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THE SOCIAL POLICY OF THE EUROPEAN COMMUNITIES

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THE EMPLOYEE PARTICIPATION DIRECTIVE— A REALISTIC UTOPIA?

by

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I. THE COMMISSION'S GREEN PAPER

1. *Present Trends*

For a long time the presence of employee representatives on decision-making bodies appeared to be a peculiarly German phenomenon. Nothing in Western Europe directly matched the (half) parity of membership on supervisory boards in the iron and steel industry, or employee election of a third of the members of supervisory boards in all other joint stock companies employing more than 500 people.[1] It is true that in France since 1945 two employee representatives have sat on all boards of directors, but unlike their German counterparts they are unable to vote.[2] Public or nationalised undertakings [3] constituted something of an exception —but that was the extent of "institutionalised employee participation".

Since 1971 the situation both within and outside the EEC has changed considerably. A 1971 law gave workers in the Netherlands a larger say in the composition of supervisory boards.[4] Thus, when a vacancy is to be filled on a supervisory board, although the new member is co-opted by the existing board, not only the shareholders' general meeting but also the majority of the "*ondernemingsraad*", elected by the employees, may veto the appointment. This of course may not be done arbitrarily, but solely on the grounds that the person concerned is unsuitable or would upset the overall balance of the body. Decisions as to the legitimacy of a veto are

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1. *Montanmitbestimmungsgesetz* (Coal and Steel Co-determination Law) of May 21, 1951, BGBl I, 347, paras. 76-77 (a). *Betriebsverfassungsgesetz* (Works Constitution Act, henceforth BetrVG) in the version of the BetrVG of January 15, 1972, BGBl I, 13.

2. VO No. 45-280; see also Camerlynck/Lyon-Caen, *Droit du travail*, 8th edition (Paris 1976) No. 410, 422.

3. *Cf.* in German literature, Leminsky, *Der Arbeitnehmereinfluss in englischen und französischen Unternehmen* (Köln 1965) p. 18 *et seq.*, 43 *et seq.*, 102 *et seq.*

4. *Wet op de structuur van naamloze en besloten vennootschappen*, German translation in (1974) *Zeitschrift für Gesellschaftsrecht*, 125 *et seq.*; also Maeijer in (1974) Z.G.R., 104 *et seq.*

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taken outside the undertaking in the Economic and Social Council, which consists of representatives of employers, unions and the public authorities.

There have been employee representatives on decision-making bodies in Denmark since 1973. On the basis of a majority decision, employees may seat representatives on the boards of directors of joint stock companies and companies with limited liability.[5] The same provision became mandatory for joint stock companies in Luxembourg in 1974,[6] although employee representatives must not comprise more than a third of the body's members.

In 1976 German legislation increased the number of employee representatives on the supervisory boards of all undertakings with more than 2000 employees. A balance between capital and labour was avoided, however, in that deadlocks are broken by the chairman's vote. He himself is designated by the shareholders.[7]

This type of employee participation is also gaining ground in other Member States. In France, the Sudreau Committee has proposed giving employee representatives (who nevertheless remain in the minority) a full vote to enable them to "co-supervise" management.[8] The Trade Union Congress in the United Kingdom has proposed a thoroughly novel scheme for making the supervisory board the most important and powerful body in an undertaking, with half of its members appointed by the unions.[9] The report of the so-called Bullock committee,[9a] published on January 26, 1977, recommends, however, in its majority report the adoption of a single-tier board structure with board members being elected on the "2x plus y" formula. There would be equal representation of company shareholders and unionists in the "2x" group, with the smaller "y" group being chosen by them jointly. A decisive influence is ensured to the trade unions through the recommendation that only union members would be eligible to take part in elections of worker directors or to stand for election.

Noteworthy parallels to these broadly outlined developments can also

5. Details in: Commission of the European Communities, *Employee Participation and Company Structure* (henceforth, Green Paper), Bull. of the E.C. Suppl. no. 8/75, p. 54.

6. Green Paper, pp. 86, 87.

7. *Mitbestimmungsgesetz* (Co-determination Law) of May 4, 1976, BGBl I, 1153, particularly paras. 27, 29 (2). For an introduction, see Bieback *et al.*, *Mitbestimmungsgesetz* (Neuwied and Darmstadt 1976).

8. Green Paper, p. 84 *et seq.*

9. TUC, *Industrial Policy, Statement of Policy by a Trades Union Congress*, first published July 1974.

9a. *The Report of the Committee of Inquiry on Industrial Democracy*, (H.M.S.O.

be found in non-EEC countries. The one-third participation model was introduced in Norway in 1972[10] and in Austria in 1974 as an extension of previously existing, but more limited legislation.[11] Although efforts to introduce employee participation in Switzerland have so far been unsuccessful,[12] the Swedish lawmaker adopted in July 1974, after several years of experience with the one-third model, an outline regulation under which the extent of union influence on company decisions is to be determined by collective agreement between management and labour.[13]

2. *EEC Commission Initiatives*

In view of these extraordinarily rapid developments, it would have been surprising if the EEC Commission had contented itself with the role of passive observer and refrained from taking any action of its own. The potentially far-reaching consequences for the structure of undertakings, not to mention the economy as a whole, made it almost inevitably necessary to provide for a minimum of agreement between the Member States in the interests of further advances towards a unified economic area.

As early as December 1972 the Commission proposed as part of the fifth directive on the approximation of company law that employees be represented on the executive bodies of joint stock companies.[14] The system of separate boards of management and supervisory councils—mandatory in the Federal Republic and the Netherlands, optional in France—was to be made compulsory in all Member States. They would then have the choice of following either the German one-third participation model or the Netherlands co-optation system with a (limited) veto.[15]

This draft, which was worked out without the participation of the new Member States, met with such a critical reception in some quarters[16] that it had to be revised. A preliminary result emerged in autumn 1975 in the

10. Grasmann, (1973) Z.G.R., 236, footnote 18.

11. Para. 110 of the *Arbeitsverfassungsgesetz* (Labour Charter) of Dec. 14, 1973, BGBl 1974, no. 22. *Cf.* commentary by Floretta-Strasser, *Arbeitsverfassungsgesetz* (Vienna, 1974). The older provisions were contained in para. 14 (6) of the *Betriebsrätegesetz* (Employees' Councils Law) of March 28, 1947, BGBl 1947, no. 97. *Cf.* Floretta-Strasser, *Kommentar zum Betriebsrätegesetz* 2nd edn. (Vienna 1973).

12. Boldt, (1976) *Recht der Arbeit*, 185.

13. Survey of recent legislation in (1976) *Mitbestimmungsgespräch* 168 and (1976) RdA, 328. *Cf.* Folke Schmidt, *Law and Industrial Relations in Sweden* (Stockholm 1977) pp. 122 *et seq.*

14. J.O. 1972, C 131/49 *et seq.*

15. Art. 4 (2) and (3) of the draft directive.

form of a Green Paper,[17] which examined national experiences with employee participation in company bodies objectively and with extreme thoroughness. It also made flexible proposals which allowed Member States more leeway. The main points of the paper may be summarised as follows:

(i) It is increasingly acknowledged as an imperative of democracy that those who are directly affected by decisions made in social and political institutions should participate in the decision-making process. Employees devote a large proportion of their daily lives to the enterprise and derive their income from it. Decisions taken by or in the enterprise can have a substantial effect on their economic circumstances, health, leisure and the satisfaction which they derive from work. Furthermore, employee participation is also a matter of human dignity and autonomy.[18]

(ii) Joint stock companies should in accordance with the proposal for a fifth directive basically be structured along dualistic lines. The body responsible for supervising the undertaking's management should also include employee representatives. Their legal status should basically be no different from that of other supervisory council members. The election or appointing procedure would be left in principle to the Member States, although there should be no restrictions on eligibility; appropriate safeguards for minorities should also be ensured.[19]

(iii) Collective bargaining in respect of company decisions is a less appropriate means of implementing employee participation. Technological changes may often have unforeseeable consequences for employees so that the obligation which collective bargaining involves does not come about. On the other hand, industrial confrontation fails in many serious cases as, for instance, when a plant closure is perceived as imminent. To legislate obligatory bargaining for the undertaking would be highly problematic; the degree of employee participation would moreover differ from one country to another and from one branch to another, so that the desired uniformity would not be achieved; to a certain extent, collective bargaining inevitably involves industrial confrontation.[20]

(iv) For an (unspecified) transition period Member States would be allowed to maintain their previously existing one-board systems; employee participation could thus be achieved by including employee representatives on the board of management. Member States, however, would also have the initial option of not including employee representatives in the management bodies of joint stock companies if they provided for em-

17. Bull. of the E.C. Suppl. no. 8/75, referred to below as Green Paper.
18. Green Paper, p. 9.
19. Green Paper, pp. 20, 23 and 41 *et seq.*
20. Green Paper, pp. 24, 33.

ployee participation through employee representation in the enterprise. In order to avoid paralysing the undertaking, only the right to information should be granted in the case of economic decisions, while a veto might also be provided for in connection with social matters.[21]

3. *Survey of Points Covered*

In the following we shall deal with the various aspects of the EEC Commission concept of employee participation as outlined above. The first point, largely passed over in the Green Paper, is what the actual legal basis for such employee participation legislation should be.

Do the provisions of Article 54 para. 3 (*g*) of the EEC Treaty on the coordination of company law also cover the participation of employee representatives, or is the general provision on the approximation of laws of Article 100 of the EEC Treaty, or Article 118 of the EEC Treaty, which does not allow for binding acts, to be invoked? Such a question is not prompted by punctiliousness regarding legal form. On the contrary, there is likely to be resistance to a form of employee participation based on Community Law in legal quarters as well, with the limited nature of the Community competences provided for in the EEC Treaty being adduced as grounds[22] (II below).

Secondly, in what follows rather closer attention will be paid to this question, mentioned only occasionally in the Green Paper: is it possible and appropriate to confine employee participation, however structured, to a single type of undertaking, *i.e.* the joint stock company, reserving other legal forms for subsequent legislation (III below)? Only after this has been examined can the main topic of this paper be addressed: whether participation of employee representatives on the supervisory council can meet the demand for employee participation, or whether such participation is not overshadowed by the danger that instead of an actual influence on decisions within the undertaking a pseudo-participation will result which merely creates the illusion of mutual interests. Is continuous employee participation in economic affairs really to be expected (IV below)?

Finally, it should be examined whether the collective bargaining system, unequivocally relegated to second place by the Commission, is really attended by greater drawbacks than the proposed participation in management bodies. Might not a solution be sought that was based less on conventional national procedures than on the object of codetermination (V below)?

21. Green Paper, p. 43.
22. *Cf.* Lutter, (1975) EuR, 50.

II. THE LEGAL BASE OF THE DIRECTIVE

1. *Article 54 para. 3 (g) of the EEC Treaty*

The EEC Commission cautiously introduced its draft fifth directive on the co-ordination of company law with these words: "having regard to the Treaty establishing the European Economic Communities, and in particular Article 54 para. 3 (*g*) thereof", it submits the following proposals to the Council.[23] Some authors have criticised this, arguing that the desired approximation of employee participation provisions goes far beyond the creditor and shareholder protection provided for in Article 54 para. 3 (*g*) of the EEC Treaty.[24] Employee participation, whether brought about in decision-making bodies or not, broaches a series of questions of fundamental importance for the global structure of companies and of the economy and therefore goes well beyond what has hitherto been discussed and achieved within the terms of the key phrase of Article 54 para. 3 (*g*).[25]

a. *Legal aim of Article 54 para 3 (g)*

Employee participation definitely lies outside the scope of Article 54 para. 3 (*g*) if the sole purpose of the provision is to dismantle establishment restrictions on undertakings registered in other Member States. If Articles 52-58 of the EEC Treaty are only concerned with putting foreign persons from other Member States on an equal footing with nationals,[26] then a directive on employee participation would be inappropriate. As foreign undertakings are nowhere subject to "stricter" employee participation than domestic ones are—on the contrary, a territoriality principle (although little emphasised) generally applies[27]—no discrimination exists which could be eliminated with the help of the European institutions.

In order to prevent the scope of Article 54 para. 3 (*g*) from being narrowed down excessively, the attempt has been made to free this provision from the framework of the right of establishment and to interpret it in the light of the general aims of the Treaty, particularly the aim of the approximation of laws stipulated in Article 3 (*h*).[28] In view of the systematic position involved, which cannot be explained away, this seems

23. See note 14 above.
24. Lutter, (1975) EuR, 48; Sonnenberger, (1974) AG, 3.
25. *Cf.* survey by Niessen, (1973) Z.G.R., 218, and Pipkorn, 136 Z.H.R., 499.
26. Similarly, Ipsen, *Europäisches Gemeinschaftsrecht* (Tübingen 1972) p. 645.
27. For details see Däubler, (1975) *Rabels Zeitschrift*, 444.
28. *Cf.* Pipkorn's survey of the controversy, 136 Z.H.R., 511.

not only doubtful[29] but also superfluous. Freedom of establishment as defined in Article 52 para. 2 of the Treaty not only includes freedom from discrimination but also the possibility of establishing oneself on a foreign market without extensive organisational or other conversions. Put succinctly, it is not only a question of legal non-discrimination but also of actual equality of opportunity. Market and other economic considerations, not national peculiarities of the place of establishment, should determine the choice of location. This material interpretation of the right of establishment is not only supported by the recognition of diplomas provided for in Article 57 para. 1, but also by the "co-ordination of the provisions laid down by law, regulation or administrative action in the Member States concerning the taking up and pursuit of activities as self-employed persons" provided for in Article 57 para. 2, which would be pointless if it were only a question equal treatment for nationals and persons from other EEC Member States. The tenor of Article 54 para. 3 (*e*) is similar in that it allows EEC nationals from other Member States to acquire and use property; likewise Article 54 para. 3 (*h*) is intended to prevent distortion of the conditions for establishment by Member State aid. It is quite consistent for Article 54 para. 3 (*g*) to be regarded as a means of "excluding as far as possible the influence of individual States on the determining factors for the exercise of freedom of establishment".[30]

Acceptance of this means that employee participation is also conceived in the light of the underlying purpose of the right of establishment. As a matter of fact, choice of location and investment behaviour may be considerably influenced by whether limited or extensive employee participation rights exist in the place of proposed business activity. In this case, of course, it does not matter whether wide employee participation in management bodies attracts investments owing to a low confrontation potential in employer/employee relations or whether restrictions on company decision-making powers encourage transfers to areas with less emphasis on employee participation. Furthermore, there is no doubt that mergers with undertakings from other Member States are impeded by the varying degrees of employee participation, of which the "merger" of Hoesch and Hoogovens is cited as a classic example.[31]

29. *Cf.* Troberg in: Von der Groeben/von Boeckh/Thiesing, *Kommentar zum EWG-Vertrag*, vol. 1, 2nd edn. (Baden-Baden 1974) Art. 54, note 3a.
30. To the point is Pipkorn, 136 Z.H.R., 511. *Cf.* as well Smit/Herzog, *The Law of the European Economic Community, a Commentary on the EEC Treaty*, vol. 2 (New York 1976) 57.03. Specifically, Renauld, *Droit Européen des Sociétés* (Brussels, Louvain 1969) 2. 10.
31. Green Paper, p. 8; Niessen, (1973) Z.G.R., 225.

b. *The object of coordination pursuant to Article 54 para. 3 (g)*

The participation of employees in the supervisory boards of joint stock companies, proposed in the fifth draft directive and in the Green Paper, may only be based on Article 54 para. 3 (*g*) of the EEC Treaty if "safeguards" are involved which are prescribed for companies "in the interests of members and others".[32]

Legal literature almost unanimously regards the individual employee as an "other" or "third party", although the Commission's intention, as shown in the following passage,[33] would seem to be to treat him as a co-proprietor:

> "Company laws of the traditional pattern have not contained such provisions[33a] in the past precisely because they were based on economic and social policies which saw employees' relationships with companies as essentially contractual. In so far as economic and social policies come to regard the company as an enterprise in which labour and capital combine in their own and society's interests, then the laws relating to companies will sooner or later have to reflect this change of underlying philosophy and include provisions expressly dealing with relationships between the providers of capital, the management and the employees, irrespective of whether they are formally deemed to be 'company law' or not."

This concept of an undertaking agrees in substance with the conceptions of Roman Catholic social theory[34] and has had considerable influence on the German[35] and Spanish[36] debate on employee participation. To attempt to base it on Community Law (especially Article 54 para. 3 (*g*) of the EEC Treaty), however, would seem somewhat premature to say the least. Even in legal systems which, like the German one, have provided for employee participation in decision-making bodies, there is basic agreement that employees do not become coproprietors but rather remain in a contractual relationship with "their" undertaking, which in no way differs from the working relationship of persons employed in undertakings

32. Gleichmann in Coing *et al.*, *Methoden der Rechtsvereinheitlichung*, (Frankfurt/Main 1974) pp. 35, 46; Lutter, (1975) EuR, 49; Niessen, (1973) Z.G.R., 219; Pipkorn, 136 Z.H.R., 514; Sonnenberger, (1974) AG, 3; and especially the Commission in J.O. 1972, C 129.

33. Green Paper, p. 36.

33a. *I.e.* provisions on employee participation (author's note).

34. Kunze-Christmann, *Wirtschaftliche Mitbestimmung im Meinungsstreit*, vol. II (Köln 1964) p. 93 *et seq.*

35. *Cf.* so-called Biedenkopf Commission Report, Bundestags-Drucksache VI/334, p. 58.

36. *Cf.* Bayon Chacon-y Perez Botija, *Manual de derecho del trabajo*, vol. I, 9th edn. (Madrid 1973/1974) p. 100 *et seq.*

that do not have employee participation.[37] The situation may change as a result of a broadening of employee participation rights, although this is not the place to discuss the desirability of such a change.[38] For the time being one cannot quibble with the fact that in no Member State have employees come to be considered as coproprietors. In view of this, the Commission should refrain from anticipating developments and reinterpreting classic concepts such as company law in such a way as to produce a comprehensive statute for those production units known as undertakings. It may be perfectly legitimate to provide concepts of the EEC Treaty with new contents in the light of altered perceptions in the Member States in order to allow for the dynamic nature of Community Law, but as regards the position of employees *vis-à-vis* undertakings, such new departures have not yet emerged.[39] The result is that Article 54 para. 3 (*g*) may only be applied in cases where employee participation rules may be classified as "safeguards in the interests of... others".

The protective nature of employee participation laws can scarcely be disputed, inasmuch as the main purpose of employee representatives' activities, both within and outside the company bodies, is to prevent management infringements of the rights of employees individually or as a group. This applies even when broader goals are posited for employee participation, as they are by the Commission, such as the democratisation of the production process and the achievement of individual autonomy; its protective nature is not cancelled (on the contrary, it is enhanced) by the fact there may be participation in decisions having no direct bearing on employees' working and living conditions. Also without relevance is the fact that employee participation rights are "collective rights" insofar as they may only be exercised by all employees together or the trade union movement.[40] The safeguard provisions referred to in Article 54 para. 3 (*g*) may very well be adopted for the benefit of a large number of persons, as the case referred to in Article 54 para. 3 (*g*) concerning company disclosure undoubtedly shows.

However, not all forms of employee participation come within the scope of Article 54 para. 3 (*g*). As is clear from the reference to "companies",

37. See the survey of progress made in the discussion by Udo Mayer, *Paritätische Mitbestimmung und Arbeitsverhältnis* (Frankfurt/Main, Köln 1976) p. 76 *et seq.*

38. See further Däubler in: Bieback *et al.*, *p. cit.* note 7, p. 181 *et seq.*

39. Of importance *de lege ferenda* is therefore only Gleichmann's remark to the effect that the fifth directive takes into account company policy developments in the Communities which aim at a more effective integration of employees in undertakings, while assigning them greater responsibility, *op. cit.* note 32.

40. For another point of view, see Lutter, (1975) EuR, 49, and Sonnenberger, (1974) AG, 3.

only those types of participation are covered which are linked with the formation of the undertaking as a company within the meaning of Article 58 of the EEC Treaty. If another approach were adopted and all the "environmental relationships" of undertakings of all kinds included in the co-ordination mandate of Article 54 para. 3 (*g*), this provision would become an overriding blanket clause for the approximation of the whole body of commercial, economic and labour law, and would deprive other provisions such as Article 100 of the EEC Treaty of any wider meaning. Employee participation rights are thus only subject to regulation pursuant to Article 54 para. 3 (*g*) when, in accordance with the proposals of the fifth draft directive and the Green Paper, they involve employee representation on decision-making bodies.[41] If, on the other hand, the main consideration was to subject certain management decisions to collective bargaining or to qualify them with a veto right held by the representative institution, Article 54 para. 3 (*g*) would have to be set aside as a legal basis. Nor can Article 57 para. 2 be of much help, inasmuch as labour law provisions of this kind are not normally regarded as belonging to the stipulations it sets out on the taking up and pursuit of activities as self-employed persons.

c. *Reintroduction of legal institutions as "coordination"?*

A final objection to the application of Article 54 para. 3 (*g*) would be that the "coordination" it provides for is confined to laws already in existence in the legal systems of Member States to the exclusion of legal innovation extending beyond the status quo. This, however would be to misunderstand the aim of Article 54 and all the legislation on the right of establishment. If a real contribution to a uniform economic area is to be made, it must be possible to achieve a certain degree of harmonisation even in cases where not all Member States have special legislation. It is thus quite properly agreed that in connection with the approximation of laws pursuant to Article 100 EEC Treaty a gap in national legal systems will not obstruct the activities of Community bodies.[42] Nor does the use of different terms such as "coordination", "harmonisation" and "approximation" in specific Treaty provisions represent any particular factual distinction; it is always a case of striving to create the necessary legal uniformity

41. For the introduction of employee participation into management bodies under Art. 54 (3) (*g*), see Ficker in: *Recht und Internationaler Handel, Festschrift für Schmitthoff* (Frankfurt/Main 1973) p. 164 *et seq.*; Gleichmann, *op. cit.* note 32; Niessen, (1973) Z.G.R., 219; Pipkorn, 136 Z.H.R., 514.

42. Goldman, *Droit commercial européen*, 3rd edn. (Paris 1975) no. 620 (p. 685); Smit/Herzog, *op. cit.* note 30, vol. 3-527 (100.10).

for the smooth operation of the Common Market.[43] As a result, no legal obstacles arise in this quarter in relation to a directive on employee participation.

d. *"Necessity" of a Community Law solution?*

Recourse to the courses of action open to Community bodies under Article 54 para. 3 (*g*) is always subject to "necessity". The reason why this is stressed is to prevent arbitrary action which is not aimed at establishing a common market, and to exclude other irrelevant initiatives. Contrary to Lutter,[44] it presents no particular problems with respect to a directive on employee participation, as no doubts exist as to the usefulness of a certain degree of uniformity.[45] If more were required than the confirmation that without the coordination under discussion the common market would be unable to function, then Article 54 para. 3 (*g*) EEC Treaty and most of the other provisions of the Treaties would be reduced to the role of expedients in cases of dire need, something that could not be reconciled with the aims of the Treaties and the resulting principles of interpretation.[46]

Actually, both the Commission and the Council have a fair amount of leeway regarding decisions as to what they consider "necessary". Only if their measures exceed extreme limits can they be annulled by the Court of Justice.[47] A stricter legal delimitation of the Commission's and Council's activities would moreover have the considerable disadvantage of further displacing decision-making competence on to the European Court of Justice; policy discussion and agreement would be replaced by legal argument, a vehicle which is both inappropriate to such matters and relatively inaccessible to public control.[48] There is consequently no objection to an employee participation directive from the standpoint of necessity.

43. Ficker, *op. cit.* note 41, p. 141.

44. (1975) EuR, 50. Pertinent to his basis concept of "necessity" are Bärmann's comments in *Europäische Integration im Gesellschaftsrecht* (Köln and elsewhere 1970) p. 50 *et seq.*

45. See (a) above, at the end.

46. More in Ipsen, *op. cit.* note 26, p. 131 *et seq.*

47. *Cf.* Ficker, *op. cit.* note 41, p. 161; Goldman, *op. cit.* note 42, no. 621 (p. 686); Kapteyn/VerLoren van Themaat, *Inleiding tot het recht van de Europese Gemeenschappen* (Deventer 1974) p. 235; Troberg, *op. cit.* note 29, Art. 54 (3) (*b*); Vignes in: Mégret *et al.*, *Le droit de la CEE*, vol. 5 (Brussels 1973) p. 161.

48. The constitutional law controversy on parity employee participation in the Federal Republic may serve as a warning; see further Däubler, *Das Arbeitsrecht* (Reinbek 1976) p. 304 *et seq.*; Mayer-Reich (ed.), *Mitbestimmung contra Grundgesetz?* (Darmstadt und Neuwied 1975).

2. *Article 100 of the EEC Treaty*

Although employee participation in decision-making bodies comes exclusively within the scope of Article 54 para. 3 (*g*) which, as a special prescription, takes precedence over the general provision for the approximation of laws of Article 100, the question arises as to the applicability of Article 100 to the second approach to employee participation discussed by the Commission, namely, the extension of collective bargaining and employee representation to management decisions.[49] This question cannot be answered by reference to the special nature of Articles 117-122 of the EEC Treaty, as neither by their wording nor their meaning do they constitute definite rules: for the harmonisation of social systems, Article 117 para. 2 refers expressly to the "approximation of provisions laid down by law, regulation or administrative action" without itself stipulating a relevant rule,[50] whereas Article 117 para. 1 specifically mentions cooperation between Member States regarding the right of association and collective bargaining, while stating, however, in its introductory clause that its provisions apply "without prejudice to the other provisions of this Treaty".[51]

The Commission and Council have therefore correctly based the directive on collective redundancies—which also falls within the scope of Article 118—on Article 100,[52] thus creating an important precedent for the further approximation of labour laws.

As to the applicability of Article 100 to employee participation in "non-company law" affairs and to material decisions, problems could arise owing to the directness of effects "on the establishment or functioning of the common market" not being immediately perceivable. It has already been stressed above, and will hardly be disputed, that the scope of employees' rights is such that they may considerably affect investment decisions and consequently the functioning of the common market. But there should also be no doubt as to "directness" in the outcome: the literature generally leaves out of account only such factors as have an

49. Goldman, *op. cit.* note 42, no. 630 (p. 691); Vignes, *op. cit.* note 47, p. 167.

50. As correctly noted by Vignes, *op. cit.* note 47, p. 166.

51. This is overlooked by Sonnenberger, (1971) AG, 77.

52. See Directive No. 75/129 of Feb. 17, 1975, O.J. 1975, L 48/29; see further Lyon-Caen, *Droit social international et européen*, 4th edn. (Paris 1976) no. 401 (p. 341). *Cf.* now also Directive No. 77/188 on the safeguarding of employees' rights in case of mergers, takeovers *etc.*, O.J. 1977, L 61/26. For these two directives on the protection of workers rights, see article by B. A. Hepple in this volume, *infra* 489-500.

indirect effect, *i.e.* those which like family and inheritance laws, relate to processes which condition the economic behaviour of the citizen on the market.[53] The separate sphere of application of Article 100 on the one hand and Articles 101 and 102 on the other, intended by the framers of the Treaty, also argues in favour of a broad interpretation of the principle of directness. If Articles 101 and 102 empower the Commission to act in the case of a distortion of competition, then the assumed (negative) effects in Article 100 on the functioning of the common market must obviously be less extensive. From this standpoint then there need be no reservations about applying Article 100 EEC Treaty in the area under consideration, although excessive discrepancies in employee participation rights (not negotiated through decision-making bodies) and the resulting peaceful or conflict-prone social relationships may have economic effects, including the flight of capital, which would at least come close to being a "distortion of competition" in the sense of Art. 101 and 102 EEC Treaty, and could have even wider implications.

3. *Employee Participation Directive and Property Guarantee*

In addition to the objection concerning legal competence dealt with up to now, any Commission and Council initiative concerning employee participation must also face a material objection. In view of the precedent set by the constitutional law discussions in Germany,[54] parity employee participation and property guarantees may well be represented as being incompatible.[54a] Article 222 of the EEC Treaty could offer a reference point in that it reserves property regulations to the Member States and thus automatically limits the action of Community bodies. Secondly, it is conceivable that property could be considered among the basic rights which, on the basis of the case law of the European Court of Justice, are also binding on the Community bodies as general principles of law.[55] This would be supported, *inter alia*, by the stipulations on property guarantees contained in Article 1 of the Additional Protocol to the European Convention on

53. Ficker in: Von der Groeben/von Boeckh/Thiesing, *op. cit.* note 29, Art. 100, note III 2; Goldman, *op. cit.* note 42, no. 621 (p. 685). For an express inclusion of "labour matters", Smit/Herzog, *op. cit.* note 30, vol. 3-521 (100.06).

54. For references, see note 48 above.

54a. See in particular Burghardt, *Die Eigentumsordnungen in den Mitgliedstaaten und der EWG-Vertrag* (Hamburg 1969) p. 67, 101 *et seq.* and *passim*.

55. See Case 29/69, *Stauder* v. *City of Ulm*, 15 *Recueil* 1969, 419; Case 11/70, *Internationale Handelsgesellschaft*, 16 *Recueil* 1970, 1125; Case 4/73, *Nold* v. *Commission*, (1974) E.C.R. 491.

Human Rights.[56] However, it is not necessary to go into these matters at this point[57] as the employee participation regulations under consideration are not sufficiently relevant to property: there should hardly be any doubt that the options proposed in the fifth draft directive (one-third participation and the Netherlands co-optation system) make no changes in the relation of an undertaking to its owners. The same applies to collective bargaining procedures, since in the final analysis they simply represent a market relationship where the strengthening of one party by no means implies a loss of property to the other. Finally, with regard to possible parity in management bodies *de lege ferenda*, care should be taken not to repeat the error of the German debate at European level: it consisted in transforming employee participation into a legal problem, for which a lasting solution will be difficult to find as long as the interests involved are expressed almost entirely in the terms of legal argument.

III. LIMITATION OF EMPLOYEE PARTICIPATION TO JOINT STOCK COMPANIES

Up to now, the Commission has confined its efforts with respect to employee participation exclusively to joint stock companies, and has simply made a number of general (as it turns out thoroughly praiseworthy) statements concerning undertakings within a group of companies.[58] The decisive consideration is that joint stock companies, as typical large undertakings, are most heavily involved in transfrontier trade and that agreement among other corporate forms could easily be secured once the main

56. The European Convention on Human Rights is dealt with by the Court as part of Community Law because it expresses general legal principles of the Member States; see Case 36/75, *Roland Rutili,* (1975) E.C.R. 1219; Golsong, EuGRZ (1976), 19. On binding the Community institutions, see also Claudi, *Die Bindung der EWG an Grundrechte* (Munich 1976) p. 399 *et seq.*, 424.

57. This matter is not much advanced through Riegel's attempt in *Das Eigentum im Europäischen Recht* (Berlin 1975) to derive a concept of property under Community Law from the basis freedoms and other provisions laid down in the EEC Treaty: basically, it corresponds to earlier liberal thinking. The arbitrariness of this interpretation becomes apparent *inter alia* from his comments on social policy at p. 134: "Pursuant to Article 117 (1) the Member States pledge themselves to promote an improved standard of living for workers. An improved standard of living necessarily includes, also in accordance with the respect for liberty underlying the EEC Treaty, measures favourable to property (asset formation, *etc.*), inasmuch as only property can in the long run guarantee social independence" (translation of German text).

58. Green Paper, p. 103 *et seq.*

problem of the joint stock company has been solved.[59] The Commission's self-limitation is consequently not the result of lack of competence—Article 58 para. 2 of the EEC Treaty excludes only non-profit organisations from the rules concerning freedom of establishment and thus from Article 54 para. 3 (*g*)[60]—but stems rather from a deliberate legal policy decision.

The optimism which finds expression here is convincing only if employee participation is perceived as a purely technical means of improving company structure, to a certain extent as a development of human relations methods, which secures employee loyalty and, after successful testing, earns the acceptance of any reasonable company head. If on the other hand, employee participation is regarded, in accordance with the Commission's standpoint as a means of asserting employee interests and democratising the production process, resistance is to be expected from employers whose freedom of decision it limits. If they do not regard employee participation as an interesting experiment, but as an evil threatening their own power they will understandably look for ways to circumvent its effects.

Apart from those exceptional cases in which a transfer of the registered place of business to a non-EEC country is feasible, the principal step taken in this respect is a change of corporate form. A joint stock company becomes a company with limited liability, a company limited by shares (but having one or more general partners), a foundation or a partnership, such as a general partnership or a limited partnership[61] and thus automatically avoids employee participation which applies only to joint stock companies. This generally involves great expense and unnecessary taxes, although neither of these constitutes an insuperable obstacle in every case. A certain amount of falling away may therefore be expected.

In many cases the option of changing their legal form is *a priori* not open to domestic joint stock companies. Their large numbers of shareholders prevent public companies from becoming companies with limited liability or foundations; other undertakings are obliged to make considerable use of the capital market, and this compels them to retain the legal

59. *Cf.* also Niessen, (1973) Z.G.R., 220.

60. This area is much narrower than that of *Tendenzbetriebe* (*i.e.* companies with, for example, a predominantly charitable, educational, cultural, informative purpose) under para. 118 (1) of the BetrVG. See Troberg in Von der Groeben/von Boeckh/Thiesing, *op. cit.* note 29, preliminary remark III on Art. 54.

61. Not all of the transformations mentioned here are possible in every Member State; the procedure itself is also subject to differing rules. However, the possibility of setting up a company with limited liability and transferring to it the assets of a joint stock company probably does exist everywhere.

form of a joint stock company. Nevertheless, even here there is a risk of employee participation being undermined: the joint stock company does not change its form but attaches itself by contract to an undertaking whose form exempts it from employee participation. Under German business combination law, this completely neutralises employee participation in the supervisory council.[62] This is the point at which the Commission's considerations concerning business combination law would apply in that it wants a group's top management decisions to be binding only if the employees may make their influence felt at the same level.[63] This exceeds the rules of German law which considers that instructions are always binding and that employees of a subsidiary may only participate indirectly in the decisions of the parent company, *i.e.* by taking part in the elections to the supervisory council if the parent undertaking is organised as a limited company.[64] If the Commissions proposal were adopted it would prevent wide-scale avoidance of employee participation. Owing to the above-mentioned possibilities of circumvention, confinement to joint stock companies is, if not a happy, at least an acceptable solution.

These observations, of course, only apply where capital and labour are equally represented on the supervisory board. On the other hand, if employees have simply a minority representation, there are many ways in which shareholders' representatives may shift actual decision-making away from the supervisory board and thereby further reduce the ability of employees to make their influence felt.[65] In this case there is no need to take the circuitous route of changing the undertaking's form or of making alterations under business combination law, although this problem has strictly speaking nothing to do with the limitation to joint stock companies.

62. Para. 308 (3) of the *Aktiengesetz* (Stock Companies Act, henceforth AktG). The conclusion of a control contract nevertheless entails, pursuant to para. 302 AktG, the assumption of losses by the controlling undertaking.

63. Green Paper, p. 104.

64. Para. 308 (3) AktG; paras. 76 (1) and (4) BetrVG 1952; para. 1 *Montan-Mitbestimmungsergänzungsgesetz* (Coal and Steel Co-determination Extension Law) of Aug. 7, 1956, BGBl I, 707; para. 5 *Mitbestimmungsgesetz* 1976, ref. note 7.

65. The Commission correctly notes (Green Paper p. 30) that minority representation does not lead to a fundamental shift in the balance of power as regards decision-making. However, it draws no conclusions from this in regard to establishing complete parity. *Cf.* also Davies, "European Experience with Worker Representation on the Board" in Industrial Democracy Committee, *Industrial Democracy, European Experience* (H.M.S.O. London 1976) p. 59 *et seq.*

IV. POSITIVE AND NEGATIVE ASPECTS OF EMPLOYEE REPRESENTATION ON DECISION-MAKING BODIES

Undoubtedly a central concern of the Commission, despite all its "flexibility", is employee representation on the supervisory board, which can be replaced by other types of employee representation only during a transitional period. Is this really, in accordance with the Commission's own claim, the appropriate way to associate those affected by decisions with the decision-making process? Can it make a substantial contribution to human dignity and autonomy?

1. *The Undertaking's Sphere of Action*

The Commission has correctly stated that employee participation in undertakings can only be one aspect of a comprehensive employee participation scheme which must also include employee participation at works level, employee participation through collective bargaining and the involvement of unions in overall economic planning. It also notes that each of these types of participation enhances the effectiveness of the others; thus, the success of participation in undertakings depends essentially on effective collective bargaining and active employee representatives.[66]

Although little in this can be gainsaid, there is a danger of overestimating the effectiveness of a legally comprehensive participation system. The Commission seems to tacitly assume that economic activity as a whole can be broken down into a plurality of decisions, no longer to be taken solely by shareholders and their representatives but rather by capital and labour acting together. At the same time, this implies a freedom of decision which in reality does not exist. In a capitalistic market economy, undertakings are unable to set their production goals arbitrarily. For both investments and sales they are obliged to adopt the strategy which, in view of market conditions, promises them the greatest likelihood of profits.[67] This means that they are at best free to choose from among various forms and procedures for maximalising profits. In specific cases, they may have no choice at all. This restricted freedom of decision becomes particularly apparent in times of crisis, when in many cases only a specific company policy—*e.g.* unconditional rationalisation with heavy

66. Green Paper, pp. 22, 25 *et seq.*

67. Among the works on employee participation see Batstone, "Industrial Democracy and Worker Representation at Board Level: Review of the European Experience" in *Industrial Democracy, European Experience, op. cit.* note 65, p. 19 *et seq.*; Däubler, *Grundrecht auf Mitbestimmung* 3rd unrevised edn. (Frankfurt/Main 1975) p. 39 *et seq.*

job cutbacks—ensures market survival. In such situations, participation in an undertaking ceases to have a positive effect; where there is basically nothing more to decide, it inevitably becomes an exercise in futility.

It even entails a disadvantage for employees: their representatives are obliged to share in the actions imposed on the undertaking by external (economic) circumstances. They may be confronted with the choice of agreeing to the dismissal of thirty per cent of the staff or contributing to the closure of the whole plant by using their veto. Should they opt for the first alternative—which would be natural—the employees affected will regard them as being jointly responsible for an act completely at variance with the interests of wage and salary earners. This would predictably weaken the employee representatives and prevent the pressing question of company policy alternatives to the existing economic order from ever being asked. Those affected would think that "their people" had done all that was humanly possible. If they could not obtain more, it was because the "force of circumstances" prevented them from doing so. This lends employee participation a "pacifying" role, which may be approved in connection with the existing economic order, but which must nevertheless be clearly mentioned in a rational political discussion. The Commission may be reproached with the fact that in failing to mention the dependence of undertakings on the market and the system in its comments, it runs the risk of creating illusions as to the significance of employee participation.

Discussion of undertakings' limited freedom of action, however, should not lead to the assumption that economic determinism exists even in those areas where there is scope for manoeuvre. It is not unusual for undertakings to have a certain operational margin in connection with their efforts to maximalise profits. It may, for instance, be both possible and reasonable to earmark a proportion of the profits for social purposes, thereby securing long-term employee loyalty, or to spread efficiency measures over a sufficiently long period to enable most of the employees affected to find other jobs. Particularly in periods of prosperity, corrective social measures may be implemented, with those which will be of greatest advantage to employees being selected from among the available options. From this standpoint, further discussion of "employee participation" is perfectly sensible; the above-mentioned limits to freedom of action, however, must always be borne in mind.

2. *Continuous Participation in Company Decisions?*

One of the main advantages of employee representation on decision-making bodies is, in the opinion of the Commission, timely and continuous participation in all decisions. Such participation would differ fundamentally from the process of influencing company action through collective bargaining, which can only begin after the decisive positions have been taken up and the employees, as the consequences begin to be apparent, show signs of resistance.[68]

The effectiveness of employee participation can only be judged in the light of the relations between the individual employees and their representatives. How the representatives are selected does not concern us here. It may be through a preliminary election by the employees, election by representative institutions or designation by the trade unions. Employee participation, however, remains the right of the individual employees whose interests and affairs are involved. Effective participation therefore depends on regulations which put employee representatives on management bodies in order to safeguard employee interests.

The most important means for accomplishing this is election or appointment by a democratically constituted body. In itself, however, this is not enough to guarantee subsequent, adequate attachment to employee interests, as the period of office generally extends over several years, and refusal to re-elect is often felt to be too severe a means of protesting against a representative's actions in connection with a particular matter. Furthermore, employee identification of interests depends on adequate information. Only an individual who is familiar with the problem can form an idea of the options open to him and appraise the correctness of other persons' attitudes. A precondition for this is a certain level of education and having the opportunity of learning all the relevant facts, even in the face of opposition from a representative who is shielding himself.

Unfortunately, the Commission makes no reference to this problem of "internal democracy". At no point does it mention that employee representatives on decision-making bodies are accountable to the employees as a whole or to the trade unions, nor is the possibility of removal from office (by majority vote) brought up. What the Commission does advocate is that employee representatives be given the same legal status as shareholders' representatives.[69] This means, for one thing, that their first concern would no longer be employee interests, but rather the welfare of the undertaking, which in the best of cases would imply employee interests also being taken into account, and in the worst, amount to a total commitment to maximum profitability.[70] Secondly, the flow of information to

68. Green Paper, p. 21 *et seq.*, 25 *et seq.*

69. Green Paper, p. 41 *et seq.*

70. The discussion on company welfare still alternates between these two poles in the Federal Republic; see further Davies, *op. cit.* note 65, p. 67; Reich/Lewerenz, (1976) *Arbeit und Recht*, 356 *et seq.* with further references.

employees would be impeded by the need to keep secret all data whose disclosure would presumably harm the undertaking.[71] Both obligations are lent particular effectiveness by the fact that an employee representative involved in an infringement is not only exposed to dismissal from office, but also, in accordance with the provisions of national company law, to an obligation to pay damages, which could ruin him financially for years. The dilemma confronting such a representative is further complicated by the vagueness of the concepts "Company welfare" and "possible damage": if he wishes to avoid risk, he will abstain even from actions which in a law suit could (and probably would) be approved by the court. An employee representative will often hesitate to inform employees of a planned closure, for instance, as disclosure of such an intention could give rise to economic disadvantages such as the cancellation of orders or the withholding of credits, for which he might then be held personally accountable. This would apply, should a dispute arise, even if the competent court had asserted that in view of paramount employee interests such damage should be accepted.

The obstruction of communication between employee representatives and employees generated by such rules—together with their being under pressure not to consider employee interests exclusively—leads to employee representatives shielding themselves and becoming independent. The fact that they can no longer fully represent the interests of their "base" provides a further inducement to withhold information and wherever possible "not to show their hands". A point may be reached where—as a survey taken in the German coal and steel industry, which has parity employee participation,[72] showed—only about half of the "participating" employees are aware of the existence of employee participation in their own undertakings. To be sure, this should not be incautiously generalised; it does however show the great danger of intended democratisation remaining simply a claim and employee participation bringing about nothing more than a partial exchange of management elites. Communication between employees and employee representatives, together with the legal status of the latter, is nevertheless more than a peripheral technical question; if no satisfactory solution is found to it, the Commission's employee participation proposal is doomed to failure at the outset. A more thorough examination than that which appears in the Green Paper is thus required.

Even if the problem of employee representatives' subsequent commitment is left aside—either because their becoming independent is accepted as inevitable, or because machinery is developed which ensures adequate employee participation—there still remain further obstacles to the continuous participation (at least) of employee representatives in major company decisions.

71. Green Paper, p. 45.

72. Quoted in Thomssen, *Wirtschaftliche Mitbestimmung und sozialer Konflikt* (Neuwied and Berlin 1970) p. 56. This relates to polls taken in the middle sixties by Infas and Emnid, two opinion poll institutes.

On the one hand, it will always be difficult to find individuals whose training and social-political commitment enables them to effectively scrutinize management, *i.e.* to consider all the implications of proposals coming from that quarter and to offer counter proposals based on employee interests. Particularly in the case of decisions having long-term effects (and according to the Commission it is precisely these rather than collective bargaining decisions which it should be possible to influence) it would be very difficult for anyone who is not a management expert to appraise the prospects and risks involved in, say, an overseas investment with any degree of accuracy. The company managers, however, either acquire their knowledge through a university education or work their way up in the undertaking (which may involve long years of perseverance), two possibilities which for the time being at least are not open to a works council member or a shop steward elected to a company body. In practice, inequality of intellectual equipment will be found to exist between the supervisors and the supervised. To be sure, there can and do exist exceptions to this and specialists are to be found on the employees side, particularly when the unions are allowed to send delegations or have the right to nominate. In general, however, lower qualifications are inevitable and this, as the Yugoslavian example, among others, shows,[73] does obstruct effective control.

Secondly, although it would appear to be a minor matter, the problem of time must be considered. If employee representatives' posts are honorary and the representatives are active in additional occupation—roughly the case in Germany—this places them at a disadvantage right at the outset as regards information in comparison with the "professionals" in the company's management.[73a] Anyone earning his living in another post will be able to make the occasional commonsense objection, but he is unlikely to be able to hold his own in a well-founded discussion of the facts. This could perhaps be remedied if the union or the company, at its own expense, were to provide him with collaborators to do the necessary preliminary work and supply him with material for discussion—a matter which thereby becomes more than a question of technical organisation.

73. Batstone, *op. cit.* note 67, p. 20; Lemân, *Das jugoslawische Modell* (Frankfurt/Main, Köln 1976) p. 112 *et seq.*

73a. Correctly noted by Davies, *op. cit.* note 65, p. 66.

Thirdly, it should be noted that supervisory councils or the non-management members of boards of directors are by no means able to influence the decision-making process at all stages, owing to their status under company law. If, for instance, large-scale investment plans are involved, the number of options which might be considered is usually reduced by the planning department in accordance with certain general criteria.[74] The alternatives selected are then worked out in detail and submitted to the management board and in some cases to the supervisory council. Frequently, both of these may only approve or reject the plan, as for all practical purposes neither is in a position to monitor the process by which options are eliminated. In these circumstances, the consistent application of the principle that employee interests are to be represented at all stages of the decision-making process would require that employee representatives be delegated to planning departments.[75] To regard this as a semi-automatic consequence of parity membership on the supervisory council would nevertheless be illusory: the almost 30 years experience of the German coal and steel industry has shown that this is precisely what does not occur and that employee representatives' activities are confined to asking a few questions and then approving the management's proposals. They only take the initiative when employee interests are directly affected, as in the case of restructuring operations.[76] Actual employee activity thus does not go beyond the sphere which in other countries is sometimes included in collective bargaining procedures.

As a result, the Commission's assumption that employee representation on the supervisory council or the board of directors leads to continuous employee participation in the company's decision-making processes, must be challenged. Without additional measures being taken for the solution of the time and eligibility problems, and for employee participation in all phases of management, including the planning department, the scope of employee participation will predictably not extend beyond that of collective bargaining, although unlike the latter it entails the danger of the estrangement of the representatives from the represented.

3. *Improvement of Other Types of Employee Participation*

The Commission feels that a further advantage of employee representatives

74. In respect of this and what follows see Fleischmann in Heinz O. Vetter (ed.), *Mitbestimmung, Wirtschaftsordnung, Grundgesetz* (Frankfurt/Köln 1975) p. 67 *et seq.*

75. *Ibid.*

76. Brinkmann/Herz, *Die Unternehmensmitbestimmung in der BRD* (Köln 1975) p. 67 *et seq.*, 73.

participating in decision-making bodies lies in the fact that representative institutions and the collective bargaining system function more effectively if management is subject to scrutiny by a supervisory council whose members include employee representatives.[77] If "more effective" is taken to mean better representation of employee interests, then this may be legitimately doubted. It is clear from German experience, on the one hand, that the formal rights of works councils in the mining sector and the iron and steel industry were wholly respected, whereas in non-participation areas they were often disregarded by management.[78] On the other hand, there are some large undertakings not subject to parity participation, for example, the German branch of IBM, which grant works councils rights exceeding those provided for in law in order to establish the works councils (and generally succeeding in so doing) in the role of social partners.[79] Consequently, it may at least be considered a possibility that a genuine strategy of integration is actually being pursued in the coal and steel industry as well, particularly in view of the fact that open conflicts, such as industrial confrontations, are extremely rare in that sector.

More specific comments may be made on the interaction between autonomy in negotiating wage rates and employee participation. Körner has recently worked out that actual wages in the (non-participatory) North Rhine-Westphalia metal *processing* sector rose annually from 1958-1966 by 1.86% more than they did in the participatory iron and steel *producing* sector.[80] If the increased productivity achieved during this period is also included it emerges that labour costs in the metal processing sector rose 2.52% faster, whereas in the coal and steel sector wage policy did not affect employment costs, *i.e.* was linked to increased productivity.[81] This is all the more noteworthy as both sectors have been organised by the same union and are located in the same geographical area. Such developments are generally attributed to the "moderating" influence of employee directors (*Arbeitsdirektoren*), who are still regarded as forming part of the trade union movement. Of course, this experience cannot be generalised and applied to conditions in other countries. However, all those concerned

77. Green Paper pp. 26, 38.

78. Hensche, (1973) *Mitbestimmungsgespräch*, 165.

79. Alberts/Klinger *et al.*, *Mit IBM in die Zukunft, Berichte und Analysen über die "Fortschritte" des Kapitalismus* (Berlin 1974) p. 89 *et seq.*; Gerd Peter, *Das IBM System. Zur Lage der abhängigen Arbeitenden in den achtziger Jahren: Disziplinierung durch Programmierung?* (Frankfurt/Main, Köln 1975) pp. 158 *et seq.*, 204 *et seq.*

80. Körner, *Mitbestimmung der Arbeitnehmer als Instrument gesamtwirtschaftlicher Einkommenspolitik* (Göttingen 1974) p. 94.

81. *Idem* at p. 97 *et seq.*

should now make greater allowance in their observations for the possibility that "more effective" functioning of representative institutions and the collective bargaining system can mean nothing more than employee restraint and avoidance of conflict.

4. *Participation in Decision-Making Bodies as a Source of Employee Satisfaction?*

On various occasions, the Commission notes in its Green Paper that employee participation in company boards can make a unique contribution to the avoidance of "unnecessary" labour disputes; this would be the way to preserve not only individual undertakings from losses but also the social and economic system as a whole.[82] This was also effectively stressed by Gundelach at an employee participation congress of the *Deutscher Gewerkschaftsbund*.[83] In other quarters it has also been urged that employee participation is accompanied in a general way by increased production.[84]

Batstone has quite correctly noted that it is impossible to make an accurate forecast concerning the possible avoidance of industrial confrontations; no basic changes have so far occured.[85] Nor can such a forecast be based on German experience, despite the long period covered. Although there have been no union-organised strikes in the mining sector or in the iron and steel producing industry since parity employee participation was introduced, a series of spontaneous work stoppages has occured since at least 1969.[86] Comparison with non-participatory sectors would be very difficult as no publication deals with spontaneous strikes with any degree of completeness.[87] Furthermore, it is precisely the sector with employee participation which has a tradition of militancy dating back to before National Socialism and the period following World War II;[88] this would further complicate an attempt to align it with other sectors of the economy. However, this fact together with the restraint exercised in

82. Green Paper, p. 39; *cf.* also pp. 23, 32.

83. Gundelach in Heinz O. Vetter (ed.), *op. cit.* note 74, p. 32.

84. Fleischmann, *op. cit.* note 74.

85. Batstone, *op. cit.* note 67, p. 35.

86. *Cf.* Eberhard Schmidt, *Ordnungsfaktor oder Gegenmacht. Die politische Rolle der Gewerkschaft* (Frankfurt/Main 1971) p. 81 *et seq.*; Jacobi/Müller-Jensch/Schmidt, "Gewerkschaften und Klassenkampf", *Kritisches Jahrbuch* (Frankfurt/Main 1974) p. 44 *et seq.*, 55 *et seq.*

87. *Cf.* Kalbitz in Jacobi et al., *Kritisches Jahrbuch 1973*, p. 163 *et seq.*

88. U. Schmidt and T. Fichter, *Der erzwungene Kapitalismus. Klassenkämpfe in den Westzonen* 1945-1948 (Berlin 1971) p. 23 *et seq.*

wage policy would suggest that participation may be regarded as a probable source of employee satisfaction.

If this assumption, obviously shared by the Commission, is acknowledged to be correct, then the negative judgement passed on strikes comes as a surprise. Collective work stoppages are a recognized and accepted part of the national legal system in all Member States; in some they are actually considered to be a basic right. To want to regulate their use through Community legislation is an unusual project which requires further discussion. In addition, there seems to be no warrant for summarily equating strikes with economic losses.[89] For one thing, the working hours lost during an industrial confrontation are made up in many cases, so that the production backlog is eventually cleared up.[90] For another, it must be asked: what would be the loss in quality of life for the great majority of the working population if they could no longer defend their interests, or no longer to the same extent, through work stoppages? It would be to disregard history entirely to take a specific state of intra-works relations, achieved under the conditions imposed by a recognized right to strike, as a basis even after workers' ability to bring social pressure to bear had been sharply reduced. Finally, the quantitative aspect should not be exaggerated. Twenty-two million working days lost through strikes amount to no more than approximately one additional national holiday in the Federal Republic or the United Kingdom. This is not altered by the fact that strikes often come as a surprise, whereas holidays are scheduled: the effects of a "surprise" can generally be neutralised through subsequent production efforts. Therefore, it is not strikes themselves but rather the conflicts underlying them which should be judged negatively.

5. *Conclusion*

The Commission proposal cannot be adopted in its present form. Apart from the danger of overestimating the scope of company freedom of action and consequently the impact of employee participation in company bodies, the following objections may also be made to it:

— Failure to take into account the relationship between employees and employee representatives opens the way for elitist, undemocratic forms of participation. Giving employee representatives the same legal status as

89. For details on the "harmfulness" of strikes, see Däubler, *Das Arbeitsrecht* (Reinbek 1976) p. 143 *et seq.*

90. Employees of the Daimler-Benz Co. went on strike in 1963 and 1971, each time for 3 weeks, while there were no strikes at other car manufacturers. A comparison of company earnings showed that no adverse effects resulted for Daimler-Benz.

shareholders' representatives, as the Commission does, ties them to the welfare of the company and imposes on them the obligation of secrecy, thus making the development of such a situation likely.

— Employee representatives on decision-making bodies do not generally have sufficient time or qualifications to monitor management effectively or counter its proposals with alternatives based on employee interests. Continuous participation in the decision-making process would also require employees to be represented at all levels of management. There is as yet no sign of a solution to this problem.

— There are many indications that parity employee participation actually weakens representative institutions and the bargaining power of unions in the area of collective agreements.

— The theory that parity employee participation reduces industrial confrontation can neither be proven nor refuted. It therefore cannot be used to justify a reorganisation of company structure, particularly as the implicit negative judgement concerning strikes cannot be vindicated on economic grounds.

V. ASPECTS OF COMMUNITY LEGISLATION

1. *Collective Bargaining and Development of Representative Institutions as an Alternative?*

If the drawbacks to employee representation on decision-making bodies, outlined above, are considered unacceptable, an alternative exists in the form of "non-institutionalised" employee participation. This would obviously avoid many of the defects of the Commission's proposal: the need to assert demands, when necessary through industrial action, prevents representatives from becoming independent; rather than their being tied to the company welfare there is a clear defence of interests; the area of management decisions included depends on the desires of those concerned. This in itself is not enough for full endorsement; it does however draw the Commission's attention to the large number of drawbacks connected with the proposed type of employee participation.

(i) Labour's bargaining position remains limited, for example, in the case of a plant closure, and industrial confrontation is an inadequate means, as the many plant occupations of recent years show.[91] However accurate this observation may be, no compelling argument against non-institutionalised employee participation can be deduced from it. As plant closures are not

91. Green Paper, p. 24.

usually arbitrary acts, but the result of chronic deficits, even the most qualified and loyal employee representatives on the supervisory council or the board of directors would have no other choice than to agree to such a measure, or at least not obstruct it. This is the point at which both conventional industrial confrontation and institutionalised employee participation become stymied.[92] The obvious objection that participation on company boards enables employee interests to be defended from an earlier point in time, overlooks—as shown above[93]—the actual potential of the types of employee participation which have been introduced so far. Much more to the point is whether the possibility of (conventional or more sophisticated) industrial confrontation does not constitute an important factor at all stages of the decision-making process, whereas institutionalised employee participation only results in plans, which take little account of employee interests, being presented to a few "insiders" in a somewhat more adroit manner than they would be otherwise.

(ii) Collective bargaining is also alleged to have a further disadvantage in that it "frequently occurs at levels which are somewhat remote as far as employees are concerned".[94] This may be true in many cases of bargaining at national level or within a particular branch. Even in such cases, however, in view of the fact that employees may be obliged to strike for their demands, a counter link between bargaining representatives and employees is indispensable, although unlikely to exist where employees are represented on company boards. For the rest, there is no obligation to shift bargaining over specific company decisions onto a higher level: Italian experience, for instance, shows that such matters may very well be negotiated at the level of individual firms.[95]

(iii) The Commission's argument that collective bargaining is inappropriate as a general means of achieving equivalent standards and safeguards, since the results depend on the relative bargaining power of the parties,[96] is also not very convincing. On the one hand, institutionalised employee participation does not take place in a vacuum. Whether employee representatives carry weight on supervisory boards or whether their statements are more of the nature of parallel commentary depends to a large extent on labour's "bargaining power" and this in turn is determined by

92. Expansion of industrial confrontation law could thus be considered as an alternative. On the admissibility of plant occupation, see Camerlynck/Lyon Caen, *op. cit.* note 2, no. 712-714; Däubler, *op. cit.* note 89, p. 182 *et seq.*; TUC, *Industrial Democracy, op. cit.* note 9, no. 2-14.

93. IV 2 above.

94. Green Paper, p. 33.

95. *Id.* at p. 78.

96. *Id.* at p. 33.

the quantity and scope of the means of exerting pressure which can be brought to bear. On the other hand, the Commission proposal does not establish equivalent standards or a uniform legal position, as it is envisaged as minimum legislation which may be improved for the benefit of employees. On this basis as well, differences in power relationships between capital and labour would be reflected in the legislation.

(iv) Finally, giving the right of veto to representative institutions is rejected in connection with economic (as opposed to social) matters on the grounds that it would entail the risk of paralysing the enterprise as a business organisation.[97] This is unconvincing. In the first place, in view of the close interdependence between economic and social affairs, there is a basic inconsistency in granting representatives the right to participate in social matters while excluding them from matters involving company policy. The ability of a works council to prevent the introduction of overtime or short-time may have greater economic effects than participating in the decision to open a branch office or sales strategy for a particular product. The Commission also contradicts its own premises whereby employees, owing to their personal interest in work and the danger of losing their jobs, "have interests in the functioning of enterprises which can be as substantial as those of shareholders and sometimes more so".[98] Why should they use the laws available to them to "cripple" an undertaking, i.e. to put it more or less out of commission, thereby putting it on the road to economic ruin? This reveals a tendency, which can also be seen in the German Co-management Commission, to make extraordinarily far-reaching statements on a very abstract level in favour of employees (which in general could only be consistently implemented in a social-democratic society), while exercising the greatest restraint when it comes to formulating concrete proposals, even to the point of allowing an (objective) partisanship in favour of employer interests to predominate.[99] Anyone who, like the European Commission, desires the democratisation of undertakings, should beware of destroying in this way the basis of his own arguments.

(v) However unconvincing the objections to non-institutionalised employee participation may be, one should guard against taking the latter as a completely problem-free alternative to the Commission proposals. First of all there is the question of information: how can the union or the representative institution procure the data needed to justify its demands

97. *Id.* at p. 34.

98. *Id.* at p. 9.

99. BT-Drucksache VI/334, p. 56 and p. 96 *et seq.*

and refute the company's counter-arguments? The traditional procedure, as mentioned by the Commission as well, was the granting of rights to information *vis-à-vis* employers, which if necessary are enforced by the State. Frequently, however, too little attention is paid to the fact that information—whether offered voluntarily or under constraint—imparted by someone who may have an economic interest in its being incomplete, is not likely to be the best source of intelligence. Consequently, a second information system must be set up which is independent of management and which is generally under union control. Among its functions should be the analysis of balance sheets, the questioning of employees and the designation of experts in order to monitor management statements and provide negotiators with material for discussion.[100] Again, it should be noted that this is not a problem peculiar to non-institutionalised employee participation; on the contrary, the same difficulty arises in connection with participation on a supervisory board: there too it may happen that a particular set of matters is not communicated to the entire body or that the capital interests settle the decisive questions in advance during informal, internal talks.[101]

The second problem of collective participation lies in its dependence on employees being constantly ready to take action. In the case of "big" decisions such as plant closures, removal of production units or automation of work processes there is usually sufficient commitment. However, there are many other areas of industrial activity which have no directly perceivable connection with specific employee interests. Regarding the purchase of another firm, the pricing of a product or the launching of an advertising campaign, it is a rare employee who would be willing to back up the divergent vote of his representatives with a strike should the occasion arise. For such cases, therefore, a certain amount of "institutionalisation" is indispensable. As is provided for in Sweden,[102] an employee committee should be set up under a collective agreement with participatory rights in areas which are not "strike-liable" as such. This second problem would thus seem to be not wholly insoluble.

100. *Cf.* from among German authors, Koubek/Küller/Scheibe-Lange (ed.), *Betriebswirtschaftliche Probleme der Mitbestimmung* (Frankfurt/Main 1974) p. 84 *et seq.* with further references.

101. On the French supervisory boards, see Louis in Mégret *et al.*, *Le droit de la CEE*, vol. 7 (Brussels 1973) p. 95.

102. *Cf.* the survey in (1976) RdA, 237, 328, and Folke Schmidt, *op. cit.* note 13, p. 201 *et seq.*

2. *Material progress, procedural freedom—a programme for an employee participation directive*

The recommendation made to the Commission here, namely, an unequivocal vote for non-institutionalised employee participation through collective bargaining and representative institutions, cannot have as its outcome a complete revision of the Commission position and the adoption of the English or Italian models. The approximation of labour laws encounters a major difficulty in the form of highly divergent national traditions, all of which, however, are not merely law in the formal sense but rather are deeply rooted in the attitudes of unions and sometimes even in those of individual workers. Labour law is experienced more intensely than other sections of the legal system, often being invested with a strong emotional charge. Contrary to all internationalistic assurances of the labour movement, it has evolved within a strictly national framework.[103] This does not prevent equivalent results from being achieved in individual cases, although the means employed are entirely different.

For example, the compensation provided for by law in many countries in the case of dismissals for company reasons is paid on the basis of collective law in the Federal Republic. Where there is a works council it negotiates a "social plan" in the case of restructuring, which also provides for compensatory payments; there are also collective agreements on protection in the event of rationalisations which likewise provide for monetary adjustments.[104]

The need to make allowance for national labour law traditions should induce the Commission to refrain from adopting either the German or the Netherlands model of representation on company boards, or the English or Italian model, whereby company decisions are subject to collective bargaining, as binding on all Member States, even after a long transitional period. The sole purpose of the exercise is to give employees the opportunity of influencing company decisions. This must be dealt with in an initiative coming from the European Institutions. The end must be stated clearly, the means left to the Member States.

What does this mean in practical terms? The directive should be confined to providing for employee codetermination on equal terms in all

103. Unlike the civil law, there are consequently no "legal families" in W. Europe either; see further Däubler, *Grundrecht, op. cit.* note 67, p. 499 *et seq.*

104. Such agreements cover only 40% of all employees according to information appearing in (1972) RdA, 299 based on a survey made by the Federal Ministry of Labour.

matters relating to the conditions of work and job security.[105] The Member States should be obliged to provide the relevant legal preconditions; how they actually do so is up to them. They would be free to provide for half-parity membership on a supervisory board which would take decisions regarding conditions of work and jobs, or they could grant representative institutions the appropriate right of veto, or, finally, stipulate that collective agreements should also cover these areas. They would be prohibited solely from subjecting company decisions entailing work place cutbacks to any of these three processes or the equivalent.[106] This solution would also eliminate the tiresome problem of the dispute over the dualist or the one-board company system. However great or small the differences might be,[107] it would remain up to the Member States, if employee representatives on decision-making bodies were opted for, to decide whether to include them on the management board under the one-board system or on the supervisory board under the dualist system. All discussions should concentrate on the actual object in question. In the course of these discussions, and pursuant to Article 117 of the EEC Treaty, the Commission should take up the cause of employee participation and with it that of improved living and working conditions for working people. That even such a notion is bound to encounter resistance goes without saying. One thing, however, is certain, and that is that at least the battle will be joined on the right field.

105. Inclusion of all management decisions could probably not be achieved for political reasons. The present wording is borrowed from the American Fibreboard Doctrine which assumes a bargaining obligation on the part of the employer *vis-à-vis* the union in all such decisions. See further 380 U.S. 1965, 263 and various writings: Goetz: "The Duty to Bargain about Changes in Operations", (1964) *Duke Law Journal*, 1; Rabin, "Fibreboard and the Termination of Bargaining Unit Work", 71 *Columbia Law Review* 1971, 803.

106. The legal situation in the Federal Republic would thus have to be changed as, apart from the coal and steel sector, management decisions are not codetermined by supervisory boards, inasmuch as employees occupy only one-third of the seats. Under para. 111 BetrVG the works council has only consultative status but not the right to participate; finally, the prevailing opinion is that these decisions are also not subject to collective bargaining, see Biedenkopf, 46 *Deutscher Juristentag* (Munich 1966) p. 161 *et seq.*

107. Pertinent comments in Davies, *op. cit.* note 65, p. 53 *et seq.*