machinery to the different production structures, particularly at factory level. This led to the drawing up of so-called 'contrattazione articolata' or 'local agreements'. Specific referral clauses contained in national agreements laid down that, in respect of certain matters and within certain limits, final provisions should be settled locally in plant and enterprise level agreements.

The decentralization thus effected came closer to meeting basic demands, and moved the focal point of negotiations to the individual firm, while retaining the main function of the national agreement, which is to ensure and protect the production structures of a country still characterized by the existence of many small and medium-sized undertakings.

The emergence of new structures for employee representation, the works' delegates and councils, had a dynamic effect on industrial relations which led to wider and more detailed negotiations within the undertaking, relating, for example, to continuing changes in technology and the organization of work. As a result of the national agreements drawn up at the end of the sixties, the material restrictions on the contents of plant and enterprise agreements have thus in practice been overcome.

With local agreements becoming firmly established, new limits and conditions were set to the employer's managerial and organizing authority. Employees' representatives now make specific demands as regards work organization, as the time has come in their view to negotiate on the management's willingness to ensure considerable improvement in working conditions generally, and more particularly in those relating to functions and the work place.

These efforts to change the organization of work at plant and enterprise level were subsequently applied to the pursuit of other objectives at national level. A profound change was requested and made for example in staff classifications, and in almost all sectors, the principle that overtime should be regarded as exceptional and be the subject of prior agreements concluded with the trade union representatives of the undertaking, was confirmed and made more strict in application.

More recently, on the basis of a critical assessment of current production structures both from the point of view of quality and location, and as a result of the urgent need to improve social structures, the employees' organizations maintained that it was time at last to start providing concrete solutions to these problems, via local agreements.

Plant and enterprise level bargaining in 1973 was marked by substantial demands in respect of certain points. Specific commitments were obtained from certain firms to place new investments in the Mezzogiorno; firms accepted requests to direct investments to socially important production sectors; in a number of cases employers agreed to make financial contributions, related to the wages bill, to improve social structures outside of the undertaking.

Policy

Both employer and labour organizations agree on the basic importance of collective bargaining to the orderly development of industrial relations.

Trade union organizations have always been consistent in emphasizing the paramount importance which they attach to agreements, as the most appropriate means of settling, from time to time, the natural conflict of interests which, in

their opinion, is inherent in the current economic system. Employer organizations, conscious of the need to create a harmonious social climate, also display readiness to engage in a searching dialogue with their counterparts.

Here it will be recalled that the big trade unions believe that given present circumstances in Italy, they have a special and basic responsibility for the organization of the economic life of the nation. In order to promote general development in line with their conception of society, these organizations use collective agreements in order to exercise influence over employers both to protect the employees' interests in undertakings, and at the same time to organize the economy according to the principles they profess. Italian trade unions consider that their position under the agreements is sufficiently strong for their planned objectives to be attained, and that the results obtained to date are not unsatisfactory.

Representative institutions: Information, consultation and approval

Present laws and practices

Three bodies should be taken into consideration, namely: internal commissions ('commissioni interne'), trade union delegations ('rappresentanze sindacali aziendali'), and finally the delegates and the works councils ('consigli di fabbrica').

The internal committees, which reappeared after the war under agreements drawn up for the first time in 1943, are at present governed by the Inter-Trade Union Agreement of 1966. Under this agreement, the internal committee, or in firms employing between five and forty persons, the plant representative, constitutes the employees' representative body before management. Their main task is to promote or maintain normal relations between workers and management, for the purpose of achieving the regular development of production in a spirit of cooperation and mutual understanding.

Their duties are thus to ensure that works agreements are applied, and that the social and legal provisions on occupational hygiene and safety are complied with. They can also formulate proposals to improve company social services and working methods, and they enjoy in substance powers of representation and consultation, except as regards internal social institutions, which they help to supervise.

The internal committees, whose activities became rather limited in the recent past, entered on a decidedly critical period, when, as stated above, the focal point of collective agreements switched to enterprise level. As a result, they have largely disappeared from most industrial undertakings, even although the inter-union agreement is still in force.

In 1970, the Statute on Workers' Rights gave workers the possibility of forming trade union delegations in each production unit. The workers' right of association, for the representation of their collective interests, was thus confirmed, and the members of the representative bodies afforded the guarantees and protection necessary for carrying out the tasks involved.

The law speaks quite generally of 'trade union representation', leaving the trade union free to select the most appropriate form of internal organization: trade union branches, departmental committees, or works councils. In many ways, particularly with regard to the appearance of new forms of representation, the legal provisions in question accepted what had been achieved in practice under the renewed agreements drawn up after the autumn of 1969.

During the industrial disputes of 1968 and 1969, new forms of worker representation emerged and spread, rapidly supplanting those in existence, because the latter had proved inadequate in advancing the new types of claim which placed most emphasis on the enterprise as the site and subject of collective bargaining. The new forms are the delegates and the works councils. The delegate is elected by a homogeneous group, i.e. by all the workers carrying out their activities in one production unit, working

under the same conditions and with the same problems. All workers in a homogeneous group take part in the election of their representative, whether or not they belong to a trade union. Voting is by ballot, which emphasizes the unitary nature of the representation. Since the delegates precisely reflect the organizational structure of the undertaking, they are able to represent the interests of employees at all stages and with regard to all aspects of the production process.

All the delegates together constitute the works council, where decisions concerning the claims to be made at plant and enterprise level, and the various forms of action, are taken.

In spite of the spontaneous and fragmentary nature of these representative bodies, they established themselves during the so-called hot autumn, and were accepted as the backbone of trade union organizations in the undertaking. The Trade Union Agreement establishing a single federation between the CGIL ('Confederazione Generale Italiana del Lavoro'), the CISL ('Confederazione Italiana Sindacati Lavoratori') and the UIL ('Unione Italiana del Lavoro') states that works councils are 'the basic units of the trade unions', and that it is their duty to negotiate industrial agreements.

In other words, the function and the duty of these representative bodies is to represent and defend the workers' interests, especially through agreements drawn up with the undertakings. Given that, as was stated above, local agreements, worked out in conjunction with trade union bodies, may henceforth relate to managerial decisions in almost all areas, for example, how to produce, what to produce and where, the role which the works council has assumed in the industrial economy is obviously important.

Policy

Given the attitude of the trade union organizations to collective agreements, both at national and factory level, it seems reasonable to assume that agreements will continue to develop, and extend still further. The relationship which labour has seen and sees between the problems of industrial democracy peculiar to the undertakings, and the general problems of the national economy, is a basic feature of this approach. Greater weight will therefore attach to the role of the new forms of representative institution which have emerged in recent years.

Participation in decision making bodies

Employee representation on the management board of firms is unknown in the private sector. Only in the public sector is it sometimes provided that employees' delegates may be included on the management boards of public institutions. Under present circumstances neither trade union nor employer organizations, as such, have shown any interest in this form of employee participation.

Generally speaking, employees are perplexed by this type of participation and in a way consider it divorced from the realities of Italian industrial relations. They think that the natural conflict of interests inherent in any undertaking makes every form of cooperation within the structure of the enterprise unreal and hazardous. It would be better to accept the conflict and settle matters by collective agreements which, as previously stated, have been greatly improved and become much more common in Italy. This machinery enables the workers to curb managerial power and to influence the choices made in undertakings.

Although the trade unions state that they are fully prepared to discuss any policy which could improve industrial relations, they naturally intend to retain any advantage gained. They consider that every new measure which may even unwittingly restrict their freedom of action should be examined with the utmost caution.

Employer organizations seem to hold that in present circumstances, in any case, the social and trade union prerequisites for employee participation in company bodies do not exist. They

point out that since the scope of collective agreements has been gradually extended to include production targets, investment commitments and organizational methods, employees have had a considerable say in fundamental decisions concerning the life of undertakings. Given the special nature of Italian industrial relations, employer organizations maintain that the introduction of formal institutionalized participation would not be likely to bring about the effects and obtain the objectives claimed for such structures elsewhere.

Company structure

Present law and practices

The administrative structure of a limited liability company ('Società per azioni') consists of three separate bodies. Two of these are compulsory and one optional, but the optional body exists in practice in most large undertakings and in the majority of medium-sized businesses.

The first body is the Council of administration ('Consiglio d'amministrazione') which is extremely important from both the institutional and the practical points of view.[1] The function of the council is of a general nature and, in fact, is identified by the law as the management of the company. The powers and duties of the members of the council are derived by inference from Article 2364 of the Civil Code which specifies the matters to be dealt with exclusively by the company in general meeting, such as the approval of the accounts, the appointment of members of the council, and matters concerning the management of the company which according to the memorandum and articles of association must be dealt with in this way.

The law itself thus places few restrictions on the council's power of managing a company, but provides that the articles of association may restrict the council's powers by specifying that particular questions shall be dealt with by the company in general meeting.

The management of a company, being a continuous and demanding business, is regarded as being possibly inappropriate for a relatively large body such as a council of administration. Article 2381 of the Civil Code accordingly lays down that where the articles of association or the company in general meeting so provide, the council may delegate their powers to an 'executive committee' consisting of certain of their members or to one or more 'delegated administrators' ('amministratori delegati'), and shall specify the extent of the delegated powers.

This provision prohibits only the delegation of powers relating to the preparation of accounts, to the right to increase the share capital when such a right is vested in the council, and to the taking of measures in the event of a reduction in capital owing to a loss.

Consequently, there are two legal restrictions on the possibility of delegation: one is procedural and is based on the requirement that provision must be made officially for the delegation in the articles of association or by a resolution of the members of the company in general meeting, and the second is a matter of substance and consists of certain matters being excluded from the power of delegation. It must be emphasized, as has already been stated, that the delegation of powers must be decided on by the council of administration and granted only to people who are already members of the council.

Delegation then gives rise to the setting up of a second body, known as the executive committee, which exists side-by-side with the council of administration.

The latter is thus empowered to form an entirely separate body in the company. The legal validity of this power of organization is based on the memorandum and articles of association and a resolution of the members of the company in general meeting, but the new body is completely separate and different from the body delegating the powers and exercises powers of its own on

[1] The administration of a company may be entrusted to one person only, a sole director.

behalf of the company ('attribuzione proprie', Article 2392). The result is both a change in the structure of the company and a certain change in the position, formally and substantially, of the delegating body, as well as in the powers and duties of the latter towards the company. The delegation of powers may be revoked or amended at any time; nevertheless it is a normal, permanent handing over of general administrative power in that the delegated body is authorized to perform not simply specific acts, but also all the acts which it considers appropriate within the limits of the delegation.

The setting up of the new body does not imply the removal of powers from the delegating body which maintains 'concurrent and cumulative' powers with the delegated body. The delegating body retains the right therefore to exercise all the powers conferred on it by law and by the memorandum and articles of association and to decide directly, even on matters delegated to the executive committee.

Accordingly, a further advantage of the Italian system can be seen to be its flexibility which does not require the complete removal of the council from active administration, thereby facilitating the adjustment of organizational structures to the varying requirements of different undertakings. The same flexibility also allows any council to intervene directly in the affairs entrusted to the delegated body whenever it considers it to be appropriate.

Nearly all commentators think that it should be possible to include a clause in the memorandum and articles of association providing for the compulsory setting up of delegated bodies and under which the council of administration would not be able to refuse to delegate to an executive committee. It is clear in such a case that the council would lose the power to revoke the delegation as a whole unless the revocation were accompanied by an identical delegation of powers to other persons, that is to say other members of the same council of administration.

The duties and consequently the potential liabilities of the council of administration change once the delegated body has been set up. As regards the functions of the executive committee, the other directors retain only a general duty to supervise the management and to intervene to prevent acts of which they are aware and which would be prejudicial to the company, or to prevent or minimize harmful consequences. The explanatory note 981 to the Civil Code shows that in this connection account is thus taken both of the requirement that the office of a member of the council shall not become an easy sinecure, and of the need to avoid the situation where fear of assuming responsibility far in excess of their powers would discourage men from taking up an office in which their knowledge and honesty would be particularly valuable.

As has already been said, the above Article 2381 also provides that powers of the council of administration may be delegated to one or more delegated administrators instead of to the executive committee. In such a case the delegated administrator is in practice entrusted with the entire running of the undertaking and the delegation is usually decided on the basis of the aptitude and professional ability of those selected. For this reason the delegated administrator is also usually permitted to represent the company towards third parties. Where powers are delegated to two or more administrators it is the prevailing opinion that in this type of case, each administrator is in general individually entrusted with full powers, even when provision is made that for certain acts all the delegate must act together.

It will be noted, finally, that the existence of an executive committee and, at the same time, delegated directors does not seem to comply with the law. Nevertheless, this sometimes occurs in fact, and some commentators have thought that it might be possible to justify it.

The above short description shows how the Italian legislator has enabled the company, by creating a new body, the executive committee or one or more delegated administrators, to assume an administrative structure which separates to a certain extent management from control and

supervision. This separation is brought about by a free organizational choice of the company and is dependent both essentially and functionally on the will of the main governing body, the council of administration which is entitled to intervene in management affairs whenever it so wishes. Moreover, as has rightly been pointed out, in reality, the delegated body consists of those who are the most highly qualified representatives of the controlling shareholders' group in the company, so that there is a tendency in practice for the council of administration to cease being the source of effective management and power.

The other compulsory body completing the administrative organization of the company is the shareholders' committee ('collegio sindacale') which is essentially an internal supervisory body empowered to act in the interests of members and third parties. The main function of this body is to supervise the administration of the company. The law has been drafted in such a way that the committee's powers are unlimited, so that the activities of the other bodies of the company come under its supervision. In particular, it should be noted that, in this context, the law emphasizes, as the primary aspect of the institutional role of the shareholders' committee, its auditing function.

Attention should also be drawn in the context of the committee's general supervisory function to cases in which the committee may be requested to intervene where one or more shareholders have reported irregular acts. Where such a request is made by a number of shareholders representing not less than 5% of the share capital, the committee is obliged not only to investigate the matters reported, but also to call immediately a general meeting if the report seems well founded and urgent action needs to be taken.

For a complete account of this body, it should be pointed out that it has two further functions, though of minor importance: an active administrative one such as calling a general meeting where the council of administration has failed to do so, and the performance of ordinary administrative duties in the event of all the members of the council ceasing to hold their office. Furthermore it has an advisory role, for example when it must advise on the remuneration of members of the council entrusted with special duties.

The many important duties of the shareholders' committees are not accompanied by sufficient powers to enable them to take the measures which may be shown to be necessary by their investigations. In fact, the shareholders' committee has practically no decision making powers. Virtually its only power is to refer matters to the company in general meeting which alone may take decisions. It must be acknowledged that the committee has had a controversial existence as regards its composition and the functions assigned to it. Wherever company law reform is mentioned, the radical reform or even abolition of the shareholders' committee is generally called for.

The recent Law No 216 of 7 June 1974 retained the shareholders' committee but delegated to the government a power to issue rules in relation to companies quoted on the stock exchange which will have the effect of removing the committees from the auditing of their annual accounts and entrusting this task to appropriate auditing companies for certification.[1] A new public body, called the National Commission for Companies and the Stock Exchange has also been set up and has been given the task of supervising quoted companies even as regards the interests of third parties.

Policy

It has already been stressed that the common view seems to be that the shareholders' committee has not come up to expectations, and references to its inefficiency are often made when calls are made for the introduction of a genuine and

[1] This delegation has since been used, see the Decree of the President of the Republic of 31.3.1975, No 136, published in the Gazzetta Ufficiale of 7.5.1975.

effective system of internal supervision. In the report of an Interministerial Commission which recently drew up a draft law on the reform of limited liability companies, which was used as the basis of the said law, it is stated that where companies which are quoted on the Stock Exchange remove from their shareholders' committee the power to audit the accounts, the said body retains 'a function which may be broadly defined as being control of management'. It was not 'considered appropriate in view of the limits placed on this reform to study in greater detail the complex problem of the internal organizational structure of companies, the reform of which is less urgent and which in any event is still being studied by the Community.' Given the almost total lack of effective internal supervision in the present administrative organization of companies, and the fact that the general duty of supervision and intervention, which all members of the council of administration have continuously to discharge, does not seem to have provided the necessary protection, there has been no lack of authorities suggesting, despite some doubt as to whether the dualist system is the ideal solution, that it should be introduced into Italy, as the most suitable means of ensuring the attainment of satisfactory internal control.

Luxembourg

Employee participation

Collective bargaining

The liberties of trade unions to organize are guaranteed explicitly by the Luxembourg Constitution, and by several international labour conventions which have been ratified by law.

Collective bargaining was first regulated by a law of 1965, though of course collective agreements had been concluded before that date, but without a particular legislative basis. Collective agreements can be concluded between one or several trade unions ('organisations syndicales') on the one hand, and on the other hand, one or several employers' organizations, enterprises, groups of enterprises engaged in similar activities, or an ensemble of enterprises of the same profession. However, only those organizations which are the most representative at the national level may conclude such collective agreements, and thus craft and enterprise labour organizations are excluded.

A legal obligation to bargain is imposed on employers though they can of course bargain as members of an employers' organization. When an employer refuses to negotiate, or when negotiations have failed to result in an agreement, the issue comes before the National Conciliation Office.

A collective bargain is defined by law as a contract relating to labour relations and general conditions of work. In particular, it deals with such matters as engagements, dismissals, hours of work, overtime, holidays and of course, the remuneration of employees. Salaries must by law be indexed.

Both parties to a collective bargain are under a legal obligation to observe its terms for its duration, which must be at least six months, and to do nothing which may compromise its faithful execution.

Collective bargains may also be extended by decree to cover all employees in a particular sector.

Representative institutions: Information, consultation and approval

Present law and practices

Two institutions must be considered: the personnel delegates ('délégués du personnel') who have been required by law in certain enterprises since the end of the first world war, and the mixed committees ('comités mixtes') first required by a law passed in May 1974.

As for the former, the law was last brought up to date in 1962 and requires a delegation representing manual workers ('délégation ouvrière') in every enterprise in the private sector and in every establishment in the public sector which normally employ at least fifteen manual workers. A delegation representing white collar workers ('delegation d'employés') is required in every enterprise normally employing at least twelve such workers. The size of the delegation varies with the number of employees, the delegates being elected by the employees from among themselves. The law confers on the delegations the general function of safeguarding and defending the rights and interests of employees in the social field. The delegates' proposals are to be made directly to management. They can receive and take up individual grievances but in such cases they must above all attempt to effect a conciliation. The delegates must also give their advice on the development and amendment of the work regulations and supervise their execution. They participate in the administration of the welfare programmes instituted by the employer and finally, they contribute to the prevention of industrial accidents and sickness.

Alongside these personnel delegates, in the private sector the law of 1974 has instituted mixed committees composed equally of employer and employee representatives. Such committees are required in all private sector enterprises employing at least one hundred and fifty persons. The size of the committees varies between six and sixteen members depending on the number of employees. The employee representatives are elected by the personnel delegates by secret ballot according to the rules of proportional representation from among the employees themselves.

The law attributes to the committee a consultative function, some powers of decision, and a supervisory function.

The law obliges the chief executive ('chef d'entreprise') to inform and consult the mixed committee at least twice a year on the economic and financial development of the enterprise. The mixed committee must also receive all documents which are to be submitted to a general assembly of shareholders. Moreover, the committee must normally be consulted in advance of any decision of an economic or financial kind which might have an effect on the structure of the enterprise or the level of employment, for example, decisions concerning investment or volume of production. In the social field, the committee must be consulted in advance as to important decisions concerning such matters as changes in production methods, in machinery and workshop rules. In the personnel field, there must be consultation as to manpower projections and training schemes.

As for powers of decision, the mixed committee has power to decide on measures concerning surveillance of employees' behaviour, health and safety. A similar power extends to the settlement of the general criteria to be followed as to the hiring, promotion, transfer and dismissal of personnel. In the event of disagreement between the two groups in relation to these matters, the law provides for the commencement of a conciliation procedure, and if necessary, arbitration before the National Conciliation Office in accordance with the provisions of a decree of 1945.

Finally the committee has a power to supervise the administration of any welfare schemes established in the enterprise, and to this end, it receives a report on the administration at least once a year from the chief executive.

Policy

The law of 1974 has not been operating for sufficient time for evaluations to be made. It follows quite closely the advice of the Economic and Social Council of Luxembourg as to mixed committees given in 1972, a fact which indicates that on its entry into force, the law met with a large measure of general approval from the major interest groups.

Participation in decision making bodies

Present law and practices

The same law of 1974 which instituted mixed committees for private sector enterprises also provides for representation of employees in public companies ('sociétés anonymes'). The law applies to all such companies having more than one thousand employees or in which there is state financial participation amounting to at least 25%, or which benefit from a concession from the state relating to the company's principal activities. The law requires all companies caught by the first criterion to have a council of administration ('conseil d'administration') on which one third of the members represent the employees. Companies caught by the second and third criteria must have a council on which there is an employee representative for every one hundred employees, provided that there cannot be less than three such representatives and they cannot constitute more than one third of the council. All companies within the scope of the law must have a council composed of at least nine members in total.

The employee representatives must normally be designated by the personnel delegates already described by secret ballot according to rules of proportional representation. They must be chosen from among the company's employees. The representatives are divided between manual workers and other employees on a proportional basis. Special provision has been made for the coal and steel sector however, in view of the traditionally close relationship in that sector between enterprises and the trade unions.[1] The law permits the most representative trade unions on the national level to designate three representatives directly who need not be employees of the company in question. All employee representatives can be removed from office by the organization which designated them.

The legal responsibility of the employee representatives is the same as that of other members of the council and they are responsible with the others according to the provisions of the law of 1915 concerning commercial companies.

Policy

The new law has not been operating for sufficient time for evaluations to be made, but it should perhaps be observed that the Council of State and a majority in the Social Affairs Commission of the Chamber of Deputies were opposed to parity of representation on the council of administration being permissible and amended the draft law accordingly.

Company structure

Present law and practice

For the most part, the law as to the administration and supervision of 'sociétés anonymes' which is currently in force in Luxembourg, and the situation to be found in practice are the same as the law and practice existing in Belgium. For this reason, the material is not repeated here.

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[1] *Projet de loi instituant les comités mixtes, etc.*, 1973. (No 1689, Chambre des Députés), p. 21.

Policy

Division of the administration of 'sociétés anonymes' between a management and a supervisory board has been contemplated for the near future as an optional form alongside the classical system of administrators subjected to legal and financial control by commissioners. This proposal was consciously related to the proposals made by the Commission in the draft Fifth Directive on the structure of 'sociétés anonymes' and the European Companies Statute.[1] A Bill was laid before Parliament to effect this change,[2] but it has not yet been adopted.

[1] *Projet de loi instituant des comités mixtes, etc.*, p. 14.

[2] *Projet de loi complétant la loi du 10 août 1915 concernant les sociétés commerciales, etc.*, 1974 (No 1781, Chambre des Députés).

Netherlands

Employee participation

Collective bargaining

Present law and practices

According to Netherlands law, collective bargains are legally binding and can be concluded at national, industrial, enterprise and establishment level.[1] However, the law does not oblige an employer to negotiate with a trade union nor does it require facilities to be made available to union delegates. Such matters are themselves often the subject of collective agreements. Collective agreements can, however, be extended by law to cover firms which were not represented in the negotiations.[2]

In practice, there is a tradition of centralized bargaining, and this tradition, reinforced by the extension by law of concluded agreements, results in a large number of employees being covered by a small number of agreements.[3] However, bargaining for particular branches of an industry and even for single large enterprises has been increasingly common in some sectors, for example in the metal, chemical and construction industries. The contents of agreements are normally confined to such issues as remuneration, hours, holidays and similar matters.

Policy

The Social-Economic Council of the Netherlands is at the present time studying the question of under which circumstances trade unions may be considered 'representative' and of what consequences a recognition of 'representativity' should

[1] Act of 24.12.1927.

[2] Act of 25.5.1937.

[3] *Worker Participation and Collective Bargaining in Europe*, Commission on Industrial Relations, HMSO 1974, p. 62.

have as regards participation in negotiations. The Council is composed of trade union, employer and independent members in equal numbers. It has an important advisory role on all social and economic matters as well as other more specific functions, some of which are referred to subsequently.

Representative institutions: Information, consultation and approval

Present law and practices

Enterprise councils ('ondernemingsraden') were established by law in the Netherlands in 1950. That law was amended by a law of 1971 which considerably extended the functions of the councils.

An enterprise council must be set up in each establishment having at least one hundred employees. If there are several councils in an enterprise or in several enterprises belonging to the same group, a central enterprise council may be formed. The central council must be formed if required by a majority of the enterprise councils. By virtue of a recent amendment, group-level enterprise councils may be set up in addition to central and ordinary enterprise councils, which are competent with regard to a specific activity (division) of the group. The members of the councils are elected by the employees, but a member of the management board is required by law to be the chairman. Candidates for the election can be nominated by the unions in consultation with their members in the establishment, and subject to certain conditions, by non-union employees. The number of representatives varies according to the size of the enterprise, the maximum being twenty-five for establishments with six thousand or more employees.

The councils have a right to information on the progress of the enterprise. The same applies to central councils in relation to questions which concern all establishments, or all the enterprises in a group. Further, in a number of cases, the councils must be allowed to give a prior opinion in relation to a decision to be taken by management, unless there are major interests of the enterprise or of persons interested which prevent it. This right of prior consultations applies to all measures which will have an effect on the structure of the enterprise such as, for example, a transfer of control of the whole or a part of the enterprise to another employer, or a closure of the whole or a part of the enterprise. In other situations, when the employer wishes to take measures of a 'social' nature, for example, with regard to training schemes or recruitment policy, then he must in every case consult the councils in advance.

Finally, the law of 1971 provides that the councils should have the right to participate in decision making on a small number of matters, also of a 'social' nature, for example, on regulations as to pensions, working time, holidays, participation in profits, and measures as to safety and health. If an agreement between the employer and the council cannot be reached, the matter may be decided by the competent Trade Commission ('Bedrijfscommissie') which is set up by the Social-Economic Council and has a membership drawn from both sides of the industry. These rights of co-decision and consultation do not apply when the matter is already regulated by a collective agreement.

It should also be observed that the Merger Code of the Social-Economic Council requires trade unions to be informed in advance and consulted concerning any measure constituting a transfer of control of an enterprise.[1]

Policy

At the present time, the proper role of the enterprise councils is under active review, not least in the Social-Economic Council, as the

[1] *SER-besluit Fusiegedragsregels (Merger Code of the Social Economic Council)*, 1971.

result of a reference of the issue to them by the government in October 1973.

The trade unions are in some disagreement as to what should be done. The Christian National Trade Union Federation (CNV) believes that the powers of co-determination of the councils as to social policy should be increased, but that their structure should not be changed. However, the Netherlands Federation of Trade Unions (NVV) and the Netherlands Catholic Trade Union Federation (NKV) do not agree with the present structure and wish to delete the provision that a member of the management board should preside over the enterprise council, so that the council becomes exclusively composed of the employees' representatives, who may however invite a manager to a meeting to inform them. In their opinion, the function of the enterprise council should be clearly defined as the representation and defence of employees' interests. As yet, the unions have not been able to resolve their differences.

Surveys of employers and employers' associations show that they are virtually unanimous that employees should have a voice in the enterprise through the enterprise council, and almost equally unanimous in their opposition to co-determination through trade union machinery.[1]

A substantial body of opinion holds that insufficient time has elapsed since the law of 1971 for a proper evaluation of the improved system to be possible.

Nevertheless, the government, besides recently legislating on group enterprise councils, has introduced a Bill according to which enterprise councils may lodge an appeal before the courts against certain management decisions on the ground that the employer, considering the interests involved, could not reasonably have taken the decision. The decisions concerned are those upon which enterprise councils must always be consulted under the present law, and perhaps those decisions upon which they must normally be consulted.

Participation in decision making bodies

Present law and practices

The Netherlands law of 1971 on the structure of public and closed companies ('Wet op de structuur van naamloze en besloten vennootschappen') introduced employee participation with regard to the appointment of the members of the supervisory councils ('raad van commissarissen') of large Dutch companies. The law applies to all such companies with a capital including reserves of at least ten million guilders, and having an enterprise council by virtue of a legal obligation or employing at least one hundred workers in the Netherlands either alone or together with their subsidiaries. These subsidiaries are exempted from the law if their parent company is itself subject to it. A special exception is also made for the holding companies of international groups having a majority of their employees abroad.

The supervisory council of companies falling within the reach of the law is composed in the following manner. New members are to be appointed by way of 'co-optation' by the existing members of the council. The shareholders' meeting, any enterprise council or central enterprise council and also the management board may advance recommendations for nominations. A person may qualify for appointment with two limitations only: no person can be recommended who is in the service of the company or its subsidiary, or of a trade union involved in determining working conditions for the company concerned. The final choice of a prospective new member remains with the supervisory council itself. Before appointing a new member, the supervisory council informs the shareholders' meeting and the enterprise council of its choice.

Both the enterprise councils and the shareholders' meeting may object to the appointment of the candidate envisaged for one of two reasons: on the ground that the person is not qualified to

[1] *Worker Participation and Collective Bargaining in Europe, op. cit.*, p. 76.

serve on the supervisory council or on the ground that the composition of the council 'would not be appropriate' if this person were nominated.

Notwithstanding this objection, the person in question can still be nominated if the supervisory council puts the issue before the Social-Economic Council of the Netherlands and a committee of the Council overrides the opposition after consultation of all parties involved. However, if the committee deems the opposition justified, the whole procedure starts again. Up to the present, no appeal to a committee of the Council has been made.

The system was proposed by the Social-Economic Council in 1969 in a unanimous report. The Council considered that in large enterprises it was desirable that employees as well as shareholders have confidence in the members of the supervisory council. Employees should therefore have the same influence as shareholders on the composition of the council, but direct representation was rejected because it was felt that there was too great a risk of polarization and faction. The system of co-optation was accordingly proposed in order to preserve a greater degree of homogeneity while at the same time giving both employees and shareholders an equal opportunity to influence the council's composition.[1]

Policy

The new system has been in operation only since July 1973 and accordingly experience of how it works in practice is somewhat limited. However, several unions are already discussing different models. The NKV has recently taken a position in favour of a model similar to that proposed by the Commission in the amended proposal for a regulation on a European Companies Statute.

Share and profit participation

The Netherlands government has announced its intention to introduce a bill setting up a system of profit sharing. If is intended to give employees a share in the 'surplus profits' of companies, a notion further to be defined. A share of 10% has been mentioned. Not more than half the amounts paid into the fund will benefit the employees of the companies which made the profit, by the allocation to them of shares of profit-sharing debentures, which will only be redeemable after a certain period of time, for example, seven or ten years.

Company structure

Present law

The Netherlands law of 1971 applying to the larger public and closed companies prescribes a formal two tier system with a management board and a supervisory council.

The supervisory council consists of at least three members who are appointed according to the procedure already described in which both shareholders and employees can normally participate. Members of the management board are appointed and may be removed by the supervisory council. Before a manager is appointed, the general meeting of shareholders and the enterprise council are informed. In case of dismissal, the general meeting must be heard beforehand, and the enterprise council must be informed.

The division of function and responsibility is that the management board carries out and is responsible for the management of the company's business under the supervision of the supervisory council. To this end, the management board must keep the supervisory council informed as to the state of the company's business. The supervisory councils must also settle the annual accounts, subject to the approval of the shareholders' general meeting. Furthermore, decisions of the management board closely affecting the

[1] See generally *Advies van de Sociaal-Economische Raad inzake de herziening van het ondernemingsrecht* (*Opinion of the Social-Economic Council of the Netherlands on the reform of the law on enterprises*), 1969.

life of the enterprise cannot be taken without the prior consent of the supervisory council, for example, decisions as to large new investments or financial participation in other enterprises, issues of new capital and closures, among other things.

Companies which are members of a group of which a majority of the employees are working outside the Netherlands have to have a modified dualist structure. The company must have a supervisory council subject to the normal co-optation procedures and this council must approve the same categories of management decision as the ordinary supervisory council. But the members of the management board are not appointed and dismissable by the supervisory council, but by the shareholders' general meeting, i.e., the dominant company. Similarly, the annual accounts are settled by the shareholders' meeting and not the supervisory council. This special provision was included to ensure the uniform direction of groups of this kind, and is called 'the mitigated regime'.

Companies not falling under the mandatory provisions of the law of 1971 may also have a supervisory council if the articles of association so provide. Here the system of the company law of 1928 still applies. The supervisory council is appointed by the general meeting of shareholders, its powers are more limited in that the general meeting, and not the supervisory council, appoints and dismisses the management board and settles the annual accounts. However, these companies may voluntarily adopt the mandatory system applicable to larger companies. Similarly a company falling under the mitigated regime may voluntarily adopt the full system applied to larger companies.

Present practices

Under the company law of 1928, two tier structures have been adopted for quite some time by most medium-sized and large Dutch companies. The use of 'commissarissen' to supervise the 'bestuurders' has been a long standing feature of Dutch company law and practice. Normally, both would be appointed and could be dismissed by the general assembly of shareholders. Thus, at the present time, most Dutch companies of any size have a formal two tier system under the terms of their statutes, even if they are outside the scope of the recent mandatory provisions.

The mandatory system came into full effect in July 1973. It applies to 325 companies and appears to have produced in practice no serious objection. This is perhaps not surprising when one remembers the Dutch tradition of voluntary two tier systems which had been pragmatically evolved, and also that the mandatory system had the unanimous approval in 1969 of the Social-Economic Council which included representatives of the major interest groups.[1]

Policy

As for the future, some interested parties and groups are at present waiting to see how the changes effected by the 1971 law work out in practice before they commit themselves to new proposals. They express the view that insufficient time has elapsed for a proper evaluation of the new law. As we have seen, the trade unions are discussing new systems of employee participation though no general agreement has yet been reached.

[1] *Opinion*, *op. cit.*

United Kingdom

Employee participation

General

Company law in the United Kingdom makes virtually no provision concerning a company's employees. However, this does not mean that employees have no legal rights in relation to the company which employs them, nor does it imply that the law prevents the implementation of schemes for employee participation even within the structure of the company itself. In the first place, there is a body of industrial relations law which regulates the relationships between employees and employers, companies included. By way of parenthesis it should be noted that this body of law still places great emphasis on the concept of agreement, whether the agreement is a collective bargain which may well not be legally enforceable or an individual employment contract. In the second place, company law itself relies fundamentally on the concept of agreement, so that it is open to those who form or own a company to agree, if they so desire, on a company constitution and structure which entail a high degree of employee participation.[1] For both industrial and company law are still fundamentally facultative rather than regulatory, though the amount of regulation grows continuously. But if those forming or owning a company do not express in the constitution a desire for the protection of the employees' special interests, then company law does not intervene, and will moreover enforce the logical implications of what has been agreed to the possible detriment of employees.[2] Accordingly, in the absence of special provision by those forming a company, employees are in no sense members of the company. Such special provision is extremely rare.

Collective bargaining

Present law and practices

The most obvious mode in which employees 'participate' in the conduct of a company's affairs is by collective bargaining through the trade union movement. Traditionally, collective bargaining has been an essentially voluntary process with little reliance being placed on the law except for a few statutes which facilitated or supported voluntary collective bargaining such as legislation for extending widely applicable collective agreements to recalcitrant employers.[3] The Industrial Relations Act 1971 attempted to give collective bargaining a more legal character, but the Trade Union and Labour Relations Act 1974 has restored the traditional position so that, for example, collective bargains are at present presumed not to be legally binding.

Collective bargaining in the United Kingdom is in practice a very flexible institution. Both the procedures for bargaining and the scope of collective bargaining are capable of almost limitless variety. It can mean very little participation at all, for example a three yearly national agreement on basic minimum wage rates and other remuneration which is the subject of much supplementation locally. On the other hand, it can mean a great deal of participation, for example, the agreement between the Glacier Metal Company Limited and four important unions which in fact forms a constitution under which *inter alia* the principles and policies within which management operates are settled by unanimous vote in a works council consisting of 14 representatives of all grades of employees and

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[1] e.g. The Scott Bader Commonwealth. See *Participation in Industry*, by Gordon Brown, 1972.

[2] See e.g. *Parke v Daily News Ltd.* (1962) Ch. 927. Since the enactment of the Redundancy Payments Act 1965, a company will now often have statutory obligations to employees in closure situations like that of the *Parke* case.

[3] The Terms and Conditions of Employment Act 1959.

a management representative representing the board. In between these extremes, a large and expanding number of forms is to be found.

Perhaps the most significant trend in recent years has been the shift in some industries from national agreements to more detailed and broader enterprise and plant level agreements, accompanied necessarily by the development of local machinery and procedures such as the shop steward committee or joint works committees involving lay members of the union who are employed in particular establishments.[1]

When collective bargaining has become very developed both in terms of scope and procedure, it is often given the name 'joint regulation'. However, the institution is fundamentally no different, being based on an agreement or a series of agreements between management and labour which may well not be legally enforceable. Glacier Metal's scheme and the activities of some shop stewards and joint works committees fall into this category. The existence of 'joint regulation' may sometimes be indicated by the inclusion of a formal 'status quo' clause in a collective bargaining agreement according to which the management agrees not to take decisions affecting the employees' interests until agreement is reached or negotiating procedures have been exhausted. The precise scope of such 'status quo' agreements is often somewhat obscure.

Even when collective bargaining is very developed, however, certain decisions, often of major importance, are not normally the subject of collective bargaining, though exceptionally they may have been. It is still the exception rather than the rule for collective bargaining to occur in relation to major decisions on investment, closures, mergers and the like.

Policy

The importance of collective bargaining is recognized by almost all major interest groups. As for the future, the Labour Party has recently reaffirmed its commitment to collective bargaining, and proposes to pass an Employment Protection Bill which will include provisions designed to strengthen the process.[2] In particular, unions would be able to bring recognition disputes, which may relate to recognition either in general or in respect of one or more specified matters, before a government authority, the Conciliation and Arbitration Service, which could recommend recognition by the employer. If agreement were not ultimately reached, the union would have the right to seek unilateral arbitration before the authority on the terms and conditions of employment of the employees concerned. Furthermore, a duty would be placed on employers to disclose to unions the information needed for effective collective bargaining. Failure to do so might give rise to a form of legally binding arbitration.

Reference should also be made to the proposed Industry Bill[3] under the terms of which trade union representatives from the firms concerned would be closely involved in the negotiation of planning agreements between enterprises and the government. In addition, important manufacturing enterprises would be required to supply to the government information on a wide range of matters, including, for example, estimates as to the enterprises' future output, sales, and capital expenditure. Subject to certain limitations and safeguards, these enterprises would have to supply the same information to trade unions recognized by them.

Collective bargaining also forms the main element in the Trades Unions Congress' (TUC) programme for industrial democracy, which contemplates the continued development of collective bargaining at many levels of a company's structure, and also increased scope for collective

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[1] See for an authoritative account the *Report of the Royal Commission on Trade Unions and Employers' Associations* (Donovan Commission) 1968, Cmnd. 3623.

[2] Employment Protection Bill. *House of Commons Bill* 119, 25.3.1975. See also *The Community and the Company*, Report of a Working Group of the Labour Party Industrial Policy Sub-Committee, 1974, p. 12.

[3] *House of Commons Bill* 73. 31.1.1975.

bargaining agreements themselves.[1] Often, the apparently more radical demands for worker participation from the labour movement are essentially demands for the extension of collective bargaining, for example, to permit union participation at all levels of a company's management structure.[2] Accordingly, it is safe to assert that the labour movement as a whole remains firmly committed to the principle of free and extensive collective bargaining.

The Conservative Party has also been a consistent supporter of collective bargaining, though often qualified by the epithet 'orderly'. Parts of the Industrial Relations Act 1971 were designed to promote effective collective bargaining, as well as to impart a more specifically legal character to the process and the resulting agreements. For example, provision was made, though in fact never implemented, for the disclosure of certain kinds of information to unions and employees to enable them to bargain more effectively. In the last election campaign, the Conservative Party announced that it would not seek to re-introduce the Industrial Relations Act and that it accepted the Trade Union and Labour Relations Act in the form in which it was finally enacted as 'the legal framework for collective bargaining'.[3] Accordingly, it appears that the voluntary nature of the process has been accepted. However there are still a number of issues, such as the closed shop, on which the two main political parties are not agreed.

Most employers' associations, in their evidence to the Donovan Commission and subsequently, have indicated their support for collective bargaining, and indeed on occasion their reluctance to see legal interference with the process.[4]

The Liberal Party alone has, by implication at least, questioned the primacy of collective bargaining. They stress that half the United Kingdom's work force is not unionized and, as we shall see, they advocate policies of 'industrial partnership' aimed at benefiting all employees whether union members or not.[5]

Representative institutions: Information, consultation and approval

Present Law and Practices

Quite a common form in which employees participate in the running of their company has been through machinery for 'consultation', defined in the Industrial Relations Code of Practice[6] as follows:

'Consultation means jointly examining and discussing problems of concern to both management and employees. It involves seeking mutually acceptable solutions through a genuine exchange of views and information.'

The most normal method of conducting consultation was through works councils. Large scale development dated from the first world war and the impetus given by the Whitley Committee reports in 1917 and 1918. The councils are not required by law and have been founded normally as a result of a management initiative but sometimes as a result of a trade union or employees' initiative, or even of a collective agreement. In the past, an effort was made to draw a sharp distinction between consultation through the works council or some other medium, and negotiation through trade union machinery leading to collective agreements. This was largely the result of trade union suspicions that the works council could be used to undermine their position.

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[1] *Industrial Democracy.* Report by the TUC general Council to the 1974 Trades Union Congress, July 1974.

[2] *'A Plan for a Break-Through in Production'* by Jack Jones (1966) and *'A Workers Control Bargain'*, by Tony Topham (1968) in *Workers Control*, ed. Ken Coates and Tony Topham (1968).

[3] *Conservative Party Manifesto*, September 1974, p. 12.

[4] See for example *The Responsibilities of the British Public Company*, Confederation of British Industry 1973, p. 20 and *'CBI Rethink on Works Councils' Daily Telegraph*, 13.9.1974.

[5] *Liberal Party Manifestos*, February and September 1974.

[6] Department of Employment, 1972, p. 16.

However, the distinction between negotiations and consultation was always somewhat unreal and after a period of decline in the 1950's, consultation has begun to revive with due regard to union suspicions about formal and separate machinery. Thus, where unions are not active, works councils are still to be found which are representative of the employees as a whole and are constituted in a variety of ways. On the other hand, where trade unions are active, there is a growing tendency for the joint consultation machinery to be union based, and for there to be a single channel for consultation and negotiation.[1] Shop stewards, normally elected by union members in particular establishments under systems of varying formality, have played an important part in this development. The merger of the machinery of consultation and negotiation is often a significant aspect of 'joint regulation' which was discussed in connection with collective bargaining. The ability of management to take decisions unilaterally has in some sectors been substantially reduced by this kind of development.

Policy

As for the future, the position of the Labour Government is somewhat uncertain. In 1973, Prime Minister Wilson publicly demanded 'a system of elected works committees in factories employing at least 100 people',[2] but the Labour Party has not formally committed itself to any such proposals on employee participation. In its recent election manifesto, it simply pledged itself to 'introduce legislation to help forward our plans for a radical extension of industrial democracy'.[3] The TUC believes that 'in general there will not be a major role for separate consultative machinery' but that 'all improvements in industrial democracy should be based on a single channel of communications',[4] that is, the trade unions. However the TUC accepts that there may be important exceptions to this principle, for example for international companies in general and European Companies in particular.[5]

The Employment Protection Bill, when enacted, will oblige employers not only to disclose to trade union representatives information requested for collective bargaining purposes, but also to inform and consult those representatives in redundancy situations.

The Conservative Party on the other hand is reported to favour the promotion of consultation, but to have had some difficulty while in office of formulating concrete proposals which would have been effective without alienating the TUC.[6] The most recent Conservative Party Manifesto[7] undertook to lay a formal duty on all large and medium-sized firms to consult employee representatives on a wide range of subjects ranging from disciplinary and dismissal procedures and redundancy arrangements to methods of working and profit-sharing and share-ownership schemes. It is desired to leave the precise methods and procedures as flexible as possible.

The Confederation of British Industry (CBI) has also indicated a preference for the development of consultation but appears to be opposed to the introduction of any mandatory system which might interfere with established collective bargaining practices.[8] Neither the Conservative Party nor the CBI up to the present have seen works or company councils as being anything more than consultative organs. There has been no suggestion that such councils should have powers of co-decision.

The Liberal Party is committed to the idea of compulsory elected works councils for all substantial enterprises. These councils would

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1 *Participation in Industry*, by Gordon Brown, 1972, p. 22. See also *Industrial Relations Code of Practice*, *op. cit.*, pp. 16 and 17.

2 '*Wilson's new recipe for contented workers*'. *The Observer*, 18.3.1973.

3 *Labour Party Manifesto*. October 1974, p. 13.

4 *Industrial Democracy*, *op. cit.*, p. 29.

5 *Ibid.*, p. 3.

6 '*A lack of harmony over participation*', in: *The Financial Times*, 26.11.1973.

7 September 1974, p. 12.

8 *The responsibilities of the British public company*. *Op. cit.*, pp. 19 to 22, and '*CBI Rethink on Works Councils*', *op. cit.*

represent all employees. They would combine consultation and negotiation with certain powers of co-decision.[1] In 1973, five leading Liberals introduced a Private Member's Works Council Bill to give effect to their proposals.[2] It made little progress.

Participation in decision making bodies

Present law and practices

In the public sector, since the second world war, it has been common practice to provide that the boards of nationalized industrial undertakings might include someone with a trade union background, and such appointments have been made. At the same time, it has normally been provided that no-one should be appointed whose interests are likely to prejudice the exercise of his functions. This has led to a practice whereby only trade unionists who are no longer active or who are at least not active in the industry in question have been appointed. The appointees are in no sense representatives of the employees in the undertaking, but represent the interests of labour in a more general fashion.

Recently in the British Steel Corporation however, a more far reaching scheme has been adopted for the appointment of worker directors to Divisional Boards of the Corporation. The scheme does not have a legislative basis, and in its present form is the product of refinement by agreement between the BSC board and the TUC Steel Committee. These worker directors can be active trade unionists in the steel industry. It is to be assumed that they normally will be. In this form the scheme has not been running long enough for an estimate of its effects to be made.

As for the private sector, participation in the decision making bodies of a company or enterprise is almost unknown, being confined to a few special organizations such as the John Lewis Partnership, and the Scott Bader Commonwealth.

Policy

On the left, the situation is at present somewhat unclear. During the last election, the Labour Party confined itself to a general pledge to introduce new legislation to help forward their plans for a radical extension of industrial democracy in both the private and public sectors which would involve major changes in company law and in the statutes governing nationalized industries and public services.[3] Earlier in 1974, a working group of the Labour Party's sub-committee on industrial policy had proposed[4] legislation which would require among other things that companies, beginning with the largest, should be required to have a two tier structure with half of the members of the supervisory board being appointed through trade union machinery. The problem of deadlock could be solved by means of a jointly co-opted or alternating chairman with a casting vote. Such worker directors would have a duty to act in the interests of the enterprise while at the same time taking special account of their constituency, with an equivalent duty being imposed on shareholder directors. The supervisory board would have the final say on decisions effecting structural changes in the enterprise such as mergers and closures.

At the same time, the TUC was in the process of formulating a somewhat similar policy contained in an interim report by the TUC General Council.[5] It was proposed that companies employing more than two hundred persons should have a two tier structure with one half of the members of the supervisory board being appointed through trade union machinery. No provision was suggested to deal with the problem of deadlock. The supervisory board would be the supreme body of the company able to overrule both management and shareholders on major

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[1] *Liberal Party Manifestos*, February and September 1974.
[2] *House of Commons Bill* 131, 9.5.1973.
[3] *Labour Party Manifesto*, September 1974, p. 13.
[4] *The Community and the Company*, *op. cit.*, pp. 12 to 17.
[5] *Industrial Democracy*, July 1973.

decisions. Specified decisions affecting the structure of the enterprise and appointments to the management board would require the consent of the employee representatives. Moreover, these representatives would be responsible to trade union members in the firm rather than to shareholders or even the company. However at the TUC Congress, a resolution to adopt the final report of the General Council, which did not differ in its essentials from the interim report, was passed only together with another resolution rejecting the mandatory imposition of supervisory boards with worker directors, recognizing the primacy of collective bargaining and calling for a more flexible approach giving statutory backing to the right to negotiate on major issues such as forward planning of manpower rationalization, but relating the control more directly to collective bargaining machinery. The passage of this resolution cast doubt upon the way in which policy in the labour movement as a whole would develop.

In early August 1975, the Labour Government announced that legislation to put worker directors on the boards of private-sector companies is to be introduced during the Parliamentary session of 1976 to 1977. In the meantime, a committee of inquiry has been set up to advise on how best to achieve this, given the essential role of trade union organization in the process. At the same time, the Government will examine the role of the employees in relation to decision making in the nationalized industries.

The Conservative Party while in office never announced its attitude to employee directors but it was reported that while not opposed to experiments, it was not in favour of general legislation prescribing employee directors, preferring in general the concept of works councils.[1] As we have seen, in the last election the party opted for a duty to consult but with methods left open and flexible. The preference for consultation, as opposed to representation on the board, is consistent with attitudes expressed generally on the right, with certain limited exceptions.[2] Thus, the CBI has stated that worker directors should not be imposed on British companies though it does not oppose their appointment under existing law.[3]

Similarly, the Stock Exchange has indicated opposition in principle to the election of directors by employees,[4] and the Engineering Employers Federation has rejected the idea as being 'premature' and 'unacceptable'.[5] The City Company Law Committee has also indicated its opposition to the imposition at the present time of a legal requirement that all or some companies should have employee directors, preferring that companies should be left free to experiment with various forms of employee participation, and indeed should be encouraged to do so.[6] Similar views have been expressed by a British Institute of Management working party.[7]

The Liberal Party on the other hand is firmly in favour of shared control through the election of directors and works councils. For companies employing between fifty and two hundred persons there would be a single board of directors, elected by workers and shareholders in equal proportions. For companies employing more than two hundred, there would be a supervisory board, directly elected by shareholders and employees in equal proportions, to appoint and supervise a management board.[8]

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1 *'A lack of harmony over participation, op. cit.*

2 e.g. Those industrialists and directors who participated in an informal study group in July 1973, reported in *The Sunday Times*, 15.7.1973: *'Top executives back shopfloor directors'*.

3 *The responsibilities of the British public company, op. cit.*, pp. 20 and 22.

4 *Company Law Reform — The Stock Exchange's View*, 1973.

5 *'Worker-director proposal "premature"*, *The Financial Times*, 11.7.1973. See also *Policy Paper: Employee Participation*, November 1974.

6 *Employee Participation*, First Report of City Company Law Committee, February 1975.

7 *Employee Participation: a management view*, British Institute of Management, April 1975.

8 *The Liberal Party Manifestos*, February and September 1974. *'What the Liberals stand for'*, *The Economist* 29.9.1973.

Share and profit participation

Present law and practices

Profit sharing and share distribution schemes have been adopted in the United Kingdom since the nineteenth century, but even with official encouragement they have never achieved a major role in the industrial scene. Official surveys carried out in 1912, 1920 and 1956[1] indicated that somewhat more than half of the schemes started had been abandoned due to lack of profit or to dissatisfaction and apathy among employees.[2] The average life for abandoned schemes was eight years and for continuing schemes twelve to fourteen years. Most schemes result from management initiative and are more in the nature of production incentive schemes than true programmes for participation. The schemes remain for the most part firmly in the control of management and are for the ultimate benefit of the non-employed shareholders.

There have been exceptions to this general picture. Organizations have been constituted in a way which gives the employees the benefits of the ownership of shares both as regards profits and control. The Scott Bader Commonwealth, Landsman's (Co-ownership) Limited, Kalamazoo Ltd. and the John Lewis Partnership are all examples of this kind of enterprise.[3] These exceptions have been in the nature of voluntary experiments and are not generally regarded as particularly instructive precedents for legislation in relation to limited liability companies in general.

Policy

As for the future, the traditional type of profit and asset sharing scheme does not form part of the Labour Government's plans. It should be noted that in the opinion of the TUC, 'company-based schemes of co-ownership and profit sharing are discredited'.[4] In their view, most such schemes provide no real control; would have to provide for share distribution on a massive scale to provide real control; entail a substantial risk for workpeople if the result is that an employee's total savings are invested in one company; will do little to reduce real inequality of wealth; and cannot be applied to the public sector. However, both the TUC and the Labour Party are investigating the possibility of a form of capital sharing at national level based on a national fund, possibly to be administered through the union movement.[5]

The Conservative Party has not adopted profit and share participation as a part of its programme though it can be assumed that it is in no way opposed to schemes of a voluntary kind. Similarly, neither the CBI, nor the Stock Exchange nor employers' associations have either proposed any substantial developments or expressed opposition to existing practices. The CBI regards such schemes as desirable options which should not be made mandatory. They also add a word of warning against the promotion of situations in which an employee has the bulk of his savings tied up in the company which employs him.[6]

The Liberal Party is committed to a proposal that all employees should by law be entitled to share in company profits and capital.[7] Similar ideas have been put forward by several commentators for some years. Some have envisaged a scheme whereby the shareholders would be bought out gradually, leaving those working in the enterprise whether as managers or in some other capacity as joint owners.[8] Others envi-

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[1] *Ministry of Labour Reports on Co-partnership of 1912 (Cd. 6496), 1920 (Cmd 544) and 1956.*

[2] *Company Law and Capitalism*, by T. Hadden, 1972, pp. 423 to 427.

[3] For detailed accounts see *Participation in Industry*, by Gordon Brown, 1972.

[4] *Industrial Democracy, op. cit.*, p. 36.

[5] *Industrial Democracy, op. cit.*, p. 35. *Capital and Equality*, Report of a Labour Party Study Group, 1973.

[6] *The responsibilities of the British public company, op. cit.*, p. 20.

[7] *The Liberal Party Manifestos*, February and September 1974.

[8] *The Future of Private Enterprise* (1951) and *The Responsible Company* (1961), by G. Goyder.

sage the shareholders becoming in effect fixed interest creditors, and again being gradually dominated by employee shareholders.[1]

Employees as members of the company

In English company law, as we have already seen, employees are not normally members of the company. However, in recent years, proposals have come from several quarters to make them members in some sense or other.

The Liberal Party has stated that 'employees must become members of their companies just as shareholders are, with the same clearly defined rights'.[2] The TUC has demanded 'a statutory obligation on companies to have regard to the interests of its workpeople as well as its shareholders.[3] The most sophisticated development of the concept has been by a working party led by Professor Gower and sponsored by the Industrial Society. Their proposal[4] is that the law should declare that employees of a company should be members of the company. As members, employees would enjoy as individuals the right to information on matters of consequence to them. As a group, they would have the right to endorse the appointments of at least two directors and of liquidators in members' voluntary liquidations, and also to be represented at shareholders' meetings.

The Conservative Party rejected the idea of making the board of directors legally responsible for the interests of employees as well as shareholders,[5] though in 1973 the Conservative government had proposed to include a provision in the Companies Bill of that year which would have entitled directors of a company to take account of employees' interests as well as the interests of the company's members in exercising their powers.[6] A working group of the Labour Party industrial policy sub-committee has commented unfavourably on the idea of making employees members of the companies which employ them.[7]

Company structure

Present Law

The general law in force in the United Kingdom at the present time neither requires nor prohibits the setting up of a two tier system of administration for limited liability companies. The main requirements of the law are simply that all companies must have one director, that all public companies registered after 1929 must have at least two directors,[8] and that any director (other than directors holding office for life in private companies on 1 July 1945) can always be removed from office by ordinary resolution on special notice at a general meeting of the shareholders.[9] For the rest, matters are largely left to be settled by the articles of association.

In most cases, companies adopt the articles set out in Table A in the First Schedule of the Companies Act 1948, modified according to their particular requirements. Table A provides that directors are initially to be appointed by the subscribers to the memorandum of association, and thereafter by the annual general meeting of shareholders, except in the case of casual vacancies which are to be filled by the remaining directors until the next annual general meeting.[10]

Table A also provides that one or more directors may be appointed managing director by the directors as a whole. These appointments can be revoked at any time subject to the terms of any agreement, and are also to terminate on the

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1 *Company and Community* (1964) by P. Derrick and *The Democratic Firm* (1964), by N. Ross (Fabian Research Series).
2 *Liberal Party Manifesto*, February 1974.
3 *Industrial Democracy, op. cit.*, p. 37.
4 *Company Law: Position of Employees.*
5 *'Legal rights plan for employees turned down' Financial Times*, 31.1.1974.
6 *House of Commons Bill* 52, 18 December 1973, clause 53.
7 *The Community and the Company, op. cit.*, p. 10.
8 Companies Act 1948, section 176. 'Director' is left almost completely undefined.
9 Companies Act 1958, section 184.
10 Articles 75, 89, 90, 91, 92 and 95.

person ceasing to be a director. The directors are further empowered to confer upon a managing director or directors extensive powers to such an extent that they can delegate for the time being the whole of their own powers. Such delegations can be revoked or amended at any time.[1] Accordingly, the distinction between executive and non-executive directors does appear in English company laws, if only in Table A, and there is no provision in the law which prohibits the adoption of articles of association which implement the dualist system to a much greater degree.

Present Practices

Most companies in the United Kingdom have not felt the need to constitute formally a two tier system of organization. But most have adopted articles to a great extent similar to those contained in Table A, and have appointed a managing director. They have also often appointed a number of their directors to executive offices, and sometimes all the members of the board have been so appointed.

In 1971, a survey was carried out for the British Institute of Management in relation to 243 of the larger British companies.[2] A typical board included between six and fifteen members and in 80% of the companies, the board included non-executive directors. Where non-executive directors were appointed, they were normally in a minority of one quarter to one third of the board. Moreover in the five years prior to the study, the number of non-executive directors had increased noticeably. The consensus of opinion among the larger companies surveyed was that the non-executive director was a guarantor to the shareholders, and to some extent to the public, that the company's executive hierarchy was accountable to persons other than themselves. This view was endorsed by the CBI in 1973.[3]

Thus, in a sense, many English companies do operate a two tier system in functional terms, and in some economic areas the two tiers are particularly noticeable, for example in banking, insurance and in certain very large companies. Nevertheless, it must be stressed that each such arrangement has been agreed voluntarily and can of course be freely amended subject only to the limitations which those concerned have placed upon themselves. Furthermore, it should perhaps also be observed that in most companies the effectiveness of the guarantee provided by the non-executive director can be exaggerated. There are practical limitations on the capacity of the non-executive directors to act independently of the executive directors, deriving in many cases from their minority position, their dependence on those who can in fact secure a majority at a general meeting, and lack of time and information.[4] Many non-executive directors in smaller companies are in fact appointed to provide special expertise such as expert accounting advice and are not there to exercise control at all.[5] Moreover, except for the largest companies, the non-executive director is often not an objective outsider, but a friend and colleague of the executive directors, particularly of the Chairman.[4] In these situations, the amount of effective supervision will be limited.

Policy

The Labour Party has not adopted a definite policy in this connection although, as we have seen, it is committed in general terms to an extension of industrial democracy involving major changes in company law.[6] A working group of the party's industrial policy subcommittee has recommended that companies, beginning with the largest; should be obliged to have a two tier

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[1] Articles 107 and 109.
[2] *The Board of Directors*, British Institute of Management. Management Survey Report No 10, 1972, carried out by Political and Economic Planning.
[3] *The responsibilities of the British public company*, *op. cit.*
[4] *The Board of Directors*, *op. cit.*, p. 13.
[5] The British Institute of Management study found this to be the case in 25% of the companies surveyed. *The Board of Directors*, *op. cit.*, p. 12.
[6] *Labour Party Manifesto*, September 1974, p. 13.

system.[1] However, this proposal was made in the context of the debate on employee participation and as we have also seen, the recent TUC Congress resulted in doubt being cast on the way in which policy in the labour movement will develop in this respect.

The Conservative Party while in office indicated that it was not convinced that the two tier board was particularly suitable in the British context. The party indicated a somewhat greater liking for a requirement that non-executive directors sit on the boards of all companies above a certain size.[2]

The CBI,[3] the Stock Exchange,[4] the Law Society's Standing Committee on Company Law,[5] the City Company Law Committee[6] and the British Institute of Management's Study Group on Company Affairs,[7] have all issued statements opposing the general imposition by law of a two tier system. However, development of the role of the non-executive director is regarded more favourably by a broad range of interest groups in the business and financial worlds including the CBI and the Stock Exchange, though the precise manner in which this role should be developed is often left somewhat vague. In 1971, a private member's Bill which would have made it obligatory for larger companies to appoint a minimum number of non-executive directors who would make an annual report to the shareholders failed to pass through Parliament.[8]

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[1] *The Community and the Company*, *op. cit.*, p. 13.
[2] *Company Law Reform*, Department of Trade and Industry. Cmnd. 5391, July 1973, paragraph 60 and 61.
[3] *The responsibilities of the British public company*, *op. cit.*, pp. 40 to 42.
[4] *Company Law Reform — The Stock Exchange's View*, November 1973.
[5] *Observations on points of principle on the draft proposal for a fifth directive*, March 1974.
[6] *Employee Participation*, *op. cit.*, paragraph 6.
[7] *Final Report*, March 1974.
[8] *House of Commons Bill 182*, 9.6.1971.

Appendix I

Companies which are members of a group

The suggestion has been made that whatever the general desirability of forms of employee participation, special rules are required if it is desired to apply the systems to companies which operate according to coordinated policy as a group, particularly if the group includes companies which are incorporated in different States. There is indeed little doubt that special rules are required, and that the problem is complex, because there are a variety of situations which have to be considered. As indicated towards the beginning of this paper, preparatory work on a proposal for a directive coordinating the laws of the Member States in relation to groups of companies has been going on for some time, and it is in that context that proposals for Community legislation affecting companies incorporated in the Member States will be made. However, certain general considerations can appropriately be stated here. Moreover, the proposed Statute for European Companies contains provisions to deal with the problem when a European Company is a member of a group. These provisions embody certain principles which are capable of a more general application.

The emergence of groups of legally distinct companies and firms which operate according to certain centrally determined policies has been one of the most significant modern developments as regards the structure of large industrial and commercial enterprises in the Community, and indeed throughout the world. However, with a few exceptions, company laws generally take little account of the reality of this situation. The group companies remain legally independent and separate entities, while in practice they operate in a coordinated fashion. Situations may then arise in which the requirements of group policy have harmful effects on an individual group company. Such situations may entail unfortunate consequences for the employees of that company among others. Concern about the problems arising from the activities of groups of companies has been mounting in recent years, and interested groups have begun to make proposals, for example, the recent proposal of the Executive Committee of the European Trade Union Confederation for the passing of legislation to require the creation of an institution for the information and consultation of a group's employees at group level.[1]

The main requirement therefore is the creation of legal systems which recognize the reality of group situations and permit groups to operate according to centrally coordinated policy, but subject to rules which safeguard the legitimate interests of those concerned, in particular minority shareholders, creditors and employees.

As far as employee participation is concerned, the major problem is that of ensuring that a parent company, if it wishes, can have sufficient control over the affairs of its subsidiaries to enable the group to operate according to a coordinated policy, when systems of employee participation have been introduced which impose legal constraints on the freedom of action of the management of a subsidiary. This problem exists even in the case of a group made up of companies incorporated within a single legal system. Situations of conflict may arise, for example, if the management of a subsidiary can take certain decisions only with the consent of employees' representatives, or with the approval of a supervisory body which the parent company cannot in practice be sure of controlling. Accordingly, where employee participation in the supervisory body of a subsidiary takes a form which leaves shareholders' representatives in a clear majority, the problem should not normally arise. However, the problem does arise where a majority of the members of the supervisory body are not appointed or dismissed by the shareholders, as under the Netherlands law of 1971, or in a situation where employees and shareholders

[1] Resolution of the Executive Committee of the European Trade Union Confederation of 6.2.1975.

appoint equal numbers of members, or in a system with a co-opted final third such as that proposed in the revised European Companies Statute.

In the Netherlands, the exercise of coordinated policy in a group cannot normally be endangered by the application of the legal provisions on employee participation with regard to supervisory bodies. For subsidiaries are exempted from those provisions once they have been applied by the parent company. The Dutch legislator has deemed it sufficient that in group situations this form of employee participation should be effectively implemented at group level only. However, if the parent company does not have employee participation in the appointment of its supervisory body, because it is the holding company of a group with a majority of its employees abroad, a matter considered further below, then the employees of a subsidiary in the Netherlands will participate in the appointment of the supervisory body of the subsidiary. But in this particular case, the coherent functioning of the group has been ensured by providing that the management of the subsidiary can be appointed and dismissed, not by its supervisory body, but by the general assembly of shareholders, i.e., the parent company. It should be pointed out, however, that this provision does not solve the problems of a possible conflict between the parent company and the supervisory body of the subsidiary. The parent company will not be able to impose its views on a subsidiary with regard to a management decision for which the supervisory body has withheld its legally required approval.

It seems questionable whether subsidiaries should be exempted generally from systems of employee participation as to the composition of their boards. In group situations, decisions may be and are taken at the level of the subsidiary on matters which are of immediate interest to the employees of that subsidiary, without there being any intervention by the parent company. In principle therefore, the employees should have their say in the decision making, both at group level and at the subsidiary's level. This participation should probably also relate to the appointment of the management of the subsidiary. Once it is accepted that employees should participate in the appointment of the directors of an individual company through their representation in the supervisory board, then the same should apply in group situations. This of course may create problems for the functioning of the group, but these can be solved by less far reaching devices than exempting the subsidiary completely from the legal regime or preserving the right of the parent company to appoint the management of the subsidiary through the general meeting of shareholders.

In the revised European Companies Statute, it has been provided that an enterprise which wishes to be able to direct the affairs of one or more dependent companies constitutes a group in which the parent can give binding instructions to the subsidiary, provided that instructions for decisions which require the approval of the subsidiary's supervisory board and which have not been so approved, are given by a parent which is organized in such a way that the interests of employees of the group are protected at group level in a manner which is the same as or at least equivalent to that required of the subsidiary. For example, if the parent is itself a European Company, measures requiring the approval of the subsidiary's supervisory board can be made the subject of a binding instruction, if such approval is refused, provided they have been approved by the supervisory board of the parent. It should be recalled that according to the revised proposal, employees' representatives on the supervisory board of a parent European Company are to be elected by the employees of all the members of the group, including those of the parent company itself. If, on the other hand, the parent is formed under national law then such binding directions can be given to a subsidiary European Company only if the interests of the employees of the European Company, and of any other companies controlled through the European Company, are protected at the level of the parent company in a manner equivalent to that required where the parent is itself a European Company.

In Germany, a solution has been adopted which is in one respect on similar lines. An enterprise which has negotiated a contract of domination with a company, in a case in which that company's supervisory board has not consented to a particular decision, may give a binding instruction to that company's board of management which the board must carry out even against the wishes of its supervisory board. But this solution solves the problem of ensuring that the dominant enterprise has sufficient control in a way which can result in the participation of employees being substantially weakened, and indeed, if the dominant undertaking does not have a supervisory board to which employees elect representatives, it can be completely eliminated.

The most hopeful line of approach as far as a Community directive on groups of companies is concerned thus seems to be one based on the principle that a parent company incorporated in a Member State should be able to give binding instructions to a subsidiary which is part of a group operating according to a coordinated business policy, provided that legal forms of employee participation in the subsidiary have equivalent counterparts at group level which have given the necessary approval. In concrete terms, this means that a group supervisory body, and perhaps a representative institution for the employees of the group, have to be organized in a way which permits the employees of the group to participate in the decision making at group level in a manner which is at least equivalent to the way in which the employees of a subsidiary participate in its decision making. If such institutions do not exist, the parent will have to accept the risk of a subsidiary going its own way. However, since the decisions which require the consent of employees' representatives, unlike those requiring the approval of a supervisory board, to a great extent concern only the internal and local affairs of the subsidiary, the necessity for a group level representative institution may well be less acute than for a group supervisory body. Indeed, a strong argument can be made that certain matters may be of such essentially local significance that a group representative institution should not have the power to overrule a local institution, for example, as to the settlement of a social plan in the case of a closure. Accordingly, the revised European Companies Statute confines the powers of a group works council to issues which concern the group or a number of undertakings within the group.

A second problem concerns those multinational groups of companies which are based in the Community but have a number of subsidiaries outside the Community. The argument has been made that in view of its multinational role, the parent company should not be required to have a system of employee participation which would be confined to employees situated in the Member State in which it was incorporated, or at most to employees within the boundaries of the Community. It is argued that to do so would be to interfere improperly with the international character of the group and thereby place it under a serious disadvantage as compared with groups based outside the Community.

Indeed, the law of the Netherlands appears to have been based on this view, and excludes from the mandatory provisions as to employee participation in the appointment of the supervisory body, all Netherlands holding companies of international groups with most of their employees abroad. On the other hand, German law does not provide for such an exception, and employees' representatives are appointed to the supervisory bodies of certain companies which are the parent companies of large, multinational groups.

The European Companies Statute provides that a European Company which is a holding company must have members on its supervisory board elected by the employees of the parent company and of all its subsidiaries within the Community. Employees of subsidiaries outside the Community cannot participate. To permit them to do so was considered to be impossible for a number of legal, political and practical reasons. In particular, there seemed to be a real danger of producing conflicts with the laws and

policies of States who are not members of the Community in which a subsidiary might be incorporated. The solution proposed is admittedly not perfect, but neither are the alternatives, and the choice involves a delicate balancing of relative advantages and disadvantages.

As far as Community legislation is concerned, a relatively clear political choice has to be made.

On the one hand, the economic and social importance of multinational groups based in the Community can be regarded as so great, that they should be exempted from a regime which is ultimately to apply to all other large and medium-sized companies, on the ground that they would be put at a serious disadvantage as compared with multinationals based outside the Community. But the logical extension of the argument in favour of their exemption is that no regulation of European multinational groups which has an effect on their competitive position should be undertaken until multinationals can be regulated on a world-wide basis. Such regulation is not likely to happen very quickly, and it is extremely doubtful whether the Community should content itself with waiting to see what develops.

On the other hand, the economic and social importance of multinational groups can be seen as a particular reason for ensuring that there is some regulation of their activities. Moreover, Community legislation, applying as it will to nine countries with integrated markets, seems a peculiarly appropriate method for such regulation. Finally, the representation of employees, and perhaps of other general interests also, seems to be in itself a desirable form of regulation as far as multinational groups based in Europe are concerned, for it will ensure that the broader implications of certain important decisions, such as decisions on major investments, are taken into account.

Furthermore, to exempt certain companies incorporated in a Member State on the ground that they are the parent companies of multinational groups with most of their employees outside the Community, would be to discriminate unfairly between enterprises and between employees. A large company which is the parent of a multinational group operating mostly within the Community would be subject to a regime of employee participation, while a similar enterprise, also active within the Community, but having most of its activities outside, would not. This hardly seems fair either to the multinational group operating mostly within the Community, or to the employees of the group operating mostly outside. Moreover, there would perhaps be an unfortunate incentive for European multinationals to transfer activities to countries outside the Community and so gain exemption.

Finally, reference should be made to the problem of those companies inside the Community which are subsidiaries of parent companies outside the Community. It is not at present possible, legally or politically, for the Community to require such parent companies to implement systems of employee participation, but of course the subsidiary will be subject to a regime and as regards the employee participation, the parent will be in the same position as any other controlling shareholder.

Appendix II

Proposed functions of a European works council

The Statute for European Companies, as revised on the basis of the opinion of the European Parliament, requires the management board of a European Company to fulfil the following obligations.[1]

First, the management board must meet regularly with the European works council, and in any event not less than four times a year. At least once a quarter, a report must be submitted on the general position of the company and its future development. The report must contain full and up-to-date information on general developments in the sectors of the economy in which the company and its subsidiaries operate; on the economic and financial position of the company and associated enterprises; on the development of the company's business; on the state of its production and marketing; on the employment situation of employees of the company and its subsidiaries and its future development; on the production and investment programme; on rationalization projects; on production and working methods, especially the introduction of new working methods; and on any other fact or project which may have an appreciable effect on the interests of the employees of the company.

The management must also inform the council of every event of importance, and the council is to receive the same communications and documents as the shareholders, including the annual accounts and report. Finally, the council may require the management to provide written information on any matter which in the opinion of the council affects the fundamental interests of the company or its employees.

Second, the management must consult the council before taking a decision concerning job evaluation, rates of wages per job or for piece work, or the introduction and application of any technical device intended to control the conduct or performance of employees. Consultation must also take place before the management decides to close or transfer an establishment or substantial parts thereof; substantially to curtail, extend or alter the activities of the enterprise; to make substantial organizational changes within the enterprise; or to establish or terminate long-term cooperation with other undertakings.

Moreover, in these cases, the council is given a reasonable time to express a view before the supervisory board may give its approval of the decision, and if the council considers that the employees' interests will be adversely affected, provision is made for the negotiation or settlement by arbitration of a social plan in the same way as is provided in the amended proposal for a third directive on mergers of 'sociétés anonymes', and the draft directive on the retention of the rights and advantages of employees.

Finally, the management are obliged to make certain decisions only with the agreement of the council, namely decisions concerning rules relating to recruitment, promotion and dismissal of employees; the implementation of vocational training; the fixing of terms of remuneration and the introduction of new methods of computing remuneration; measures concerning industrial safety, health and hygiene; the introduction and management of welfare facilities; the establishment of general criteria for the daily times of commencement and termination of work; and the establishment of general criteria for preparing holiday schedules.

[1] See Title V, Section One, Sub-section Five of the amended proposal, Supplement 4/75 — Bull. EC.