ARTICLE

EEC COMPANY LAW HARMONIZATION AND WORKER PARTICIPATION

PROFESSOR DR. WALTER KOLVENBACH*

SYNOPSIS

The company law harmonization program of the European Community has as its principal components the coordination, safeguarding, protection and equivalence necessary to protect shareholders, creditors, customers, potential investors and, last, but not least, the employees of companies in the Member States. The goals are to remove obstacles to the establishment of businesses by Common Market citizens within the entire Community and to harmonize the company laws of the Member States. While the removal of obstacles has proven to be uncomplicated, the second goal of harmonization is politically sensitive as a result of the different degrees of employee participation that exist in the Member States. While some Member States do not have any scheme for employee participation at all, others have extensive legislation in this area. Organizations of employers and employees take different views not only as to the extent of harmonization, but also as to the methods and means to achieve such harmonization.

These differences became apparent when the Commission proposed harmonization of company laws involving employee participation systems. Out of the original ten company law directives envisaged, seven have been enacted by the Council of Ministers because they harmonize primarily technical aspects of company law. The remaining three directives, the Fifth Company Law Directive, the Ninth Com-

* Dr. Jur. 1949, University of Cologne; former President of the European Company Lawyers Association; former Chairman of the Legal Committee of the German Chemical Association; former Chairman of the Section on General Practice of the International Bar Association; member of the German Bar; Lecturer of Law, University of Cologne and University of Bonn; Honorary Professor of Law 1988, University of Cologne; former General Counsel to Henkel, KGaA, Düsseldorf; Of Counsel with Heuking, Kühn, Herold, Kunz and Partner, Düsseldorf.
pany Law Directive, and the Tenth Company Law Directive, have encountered considerable difficulties and discussions continue. These Directives involve or affect employee representation in companies and, therefore, have been strongly criticized, especially in countries where such representation is nonexistent or practiced only to a limited extent. In particular, the Fifth Company Law Directive, the creation of a uniform structure for companies within the EEC, has been blocked in the Council of Ministers. Other projects affected by the problem of employee participation are the proposed Directive on the Information and Consultation of Employees, especially with regard to transnational corporations, and the Statute for a European company.

In the attempt to complete the internal market by the end of 1992, the Commission has taken new steps to overcome the hurdle of employee participation. As a vehicle for this attempt the Commission has chosen the European company. The Commission presented a Memorandum for comment to the Council, the European Parliament, and the two sides of industry in 1988. This Memorandum outlined possibilities for worker participation in the company decision-making process. The Memorandum invited views on its broad proposals before presenting a new, formal draft of a Statute for a European company.

This article discusses existing difficulties with the proposed company law directives which have not yet been passed by the Council. In addition, the projects for a Directive on Information and Consultation of Employees and the Statute for a European company are examined. Since it can be expected that the new proposal made by the Commission will eventually lead to a compromise solution to the problem of employee participation in European companies, it is interesting to observe the past and present discussions of this topic. Obstacles to agreement are still great, but European governments will have to overcome their differences on the proposals made by the Commission in order to enable the Community to proceed with small steps on the road to 1992.

1. INTRODUCTION

The Treaty of Rome brings the general matter of company law within the scope of the European Economic Community ("EEC"). The liberal trade philosophies which influenced the drafting of the document provided for the free flow of goods between the Member States. It was assumed that the existence of independent company laws were a potential obstacle to the free flow of goods between the Member states, and thus the Treaty of Rome provides for the harmonization of company laws. Article 54.3(g), in conjunction with Article 54.2, is the authority for the harmonization of company laws commenced by the
Commission of the European Communities ("Commission"). Article 54.2 states:

In order . . . to achieve a stage in attaining freedom of establishment as regards a particular activity, the Council shall, acting on a proposal from the Commission, in co-operation with the European Parliament and after consulting the Economic and Social Committee, issue directives acting unanimously until the end of the first stage and by a qualified majority thereafter.¹

Article 54.3 states:

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

(g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 58 with a view to making such safeguards equivalent throughout the Community.²

The program of company law harmonization has been constructed on this foundation. The principal components of harmonization—coordination, safeguards, protection, and equivalence—are apparent in the language of Article 54.3(g). Legislation of the Member States, designed to protect shareholders and "others" (creditors, customers, potential investors, and workers) by reducing their exposure to unacceptable risk, is to be harmonized throughout the EEC.

Two goals were to be achieved through the Treaty of Rome. The first was the removal of immediate obstacles to the establishment of businesses by common market citizens within the entire community, and the second goal was the harmonization of the company laws of the Member States.³ The first of these goals proved fairly simple to accomplish. The second, however, presents continuing difficulties. Citizens of

² Treaty of Rome, supra note 1, at 39; Encyclopedia of EC Law, supra note 1, at B10052.
A Member State (including business associations formed under its laws) are generally able to extend their business into the territory of any other Member State. A "market" thereby arises for company laws which offers the business the greatest degree of latitude. On the other hand, "Company law Delawares" were to be avoided. The European scheme of harmonizing company laws is based on a "federal" approach; in other words, the harmonization results in little influence by the Member States in these matters. The safeguards contained in national regulations are politically sensitive and/or in evolution. The process of harmonization is as much political in character as it is technical.

1.1.

The original program to harmonize the company laws of the Member States encompassed ten directives. Seven directives have been issued by the Council of Ministers ("Council"). The remaining three have either been proposed by the Commission or are under discussion.

Other legislative initiatives that could significantly affect the operations of companies in the EEC are the proposal on the dissemination of information to and consultation with worker's representatives, the European Economic Interest Grouping, and the model charter of a European Company (a "Societas Europea" ("S.E.")).

Despite obvious difficulties, the Commission has been successful in obtaining the Council's approval of seven company law directives, which have since been implemented by the Member States. These directives are as follows:

- Id.
The First Directive, Directive 68/151/EEC of March 9, 1968, provides for coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies, within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community.

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8 Treaty of Rome, supra note 1, at 40; Encyclopedia of EC Law, supra note 1, at B10054/8.
9 11 J.O. COMM. EUR. (No. L 65) 8 (1968). The First Directive has been implemented in Member States by the following national legislation:

- Republic of Ireland: European Communities (Companies) Regulations, 1973, No. 163.
- United Kingdom: The European Communities Act, 1972, ch. 68, §9.
The Second Directive, Directive 77/91/EEC of December 13, 1976, provides for the coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with respect to the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent throughout the country.\textsuperscript{10}

The Third Directive, Directive 78/855/EEC of October 9, 1978, based on Article 54.3(g) of the Treaty, addresses mergers of public limited liability companies.\textsuperscript{11}

\textsuperscript{10} 20 O.J. EUR. COMM. (No. L 26) 1 (1976). The Second Directive has been implemented in Member States by the following national legislation:

- Italy: Decreto del Presidente della Repubblica de lo febbraio 1986, Modificazioni alla disciplina delle società per azioni, in accomandita per azioni, a responsabilità limitata e cooperative, in attuazione della direttiva del Consiglio delle Comunità europee n. 77/91 del 13 dicembre 1976, ai sensi della legge 8 agosto 1985, n. 412, 1986 Rac. Uff. 76.
- Portugal: Código das Sociedades Commerciais, Decreto-Lei No. 262/86 (2 Setembro 1986).

\textsuperscript{11} 21 O.J. EUR. COMM. (No. L 295) 36 (1978). The Third Directive has been implemented in Member States by the following national legislation:

The Fourth Directive, Directive 78/660/EEC of July 25, 1978, based on Article 54.3(g) of the Treaty, addresses the annual accounts of certain types of companies. Subsequent to the implementation of the Fourth Directive, national legislation was adopted in various Member States to harmonize their accounting standards with the directive. The implementational steps in different Member States are detailed below:


Portugal: Código das Sociedades Commerciais, Decreto-Lei No. 262/86 (2 Setembro 1986).


Germany: Gesetz zur Durchführung der Vierten, Siebenten und Achten Richtlinie des Rates der Europäischen Gemeinschaften zur Koordinierung des Gesellschaftsrechts (Bilanzrichtlinien-Gesetz-BiRiLiG), 1985 BGBl I 2355.


Netherlands: Wet van 7 december 1983 houdende aanpassing van de wetgeving aan de vierde richtlijn van de Raad van de Europese Gemeenschappen inzake het vennootschapsrecht, 1983 S. 663. Besluit van 22 december 1983 houdende regels over de inhoud, de grenzen en de wijze van toepassing in de jaarrekening van waardering van activa tegen actuele
The Sixth Directive, Directive 82/891/EEC of December 17, 1982, based on Article 54.3(g) of the Treaty, addresses the division of public limited liability companies.\(^{13}\)

The Seventh Directive, Directive 83/349/EEC of June 13, 1983, based on Article 54.3(g) of the Treaty, addresses consolidated accounts.\(^{14}\)

The Eighth Directive, Directive 84/2253/EEC of April 10, 1984, based on Article 54.3(g) of the Treaty, addresses the approval of persons responsible for carrying out the statutory audits of accounting documents.\(^{15}\)

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Republic of Ireland: Companies (Amendment) Act, 1986, No. 25.

United Kingdom: Companies Act, 1985, ch. 6, §§ 228-30, sched. 4.

\(^{13}\) 25 O.J. EUR. COMM. (No. L 378) 47 (1982). The Sixth Directive has been implemented in Member States by the following national legislation:

- Portugal: Codigo das Sociedades Comerciais, Decreto-Lei No. 262/86 (2 Setembro 1986).

Scissions are not permitted in Germany, Denmark, or the Netherlands and for this reason the Sixth Directive is not applicable in these countries.

\(^{14}\) 26 O.J. EUR. COMM. (No. L 193) 1 (1983). The Seventh Directive has been implemented in Member States by the following national legislation:


- Germany: Gesetz zur Durchführung der Vierten, Siebenten und Achten Richtlinie des Rates der Europäischen Gemeinschaften zur Koordinierung des Gesellschaftsrechts (Bilanzrichtlinien-Gesetz-BiRiLiG), 1985 BGBI I 2355.


\(^{15}\) 27 O.J. EUR. COMM. (No. L 126) 20 (1984). The Eighth Directive has been implemented in Member States by the following national legislation:


- Germany: Gesetz zur Durchführung der Vierten, Siebenten und Achten Richtlinie des Rates der Europäischen Gemeinschaften zur Koordinierung des Gesellschaftsrechts (Bilanzrichtlinien-Gesetz-BiRiLiG), 1985 BGBI I 2355.

These rather technical Directives were passed by the Council without too many complications. Progress in company law harmonization slowed when proposals for the Fifth Directive, the Tenth Directive and an eventual Ninth Directive were presented by the Commission. Obstacles included the difficult taxation problems and the significant problem of worker participation.

1.2.

In modern European company law, the internal constitution of corporations and the rights of shareholders cannot be ascertained simply by recourse to the appropriate company laws because these are, to some extent, superseded by laws regulating worker-management relations. The "company law" has been effectively replaced by a "law of enterprises." Consequently, the coordination of company laws necessarily requires the coordination of co-determination statutes. Consultation and information rights of workers are generally classified among the desirable social benefits of national company laws which harmonization was designed to protect.

The Treaty of Rome does not address the right of workers to participate in co-determination. In the first decade of the Community's existence, co-determination was not a major issue in the coordination debate. During that period, only one Member State, the Federal Republic of Germany, had a comprehensive scheme of co-determination at the board and management levels. Thereafter, Denmark and the Netherlands passed board-level co-determination legislation. Belgium, Luxembourg and France introduced reforms creating works council co-determination. In Britain, a commission of experts urged the adoption of a

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18 A Draft Ninth Directive has not yet been submitted by the Commission to the Council. The aim of the Draft Ninth Directive is to establish a special regime for groups of undertakings.
system of co-determination. Spain and Portugal adopted works council legislation, and debates concerning board-level co-determination gave reason to anticipate further advancement. In view of this legislative tide, the Commission ventured to propose a range of co-determination measures within the company law program.

1.3.

The prospect of a European union has been discussed since the early 1970's. In October 1972, the European Council confirmed the objective of achieving a European union by 1980. However, in spite of several expert reports, it proved impossible to attain such an objective during the 1970's. In 1983, the European heads of state reaffirmed their intention to strive towards achieving a European union in the Stuttgart Declaration of June 19, 1983.\textsuperscript{19} At the time, this meant primarily the strengthening and continuation of the development of the Communities within the framework of the Treaty of Rome.

It was the European Parliament ("EP"), directly elected since 1979, that prompted a more fundamental approach to the matter, namely through initiating amendments to the Treaty of Rome. In a draft treaty adopted by the EP on February 14, 1984,\textsuperscript{20} the objectives of European cooperation were redefined, and the tasks and powers of the institutions of a European union were reformulated. This initiative by the EP was a major impetus to the efforts to amend the European treaties. Consequently, in February 1986, the procedure articulated in Article 236 of the Treaty of Rome was implemented. Article 236 states:

The Government of any Member State or the Commission may submit to the Council proposals for the amendment of this Treaty.

If the Council, after consulting the Assembly and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the Governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to this Treaty.

\textsuperscript{19} *Solemn Declaration on European Union*, 16 \textit{Bull. Eur. Communities} 24 (No. 6, 1983).

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.\textsuperscript{21}

1.4.

In June 1984, the European Council in Fontainebleau created an ad hoc Committee for Institutional Affairs. Its function was to make suggestions for the improvement of European cooperation. The Committee recommended that a conference of the representatives of the governments of the Member States convene to negotiate a draft European Union Treaty. Finally, at the European Council's meeting in Milan in July 1985, a majority of the Member States (overriding the views of the United Kingdom, Denmark and Greece which were not in favor of amending the Treaty) decided to convene an intergovernmental conference to revise the Treaty of Rome and other treaties, in order to speed up decision-making procedures. New decision-making procedures appeared all the more urgent in view of the enlargement of the Community by the accession of Spain and Portugal.\textsuperscript{22} In order to amend the Treaty of Rome and create new decision-making procedures, the Single European Act was approved by the European Council in Hamburg in December 1985.\textsuperscript{23} The Act was signed on February 17, 1986, by nine Member States. Italy, Greece and Denmark signed it on February 28, 1986. The Single European Act has had far-reaching consequences.

On June 14, 1985, the Commission presented a White Paper program requiring a huge legislative program for the completion of the internal market.\textsuperscript{24} Most important is the commitment of all Member States which have signed the Single European Act to the completion of the Internal Market by 1992.\textsuperscript{25}
The approval of the Single European Act was itself a unique event of major political importance. It reflects the readiness of the Member States to develop further and reinforce cooperation among themselves. Its more flexible decision-making instruments may be valuable in overcoming the participation problem.\(^\text{28}\)

2. **THE PROPOSAL FOR A FIFTH EEC COMPANY LAW DIRECTIVE: STRUCTURE OF PUBLIC LIABILITY COMPANIES**

Until recently, the draft Fifth Directive concerning the structure of companies had been the main object of discussion regarding the introduction of employee participation systems in EEC company law. The proposals concerning the internal organization and structure of companies were heavily criticized and rejected, especially by Member States that traditionally practiced the unitary system in their company laws, i.e. having a single administrative organ (board of directors, conseil d'administration). The reception of these proposals demonstrates the limits of the harmonization efforts by the EEC due to employee participation systems. It is therefore interesting to observe the development of the Fifth Directive.

2.1.

As part of its program to approximate the company law in the Member States, in 1972 the Commission published the "Proposal for a
fifth Directive to coordinate the safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of article 58 of the Treaty, as regards the structure of société anonymes and the powers and obligations of their organs.”

This first draft recommended that the decision-making organ of shareholding companies in all Member States should have a dualistic structure. That is, there should be a division of power between the supervisory board and the management board as executive organ of the company. The draft also demanded certain minimum guarantees for the participation of employee representatives in decision-making processes at the board level. The Member States had the option between two systems:

(1) In companies with more than 500 employees, two thirds of the members of the supervisory organ are appointed by the general assembly, and one third is appointed by the workers or their representatives or upon proposals made by the workers or their representatives; or

(2) The supervisory organ coopts its own members. However, the general meeting or the representatives of the workers may object to the appointment of a proposed candidate if the proposed candidate lacks the ability to carry out his duties or if his appointment would cause an imbalance in the supervisory body’s composition with respect to the interests of the company, the shareholders and the employees. In such case, an independent legal body decides on the objection.

The draft was widely commented on and substantial changes proposed. Furthermore, the EP demanded important changes. The legal

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committee of the EP even temporarily stopped discussion of the draft in order to wait for a new proposal from the Commission. Replying to the widespread criticism, and in order to explain its intentions more fully, in 1975 the Commission presented the so-called "Green Paper."^31

2.2.

In the Green Paper, the Commission raises the rhetorical question of why it has

proposed Community legislation in relation to the undeniable 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?^32

Answering this rhetorical but very valid question, the Commission repeats: "If progress is to be made towards a European Community in the real sense of the word, a common market for companies is an essential part of the basic structure which must be created."^33

The role of employees in decision-making structures of companies is of central importance for the companies themselves, for employees and their representative organizations, and for society at large. The existing differences between co-determination structures in the Member States are an obstacle to rational reorganization of the legal structures of enterprises across national frontiers. After reporting in detail about


^32 Id. at 7.

^33 Id. at 7.

^34 Incorporation under a particular national system is a serious barrier to the rational restructuring of enterprises necessary to take advantage of community-wide markets. Transfer of domicile and merger across national borders are practically impossible. Suitable instruments to overcome these barriers are, in the opinion of the Commission, the "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 and the Convention on International Mergers." Id. at 8 (footnote omitted) (now to be embodied in the Tenth Directive).
the existing co-determination systems in the Member States, the Commission suggests that one-third of the board members should be employee-elected. Alternatively, Member States could opt for the Dutch cooptation model. The Commission justifies the inclusion of such regulations by claiming that past regulations of this kind have been included in various legal provisions. Traditionally, these matters have not been regulated by company laws because of the concept, based on economic and social theories, that the relationship between company and employees is essentially a contractual relationship. Modern theories, however, define the enterprise as a partnership between capital and labor. The company laws of the Member States will gradually have to reflect these changes which have led to "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."

Despite this attempt by the Commission to give a well-founded explanation for its aims, criticism of the draft continued. In particular, public opinion in the United Kingdom refused to accept new company structures which were considered to be typical for German Aktiengesellschaften. The dualistic system and employee participation were regarded as strange institutions, not suitable for adaptation to British labor relations.

The Community-wide discussion on co-determination exposed the proposal's insufficient consideration of different political, historical and ideological traditions, social relations, and systems of relationships between undertakings and employees in the Member States. Countries historically familiar with co-determination mechanisms were better prepared to accept European participative proposals than countries are where such mechanisms are unknown and where the social partners do

36 Id. at 9.
37 See, e.g., Schmitthoff, supra note 36.
38 The widely differing opinions in the UK were reflected in the Report of the Committee of Inquiry on Industrial Democracy (Chairman Lord Bullock) which was presented to Parliament in January 1977. INDUSTRIAL DEMOCRACY, 1977, CMND. No. 6706. Even though this Report made recommendations for a British domestic solution, the employee participation proposals of the Commission became part of the debate. For details, see W. KOLVENBACH & P. HANAU, "UNITED KINGDOM" HANDBOOK ON EUROPEAN EMPLOYEE CO-MANAGEMENT (1989).
not believe in cooperation between management and labor.\textsuperscript{39}

2.3.

Strong criticism was voiced in the EEC institutions and substantial changes to the draft were demanded.

2.3.1.

In its report of February 2, 1978, the Economic and Social Committee ("ESC") adopted the opinion "that employee participation in the broadest sense of the term is a desirable development in a democratic society," but that "the issue of participation should be treated in a down-to-earth and practical fashion. . . . [T]he only conceivable Community provisions on participation are flexible ones."\textsuperscript{40} The report of the subcommittee shows the wide range of differing opinions existing in the Member States. Specifically, British delegates pointed out that in some Member States trade unions and employees are not willing to accept co-responsibility.

2.3.2.

The Legal Affairs Committee of the EP referred to the amended Statute for European Companies, which proposes that one-third of the supervisory board should be composed of representatives of the capital owners, one-third should be representatives of the company's employees, and one-third should be persons elected by both groups. According to the Legal Affairs Committee's first report, the co-option model "does not constitute a form of genuine employee participation in the organs of the company. There is no point in employees' representation in the organs of the company unless the company employees are free to elect their candidates . . . [who enjoy] their confidence."\textsuperscript{41} The first directly

\textsuperscript{39} See generally W. KOLVENBACH, COOPERATION BETWEEN MANAGEMENT AND LABOUR (1982).

\textsuperscript{40} 22 O.J. EUR. COMM. (No. C 94) 1, 3 (1979). The difficulties of coordinating employee participation structures in the Member States are vividly shown by the Report of the ESC subcommittee on the Green Paper. The subcommittee notes that the Green Paper was drafted in English and "[t]hat the original English text uses the term 'participation' as the general term for all types of participation by employees and trade unions." In the German version, "participation" had originally been improperly translated as "Mitbestimmung." The narrow definition of that term, in English "co-determination," caused a certain amount of confusion. The confusion has since been quelled by re-translating the term as "Mitwirkung," a broader term encompassing all forms of employee involvement, including the narrower "Mitbestimmung." \textit{Id.}

\textsuperscript{41} 1979-1980 EUR. PARL. DOC. (COM No. 136) 1, 30 (1979). The report was
Elected EP appointed a new rapporteur, Aart Geurtsen. Mr. Geurtsen’s report recommended equality of the right to protect the interests of the firms affected by the proposed directive. Only firms with at least 2,000 employees should fall under the new directive. All employees, regardless of whether or not they are members of a trade union, shall have a vote in the election of their representatives for the board. This provoked strong opposition, especially in Great Britain.

On January 15, 1982, the Legal Affairs Committee submitted its second report. In the final vote on May 11, 1982, the proposed changes were accepted by a vote of 159 to 109. Thus, after almost ten years of parliamentary battles, the EP passed the Fifth Directive with substantial changes to the first draft of the Commission. The proposal that emerged from this parliamentary battle contained minimum requirements of employee participation, with the possibility for governments of the Member States to take into account national traditions.

The trade union movement considered the changes demanded by
the EP to be not far-reaching enough, but in reply to the demand of the EP, the Commission accepted most of the EP's suggestions in its answer of September 16, 1982.47

2.4.

The Commission amended the proposed Fifth Company Law Directive at its meeting on July 28, 1983.48 The Commission stated that the "further coordination of laws relating to public limited companies has been given priority owing to their relative importance as regards cross-frontier economic activities."49 Two different arrangements of company administration are presently practiced in the Community: (1) one administrative organ, or (2) two organs, which are a management organ responsible for managing company business and a supervisory organ responsible for controlling the management body. The proposal clearly favors the two-tier arrangement, but states that making this system compulsory is impractical at the present time. The Commission opines that provisions should be made for employee participation within the supervisory or administrative organ in all Member States in order to comply with the flexibility demanded by the ESC and the EP. The operation of the Directive's provisions concerning organization and employee participation should be reviewed within five years after these provisions are first applied. This review should contemplate whether further harmonization is desirable, "including the question of the desirability of the general introduction of equal representation of shareholders and employees on the supervisory or administrative organ."50

Consistent with the desired flexibility, Member States should principally adopt the two-tier system (management organ and supervisory organ) in their company laws. They may, however, permit a choice between the two-tier system and a one-tier system (administrative organ).

2.4.1.

For companies in the Community employing more than 1,000 employees either directly or in subsidiaries, Member States are required to adopt one of four options regarding employee participation. However, a

49 Id. at 3.
50 Id. at 4.
participation model does not have to be applied if a majority of the employees vote against it. In countries with participation systems under which employees appoint one-half of the members of the supervisory organ, the voting procedures must assure that "decisions may ultimately be taken by the members appointed by the general meeting," that is, by the shareholders' representatives.\(^5^1\) The four options give the entire system a large degree of flexibility and enable Member States, through their national legislation, to practice participative structures which have historically grown and proven to be effective.

Under the first option, the general meeting appoints a maximum of two-thirds of the members of the supervisory organ. The employees appoint a minimum of one-third and a maximum of one-half of the members of the supervisory board.

The second alternative is modelled along the Dutch cooptation system. Members of the supervisory organ are coopted by that organ. The general meeting or the representative of the employees may object to the appointment of a candidate on the ground that either he lacks the ability to carry out his duties or that his election would create an "improperly constituted" organ in view of the interests of the company, the shareholders and the employees. On appeal, an independent body existing under public law can find the objection unfounded.

Under the third alternative, employee participation takes place through a separate body representing company employees. This body has the right to regularly receive information and consultation on the company's administration, progress and prospects, competitive position, credit situation and investment plans from the management organ. The rights of this representative body are the same as the information rights of the members of the supervisory organ appointed by the general assembly. Further, this body must be consulted in the same way as the supervisory organ and in all cases in which the supervisory organ considers granting authorization for decisions of the management organ. The employee body meets prior to each supervisory board meeting and must be provided with all the documentation and information related to the agenda of the supervisory board meeting.

The fourth alternative institutes employee participation through collectively agreed upon systems. If collective agreements are not concluded before a certain period of time, Member States must regulate employee participation in accordance with one of the other options.

\(^5^1\) Id. at 8.
2.4.2.

If the unitary organization continues to be practiced in a company, the administrative organ must consist of executive members who manage the company and non-executive members who supervise executive members. The number of non-executive members shall be greater than the number of executive members and divisible by three. The non-executive members appoint the executive members of the administrative organ by majority decision. In principle, the Commission has included in its proposal for the one-tier system the same rules for employee participation as in the two-tier system.

In its opinion, the EP insisted on certain principles for the appointment or election of employee representatives in order to guarantee the democratic character of employee participation systems. Under the amended proposal, the Member States may prescribe specific rules in accordance with their national laws and practice, but, as a matter of principle, the members of the supervisory organ and the representatives of the employees must be elected in accordance with a proportional representation to ensure the protection of minorities. All employees must be able to participate in the election which shall be by secret ballot. The free expression of opinion shall be guaranteed.\(^5\)

2.5.

The Commission hoped to overcome criticism by complying with the demands of the EP and by offering a number of options for employee participative systems. Unfortunately, the criticism continues. The trade unions are discontented because the amended draft is, in their opinion, less stringent than the original proposal. The European

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Trade Union Confederation ("ETUC"), in its position paper, criticized the "reactionary nature of the amendments" and claim they have a negative attitude to genuine participation. The German Trade Union Organization described the amended draft as "an insult" to employees and the co-determination rights for which they had fought. On the management side of industry, the Union des Industries de la Communauté Européenne ("UNICE") claims that the Directive wants to establish co-determination systems in countries without a history of employee participation. UNICE opposes employee participation in company organs, and claims that the different systems are not suitable for harmonization. Furthermore, the number of companies with transnational operations affected by non-harmonized worker participative institutions is small. The proposed regulation is incompatible with the traditions and practices of industrial relations in some Member States, especially those which have yet to pass legislation in this area.

The Trades Union Congress ("TUC") claims that trade unions should be concerned with the general issues raised in the Fifth Directive. "In view of the ten year delay in tackling this important area the General Council (of TUC) notes with great concern the indication in the governmental document that a further lengthy delay is envisaged by government." TUC believes that the government's comments on the drafts are of a "highly prejudicial nature." But it is also of the opinion that the Fifth Directive "reflects a naive view of the nature of representative democracy in collectively representative structures."

Opposition is especially strong in the United Kingdom. In No-

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64 Press release of Deutscher Gewerkschaftsbund (Nov. 28, 1983).
65 Union des Industries de la Communauté Européenne, UNICE Position on Employee Participation and the Structure of the Organs of Public Limited Companies (Feb. 28, 1984) (addressed to the European Commission and the Council of Ministers).
67 Id.
68 Id.
69 The Confederation of British Industry (CBI) opposes both the draft Vredeling Directive and the Fifth Directive. It considers both drafts not only unnecessary but, if implemented, irrelevant to the needs of industry; counter-productive to the achievement of widespread and genuine employee involvement; damaging to competitiveness and largely impractical. . . . Genuine and effective employee involvement, benefitting both companies and their employees, can be developed only on a voluntary basis. It is only in this way that the particular need and circumstances of individual companies, the sectors of industry in which they operate, and the existing national framework of labor relations law and practice can be taken into account.
November 1983, the British Departments of Employment and of Trade and Industry published a consultative document on the “Draft European Communities Fifth Directive on the Harmonization of Company Law” (and on the directive on procedures for informing and consulting employees). The British Government states:

It has already made clear its profound reservations on these proposals. Whilst it is firmly committed to the principle of managements informing and consulting employees about matters which affect them and has consistently urged organizations to develop procedures which are appropriate to their particular circumstances, it believes that successful employee involvement depends as much on a spirit of co-operation as on the existence of formal machinery, and that it is best introduced voluntarily. [The British Government] believes that the introduction of community-wide legislation in this area would contribute nothing to the establishment of a common market in goods and services, but would increase employer’s costs and damage the competitive position of industry in the Community. Nevertheless, in order to insure that the views of U.K. interests are fully represented during the negotiations in Brussels . . . . the government would welcome the views of all interested organizations and individuals on the revised text.

The Law Society discusses legal problems which may arise if the United Kingdom adopts company law principles as well as the employee participation systems in the Fifth Directive. The political acceptance of these principles necessitates extensive changes and amendments to the existing body of legislation. More than 100 organizations and individuals responded to the United Kingdom government’s consultative document, and almost all criticized the draft directives.

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61 Id.


63 The Participation Debate Continued, supra note 56.
The Federal Republic of Germany also expressed concern over the effect of the Fifth Directive. Its general concern is whether the special co-determination regime for the coal and steel industry in the Federal Republic could still be practiced under the Fifth Directive. Despite repeated assurances that the revised draft permits the continuation of the coal and steel co-determination model, the German Minister for Labor officially criticized the Fifth Directive and described it as “token-harmonization.” The uneasiness is, to a certain extent, a result of the political problems that implementing the necessary changes to existing German co-determination legislation would create.

2.6.

The EP has repeatedly asked the Commission for a report on the progress of the Council's discussions on the proposed Fifth Directive. One of the EP's questions was motivated by a Commission representative's statement at a meeting of the Committee on Social Affairs: “(a) that, as regards worker participation and workers' rights, it was necessary in practice to take account of the Council's negative attitude and that proposals in this area were therefore inopportune, and (b) that the Single Act excluded the matter of workers' rights and worker participation.” The Commission's answer emphasized that the Single European Act, particularly as a result of the new Articles 118 A and 118 B, has given a new impetus to Community initiatives in social policy:

Relating more particularly to the rights and interests of workers, although they are excluded from the field of application of the new Article 100 A of the Treaty nevertheless they can be the subject of measures covered by other provisions of the Treaty and the Commission will not fail to adopt the appropriate initiatives with a view to protecting them when the time is ripe.

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64 Handelsblatt, June 24, 1989, at 9.  
68 Id.  
69 Id. Articles 118a and 118b supplement the Treaty and deal with improvements in the working environment. Under the new system the Council has the power to act by a qualified majority:

**Article 118a**

1. Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of
The Commission, in its Memorandum on the Statute for the European Company to the EP, the Council, and the two sides of industry, mentions that the proposed Fifth Directive is currently in its second reading in the Council.\footnote{70}

With regard to the questions of "structure" it would seem the groundwork for a decision at a political level is by and large done; on the worker participation provisions we are far less advanced, despite progress in this context since 1972 at

\begin{verbatim}
condition in this area, while maintaining the improvements made.
2. In order to help achieve the objective laid down in the first paragraph, the Council, acting by a qualified majority on a proposal from the Commission, in co-operation with the European Parliament and after consulting the Economic and Social Committee, shall adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.
3. The provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent measures for the protection of working conditions compatible with this Treaty.

Article 118b
The Commission shall endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement.

Article 100a excludes from qualified majority decisions of the Council provisions "relating to the rights and interests of employed persons." Id. at 8.

Article 100a
1. By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 8a. The Council shall, acting by a qualified majority on a proposal from the Commission in co-operation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

Id.
\end{verbatim}

\footnote{70} The complicated and time consuming procedure in the Council which normally is not publically known has been described by Woodland, \textit{Le Processus Légitatif dans la Communauté Économique Européenne (Aspects de Droit des Sociétés)}, 28 REVUE DU MARCHE COMMUN [REV. MARCHÉ COM.] 503, 511 (1985). "L’harmonisation du droit des sociétés, a fortiori l’adoption de règles uniformes, suppose de payer le prix du compromis et de prendre quelque liberté avec un rigorisme juridique et une concision rédactionnelle qui se conçoivent mieux dans l’environnement déterminé du droit national, bien que les législations contemporaines n’en fournissent guère la démonstration." Id.
the national level and despite the more flexible approach to this topic in the amended proposal. It will probably not be until the end of the third reading, within two to three years, before adoption at political level of the complete Fifth Directive could be finally assessed.\textsuperscript{71}

The Commission realizes that:

[Slow progress is] the result of a long-standing difficulty which stems from differences in traditions regarding participation by workers in company-decision-making: according to some, any such participation must be voluntary, while for others it must be written in statutory law relating to enterprises. Nevertheless, no satisfactory compromise has yet been found which would bridge the gap between the two basic attitudes . . . . The difficulty of moving forward on the fundamental issue of worker participation is a perennial problem in the harmonization of company law, and a bone of contention in the social dialogue. A break-through in this area now seems to be essential in the social dialogue; otherwise vital elements in the construction of a single market may remain blocked for a long time.\textsuperscript{72}

In proposals for other company law directives, the Commission has referred to the draft Fifth Directive whenever employee participation had to be mentioned. Examples include the proposal for a Ninth Directive on groups of companies\textsuperscript{73} and the proposal for a Tenth Directive on transborder mergers.\textsuperscript{74} The Fifth Directive is also referred to in the European Economic Interest Grouping\textsuperscript{75} and the Statute for a European Company.\textsuperscript{76}

3. THE PROPOSAL FOR A NINTH EEC COMPANY LAW DIRECTIVE: LINKS BETWEEN UNDERTAKINGS AND IN PARTICULAR GROUPS

3.1.

In its White Paper of June 14, 1985, the Commission mentioned

\textsuperscript{71} Commission of the European Communities, Memorandum on the Statute for the European Company (1989).
\textsuperscript{72} Id.
\textsuperscript{73} See infra notes 77-91 and accompanying text.
\textsuperscript{75} See infra notes 182-91 and accompanying text.
\textsuperscript{76} See infra notes 192-262 and accompanying text.
the necessity for a Directive on the relationship of undertakings in a
group. Although a proposal was to be announced in 1988 and to be
adopted in 1990, neither has occurred. The Ninth Directive intends to
harmonize the law of the Member States with respect to such issues as
parent company responsibility, rights of minority shareholders, safe-
guards for creditors of subsidiary companies, and rights of employees
within a group. Other important matters also will be included. The
first ideas for the directive received little support and various provisions
drew vehement opposition.

Especially criticized was the envisaged far-reaching personal lia-
bility of the parent's Board of Directors for management actions that
inure to the detriment of the subsidiary. Liability is not conditioned on
noncompliance with recognized standards of prudence and business
judgment. Also criticized were the requirement of public notice when-
ever blocks of shares in companies are acquired by other enterprises
and the requirement of periodic reports detailing all activities under-
taken by a subsidiary for the benefit of the parent. It was claimed that
the Ninth Directive was aimed at the decentralization of corporate
management. The first draft was considered to be inconsistent with
the obligation of the board of directors to defend the interests of its
company or group of companies.

3.2.

The preliminary draft of the proposed directive, which the Com-
mission sent to the Member States of the Community in 1984, has been
the subject of great criticism, especially in the United Kingdom. Even
its basic approach towards the regulation of groups of companies was
questioned.

The concept of regulating companies is foreign to most Member
States, and some countries emphasize that only the Federal Republic of
Germany and Portugal have a Konzernrecht. Therefore, the pro-
testing States claim, there is no need for harmonization, since the other
Member States do not have similar company law regulations.

It was critically noted that the draft of the Ninth Directive pre-

77 See White Paper, supra note 24.
78 Nieuwdorp, Status Report on EEC Company Law Harmonisation, 12 Int'l
79 Schneebaum, The Company Law Harmonization Program of the European
comprehensive legislation concerning company groups).
80 A comprehensive set of regulations governing company groups integrated in the
1965 West German corporate law. Aktiengesetz, 1965 BGBl II 1089.
supposes that the Fifth Directive will pass into law. The draft proposal describes management structures which are consistent with the requirements of the Fifth Directive. The preamble to the draft refers to the workers' right to participate in the decision-making process, and it is stated that these rights are not to be reduced as a result of a company's incorporation into a group of companies. In the United Kingdom, strong voices suggest that the Ninth Directive should not be used to introduce the Fifth Directive "through the backdoor." The United Kingdom Government is of the opinion that there is no need for such a directive. Other countries have been reluctant to comment.\(^8\)

### 3.3.

The Commission's "Proposal for a Ninth Directive pursuant to Article 54.3(g) of the EEC Treaty relating to links between undertakings, and in particular groups"\(^8\) refers in a number of clauses to codetermination rights of employees. The authors of the draft are of the following opinion:

[Many companies] have links which make them interdependent with other enterprises and are no longer economically independent entities. Incorporation into a group constitutes a particularly advanced form of this interdependence. It is characterized by the fact that the undertakings concerned retains its individual legal form, but loses its economic independence. Undertakings which are members of groups play a significant role in many economic sectors whether they concern industry, commerce or the provision of services. They employ a significant part of the working population and play a major role on the capital market.\(^3\)

The draft points out that multinational undertakings have, legally speaking, a group structure and that their economic importance gives them a leading position in this context. The proposal states that a special solution is required in the context of groups, especially with respect to employee information, consultation and participation. "This is because existing rights may become meaningless and ineffective if, within a group, employees are not also informed, consulted and represented.

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\(^8\) III/1639/84-EN (internal Commission Number) [hereinafter Proposed Ninth Directive]. This proposal is published in German at 3 ZGR 444 (1985).

\(^8\) Proposed Ninth Directive, *supra* note 82.
where group policy is made." These concerns are addressed in the amended proposal for a Directive on the Information and Consultation of Employees (Vredeling Proposal). This directive "will ensure procedures for informing and consulting the employees of undertakings." The author of the draft could not have envisaged that this proposal would not yet be passed in 1989 nor that it is unlikely to be passed in the near future.

3.4.

The proposal continues: "as regards employees, there must be a guaranty in their favor that their rights to participate in the decision-making process of a public limited liability company are not endangered as a result of its incorporation in a group." Article 2(a) refers to the amended proposal for a Fifth Directive and explains that this amended proposal provides:

that public limited liability companies may be organized not only on the dualistic structure (a management body and a supervisory body) originally envisaged, but also on a monist structure (a single body, the administrative body), the operation of which has been conceived as closely analogous to that of the dualistic system. In these circumstances, it was not thought appropriate to encumber the text of the present directive with constant references to the two alternatives. Article 2(a) makes, once and for all, the necessary adjustment of terminology."

According to the proposal’s introduction:

[Employee participation at group level at present forms the subject of transitional provisions in the amended proposal for a directive on the structure of public limited liability companies, pending a subsequent coordination. The present proposal for a directive does not and will not seek to deal with these problems. Whilst it does contain a safeguard clause on one limited point, this is to ensure that the rules already in force in certain Member States are not evaded before appro-
Appropriate measures have been adopted at Community level.\textsuperscript{89}

Article 7 of the proposal requires the management body of a subsidiary to prepare a special report every year.\textsuperscript{90} This special report shall give information which makes it possible to assess the extent and intensity of the relationship between the subsidiary and the parent. Agreements or measures which are wholly or partly detrimental to the company, involve a particular risk for the company, or differ substantially in extent and subject matter from the business which the company normally transacts, shall be individually specified in this special report. The report shall also specify the actual or foreseeable effect of such agreements or measures on the company's employees. The auditors of the company must certify the accuracy of the details contained in the special report. On application by a shareholder, creditor, or "competent employees' representatives within the company," a court or an authority competent under national law may appoint one or more special auditors to examine the special report. The company, any shareholder acting on its behalf, or a competent employees' representative within the company acting on its behalf may file a claim for the damages resulting from interference of the parent undertaking.

The phrase "competent employees' representatives within the company" is interpretable under existing German co-determination legislation. The works council or the elected representatives in the supervisory board satisfy the definition. However, under German law, the works council does not have the right to interfere with the legal situation of the enterprise. Also, the employee members of the supervisory board are part of a company organ which does not enjoy any special rights. Therefore, it is understandable that German authorities have been very careful to comment on the proposed draft for the Ninth Directive.

Article 24 of the proposal also refers to employee participation in company decision-making. The interests of the employees of a company which receives instructions from the dominant undertaking are referred to in Article 24. The special rights created by the proposal are unacceptable in countries where the company laws define the rights granted to employee representatives in company organs. German company law contains explicit rules for groups of companies and protects outside shareholders and creditors of a dependent company, but does not protect the company itself, or its employees. Furthermore, employee participation rights are regulated in the co-determination laws of the Federal

\textsuperscript{89} Id.
\textsuperscript{90} Id.
Republic of Germany.\(^91\)

Many technical regulations of the draft are also opposed by Member States that do not have special legislation for groups of companies. Therefore, it is not certain whether the Commission will be successful in getting the Ninth Directive passed within the period mentioned in the White Paper.

4. **THE PROPOSAL FOR A TENTH EEC COMPANY LAW DIRECTIVE: CROSS-BORDER MERGERS**

The Commission presented its “Proposal for a tenth Council Directive based on Article 54.3(g) of the EEC Treaty concerning cross-border mergers of public limited companies”\(^92\) on January 14, 1985. This proposal ended an academic discussion that had begun in 1965. In its explanatory memorandum, the Commission considered it important that Community undertakings “have at their disposal the instruments which would enable them to adapt their legal status to the dimension of the Community and to achieve cross-border mergers of public limited companies within the Community.”\(^93\) Cross-border merger is, above all, a technique to simplify the procedures for creating or restructuring complex economic entities.

4.1.

In 1965, a working group chaired by Professor Goldman started work on a draft convention to facilitate mergers between companies subject to different national laws. The working group completed the first stage of its activities in 1972 and presented a report on the Draft Convention on International Mergers in 1973.\(^94\) After the accession of the three new Member States, work resumed to adjust the draft to the laws of the new members and to attempt to overcome problems not solved by the working groups. Work on the draft Convention stopped

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again in 1980.

There were two reasons for the slow progress and eventual standstill of the work. First, tax arrangements for international mergers were problematic; it would be pointless to make international mergers legally possible unless fiscal barriers were abolished. Progress of the group's work, therefore, depended on the progress of the directive on tax arrangements for mergers (which also eventually came to a standstill). Second, the role of employee representatives in a company's decision-making bodies caused controversy. Member States with special legal provisions for employee representation expressed concern that international mergers could be used to avoid such representation.

4.2.

The original draft of the Convention was based on Article 220, paragraph 3, which states:

Member States shall, so far as is necessary, enter into negotiations with each other with the view to securing for the benefit of their nationals:

. . . . . the mutual recognition of companies or firms within the meaning of the second paragraph of Article 58, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between the companies or firms governed by the laws of different countries. . . .

In 1984, however, new efforts to find a solution for cross-border mergers concentrated on the Third Directive, which was adopted on October

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95 Treaty of Rome, supra note 1, at 87; Encyclopedia of EC Law, supra note 1, at B10170/8. Authors in German publications have pondered whether using Article 54.3(g), instead of using Article 220 which necessitates a convention, would simplify the process of negotiating a solution. See Bärmann, Europäische Fusion, in BEITRAGE ZUM WIRTSCHAFTSRECHT FESTSCHRIFT FÜR KAUFMANN 13 (1972); Beitzke, Internationales rechtliche zur Gesellschaftsfusion, in PROBLEME DES EUROPÄISCHEN RECHTS FESTSCHRIFT FÜR HALLSTEIN 14 (1966); Beitzke, Anerkennung und Sitzverlegung von Gesellschaften und juristischen Personen im EWG-Bereich, 127 ZHR 1 (1964); Colloque organisé par le Centre Universitaire d'Études des Communautés Européennes de la Faculté de Droit et de Sciences économiques de Paris, October 26-28, 1967, 109 REV. MARCHÉ COM. (1968); Helbrich, Zur rechtlichen Problematik grenzüberschreitender Unternehmensfusionen, 1 ÖSTERREICHISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 65 (1974); Lutter, supra note 30; Mertens, Angleichung des Gesellschaftsrechts, europäische Handelsgesellschaft und europäischer Konzern, 1970 JURISTISCHE RUNDSCHAU 321; Ommeslaghe, Unternehmenskonzentration und Rechtsangleichung in der EWG, 132 ZHR 201 (1969); Buchholz, Die Harmonisierung des Gesellschaftsrechts nach dem EWG-Vertrag unter besonderer Berücksichtigung des Article 54.3(g) (1966) (unpublished dissertation).
This Directive, based on Article 54.3(g) of the Treaty, deals with mergers between two companies which are both subject to the laws of the same Member State. The Commission concluded that a convention would have disadvantages which a directive would not have: the text of a convention would have to be more complex to be self-sufficient, national parliaments would have to ratify the convention, and a convention would have to be re-negotiated every time a new Member State joined the Community. Therefore, it seemed more advantageous to propose a directive based on Article 54.3(g). Furthermore, international mergers could, in certain instances, be covered by the rules of the Third Directive; only specific rules taking account of the international nature of the merger would be necessary. Since most of the Member States approved the Commission’s new approach, the directive seems to be the most suitable instrument for international mergers.

4.3.

Work on the Draft Tenth Directive was bolstered by progress made on the tax aspects of international mergers. A compromise on the problem of employee representation made a break-through in tax matters possible. This compromise combined taxation and company law. It permitted Member States to decide not to apply tax arrangements favoring an international merger if, as a result of the merger, a firm, even if it is not directly involved in the operation itself, would no longer meet the conditions required for employee representation in its decision-making bodies. The proposal for the directive is complemented by a fiscal regulation which is part of a package of three fiscal directives.

On January 8, 1985, the Commission presented the proposal for a Tenth Directive of the Council based on Article 54.3(g) of the Treaty concerning cross-border mergers of public limited companies. The legal machinery of the Tenth Directive for mergers between companies meets two main objectives: (1) cooperation between firms should be

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97 Koppensteiner, Grundlagenkritische Bemerkungen zum EWG-Entwurf eines Übereinkommens über die internationale Verschmelzung von Aktiengesellschaften, 39 RABELSZ 405 (1975); Pipkorn, supra note 30; Schwartz, Wege zur EG-Rechtsvereinheitlichung: Verordnungen der Europäischen Gemeinschaft oder Übereinkommen unter den Mitgliedstaaten?, in FESTSCHRIFT FÜR ERNST VON CAEMMERER 1067 (H. Fickes ed. 1978); Timmermanns, supra note 52.
98 Proposal for a Tenth Directive, supra note 17, at 5 n.3.
possible to the fullest extent, particularly in order to adapt their size to
that of the market in which they operate; and (2) to simplify proce-
dures for restructuring a group. Mergers thus provide a legal tool nec-
essary for a durable and homogeneous community market.

A prerequisite for cross-border mergers is that such mergers be
legally possible. At the present time, legislation in some Community
countries does not provide for mergers. In others, such operations are
subject to prohibitive conditions. Therefore, Community undertakings
wishing to merge have to resort to complex techniques. Even then,
however, the result is by no means identical to that of a merger because
the original companies normally retain their separate legal existence.

Referring to the tax compromise regarding employee representa-
tion in an undertaking, the Commission states:

In the tax Directive a solution was found based on the idea a
Member State might subject an international merger to cer-
tain conditions if one of the effects would be to put an end to
employee representation in an undertaking, particularly one
being required.

Given the priority accorded to solving the problems of
international mergers, this solution could also be temporarily
accepted in the company law field pending subsequent coor-
dination to be achieved by the proposed fifth Directive on the
structure of public limited companies and the powers and
obligations of their organs. This provides different but
equivalent employee representation systems and thus facili-
tates the complete solution of the problems related to inter-
national mergers.\textsuperscript{100}

Therefore, Article 1.3 of the draft has been worded: "Pending subse-
quent coordination, a Member State need not apply the provisions of
this Directive to a cross-border merger where an undertaking, whether
or not it was involved, would as a result no longer meet the conditions
required for employee representation in that undertaking's organs."\textsuperscript{101}
This possible exemption is, however, temporary and will disappear
when a uniform system is instituted.\textsuperscript{102}

\textsuperscript{100} Proposal for a Tenth Directive, supra note 17, at 6 (footnote omitted).
\textsuperscript{101} 28 O.J. EUR. Comm. (No. C 23), at 12; Proposal for a Tenth Directive,
supra note 17, at 12.
\textsuperscript{102} Joachim Ganske, a German government official involved in negotiating the
Tenth Directive, predicted in 1985 that the Commission’s time limits for the Tenth
Directive might not be realistic. Ganske, Internationale Fusion von Gesellschaften in
der Europäischen Gemeinschaft - ein neuer Ansatz. Zum Vorschlag der EG-Kommis-
sion für eine Zehnte Richtlinie, 11 DER BETRIEB 581 (1985). Although both European
Since harmonization has already been achieved in the field of national mergers, the new directive is limited to matters specific to cross-border mergers. All mergers, both national and cross-border, involve the same steps. The special aspect of cross-border mergers is that the merging companies are governed by the laws of different Member States. All preparatory acts are carried out individually by each of the companies involved in a cross-border merger in accordance with the law of its own Member State, without any need for uniform rules. It is necessary, however, to synchronize certain steps in the procedures, and certain rules relating to cross-borders must be harmonized more extensively than is necessary for national mergers. Especially important are the contents of the draft terms of the merger, the protection of creditors of acquired companies, the date on which the merger takes effect, and the clauses of nullity of mergers.

4.4.1.

UNICE informed the Commission in a memorandum of July 18, 1985,\textsuperscript{103} that European industry is in favor of a Community instrument allowing cross-border mergers. It considers a Directive "the most appropriate instrument to achieve this aim as it lends itself more easily to harmonization than a convention, which is a cumbersome instrument."\textsuperscript{104}

UNICE’s basic objection is to the proposal concerning employee participation: "Art. 1(3) would enable a Member State to exclude from the scope of the directive any merger that threatens existing rights to employee participation."\textsuperscript{105} This provision would fundamentally detract from the stated goal of the Commission’s proposal, which is the harmonization of employers' organizations and trade unions in the ESC in February 1989 favored the Community’s action to guarantee basic rights and to protect workers in cross-border mergers, the problem is still unsolved and, apparently, will not be solved in the near future. See Brussels Claims Wide Support over Workers’ Rights, Financial Times (London), Feb. 24, 1989, at 2. Additionally, the German Bundesrat instructed the German Government to demand, during Council deliberations on the proposal, additional safeguards for the co-determination rights that exist in the Federal Republic of Germany. In view of the uncertainty of the Fifth Directive, it must be assumed that Article 1(3) of the proposal remains effective for an indefinite period of time. Under these circumstances, Article 1(3) cannot be reconciled with the harmonization directive and, therefore, serious objections must be raised. Decision of Deutscher Bundesrat 56/85 (Mar. 14, 1986).

\textsuperscript{103} Union des Industries de la Communauté Européenne, UNICE Position Memorandum 22.6/7/1 (July 18, 1985) (internal document).

\textsuperscript{104} Id.

\textsuperscript{105} Id.
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nization of legislative arrangements throughout the EEC. The draft article would cause confusion, uncertainty and delay for companies involved in cross-border mergers.

UNICE has several objections to the substance of Article 1(3). The provisions allow Member States, for a period whose end is not yet in sight, to prevent firms from being taken over in cross-border mergers. As a result, firms will be branded and the possibility of resorting to available legal instruments when restructuring will be severely limited. Article 1(3) gives legal standing to arrangements for employee participation in company organs even if these arrangements do not exist under national law. Under national law, a firm can be changed into a legal entity not subject to employee participation requirements. UNICE refers to the "German Limited Company" (Gesellschaft mit beschränkter Haftung) which is subject to employee participative systems and which can become a general partnership (Offene Handelsgesellschaft) not subject to employee participation systems. This example shows that, at a national level, employee participation provisions do not prevent a change in structure that effectively removes the requirement for employee participation.

Another objection is that a directive including Article 1(3) would create an imbalance between Member States. UNICE states:

In fact, in Member States where employee participation in company organs is not provided for, firms could proceed with these mergers in which they could be either the acquiring company or the one absorbed. On the other hand, in Member States that can apply the reservation provided for in Article 1(3), firms established there could not be acquired by other firms. This imbalance poses a serious problem with regard to industrial policy, which must ensure that operations can work both ways.\(^{106}\)

Additionally, UNICE comments that the company law directive must be accompanied by a fiscal directive because the tax burden on mergers could be so heavy that a directive providing for cross-border mergers would remain impractical. Once its recommendation regarding Article 1(3) has been met satisfactorily, UNICE will examine the various technical provisions of the proposed directive in a constructive spirit.

\(^{106}\) Id.
On September 26, 1985, the European Social Committee ("ESC") adopted its opinion on the Draft Tenth Directive. The opinion, passed as a compromise between the groups represented in the ESC, suggests a number of revisions to the text regarding worker participation and consumer protection. Most of the proposed revisions concern employee representation, and the supporting arguments are similar to the comments made by UNICE. The ESC opinion suggests research in order to determine whether there is a strong demand for cross-border mergers. Experiences with national mergers should be examined and the consequences of such mergers for employees studied. The opinion emphasizes that the Tenth Directive is not adequate to solve the problems raised in the Fifth Directive. Therefore, it is necessary to re-draft the Tenth Directive.

The EP rejected the proposal and referred it back to the Commission for further deliberation. It believed that Community rights for worker involvement in company decision-making had to be guaranteed before cross-border merger rules can be adopted. Therefore, the Fifth Company Law Directive seemed to be more urgent than the Tenth Directive.

5. THE PROPOSAL FOR A DIRECTIVE ON PROCEDURES FOR INFORMING AND CONSULTING EMPLOYEES

Strictly interpreted, the Vredling proposal does not belong to the company law directives. It has to be included in a survey of the harmonization program of the Commission, however, because it is referred to in other draft directives as an important complement to the entire package. The proposal to improve and coordinate the information and consultation procedures for employees has to be seen in connection with two principal objectives of the Commission.

On January 21, 1974, the Council passed a resolution on a Social

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Action Program presented by the Commission on October 25, 1973. The Council gave priority to "[t]he progressive involvement of workers or their representatives in the life of undertakings in the Community." In the sixties, the social policy activities of the Community had been overshadowed by the efforts made to establish a free flow of goods. In the early seventies, it was realized that the tremendous economic growth of the postwar period had to be supplemented by far-reaching social reforms. Economic integration had to be made attractive to the working population through social integration "to attain . . . full and better employment at Community, national and regional levels, which is an essential condition for an effective social policy."

5.2.

On November 7, 1973, the Commission sent a Communication to the Council on the situation of multinational undertakings in the Community. In its Communication, "Multinational Undertakings and Community Regulations," the Commission pointed out that:

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

The Commission attributed this development to the size and geographic spread of multinational undertakings and claimed that the "effectiveness of the traditional measures of the public authorities and trade unions" was in doubt because national legal, fiscal, economic and mon-

113 COMMISSION OF THE EUROPEAN COMMUNITIES, supra note 112. See also Multinational Undertakings and the Community, supra note 113, at 7.
114 COMMISSION OF THE EUROPEAN COMMUNITIES, supra note 113. See also Multinational Undertakings and the Community, supra note 113, at 7.
115 COMMISSION OF THE EUROPEAN COMMUNITIES, supra note 113. See also Multinational Undertakings and the Community, supra note 113, at 7.
etary rules were inadequate to address the problems.
It is necessary, therefore, to introduce suitable counterweights at
the Community and international level.

[T]he Commission is aware of the legal problem raised by
the need for appropriate representation of employees' inter-
estests vis-à-vis a company which no longer takes its decisions
independently but complies with those of the group of which
it forms [a] part. In the course of the coordination of the law
on groups of companies which it is at present undertaking,
the Commission will examine the question as to what mea-

ures will have to be adopted in this field.

The provision of information for, and the participation
of employees in cases where either the parent company or
any of the member undertakings of the group are situated
outside the Community raise substantial problems to which
the Commission's departments are seeking adequate
solutions.\textsuperscript{116}

This declaration of the Commission has to be seen in the context
of the worldwide discussion regarding the role of multinational corpo-
rations ("MNCs") in the world economy. Effective control of trans-
border activities and the ensuing legal problems led to the attempt to
subject MNC's to international control by creating codes of conduct for
MNC's.\textsuperscript{117}

All codes of conduct recognize problems in industrial relations be-
cause MNC's are organized in such a way that major decisions con-

erning economic and commercial strategy affecting the entire operation
are often made at the highest level.

[C]entralized decision-making, especially in respect of deci-
sions affecting employment . . . , the organization of work,
the introduction of a central company philosophy into indus-
trial relations, which may be foreign and alien to local cus-

\textsuperscript{116} \textit{Commission of European Communities, supra} note 113; \textit{Multinational
Undertakings and the Community, supra} note 113, at 11.
\textsuperscript{117} Following the practice of the United Nations, MNC's are also called transna-
tional corporations. The author has described the attempts to negotiate the most impor-
tant codes of conduct and has listed the relevant legal publications in this area. \textit{See}
Kolvenbach, \textit{Verhaltenskodizes für multinationale Unternehmen: Problem oder
Hoffnung?}, in \textit{Wettbewerbsordnung und Wettbewerbsrealität Festschrift
für Arno Sölter} 381 (C.A. Andreae & Benisch eds. 1982); Kolvenbach, \textit{The European
Economic Community and the Transnational Corporation}, 5 N.Y.L. SCH. J.
INT'L & COMP. L. 253 (1984); Kolvenbach, \textit{Bhopal - Storm over the Multinationals?},
15 ZGR 47 (1986); Kolvenbach, \textit{Neue Rechtsprobleme für Multinationale Unter-
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toms . . . can undoubtedly affect the balance of power between management and labour; multinationals thus escape the national social network and may become, or seem to become, unaccessible to the local partners.118

The Commission is of the opinion that "unfortunately these codes of conduct have not achieved the desired transparency for all workers since observance of these guidelines is voluntary and does not constitute an obligation which is subject to legal sanction in the event of non-compliance."119

The legislative institutions of the Community monitored the work of the Commission in connection with MNC's. A delegation of the EP drafted, jointly with representatives of the Congress of the United States, a code of principles for international undertakings and governments.120 In addition, the EP Committee on Economic and Monetary Affairs presented a working document analyzing the role of "enterprises and governments in international economic activity" to the EP Assembly.121

5.3.

Despite strong objections raised by UNICE and some Member States, on October 1, 1980, the Commission passed the proposal for "A Directive on Procedures for Informing and Consulting the Employees of Undertakings with Complex Structures, in Particular Transnational Undertakings."122 This proposal, the Vredeling Proposal, was introduced by the then-responsible member of the Commission for Social Affairs, the Dutch socialist Henk Vredeling, with the support of the Belgian Commissioner Davignon.123

The proposed directive is important because it would be the first internationally binding legislation regulating MNC's. The existing codes of conduct are not binding and cannot, therefore, provide for legal

119 Director General V, Discussion paper V/363/80-EN (Apr. 29, 1980) (unpublished). One should not overlook the remark that "in this time of major difficulties in the area of employment and social policy in the Community, the Commission could take this opportunity to show workers that progress is still possible in social matters, particularly as regards involvement in the affairs of their firms." Id.
122 Vredeling Proposal, supra note 5.
123 Id.
sanctions in case of breach. The Commission is of the opinion that this initiative is not in conflict with the existing codes, but that it is a further step to achieve a binding regulation on a Community level for MNC's.

Critics of the draft point out that many provisions show an incomplete understanding of corporate decision-making processes and industrial relations practices.\textsuperscript{124} They suggest that the proposed directive could create an adverse relationship between employers and employees. Instead of promoting more harmonious industrial relations, the competitiveness of the Community and its industry would be reduced by obligations which competitors in non-member states do not have to observe. The proposed information procedure would create delays and difficulties in the planning and implementation of envisaged measures. Furthermore, Community legislation in this area is not necessary because the existing guidelines are widely accepted and observed.\textsuperscript{125}

5.4.

The EP demanded substantial changes, thus requiring that the first draft of the Commission be completely revised. The revised proposal was submitted to the Council on July 13, 1983.\textsuperscript{126}

The title of the proposed directive was shortened to “Directive on Procedures for Informing and Consulting Employees.”\textsuperscript{127} The phrase “Undertakings with Complex Structures, in Particular Transnational Undertakings” was deleted from the old title to avoid the argument that the directive discriminates against MNCs operating in the EEC and so results in different treatment of national and international

\textsuperscript{124} Few proposals of the Commission have found such unanimous opposition by the industry of Member and non-Member States. Especially United States industrial organizations, but also the Japanese industrial organization Keidanren, have protested against the project of the Commission. For a general discussion, see Kolvenbach, \textit{The European Economic Community and the Transnational Corporation}, 5 N.Y.L. SCH. J. INT'L & COMP. L. 253, 263 (1984).


\textsuperscript{127} Revised Vredeling Proposal, \textit{supra} note 126.
The revised draft refers to the Social Action Program of the Council and points out that "procedures for informing and consulting employees, as embodied in legislation or practised in the Member States, are often inconsistent with the complex structure of the entity which takes the decisions affecting them." This "may lead to unequal treatment of employees affected by the decisions of one and the same undertaking." The aim of the amended proposal is "to ensure that workers employed by a subsidiary in the Community are kept informed as to the activities and prospects of the parent undertaking and the subsidiaries as a whole so that they may assess the possible impact on their interests." The information and consultation procedures apply to employers or organizations which as a whole employ at least 1000 workers in the Community, regardless of whether the organization operates in one or in several Member States. Where the decision-making center of the undertaking is outside the Community, the disclosure and consultation requirements have to be undertaken either by an authorized agent in the Community designated by the outside parent company or, in the absence of such agent, the management of each subsidiary will be automatically responsible for complying with the requirements of the directive. At least once a year, the management of a parent undertaking must give explicit information on the activities of the parent and its subsidiaries as a whole to the management of each subsidiary in the Community. In addition, specific information pertaining to the production or geographic area in which the subsidiary is active must be given. "This information shall relate in particular to: (a) structure; (b) the economic and financial situation; (c) the probable development of the business and of production and sales; (d) the employment situation and probable trends; (e) investment prospects."

The management of the subsidiary must communicate the information without delay to the employee representatives who may ask

128 Id. 129 Revised Vredeling Proposal supra, note 126, at 3; Employee Information and Consultation Procedures: Amended Proposal, supra note 126, at 7. 130 Revised Vredeling Proposal supra, note 126, at 3; Employee Information and Consultation Procedures: Amended Proposal, supra note 126, at 7. 131 Revised Vredeling Proposal, supra note 126, at 5; Employee Information and Consultation Procedures: Amended Proposal, supra note 126, at 8. 132 Revised Vredeling Proposal, supra note 126, at 7; Employee Information and Consultation Procedures: Amended Proposal, supra note 126, at 12. 133 Article I defines the term "employees' representatives" as "the employees' representatives provided for by the laws or practice of the Member States." Revised Vredeling Proposal, supra note 126, at 6; Employee Information and Consultation
the management for all explanations that the management is required to give. It is up to the management to state what information is to be treated as confidential. If the management does not give the required information to its employee representatives, the representatives may address the management of the parent undertaking in writing. In that case, the parent undertaking must communicate the information to the management of the subsidiary.

This right of employee representative is supplemented by the right to be consulted when central management plans to make a decision "concerning the whole or a major part of the parent undertaking or of a subsidiary in the Community which is liable to have serious consequences for the interests of the employees of its subsidiaries in the Community." The reasons for the proposed decision, the legal, economic and social consequences of the decision for the employees concerned, and the measures planned with respect to such employees, must be relayed to the employee representatives. Examples of decisions which trigger consultation requirements are: the closure or transfer of the whole or major parts of the establishment, restrictions or substantial changes to an undertaking's activities, major changes affecting organization, working practices or production methods "including modifications resulting from the introduction of new technologies," as well as the start or termination of long-term cooperation arrangements with other undertakings and measures relating to employees' health and safety. This list is not complete; however, these are the decisions which "in particular" may lead to consultation procedures.

In the consultation process, the management of the subsidiary has to communicate the required information to employee representatives, in writing, and "without delay." The management must give the employee representatives at least 30 days in which to express their opinions and to hold consultations with local management "with a view to attempting to reach agreement on the measures planned in respect of the employees." As soon as the opinion of the employee representatives has been received, the management decision may be implemented.

Procedures: Amended Proposal, supra note 126, at 11.
124 Revised Vredeling Proposal, supra note 126, at 9; Employee Information and Consultation Procedures: Amended Proposal, supra note 126, at 13-14.
125 Revised Vredeling Proposal, supra note 126, at 9; Employee Information and Consultation Procedures: Amended Proposal, supra note 126, at 14.
126 Revised Vredeling Proposal, supra note 126, at 9; Employee Information and Consultation Procedures: Amended Proposal, supra note 126, at 14.
127 Revised Vredeling Proposal, supra note 126, at 9; Employee Information and Consultation Procedures: Amended Proposal, supra note 126, at 14.
128 Revised Vredeling Proposal, supra note 126, at 10; Employee Information and Consultation Procedures: Amended Proposal, supra note 126, at 14.
If after 30 days no opinion, or an opinion differing from the intended decision, is submitted, management can nevertheless implement the decision. The Commission mentions in its comments to the revised draft that the directive does not give rights of co-determination as they exist in many European laws.

A new element in employee representations in the EEC is the right for management and employee representatives to conclude agreements establishing a single body representing all employees of the parent undertaking and its subsidiaries within the Community. This would be, in effect, an international works council for the entire workforce of an undertaking in the Community. The establishment of "supranational" works councils has been a longstanding request of trade unions.

The regulations regarding secrecy and confidentiality are highly controversial. The management of an undertaking has the right to withhold secret information, defined as information which, upon disclosure, "could substantially damage the undertaking's interests or lead to the failure of its plans." The term "interests of the undertaking" means not only the interests of the subsidiary but also those of the parent undertaking. The "interests of the undertaking" may be especially damaged "where the legislation of the State (within or outside the Community) to which it was subject prohibited the communication to third parties of certain secret information." The violation of such a rule is considered to be damaging to the interests of the undertaking. Disputes concerning the secret character of any information are to be settled by tribunals or other competent national authorities. Employees, their representatives, and the experts to whom they refer shall not reveal to third parties information which has been given in confidence.

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139 Revised Vredeling Proposal, supra note 126, at 14; Employee Information and Consultation Procedures: Amended Proposal, supra note 126, at 20.
141 Thus the Commission has taken account of legislation existing in various non-Member Countries. For example, Switzerland punishes those who give a foreign authority, organization or private business entity or their agents access to business secrets. Also, the Business Records Protection Act of the Canadian Province of Ontario, Ont. Rev. Stat. ch. 56, § 1 (1980), prohibits the disclosure of certain information to jurisdictions outside of Ontario. And the Australian Foreign Proceedings (Prohibition of Certain Evidence) Act of 1976, Austl. Acts P. No. 121 (1976), is a relevant nondisclosure act. Furthermore, United States companies subject to stock exchange or securities regulations objected to being required to disclose to the general public information on future plans which have to be published to employees in EEC subsidiaries. Possible liability for insider trading or other offenses was argued. See, e.g., Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1988); SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1982). These examples illustrate the problems which might be created by the Directive.
Member States have to provide appropriate penalties for failure to comply with these obligations.

Like all EEC directives, the Vredeling Proposal has to be implemented by the Member States into their national law. In Article 9, Member States were given until July 1, 1987 to comply with the directive. This was of course, conditional upon the directive being effected by the Council within reasonable time.

5.5.

Recognizing strong opposition on the part of trade unions and industry, the draft provides for review two years after coming into effect. Member States will be required to provide information enabling the Commission to determine the effect of the directive’s application upon the Member States.

The extraterritorial aspects of the proposal are frequently debated. In support thereof, the EEC authorities argue that the different legal systems, under which MNCs operate, require coordination. Common Market legislation does not apply, per se, to undertakings in non-Member countries. In the past, some of the individual Member States as well as the EEC as a whole strongly opposed the extraterritorial effect of United States antitrust legislation. In fact, some Member States even promulgated special legislation to protect local corporations from the United States’ requirements.\textsuperscript{142} Ironically, in an address to the American Society of International Law in Washington, D.C. on April 15, 1983, Deputy Secretary of State Kenneth W. Dam cited the Vredeling proposal to demonstrate that the United States “is not alone in applying its law to foreign entities or transactions.”\textsuperscript{143} Although similar efforts have failed, the Vredeling proposal attempts to establish concurrent jurisdiction of states over the activities of multinational enterprises.


\textsuperscript{143} Dam, \textit{Extraterritoriality and Conflicts of Jurisdiction}, 83 DEP’T ST. BULL. 48, 49 (1983).
5.6.

The Commission’s compromise draft still fails to satisfy the differing interests discussed supra. ETUC considers the original proposal of October 1980 to be a feasible compromise between worker and employer interests in the EEC. It believes that a directive “must not introduce any deterioration in the legislative situation in the Member States in which there is a high level of workers’ rights, and that it should bring improvements for countries where the level is lower.” In its present form, however, the directive, with its binding nature and multinational scope, may be regarded as an important step towards promoting the rights of workers.

Industry organizations in non-Member states have also voiced strong criticism. Keidanren, the Japanese Federation of Economic Organizations, claims that the directive would have “a restrictive effect on the growth of Japanese investment in Europe and future industrial cooperation between our two regions.” American business organizations express deep concern and fundamental objection to the concept of the directive as a whole. Some of the lobbying methods employed were previously unknown in Europe and invoked critical comments, even in the United States. Indeed, some of the large multinational corporations operating in Europe agreed that this lobbying was not in the best interests of United States industry.

Finally, academic publications, both within and outside the EEC, have attempted to evaluate the proposed directive and its possible consequences.
Considerable concern over the proposal has also been voiced in some Member States. The British government has repeatedly stated that employee involvement should be accomplished voluntarily and not through legislative rules. On November 6, 1983, the British government published a “Consultative Document” seeking “the view of industry, commerce, the professions and trade unions on European Commission proposals on employee participation and company law harmonization.” The government left no doubt that it rejects the rigid proposal and that, in its opinion, “the main initiative . . . to promote the involvement of employees in the enterprise for which they work . . . is best left to employers and employees, who are in the best position to judge what best suits their particular circumstances.”

In its response to the government’s Consultative Document, CBI attacked both the Vredeling Initiative and the draft of the Fifth Directive, labeling them “unnecessary.” Furthermore, if implemented, the drafts would be “irrelevant to the needs of industry, counterproductive to the achievement of wide-spread and genuine employee involvement, damaging to competitiveness and largely impractical.”

The Law Society expressed concern over the changes in the laws

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161 British Departments, supra note 60.

162 Id.

of the United Kingdom that the Directive would require. "Most of the changes would be in the field of employment but it would also affect company law." TUC stressed its dismay over the delays accompanying this Directive. It therefore supports the draft Directive and will focus its campaigning on the Vredeling proposal.

The Federal Republic of Germany also voiced its official concerns. Although the German Bundesrat recognizes the need to harmonize national laws which differ with respect to the information and consultation of employees, it wishes to proceed carefully in order not to impair the slow and difficult restructuring of the economy, which is faced at present with high unemployment. A framework under which the Member States can adapt their specific legal structures is favored. The revised draft is viewed cautiously because of its possible conflicts with existing German co-determination regulations. This potential for conflict with existing co-determination legislation has been emphasized both by German industry and in academic publications. To alleviate its concern, the Netherlands asked the SER for an opinion advising it how to cast its vote in the Council.

5.8.

Although discussions in the Council are not public, it was evident that a number of Member States had strong reservations about the Commission's revised draft. In its report, the Irish Presidency stated diplomatically that the discussions "brought to light several problems of a political and technical nature." An ad hoc working group initiated by the Irish President attempted to advance technical issues in the draft and to clarify the position of Member States.

The Council concluded its work, stating that "the Council has to

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168 Slagter, SER - advies over de Vredeling-Richtlinie, 1984 TVVS 121.
170 Irish President, supra note 159. See New Approach on "Vredeling", supra note 159.
The need for a social dialogue at all levels was nevertheless generally acknowledged, particularly in view of the rising level of unemployment and the large-scale introduction of new technology. Its conclusions were as follows:

The Council
1) **Considers** that the problem of informing and consulting employees is of great political and economic importance and that the solution to this problem can contribute towards improving relations between management and labour and thus towards a better performance by the undertakings and economies of the Member States;

2) **Emphasizes** the importance of a social area in the context of the completion of the Community internal market and the need for greater convergence between the rights of employees in the Member States to be informed and consulted regarding major decisions in the undertakings concerned;

3) **Note** that it has been unable to find a solution to this problem on the basis of the amended proposal for a Directive submitted by the Commission to the Council on 13 July 1983, and recalls that on 13 June 1985 it noted that in some Member States this problem came solely under collective agreements and that, before examining the said proposal further, a solution to this issue of principle would have to be found;

4) **Invites** the Commission to:
- continue its work on this subject and to follow closely developments in national legislation in this area and agreements concluded between management and labour regarding the information and consultation of employees,
- continue its close contacts with management and labour with a view to reporting back to the Council each year on major developments in this respect;

5) **Will resume**, at the beginning of 1989, on the basis of these reports, its examination either of the amended proposal for the said Directive or of any other proposal which the Commission might submit to it concerning the information and consultation of employees;

6) **Invites** the employers' and employees' organizations in

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the Community to continue their dialogue on the subject at all levels with a view to arriving at agreements, at the appropriate level, which provide for information and consultation of employees, inter alia when new technology is introduced, and recalls in this connection the text of the new Article 118 B of the Treaty, as provided for in Article 22 of the Single European Act and reading as follows:

"The Commission shall endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable [sic], lead to relations based on agreement."162

Since these Conclusions have been published, questions in the EP repeatedly stress the necessity to inform and consult employees. Referring to special cases, the EP has called upon the Commission "to take fresh initiatives in consultation with both sides of industry in order to ensure that a directive is adopted as soon as possible."163 In other draft directives, the Commission has emphasized the necessity to inform and consult with employees.164

5.9.

When presenting the working program of the Commission for 1988,165 President Jacques Delors specifically mentioned the "social dimension" of the Common Market and pointed out that under Article 118 social policy has become part of the Single European Act and that it will be a key for the success of the internal market. He announced that the Commission wants to further social dialogue despite its difficulties and that, therefore, it will propose that the Statute for a European Company include more than one model for worker participation in order to give the Member States their choice of models.166 On December 7, 1987, the Deutsche Gewerkschaftsbund presented priorities

164 Examples are the proposed merger control regulation and the proposal for a Thirteenth Directive on Takeover Bids. 31 O.J. EUR. COMM. (No. C 148) 9 (1988).
166 In a speech before the sixth ETUC Congress at Stockholm on May 12, 1988, Delors again emphasized the importance and necessity for the Commission to step up its social dialogue with management and labor. See The Social Dimension of Building Europe, 21 BULL. EUR. COMMUNITIES 8 (No. 5, 1988).
which the trade unions asked the German EEC Presidency to observe for the first half of 1988. On behalf of the other European trade unions, the commitment to the political integration of Europe and the completion of the internal market was reiterated; referring to the urgency of the Fifth and Tenth Directives, the publication insisted on strengthening the social component of the European Market, which includes information, consultation and the right of worker participation.\textsuperscript{167} The German Federation of Employers (Bundesvereinigung der Deutschen Arbeitgeberverbande) has noted the far-reaching consequences of the term “social space.” The German worker participation legislation could become a stumbling block for future developments in this area unless the German trade unions agree to a corresponding reduction of employee rights under present legislation.\textsuperscript{168}

These discussions in the Federal Republic of Germany reflect the importance of the social dimension to the completion of the internal market. The German Presidency used the European Council at Hanover and its own 1988 semi-annual report to plead for a solution to the social problems before the EP, and for a resolution to the differences of opinion between the Member States in these matters. Finally, discussing new proposals for the European Company, Delors asked the EP to avoid the “sterile controversial discussions of worker participation.”\textsuperscript{169}

It is interesting to observe that since the beginning of 1988, EEC topics such as “social standard,” “multinational corporations,” “merger control” and others have one common thread: employee rights to information, consultation and participation in companies. The pressure has mounted to create a “social area” within the EEC. The Greek Presidency, during the second half of 1988, and the Spanish Presidency, during the first half of 1989, have stated that this topic is urgently important and have underlined the necessity of attaching more emphasis to social policy. On September 7, 1988, the Commission, based on the conclusions of the European Council’s meeting in Hanover on June 27-28, 1988, released a Communication entitled “The Social Dimension of the Internal Market” which covers a variety of areas, including employment growth, social cohesion and social dialogue. The social dialogue or consultation is indispensable since agreement is regarded as the basis of EEC legislation and ensures its implementation. In its attached list of proposals, the Communication also mentions a directive


\textsuperscript{168} E.G. Erdmann, Vor Gesellschaftspolitischen Weichenstellungen (May 26, 1988) (unpublished manuscript).

\textsuperscript{169} Handelsblatt, July 7, 1988, at 8.
concerning the information and consultation of employees which the Commission had wanted to propose in 1988 and which was to be accepted by the Council in 1989.

5.9.1.

A report dated October 6, 1988, drawn up on behalf of the EP Committee on Social Affairs and Employment, was discussed at great length on October 28, 1988, and was adopted the same day by a substantial majority. In the report, the EP reaffirms its strong opposition to the Council's postponement until 1989 of further debates on the Draft Vredeling Directive. Furthermore, the EP calls upon the Commission to present a new draft directive based on Article 118 A and demands the inclusion of a section on disclosure of information and consultation in the new draft statute for a European company. The Commission must also propose ways in which the social problems associated with the creation of the internal market can best be discussed, particularly the development of European-level collective bargaining within multinational companies. With respect to pan-European collective bargaining:

[The EP] Calls on the Commission, on the basis of Article 118 b of the EEC Treaty, to draft as a matter of urgency a directive on the role of management and labour in the completion of the internal market, outlining the tangible conditions for organizing a European social area and covering the following points:
-the removal of obstacles to the creation of European contractual relations, the potential outcome of the 'social' dialogue,
-clarifying the connection between these relations at European level and those at other levels,
-setting up an institutional forum where labour questions in the Europe without frontiers may be raised and discussed,
-the development of contractual relations within European multinational companies.

In the explanatory statement attached to this resolution of the EP,
the dialogue between labor and management is marked as an instrument of regulation on par with other provisions. The harmonization of conditions of employment and work in the Community should not be entrusted solely to regulations and directives. In view of the current variety of systems in force in the various Member States, it would be an illusion to hope for European collective agreements. The concept, therefore, must be standardized as the rights and obligations of the two sides of industry differ from one Member State to another. These differences concern matters as fundamental as the nature of contractual commitment, the legal capacity of partners, and the role of the state. Furthermore, a fundamental problem is the combining of a "European contractual level" with other levels (e.g., interprofessional collective agreements, agreements at branch level, negotiations by undertakings). The EP calls on the Commission to clarify this problem and to put forward practical proposals in the area.\footnote{173}

Supporting a procedural directive for informing and consulting the employees of complex undertakings, the EP not only restated its "unequivocal opposition to the Council's unilateral decision to freeze this matter until 1989 at the earliest,"\footnote{174} but also stated its belief "that the appropriate legal instrument to achieve the desired political objective, i.e. a standardized procedure for informing and consulting employees at common and Community level, is the directive\footnote{175} under Article 118 A of the Treaty. The EP's insistence on a directive counters the statement of the Council in its Conclusion of July 21, 1986,\footnote{176} in which the two sides of industry were invited to continue their dialogue on the subject at all levels with an eye to arriving at agreements which provide, inter alia, for information and consultation of employees when new technologies are introduced.

On January 12, 1989, the effort for "social dialogue" continued with the establishment of a joint committee to focus on social and labor problems associated with the development of the Single Internal Market.\footnote{177} Both UNICE and CEEP (public sector employer organizations) and ETUC will continue to cooperate in this committee. The Commission will request the opinion of these partners in industry with respect to the concept of a draft on social rights and with respect to a statute for a European company, particularly in relation to its provisions on employee representation.

\footnote{173}{1988 EUR. PARL. REP. (No. A 2-211/88/B) 1 (Oct. 6, 1988).}
\footnote{174}{Id. at 38.}
\footnote{175}{Id.}
\footnote{176}{Id. at 39. \textit{See also} 29 O.J. EUR. COMM. (No. C 203) 1 (1986).}
\footnote{177}{Relaunch of "Social Dialogue", EUR. INDUS. REL. REV., Feb. 1989, at 2.}
A charter on basic social rights must recognize that the framework of such rights has already been defined through the Conventions of the International Labor Organization ("ILO"), the Social Charter of the Council of Europe and the Social Security Code of the OECD.178

On February 22, 1989, the ESC recognized basic social rights which are to be applied across all Member States. It avoided any title such as "Charter" or "Convention" and issued an opinion regarding such basic social rights instead. These social rights will be guaranteed by instruments made available in the Treaty of Rome in order to ensure the "balanced implementation of the internal market necessary to avoid the risks of unfair competition. . . ."179 To avoid long and sterile debates on the rights to be included, the opinion recommends the adoption of the rights already set out in numerous ILO Conventions, Council of Europe charters and protocols of United Nations resolutions. Among the listed principles is one stating that the EEC must create its own social policy but that Member States must be free to legislate, leaving employers and trade unions the freedom to negotiate.180 In the opinion of the Commission, the EP and the ESC, the creation of the European social dimension no longer requires a uniform set of national rights. On the contrary, the specific characteristics of each country constitute part of the wealth of Europe as a whole. Rather than requiring detailed legislation (as some draft directives have attempted to achieve in the past), agreement over guiding principles of social policy need only be reached. Each Member State has several choices as to the means it will use to implement these principles. The chosen implementation will be monitored by uniform procedures.

The "Community Charter of Basic Social Rights for Workers" was adopted by the European Council at Strasbourg on December 8-9, 1989. To implement this Charter, the Commission prepared an action program containing a number of measures that it considered necessary in order to achieve the rights proclaimed in the Charter. The Commission announced in this program that, "following consultation with the social partners:"

[The Commission will prepare] a draft for a Community instrument which, in substance, could follow the under-men-


179 EEC: Opinion of the Economic and Social Committee on Basic Social Rights within the Community, EUR. INDUS. REL. REV., May 1989, at 32.

180 Id.
tioned principles:
- Establishment of equivalent systems of worker representation in all European-scale enterprises.
- General and periodic information should be provided regarding the development of the enterprise as it affects the employment and the interests of the workers.
- Information must be provided and consultations should take place before taking any decision liable to have serious consequences for the interests of the employees, in particular, closures, transfers, curtailment of activities, substantial changes with regard to organization, working practices, production methods, long-term cooperation with other undertakings, etc.
- The dominant associated undertakings shall provide the information necessary for the employer to inform the employees' representatives.\(^\text{181}\)

6. **European Economic Interest Grouping ("EEIG")**

On July 25, 1985, the Council issued Regulation 2137/85.\(^\text{182}\) The legal instrument of regulation, which has a directly applicable effect, was used to create the first corporate body at the community level (the EEIG has been termed the first "supranational" company law instrument). It was modeled after the French "groupement d'intérêt économique" which has existed since 1967 and has been used successfully in France for international cooperations of great dimension like Airbus Industry and Ariane Espace. The purpose of the new instrument is to facilitate cross-frontier cooperation. Its direct incorporation into community law fills a gap in both the national laws of the Member States and the community law itself. The development of the drafts reveals the difficulty of establishing a new corporate form on a European level that accounts for the employee participative rights which exist in some Member States.

The first draft in 1974 stated that "a grouping may not have more than 250 employees."\(^\text{183}\) This limit was increased in the second draft to 500 employees, and was retained by the final regulation. The second

\(^{181}\) Commission of the European Community, **Community Charter of Basic Social Rights for Workers**, COM No. 568 final (Nov. 20, 1989).


draft\textsuperscript{184} also emphasized the protection of employees’ interests, particularly when the grouping is formed or is voluntarily terminated.

Before a grouping is created, an obligation to inform the work force exists. This communication enables employees or their representatives to assess the grouping’s effect on their interests. Under Article 1a, “the employees concerned, or their representatives shall be notified in good time before a grouping is formed.”\textsuperscript{185} If the employees or their representatives believe that their interests will be adversely affected, then the measures to be implemented for their benefit must be developed through negotiations between the management that seeks to form the grouping and the employees or their representatives.\textsuperscript{186} Article 16a of the amended proposal addresses the situation where employees or their representatives believe that their interests will be adversely affected by the intended termination of a European Cooperation Grouping.\textsuperscript{187} In this situation, the manager or managers of the grouping will consult with the employees or their representatives on the measures to be taken in favor of the employees (the social plan), before the decision to terminate at the general meeting is made. The agreement on a social plan must be written and the manager must inform the general meeting of the outcome of the social plan negotiations.\textsuperscript{188}

The final wording of the regulation was strongly influenced by Member States that already have institutionalized employee representation. The limitation of the workforce to 500 employees was introduced to ensure that the EEIG cannot develop into a large enterprise. The Federal Republic of Germany insisted on this limitation to avoid complications with existing German co-determination legislation.

In addition, Article 3.2, introduced in connection with co-determination regulations, provides that “a grouping may not: (a) exercise, directly or indirectly, a power of management or supervision over its members’ own activities or over the activities of another undertaking, in particular in the fields of personnel, finance and investment.”\textsuperscript{189} The trade unions, in particular, insisted on clauses that would avoid an erosion of co-determination. Article 3.2 makes it unnecessary to retain special regulations to protect the employees’ interests at the foundation or liquidation of the EEIG. One of its clauses expressly states that in mat-

\textsuperscript{184} 21 O.J. EUR. COMM. (No. C 103) 4, 7 (1978).
\textsuperscript{185} Id. at 6.
\textsuperscript{186} Id.
\textsuperscript{187} Id. at 13. European Cooperation Grouping is the former name for European Economic Interest Grouping.
\textsuperscript{188} Id.
\textsuperscript{189} 28 O.J. EUR. COMM. (No. L 199) 1, art. 3.2(a), at 3; 20 BULL. EUR. COMMUNITIES 1 (Supp. No. 3, 1987).
ters not addressed by the Regulation, such as social and labor laws, the laws of the Member States and Community Law apply. This guarantees that the extant protection of employee rights in some Member States will also apply to the new corporate unit.

It is remarkable that the EEIG represents the first instance that the Council has agreed upon a Community-wide legal instrument for cross-border cooperation and the first time that compromises have satisfied the interests of the social partners concerning employee rights.

7. Statute for a European Company

The Commission has always taken the view that the legal framework, within which European undertakings must operate because of differing national characters, does not correspond to the economic framework which the Community has developed. To overcome this gap, the Commission intended to permit the formation of companies which are only subject to a special legal system directly applicable in all Member States, in addition to companies governed by national laws. The Commission has suggested "Societas Europea" ("S.E.") as a centralized incorporation option for companies that wish to be considered domestic in all Member States. The idea originated in the Netherlands and was promoted heavily by France. The new corporate form was intended to strengthen intercompany cooperation and to facilitate cross-border activities of multinational corporations.

7.1.

The Commission asked a group of experts, chaired by Professor Pieter Sanders of the Legal Faculty of the University of Rotterdam, to examine the legal questions and aspects of a statute for European companies. In December 1966, this group presented a first draft of a statute for European companies. In this study, Sanders noted that

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190 28 O.J. EUR. COMM. (No. L 199) 1, art. 3.2(d), at 3; 20 BULL. EUR. COMMUNITIES 1 (Supp. No. 3, 1987).
192 P. SANDERS, VORENTWURF EINES STATUTS FÜR EUROPÄISCHE AKTIENGESELLSCHAFTEN (Studien-Reihe Wettbewerb - Rechtsangleichung der Kommission der Europäischen Gemeinschaften, No. 6, 1967). This study was drafted in GER-
worker participation was an important point to resolve, especially for Germany and France as they already have co-determination regulations. The Commission realized that this problem would be one of the major difficulties. Consequently, it asked Professor Gérard Lyon-Caen of the University of Paris to develop different models for the representation of employees in a future European company. His study addressed participation in the decision-making process at the shop-floor level as well as representation in the corporate management. In the spring of 1970, the Commission also discussed the question of employee participation with trade unions and employer organizations of the Member States.

The Commission's first draft, entitled "Proposal for a Council Regulation on the Statute for European Companies of 1970," indicated that the differences between the co-determination regulations of the Member States, particularly the representation of employees in corporate management, rendered harmonization with respect to national laws difficult. The Commission proposed that European companies operating in different Member States have national employee representation on a European Works Council. This European Works Council ("EWC") would be responsible for all matters involving more than one establishment. The EWC's members would be elected by a direct vote of all employees of the establishment. The draft also provided for one-third of the members of a company organ to be appointed by the national representation of employees. One of the three employee representatives of this company organ does not have to be employed by the European company.

The discussion in the EEC institutions indicate that employee participation would become the focal point of disagreement. The ESC opinion acknowledged that the Commission attempted to develop a

man and published in French, German, Dutch and Italian.

193 G. Lyon-Caen, Contribution a l'étude des modes de représentation des intérêts des travailleurs dans le cadre des sociétés anonymes européennes (Serie Concurrence - Rapprochement des Legislations No. 10, 1970). This study has been published in French and German.


196 Professor Sanders has suggested that employee representation at the shop floor be governed by the national legislation of each Member State. See P. Sanders, supra note 192.
compromise between the different systems and attitudes that existed in the Member States (which then numbered six), but suggested a redraft of the proposal.\textsuperscript{197}

The EP favored a European Company Statute as a valuable instrument not only for economic reasons, but also for political purposes. In addition to making some changes in the European Works Council proposal, the EP initially proposed a highly controversial composition of the supervisory board.

The compromise proposed that a supervisory board be comprised of one-third shareholder representatives, one-third employee representatives, and one-third members (the "third bench") elected by the two other groups. The shareholders assembly, the European Works Council, and the management board would nominate potential members to the "third bench." Representatives of "the general interest" who have the necessary knowledge and are not dependent on the interests of shareholders, employees or their respective organizations, would be eligible for nomination. Election to the supervisory board would require a two-thirds majority.\textsuperscript{198}

The Commission presented an amended proposal on May 13, 1975 which accounted for the opinions of the ESC and the EP, and which made the adjustments necessitated by the accession of Denmark, Ireland, and the United Kingdom to the EEC.\textsuperscript{199} Title V of the proposal, "Representation of Employees in the European Company," provides for a European Works Council and membership for employees on the supervisory board.\textsuperscript{200}

\section*{7.1.1.}

A European Works Council ("EWC") must be formed if a European company has at least two establishments in different Member States each employing at least fifty workers. Since national employees' representation will continue, national works councils and an EWC will exist side by side.\textsuperscript{201} A group works council must be formed if the European company has at least two establishments in the same Member State.\textsuperscript{202}

\textsuperscript{197} 15 J.O. COMM. EUR. (No. C 131) 32 (1972).
\textsuperscript{198} 17 O.J. EUR. COMM. (No. C 93) 22 (1974).
\textsuperscript{199} Proposal for a Council Regulation on the Statute for European Companies, 8 BULL. EUR. COMMUNITIES 1 (Supp. No. 4, 1975).
\textsuperscript{201} For a thorough analysis, see Birk, Europäische Aktiengesellschaft und nationales Betriebsverfassungsrecht, 5 ZFA 47 (1974).
\textsuperscript{202} Id. at 65.
Members of the EWC are elected by the employees of all the establishments of a company.\textsuperscript{203} During their term of office, the members of the EWC are relieved from their work responsibilities if the EWC considers it necessary.\textsuperscript{204} The EWC must regularly inform its constituency of its progress, except for information declared confidential by the management board. The EWC's competence covers all matters which concern more than one establishment located in at least two Member States, and which cannot be settled by the national employees' representative bodies. These problems primarily arise out of the existence of a transnational company with an international workforce. The EWC cannot be a party to collective bargaining agreements.\textsuperscript{205}

The information rights of the EWC are similar to the rights of national works councils that already exist in some Member States. Communications and documents sent to shareholders must also be submitted to the EWC. These documents include annual accounts and reports, consolidated or partially consolidated accounts, and consolidated annual reports. The information must be conveyed in writing if, in the opinion of the EWC, a matter affects the fundamental interests of the European company or its employees.\textsuperscript{206}

The management board must consult with the EWC regarding certain matters, including the employees' work responsibilities, compensation, working time, training, industrial safety, and the management of social facilities. In these matters the agreement of the EWC is required.\textsuperscript{207}

If, in the opinion of the EWC, employees' interests will be adversely affected by management decisions, the management board must negotiate with the EWC to reach agreement on employee-related measures. Such negotiations must take place before the supervisory board makes a decision. Disputes or disagreements must be settled by an arbitration board, composed equally of representatives from the EWC and the management board. A chairperson will be appointed by mutual agreement, or, if necessary, by a competent court of justice.\textsuperscript{208}


\textsuperscript{204} \textit{Id.} art. 113, at 60.

\textsuperscript{205} \textit{Id.} art. 119, at 61-62.

\textsuperscript{206} \textit{Id.} arts. 120-122, at 62.

\textsuperscript{207} \textit{Id.} arts. 123-125, at 63-64.

\textsuperscript{208} \textit{Id.} arts. 126-129, at 64-65.
7.1.2.

The proposal provides for representation of employees on supervisory boards, although a majority of a company’s employees can waive board representation in a “pre-election.” The representatives are elected by all employees and have the same rights and duties as the other members of the supervisory board. One of three employee representatives may be an individual who is not employed by the European company, such as an outside trade union official. If there are more than three employee representatives, two outside individuals can serve as employee representatives. In companies with more than one establishment, electors representing the various establishments elect the employee representatives.

The EP amended the first draft of the proposal with Article 74a, stating that “[t]he supervisory board shall consist as to one-third of representatives of the shareholders, as to one-third of representatives of the employees and as to one-third of members co-opted by these two groups.” Candidates for co-option may be nominated by the general meeting, the employee’s representative body, or the management board. Their qualifications are described in Article 75a(3), which declares that “[o]nly persons representing general interests, possessing the necessary knowledge and experience, and not directly dependent on the shareholders, the employees or their respective organizations may be nominated.” They are elected with two-thirds of the votes of the supervisory board.

All members of the supervisory board must safeguard the interests of the company and its personnel. They must also exercise proper discretion with respect to confidential information.

Members of the management board are appointed by a majority vote of the supervisory board for a term of office of up to six years. Thus, employees can indirectly influence the management of the company.

The amended draft was welcomed in principle by industry and trade unions. However, the proposal that recommended employee representation on the supervisory board was strongly criticized. Academics considered the draft to be an interesting step toward a unified

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209 Annex III of the draft statute regulates in detail the election procedure for the representatives to the Supervisory Board. Id. Annex III, at 130.
210 Id. art. 74a, at 44.
211 Id. art. 75a, at 45-46.
212 Id. art. 75a(3), at 46.
213 Id. art. 75b, at 46.
214 Id. art. 80, at 48.
legal system for companies in Europe.  

For technical discussions, the Council appointed an ad hoc Working Party which, between 1976 and 1982, labored through the first

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reading in "a constructive and rather positive atmosphere." Work was suspended in 1982 and has not yet been resumed.

7.2.

In the internal market White Paper, the statute for the European company was mentioned as one of the objectives to be achieved by 1992. In Brussels, on June 29, 1987, the European Council requested the relevant Councils "to make swift progress with regard to the company law adjustments required for the creation of a European Company." In view of the difficulties in overcoming the worker participation problem, it was not expected that the Commission would hasten to present new proposals.

The Commission, in its Memorandum of July 15, 1988 to the Council, the EP, and the two sides of industry, carefully avoided drafting a completely new statute for a European company. Instead, the Commission listed the main difficulties with the European company Statute, "in particular the question of worker participation in the company decision-making process and attempts to put forward solutions" because political initiatives at community level gave the Commission reason to revive the plan to create a European company. The Commission invited the EP, the Council, and the two sides of industry to express their views on the "broad lines of this Memorandum before the Commission makes a formal proposal."

The Memorandum noted:

Cross-frontier cooperation in the Community is not only an essential aspect of the creation of a genuine Common Market, [but that] it is at the same time absolutely vital if the Community's national enterprises in major industrial sectors are to maintain and improve a competitive market position, both at home and in the world at large.

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217 See White Paper, supra note 24.
221 Internal Market and Industrial Cooperation: Statute for the European Company, supra note 219, at 8.
222 Id.
The creation of specific legal instruments based upon European law rather than national law which could be used by enterprises for cross-frontier operations would further stimulate cooperation among enterprises. "Such legislation at the European level could at the same time pioneer worker involvement in the decision-making structures of European industry."

The Memorandum stated that:

[The proposed European company statute had] not been looked at even at expert level since 1982 . . . [because] of a long standing difficulty which stems from differences in traditions regarding participation by workers and company decision-making: according to some, any such participation must be voluntary, while for others it must be written into statutory law relating to enterprises.

Finding a satisfactory compromise between the two basic attitudes is essential to the social dialogue. Additional Community instruments, particularly in the company law sphere, must be established. Traditionally, this problem has been dealt with by coordinating the company law of the nations involved in order to make the various national laws equivalent. Industrial groups need a transnational company independent of national laws that can concentrate substantial assets to compete with American and Japanese businesses.

A European company statute must resolve the following issues:

(a) It must create a single system of company law which is totally independent of national systems. To achieve this goal, it must introduce solutions to legal problems which differ from national law and which do not exist in any Member State’s legislation. Regulation of the EEIG has proven that this type of coexistence is possible.

(b) Rules governing the participation of workers in the structure and decision-making processes of the European company, particularly concerning supervision and the development of company strategy (not at the daily management level) are “essential, since the multinational company carrying out its business in the Community in accordance with the different legislations has to comply with the whole range of different arrangements as regards the role of employees within the company.” The rules are also necessary because worker participation plays an important part in daily industrial relations in many Member States.

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223 Id.
224 Id. at 8-9.
225 Id.
The Commission noted that industry had previously welcomed the concept of a European company but had found it difficult to accept a statute that included a system of worker participation. On the other hand, trade union representatives, particularly those from Member States with worker participation systems at the national level, strongly favor such a system. The EP also strongly supports participation regulations.

Four main approaches for the resolution of this problem of employee participation may be considered:

(i) The model in the statute itself, in which a supervisory board is composed of one-third shareholder representatives, one-third worker representatives, and one-third members elected by these two groups to represent the general interest.

(ii) The system existing in the country where the company is headquartered, along with added protection for the participatory rights acquired by workers in branch establishments that are located in Member States with participative legislation.

(iii) A choice between the two principal schemes examined in the Fifth Company Law Directive:

- workers elect no less than one third and no more than one half of the members of the supervisory board (the German system);

- worker participation through a body representing the employees that is separate from the company organs. This body must regularly receive information about the company's business. The supervisory board or the management must inform and consult this institution.

(iv) Worker participation through collective bargaining agreements.

The first model, which dates back to an amendment made by the EP, represents the most developed and ambitious form of participation in the Commission's opinion. However, this model has not yet been applied in any Member State, thus making it difficult to retain such an approach at this stage.

The second approach fails to keep the European company independent from significant legal ties with any national system. It would result in the emergence of European companies which are distinguishable on the basis of varying national characteristics. It could also result in the migration of companies to countries with the least stringent national systems.

Therefore, a desirable system must necessarily satisfy certain conditions:

(a) It must employ the participatory principles that are systematically practiced in certain Member States, while retaining the flexibility to allow the various parties involved in a corporate undertaking to
reach a consensus.

(b) It need not be uniform. Companies should be permitted to choose between different schemes which reflect the accepted practices in most Member States. The companies should then consult with the workers who will be affected by the chosen scheme. Member States should be permitted to restrict the choice to alleviate their fears that companies will use the European company to avoid provisions of national law in this area. This restriction would, for example, give Germany the authority to insist that companies formed on German territory apply a German participatory system. Of special importance is the proposition that worker participation need not be introduced if opposed by the company workers. This proposition can be enacted in two different ways: obligatory worker participation, unless the workers vote against it, or by making participation dependent upon a request from the work force.

(c) The workers of the European company should benefit from the same rights to information and consultation that exist in other firms in the Community. The inclusion of more stringent rules in the statute is not desirable at this stage. The issue should only be resolved in the wider context of the social dialogue.

(d) With the exception of Germany and Portugal, the laws of the Member States are based on the principle of a company’s economic independence. It is questionable whether the statute for a European company is the proper arena for the creation of a body of rules governing groups of companies.

(e) The European company, like national companies, will be subject to the tax laws of the state in which it is domiciled. Double taxation agreements will also apply to the European company. Enterprises may be attracted to the European company form by the leniency of conditions under which losses suffered by the European company’s establishments in other Member States or by foreign subsidiaries may be deducted from the profits in the Member State of residence. The acceptance and utilization of the European company instrument by industry will depend to a large extent upon a satisfactory resolution of this question of taxation.

(f) In its conclusions, the Commission emphasizes that enterprises will be entirely free to choose whether they want to operate under the revitalized European company statute. It would be transnational in outlook to overcome the present legal difficulties surrounding associations or mergers between companies domiciled in different Member States.

The Commission requested the Council, the EP and the two sides
of industry to express their views on the Memorandum before the end of 1988. It asked these groups to comment in particular on three key questions: (1) The principle of an optional statute; (2) the independence of such a statute from national laws; and, (3) the inclusion of the three schemes for worker participation. After examining these views, the Commission will again prepare a formal proposal for the statute.

7.3.

The Commission hopes to reach an agreement with the adversaries of this proposal, as well as advocates of employee participation, thus bringing to fruition the concept of a supranational European company. The attempt to achieve a compromise after ten years of inactivity was attacked at the July 1988 council meeting in Athens. Great Britain balked at any statutory worker participation, while the Federal Republic of Germany and other countries expressed concern that their national schemes could be undermined or evaded.

7.3.1.

At its session in Madrid on October 6 and 7, 1988, the ETUC Executive Committee adopted a resolution which, in principle, welcomed the Commission’s initiative to give new impetus to the discussion of a European company. ETUC shared the Commission’s view that a solution which accounts for full worker participation in a company’s decision-making process must be found. ETUC stressed that this condition is essential for necessary economic restructuring and internal market completion. The development of economic democracy in Europe is absolutely imperative from a social perspective. Moreover, economic democracy would enhance the Community’s prospects in world competition.

With respect to the Commission’s questions on the general concept of the Memorandum, “ETUC considers a statute under autonomous European law which is optional in nature to be useful provided that it does not enable undertakings to evade the provisions of national legislation and collective agreements. The safeguarding of acquired rights must form an integral part of the statute.”

The ETUC welcomes a European company founded on the basis of consensus and considers the following basic conditions as absolute

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226 See European Trade Union Confederation, Memorandum (Oct. 6-7, 1988) (commenting in detail on COM No. 320 FINAL (July 15, 1988)). See also supra note 218 and accompanying text.

227 Id.
requirements for economic democracy:

- The statute must provide an additional dimension of European participation by workers' representatives in company decisions without undermining national participation rights.
- The possibilities for workers' representatives to exert influence must be equivalent to those of the capital, irrespective of the choice of model.
- The participation of workers' representatives at the level of supervision and control must be a precondition for the establishment of the European company, irrespective of the model chosen. Where collectively agreed systems are chosen, worker participation with equal rights must be integral to the agreement. Agreed renunciation of participation must be ruled out.
- The trade unions at national and European level must be provided with the possibility of instituting proceedings through which it can be established whether an agreed participation model complies with the requirements of the statute.
- The capacity of the European company to conclude collective agreements must be embodied.\textsuperscript{228}

ETUC is convinced that worker representation at the level of supervision and control can only operate satisfactorily if the statute provides for worker representatives at the plant level who would continue to be appointed according to national practice. Furthermore, ETUC prefers that regulations concerning the information and consultation of the employee representatives be established.\textsuperscript{229}

7.3.2.

The UNICE position paper of November 7, 1988 expresses skepticism with respect to the Council's adoption of a European company statute.\textsuperscript{230} Therefore, it suggests that the Commission assess the chances of the adoption of such a statute after the Member States, the EP, and the two sides of industry have all responded to the proposal. If the Commission acts hastily, UNICE reasons, then considerable human and financial resources could be wasted. Additionally, UNICE suggests

\textsuperscript{228} Id.
\textsuperscript{229} Id.
\textsuperscript{230} Union des Industries de la Communauté Européenne, UNICE Position Paper 22.6/13/1 (Nov. 7, 1988) (internal document).
that the legal basis of a possible proposal be determined before a new draft is presented.

In principle, the European company statute could be a useful legal instrument for certain corporate restructurings within the Community. However, it is not indispensable to the completion of the internal market. Business will only favor this statute if it meets its needs, that is, if it is a flexible instrument which does not impose unacceptable constraints, allows proper management of the company, and offers the necessary legal certainty. For certain types of transnational company groups, the European company statute would be an instrument which would enable companies to form a much simpler group structure than is possible under national laws. For transnational joint ventures or company groups where participants do not wish to have a specific "nationality," the European company statute could be regarded as neutral and not linked to a particular Member State. For neutrality to occur, however, the European company would need to be identical in all Member States and not be required to have its registered office in a specific Member State. If the statute departs from its independence of national law by referring to that law in specific instances, the result will not create a single European company statute, but twelve different versions of the statute.

UNICE realizes that it will be very difficult to formulate a law on company groups which is generally acceptable to all Member States. The Commission's suggestion must doubtlessly be seen as an attempt to prevent the debate on the European company statute from becoming bogged down with a problem which will be difficult to resolve. Therefore, UNICE supports the Commission's suggestion. In explanations given by EEC officials at a briefing with UNICE on September 16, 1988, the Commission explained the possibility of referring the matter of annual accounts to harmonized national law. However, UNICE notes that the harmonization directive in question leaves Member States with more than sixty options that previously have been employed in distinct ways. Consequently, the degree of harmonization is very imperfect. The European company statute should have its own provisions on the preparation and presentation of annual accounts based upon the provisions of the Fourth and Seventh Directives. Fiscal questions pose a special concern. In its Memorandum, the Commission accurately states that a package of three proposed tax directives would facilitate cross-border cooperation. UNICE has repeatedly expressed support for these three proposals which have been under consideration since 1976 and which were presented independently of the European company statute. Therefore, since the proposals are not directly linked with the statute,
UNICE advocates their adoption for the benefit of all companies. Also, taxation should not be restricted to European companies with branches or subsidiaries in other Member States since it would discriminate against companies with branches or subsidiaries under national law. The taxation proposals should apply to all company groups which are active in more than one Member State.

Understandably, special attention is paid to employee participation. A formula which the Commission still considers to be "the most developed and ambitious form of participation" was included in the Commission's first proposal, which failed in 1982.\textsuperscript{231} UNICE criticizes this statement because this formula for employee participation does not currently exist in any Member State. Member States with participatory schemes only apply their regulations to companies employing a certain number of workers. Therefore, the European company statute might initially be confined to companies with fewer than a given number of employees, for instance a threshold of 1,000 employees. This limit would allow the statute to quickly affect a certain category of companies and simultaneously facilitate empirical analysis while solutions are developed for the participatory problem of companies which exceed the threshold. UNICE members from EEC countries without mandatory employee participation schemes favor the referral of worker participation back to the national law of the country in which the company is established.

Although the European company statute is simply one option for companies to consider, opposition to the formulation of proposals on employee participation stems from concerns that a formula contained in the statute could be considered a model for future harmonization of national laws. Another criticism is that it could become a bargaining issue between management and labor. A company in difficulty might find it hard to resist adopting the statute.

UNICE delegations from EEC countries with legislation on employee representation on the supervisory board consider it unrealistic to adopt a statute which does not contain a formula for employee participation from which the company could choose. Therefore, the Commission's approach seems to be acceptable to these Member States. However, these nations believe that the three options in the Memorandum are insufficient and leave many critical questions unanswered. It is surprising that the Commission, without explanation, has omitted the Dutch and French systems as possible options. The description of the

\textsuperscript{231} Internal Market and Industrial Cooperation: Statute for the European Company, supra note 219, at 14.
German system in the Memorandum is not entirely accurate because it disregards the fact that German law provides for casting votes on the shareholder’s side. The ability to cast votes “enshrined in law and geared to practical needs is essential where there is equal representation on the board.”

With respect to the matter of employee information and consultation, the Memorandum suggests a referral to the law and practices of the various countries where the company’s activities are performed. UNICE believes that this approach is realistic because the Commission would not be able to formulate generally acceptable, uniform rules on employee information and consultation for the purposes of the European company. The idea of establishing a compulsory “European meeting place” for the various components of a European company could result in the creation of bureaucratic bodies which would increase a company’s expenses without conferring any benefit to the company.

7.3.3.

By an overwhelming majority, at its 260th Plenary Session on November 24, 1988 the ESC adopted an opinion which welcomes the attempts to revive the deliberations on a statute for a European company. The ESC believes that the statute can contribute to the completion of the single European market if it is given a practical form. However, a final assessment of the statute will not be feasible until the complete revised version of the proposal is available.

The ESC comments that the creation of an additional legal structure which would accompany the Member States’ national laws is appropriate and necessary. Thus, firms would be free to decide in favor of the new statute or continue to utilize national company law.

The ESC agrees that worker participation should be regulated in the European company statute. In view of the considerably different level of worker participation, the ESC concurs “that the worker participation arrangements laid down in the European company statute need not necessarily be uniform” and considers it important to avoid rigid, binding structures. However, the decision to adopt one of the various

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233 See UNICE, supra note 230.
234 Id.
possible participation systems "must be the subject of consultations between the trade unions represented in the companies or their in-company representatives (works councils, in-house committees etc.) and the management of the company concerned, in order to reach an agreement."^236

Regardless of which system is adopted, it is essential to define its content. The collectively agreed upon systems of participation must be similar to the other solutions proposed in the Memorandum. A shareholders' vote is required to finalize decisions. The Committee agrees to exclude from the statute any rules about participation at plant level and shares the Commission's view that the workers be given adequate information. The international integration highlights the problem of worker information and consultation in companies belonging to multinational groups whose decision-making center is located outside the Community. Therefore, the Committee asks the Commission "to give thought—not just in connection with the European company statute, of course—to the need to ensure that consultation takes place at the levels where decisions are made on the distribution of production and labour which could affect the position of workers employed in European subsidiaries."^237

Thus, the ESC, like ETUC and UNICE, welcomed the initiative of the Commission, but did not see a possibility of expressing a final opinion due to the problem of worker participation.

7.3.4.

The reports of both the EP Committee on Legal Affairs and Citizens Rights and the EP Committee on Economic and Monetary Affairs and Industrial Policy^238 reflected the extreme inquietudé of the EP regarding both the Memorandum presented by the Commission and the entire policy regarding worker participation. The discussion of these reports in the plenum on March 14, 1989, and the vote taken thereafter, added paragraphs to the Resolution which further manifested the disappointment of the EP.^239

In its Resolution replying to the Memorandum, the EP points out that the achievement of a single market must benefit all participants in the economic process and the wishes of wage-earning employees to contribute in the decision-making process must be considered. Develop-

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^236 Id. at 38-39.
^237 Id. at 39.
ments in European undertakings like Thompson Grand Public and Bull (where European employee representations have been agreed upon by negotiations) are expressly welcomed. The EP considers the European company statute a valuable mechanism for restructuring the European undertaking. In particular, the EP believes that the statute will improve European companies' ability to effectively compete in the world market. References to national company law are admissible in all cases where company law has already been sufficiently harmonized. The three directives relating to the harmonization of taxes must be hastened. The EP is also amenable to the choice of options offered by the statute to the undertakings.

The EP recommends the adoption of the tripartite model which it developed in 1974 and which the Commission adopted in its amended proposal in 1975. This confirms the EP's previous position expressed in its Opinion on the proposal for a Fifth Directive, where it regarded the suggested worker participation models as equivalent. Restriction by the Member States on the freedom of choice counters the purposes of the system. Even if restriction would increase the acceptability of the European company statute, management and staff must reach agreement on a model of worker participation.

It is essential to bring employee information and consultation arrangements within the European company framework. Therefore, the new proposal of the Commission should include provisions for representation of employees similar to the 1975 amended proposal which included a special section on "The European Works Council." Simply referring back to the existing directives and the outcome of the dialogue between the two sides of industry is totally unsatisfactory.

The EP takes the view that the European company must be able to conclude collective labor agreements with the trade unions in order to eliminate the major discrepancies that exist between the different Member States with respect to working conditions, remuneration, and social security. In this context, the EP asks the Commission to provide a directive enabling the European company to conclude collective wage agreements.

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240 The Committee on Legal Affairs and Citizens' Rights expresses in its Report surprise that the "so-called 'Dutch system' of co-option to the supervisory body with the option for workers of opposing the election of certain members" has not been included in the choices. See 1989 EUR. PARL. REP. (No. A 2-405/88) 1 (Feb. 24, 1989).


242 The Committee believes that worker participation based upon collective wage agreements, the "Swedish model," presupposes a fully developed base of social legislation in all Member States. No base of social legislation presently exists, nor is it likely
The most interesting comment of the EP Committee on Legal Affairs and Citizens Rights concerns the legal basis for a European company statute. The original proposal, as well as the amended proposal, were based upon Article 235 of the EEC Treaty. The Committee questioned the need to rely on this provision since Article 100A of the Treaty may serve as an alternative legal basis. The creation of a European company statute would achieve one of the objectives of Article 8 and, consequently, also contribute to the objective of creating the internal market. The European company would operate in economic terms with an effect comparable to the establishment of companies through cross-frontier merger. After withdrawing the proposal for a Tenth Directive, the statute could also be understood in a technical sense as a measure for approximating laws.

Article 100A, paragraph 2, excludes the application of Article 100A from provisions governing taxation, free movement, and the rights and interests of workers. Free movement is not involved, and the tax provisions are only of an incidental character. Whether the provision governs the rights and interests of workers, and this is not subject to the application of Article 100A, depends upon the interpretation.

If Para. 2 is understood simply to mean that the rights encompassed in the so-called Vredeling Directive are to be understood in that context, then Para. 2 would not preclude worker participation rights. But even if this interpretation were not accepted, there would still be another way out: the rules on worker participation and the informing and consulting of workers could be taken out of the statute and put into a separate directive that could be based on Article 54.3(d).

If both legal instruments constitute a single policy unit, the Council could adopt them with a qualified majority after a second reading in Parliament. This argument is of great importance because it shows the intention of the EP to introduce worker participation even against the express wishes of some Member States.

The EP asked the Commission to submit a proposal upon which Parliament can deliver its opinion as soon as possible. The EP's
to exist in the foreseeable future. Therefore, this model requires either far-reaching framework provisions or the achievement of substantive minimum criteria. See id. at 10-11.

243 See id. at 12; Treaty of Rome, supra note 1, art. 235, at 91.
244 See 1988-1989 EUR. PARL. DOC. (COM No. 405) 1, 12 (1989).
247 See id. at 7.
strong and somewhat aggressive statements were generally interpreted as an indication that the EP wants to enforce a decision of the Council on worker participation.248

7.3.5.

As in all legislative matters, the final decision belongs to the Council. Therefore, it is interesting to observe the attitudes expressed by Member States.

At an informal Council meeting in Athens in July 1988, it became obvious that the United Kingdom rigorously rejects any legally enforceable regulation of worker participation. The Federal Republic of Germany and other Member States expressed concern that their national legislation could be weakened or diluted. The Greek presidency presented a compromise formula which would require all Member States to introduce obligatory schemes of worker participation, but would allow each individual enterprise to adopt the system of its choice.249 Lord Young, the British Trade Secretary, stated in an interview that “the government would resist any attempts to introduce the so-called European Company Statute, facilitating varying degrees of worker participation in company decision-making, insisting that what might be good for West Germany was not necessarily good for Britain.”250

The French Minister for European Affairs hopes that France can accelerate the adoption of a European company statute which includes worker participation elements. In an open letter, the President of the French Employers Association (Patronat) argues against any idea of a Social Europe which might increase industry’s costs or limit the freedom of management to manage. French trade unions asked the French government to press for the adoption of a social charter through directives which would become part of the national law, thus providing the opportunity to call upon the European Court of Justice.251

The German Government is in a difficult position. It would have preferred the Commission to have presented its ideas in detail, rather than issuing the Memorandum which raised new questions. Worker

participation remains the principal problem to be resolved.\textsuperscript{252} In an official statement of November 25, 1988, the German Bundesrat (Second Chamber) reiterated that the principle of worker participation is an inevitable precondition for any modern enterprise law.\textsuperscript{253} Therefore, this principle must also be included in the proposed European company statute and have a binding effect on all Member States. The Bundesrat rejects the possibility of choosing between a "German model" and the other models mentioned in the Memorandum, because these models possess many important differences with respect to the intensity of worker participation and, therefore, cannot be considered equivalent. The Bundesrat considers any system which would enable German enterprises to evade the existing German Mitbestimmung unacceptable. To avoid further divergencies in the legal system, the Bundesrat believes that the European company should be a uniform European legal instrument, independent of national company laws. Differences between existing national company laws and a European company law cannot be tolerated, lest the evasion of existing national rules which protect shareholders and creditors would occur. Granting one-sided tax advantages to the European company would result in considerable distortions of competitive situations and would be particularly disadvantageous to small and medium-sized enterprises which will probably not use the instrument of a European company. In principle, the Bundesrat favors efforts to create an independent transnational type of company, but this proposal requires cross-frontier cooperation to harmonize legal structures which currently exist in the company laws of the Community.\textsuperscript{254}

The German Minister of Justice, when addressing the problem of worker participation, suggested that it was surprising that the Commission had not yet presented the idea of a European company with limited liability, such as a holding company or a joint subsidiary of a national enterprise. If the size of such "Euro-GmbH" would be limited, the problem of worker participation would not arise. In his opinion, the Commission should investigate whether this concept could further European integration.\textsuperscript{255}

\textsuperscript{252} Handelsblatt, Oct. 20, 1988, at 5.
\textsuperscript{253} Decision of Deutscher Bundesrat 392/88 (Nov. 25, 1988).
\textsuperscript{254} See id.
\textsuperscript{255} See Engelhard, \textit{Defizite im Gesellschaftsrecht bei der Vorbereitung auf den offenen EG-Markt}, Handelsblatt, Dec. 30/31, 1989, at 6. The German Minister of Labor, Norbert Blüm, raised the question of whether it is worthwhile to sacrifice the successful practice of co-determination rights in the Federal Republic of Germany, in return for small steps forward in the direction of a European company law. \textit{Id.}
The Commission did not discuss in detail the various opinions expressed in reply to the Memorandum. Instead, on August 25, 1989, the Commission presented a new draft of the European Company Statute consisting of two parts, a regulation and a directive: (1) the Proposal for a Council Regulation on the Statute for a European company,\(^\text{256}\) and (2) a Proposal for a Council Directive complementing the Statute for a European company with regard to the involvement of employees in the European company.\(^\text{257}\) The draft regulation for the European Company Statute is based on article 100A of the Single European Act because the Commission believes the Statute is related to the creation of the internal market. The proposed directive is based on Article 54 and contains regulations concerning employee participation in the supervision and strategic development of the European company. The Commission points out that the provisions of the directive "form an indissociable complement to the provisions of [the Regulation] and it is therefore necessary to ensure that the two sets of provisions are applied concomitantly."\(^\text{258}\) The purpose of splitting the original draft into two different parts is to overcome the expected opposition of the United Kingdom which would prevent acceptance if unanimous vote had been required. The system chosen by the Commission will require only a qualified majority vote for eventual adoption by the Council. In substance, the Commission sees worker participation as an integral element of the European Company Statute.\(^\text{259}\)

The draft has been considerably reduced. Of the original 284 articles, only 137 articles are considered necessary. This reduction has been achieved by cross-referencing the Statute to existing or draft regulations. One of the changes made to the draft was to reduce the minimum share capital to ECU 100,000.\(^\text{260}\) The purpose of this change is to

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\(^{260}\) New Draft Regulation, *supra* note 256, art. 4, at 43.
make it easier for small businesses to take advantage of the Statute. To facilitate the administration of a European company, the title concerning annual accounts and consolidated accounts has also been streamlined considerably by referring to the provisions of already existing directives.261

In further deliberations of the Commission's proposal, the most controversial point will be the employee participative rules. The draft directive clarifies that these rights cover the supervisory aspects of management and not administrative questions. Corporate strategy includes relocation, restructuring, joint ventures, mergers and closures. It is quite clear that a European company may not be established without some form of employee participation with respect to these matters. If no agreement on the model can be reached, management has the final choice.

The three models available are the same as suggested in the Commission's Memorandum on the new Statute for a European Company:262

- (i) At least one-third and not more than one-half of the members of the supervisory board or the administrative board shall be appointed by the employees of the SE or their representatives.
- (ii) Members of the supervisory board or the administrative board shall be co-opted by the board. The general meeting of shareholders or the representatives of the employees may, on specific grants, object to the appointment of a particular candidate. In such a case, an independent body established under public law decides on the objection.
- (iii) A separate body shall represent the employees of the European company. The number of members and detailed rules governing their election or appointment shall be included in the statutes of the SE in consultation with the representatives of the employees of the founder companies and in accordance with the laws or practices of the Member States.

The model adopted must be agreed upon by the management board or the administrative board of the founder companies and the representatives of the employees of those companies. Other models chosen may be adopted by agreement between management and the representatives of the employees. Such an agreement requires the approval of both the employees and the general meeting of the European company. Each Member State may restrict the choice of models listed in the draft directive or may make one model compulsory for all European compa-

261 Id. tit. V, at 61-64.
262 See notes 217-25 and accompanying text.
nies having their registered office in the territory of the Member State. Additionally, other models may be adopted by agreement between the management board or the administrative board of the founder companies and the employees or their representatives in those companies.

In all models, workers' representatives are guaranteed the same rights to information and consultation. They have to be informed at least once every three months of the progress of the company's business, including undertakings controlled by it, and of its prospects. Confidentiality of information must be observed. Information may be withheld if the law of the Member State where the European company has its registered office permits such withholding and the disclosure might seriously jeopardize the interests of the company or disrupt its projects.

There is no threshold for introducing participative systems, but one of these systems is obligatory for each European company. In principle, the Commission has included in its proposal a more or less simplified version of the Draft Fifth Directive.

8. Conclusion

The attempt of the Commission to revive the discussion on a European company is also an attempt to find a solution for the worker participation problems which have become obstacles for the completion of the company law harmonization program. It is difficult to predict whether the options offered will be acceptable to a majority of the Member States, provided that this topic is suitable for a majority decision in the Council. Member States like the United Kingdom, without historically grown information and consultation rights for employees and without existing worker participative schemes, are still opposed to any EEC legislative attempt to enforce adoption of such schemes. The discussion of the "Vredeling Saga"\(^{263}\) is partially responsible for the enduring objections and opposition. The difficulty of harmonizing the existing worker participation systems in Europe is demonstrated by the variety of models offered. It should not be overlooked that Member States which possess a worker participation scheme base their practice on a historically grown attitude of cooperation between labor and management. Existing legislation has been interpreted by national courts, and management and labor have adapted to the practical aspects of this cooperation.

But even Member States with a long history of employee participation object to any solution which might result in changes in their

\(^{263}\) See supra notes 122-41 and accompanying text.
present systems. This resistance results from the fact that, in most of these countries, the legislative basis for such systems is the result of political compromises which are solidly entrenched. Attempts to influence these systems by transnational obligations might result in internal political problems. In an interview, Commission President Jacques Delors promised that employees would have available a "menu à la carte" which takes into consideration the various situations and which gives employees a choice between worker participation under the German model, the Swedish model based upon collective agreement for the enterprise, as well as a system of works councils and trade union representation under the French or Italian model.\textsuperscript{264}

The Swedish model, worker participation through collectively agreed upon systems within the company, will become increasingly important. Member States with a legislative base for employee participation would have difficulties operating the Swedish System concurrently with stringent legislation. ETUC wisely remarks in its Resolution that the binding recognition of collectively agreed upon arrangements could well become one of "the thorniest issues in the coordination of national and European law."\textsuperscript{265} UNICE's position paper raises issues which would need to be answered if this option becomes part of the final regulation. The most difficult question to resolve will be the consequences of the situation where there is no reachable agreement. The ESC mentions the problem of Member States in which worker participation at the company level is governed exclusively by legislation, and the EP wants the European company to have the opportunity to conclude collective labor agreements with trade unions.

The revised draft of 1975 already indicated the possibility of reaching collective agreements with trade unions represented in establishments of the European company found in Article 146.\textsuperscript{266} Article 147\textsuperscript{267} adds that conditions of employment governed by a collective agreement shall apply directly to and be binding upon all employees of the European company who are members of a trade union which is a party to that collective agreement. At that time, the transnational European collective agreement was seen primarily as an instrument to regulate wages and working conditions.\textsuperscript{268} A certain preference for contractual rather than legislative measures exists, particularly in the United

\textsuperscript{264} Frankfurter Allgemeine Zeitung, Aug. 30, 1988, at 4.
\textsuperscript{265} European Trade Union Confederation, supra note 226.
\textsuperscript{266} See Proposal for a Council Regulation on the Statute for European Companies, supra note 199, art. 146, at 68.
\textsuperscript{267} See id. at 69.
\textsuperscript{268} See Steinberg, Der Europäische Tarifvertrag, 1971 RDA 18.
Kingdom, Ireland, Denmark, and Italy. But even in countries where legislative instruments are primarily used, collective agreements are acquiring a growing importance for certain matters such as the introduction of new technologies. Therefore, collective agreements could eventually play an important role in the implementation of EC Directives. This would facilitate solutions which give consideration to the differences existing in national labor and industrial relations systems.\textsuperscript{269} A recourse to collective agreements could be one resolution of the European worker participation dilemma. The trade unions have recognized this possibility and the European Metal Workers Association ("EMB") already demands EWC's contractual basis to bridge the time until the Council creates a basis for works councils in transnational corporations.\textsuperscript{270} Thus, an interim substitute for the Vredeling Proposal regarding information and consultation of employees could be established.

It will be interesting to observe the future events which will determine whether the company law directives originally developed by the Commission can be realized. If it is not possible to find a solution for worker participation in the European company, achieving a European company statute will become a difficult task.
