THE EUROPEAN ECONOMIC COMMUNITY AND THE VREDELING PROPOSAL: THE DEBATE TO TEMPER IDEOLOGY WITH REALISM

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For the past several years, the Vredeling Proposal has been one of the most hotly debated topics in Western Europe. The Proposal has been the focus of debate among politicians, business people, union leaders and industrial relations experts. In its original form as a draft directive of the European Economic Community, the Vredeling Proposal would require multinational enterprises, including European subsidiaries of American corporations doing business within the Common Market, to consult with their employees' representataives before adopting corporate policy which might affect the livelihood or working conditions of the employees. In addition, the directive would require multinational corporations to provide their employees with information annually regarding not only the corporation's structure and financial stability, but also its commercial expectations, plans, and prospects for the future.

Although the amended proposal has had overwhelming support from labor leaders, it has evoked explosive protest from both European and American business associations. Business officials in Europe and the United States have vehemently attacked the proposal by arguing that the draft directive is not only too ideological, but implementing the directive would serve to undermine the authority of management of European subsidiaries.

This Article will analyze the development of the Vredeling Proposal from its inception through its most recent revision. The Article will examine many of the key provisions which have generated debate and which ultimately led to the amended proposal. Finally, the Article will analyze some of the possible difficulties which would be encountered in implementing the current revision of the Vredeling Proposal.

I. THE DEVELOPMENT OF THE VREDELING PROPOSAL

The implementation of the Marshall Plan in Western Europe served to boost the weakened European economies of the post-war years. In contrast to the economic growth and prosperity of the post-war years, the 1970's and 1980's saw a decline in economic strength throughout Western Europe.[1] Following the devaluation of the United States dollar in 1971, and the oil crisis of 1973-1974, Western Europe has been plagued by spiraling inflation and increased unem-

1. Carr & Kolkey, *U.S. Perspective on the Vredeling Proposal and Other Proposals by the EEC*, 1984 INT'L. BUS. LAW. 57.

ployment.[2] The rate of unemployment throughout Western Europe increased from approximately three percent in 1970 to eleven percent in 1984.[3] Over the past decade, the number of jobs has increased by only one-half percent in the ten-member European Economic Community.[4] Furthermore, if the rate of unemployment continues to rise while the European gross national product increases only slightly, the European Community is certain to suffer the effects of an inflationary economy.[5]

Given the weakened European economy as it has existed over the past decade, it is not surprising that European Community officials have attempted to initiate various programs aimed at protecting the rights of employees. For example, on October 9, 1972, the European Commission announced its Fifth Company Law Directive. This directive, aimed at safeguarding employee participation in the decisions of management, required that the employee representatives be directly elected by the general workforce.[6] In 1975, the Council of Ministers adopted another directive which obligates employers to comply with specific notification and consultation requirements when a large number of employees are dismissed. This proposal focused on the protection of employees in cases of collective redundancies.[7] In 1977, the Council of Ministers adopted yet another directive which gives employee representatives the right to receive notice and to participate in consultations regarding corporate mergers and acquisitions.[8] Like the previous directive, the purpose of the 1977 directive was to safeguard the rights of employees.[9]

On October 24, 1980, the European Commission presented the Vredeling Proposal to the Council of Ministers.[10] The adoption of

2. Although the 1973-74 oil crisis threatened the economies of developed countries world-wide, the effects in Western Europe have continued for more than a decade. *Id.*

3. *The New Economy*, TIME, May 30, 1983, at 65.

4. *Id.*

5. *See* Carr & Kolkey, *supra* note 1, at 57.

6. 15 J.O. COMM. EUR. (No. C 131) 49 (1972).

7. *Council Directive of 17 February 1975 on the Approximation of the Laws of Member States Relating to Collective Redundancies*, 18 O.J. EUR. COMM. (No. L. 48) 29 (1975).

8. *Council Directive of 14 February 1977 on the Approximation of the Laws of the Member States Relating to the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, Businesses or Part of Business*, 20 O.J. EUR. COMM. (No. L 61) 26 (1977).

9. For a general discussion of the directives of 1975 and 1977, *see* Hepple, *Community Measures for the Protection of Workers Against Dismissals*, 14 COMMON MARKET L. REV. 487 (1977).

10. *Proposal for a Council Directive on Procedures for Informing and Consulting Employees of Undertakings with Complex Structures, in Particular Transnational Undertakings*, 23 O.J. EUR. COMM. (No. C 297) 3 (1980) [hereinafter cited as Vredeling Proposal].

the proposal would obligate parent companies of a transnational enterprise to transmit specified types of information on a regular basis to each of its subsidiaries in the European Economic Community.[11] In addition, the proposal would require that the management of these subsidiaries consult with their employees' representatives on issues relating to corporate business policies.[12] The clash of interests between management and labor led to the adoption of an amended version of the Vredeling Proposal on July 8, 1983.[13] It is this proposal that evoked extensive debate between management and union leaders within the European Community.[14]

A. The Birth of the Vredeling Proposal

The Vredeling Proposal is the most significant European Community initiative which has been aimed at harmonizing corporate policy with respect to the rights of employees.[15] The presentation of this particular proposal has caused the United States to become acutely aware of the developments in European Economic Community law.[16]

The original proposal was named after its sponsor, Dutch Socialist Henk Vredeling.[17] Vredeling, a former Dutch defense minister, also served as the European Community's Commissioner for

11. For the specific provisions *see id.* at art. 3.

12. *See id.* at arts. 4-5 for the consultation requirements.

13. 26 O.J. EUR. COMM. (No. C 217) 3 (1983) [hereinafter cited as Amended Vredeling Proposal].

14. Since the presentation of the original Vredeling Proposal by the European Commission to the Council of Ministers in 1980, the Commission's most notable proposal has been a draft of the Ninth Company Law Directive. The adoption of this draft directive would effectively prevent a parent corporation from limiting its liability. *See also Employee Information and Consultation Procedures*, BULL. OF THE EUROPEAN COMMUNITY (Supp. March 1980). The draft of the Ninth Company Law Directive, as well as the Vredeling Proposal and the proposed Fifth Company Law Directive have been sharply criticized because the proposals will neither cushion the escalating effects of unemployment nor safeguard the rights of employees within the European Economic Community. Arguably, the adoption of such proposals will have a detrimental effect on employees by severely lessening the prospects of corporate investment in the European Economic Community. For this reason, the adoption of these proposals may serve only to impede the creation of new jobs within the Community. *See also* Carr & Kolkey, *supra* note 1, at 57.

15. Schneebaum, *The Company Law Harmonization Program of the European Community*, 14 LAW & POL'Y INT'L BUS. 293, 321 (1982).

16. The potential issues raised by the information and consultation requirements include effects on competition, stock prices, and the "insider trading" rules of the U.S. Securities and Exchange Commission. *Id.* at 323.

17. Chadwin, *Special Report: Vredeling-Europe Debates the Vredeling Concept*, PERSONNEL ADMINISTRATOR, Sept. 1983, at 62.

Employment and Social Affairs in 1980.[18] Since the time of its original draft, the Vredeling Proposal has been supported by the British Laborite Ivor Richard, Vredeling's successor as Commissioner.[19] In addition, the Proposal has been widely supported by labor union representatives of multinational enterprises.

The amended proposal for a Council Directive on the procedures for informing and consulting employees was adopted formally by the Commission on July 8, 1983.[20] The amended proposal incorporates the opinions of both the European Parliament[21] and the Economic and Social Committee[22] concerning the original Vredeling Proposal. It is apparent from the opinions of the European Parliament and the Economic and Social Committee that both recognized the need for a Community Directive for informing and consulting employees. In September 1982, the European Parliament debated the Commission's proposal on the basis of a report written by the British Conservative Mr. Spencer as a representative of the Social Affairs Committee.[23]

In December 1982, although, the European Parliament approved the proposal, it required that various amendments be drafted in order to alleviate the anxieties felt by employers' organizations with regard to maintaining the authority of local management through employee representatives. Moreover, the European Parliament required amendments which would serve to strengthen the provisions relating to the secrecy of corporate affairs.[24]

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18. *Id.* Henk Vredeling's term as Commissioner for Employment and Social Affairs ended on December 31, 1980. *See* Schneebaum, *supra* note 15, at 321.

19. Chadwin, *supra* note 17, at 62. Richard also served as the British Ambassador to the U.N. from 1974 to 1979.

20. *See supra* note 13 and accompanying text.

21. The views of the European Parliament are found in *Council Directive on Procedures for Informing and Consulting the Employees of Undertakings with Complex Structures, in Particular Transnational Undertakings*, 25 O.J. EUR. COMM. (No. C 292) 33 (1982); and *Opinion on the Proposal for a Directive on Procedures for Informing and Consulting the Employees of Undertakings with Complex Structures, in Particular Transnational Undertakings*, 26 O.J. EUR. COMM. (No. C 13) 25 (1983).

22. For the Committee's views on the Proposal, see *Opinion on the Proposal for a Directive on Procedures for Informing and Consulting the Employees of Undertakings with Complex Structures, in Particular Transnational Undertakings*, 25 O.J. EUR. COMM. (No. C 77) 6 (1982).

23. The content of the proposal and the debate in the European Parliament and the Economic and Social Committee is reported in BLANPAIN, BLANQUET, HERMAN, MOUTY & VREDELING, *Information and Consultation of Employees in Multinational Enterprises*, BULL. OF COMP. LAB. REL. (1983).

24. *Id.* The proposal was approved by a vote of 161 in favor, 61 opposed, with 84 abstentions. *Id.*

In January 1982, the Economic and Social Committee held a debate on the Commission's proposal. During the debate, it appeared that the only common ground between the Committee members representing employees' interests and those representing employers' interests was that both were cognizant of the fact that the proposal could have a significant impact on labor relations. Both groups sharply disagreed, however, on whether this would be detrimental for labor relations and the state of the economy in general. Nonetheless, the Economic and Social Committee approved the proposal contingent on the further simplification of the structure of the draft Directive.[25]

Despite these views and the fact that the European Commission had made it clear that it was ready to follow most of the amendments to the original proposal, various industrial organizations argued that there were neither practical nor legal grounds on which the Council should go forward. These industrial organizations asserted that the proposed directive would have an adverse effect on industry and would retard the economic recovery of the European Community.[26] Contrary to the opinions held by the industrial organizations, the trade unions supported the view that such a directive was necessary. They remained dissatisfied with the amended draft directive to the extent that it served to compromise essential points regarding the initial Vredeling Proposal in a way which was not wholly beneficial to employees.[27]

B. The 1980 Draft Directive

Analyzing the most recent version of the Vredeling Proposal presupposes a thorough understanding of the original draft directive. For this reason, the following discussion will focus on the various obligations imposed on multinational enterprises by the original draft directive. The discussion will then analyze some of the most significant changes in the Vredeling Proposal as amended on July 8, 1983.

Under the original draft, multinational corporations operating within the European Economic Community would be required to safeguard the rights of employees in three distinct ways. First, multinational enterprises would be required to provide employees' repre-

25. *See* 25 O.J. EUR. COMM. (No. C 77) 6 (1982). The approval was by a vote of 79 in favor, 61 opposed, with 11 abstentions.

26. Chadwin, *supra* note 17, at 62.

27. Pipkorn, *The Draft Directive on Procedures for Informing and Consulting Employees*, 20 COMMON MKT. L. REV. 727, 734 (1983).

sentatives with "a clear picture of the activities of the dominant undertaking and its subsidiaries taken as a whole," on a periodic basis.[28] In defining what is "a clear picture of the activities," the Proposal requires multinationals to furnish information relating to "the economic and financial situation, . . . the employment situation and probable trends, . . . manufacturing and working methods, [and] all procedures and plans liable to have a substantial effect on employees' interests."[29]

It is apparent from a cursory review of these provisions that the language is vague and subject to a variety of interpretations. Irrespective of how difficult it might be to define these terms with any degree of accuracy or certitude, what is required to be disclosed by multinational enterprises under the Proposal is subject to negotiation. Given this fact, corporate undertakings would be hard pressed to argue that circulating an information sheet describing in general terms the company's plans for the future to their employees is unduly burdensome.

Second, the Vredeling Proposal makes the disclosure of information to employees mandatory when "the management of a dominant undertaking proposes to make a decision concerning the whole or a major part of the dominant undertaking or of one of its subsidiaries which is likely to have a substantial effect on the interests of its employees."[30] The parent company is required to disclose such information to the management of its subsidiary not less than forty days "before adopting the decision."[31] During that time, the parent company must communicate such information "without delay" to employees' representatives whose opinion must then be sought within thirty days.[32] In addition, the disclosure must include "the grounds for the proposed decision, its legal and social consequences for the employees, and the measures planned in respect of these employees."[33] Included among company decisions which trigger these obligations are plant closings or transfers, "substantial modifications" to a company's activities or to its organization, and the introduction or

28. Vredeling Proposal, *supra* note 10, at art. 5, para. 1. It should be noted that references to the Proposal are to the published version of the European Commission.

29. *Id.* at art. 5, paras. 2(b), (d), (g), (h).

30. *Id.* at art. 6, para. 1.

31. *Id.*

32. The Proposal states that, "The management of each subsidiary shall be required to communicate this information without delay to its employees' representatives and to ask for their opinion within a period of not less than 30 days." *Id.* at art. 6, para. 3.

33. *Id.* at art. 6, para. 1.

termination of long-term cooperation with other enterprises.[34]

Problems may arise, however, when the parent corporation is saddled with the obligation of disseminating information relating to a corporate policy decision prior to the time that policy decision is formally adopted. Initially, it is conceivable that the disclosure of such information could adversely effect market competition within the European Economic Community. Furthermore, with respect to United States corporations holding subsidiaries in the Community, it is possible that the disclosure requirement would violate the "insider trading" rules of the United States Securities and Exchange Commission.[35]

Third, the Vredeling Proposal would require that the consultations between management and employees' representatives be "with a view to reaching agreement on the measures planned in respect of them."[36] In the event that the management of the subsidiary should neglect to carry out such consultations, employees' representatives would be permitted to consult with the management of the parent undertaking.[37] This would be true even though the parent undertaking is located outside the European Community. Thus, it is possible that employees' representatives would communicate with the management of a United States parent corporation in an effort to obtain that information which should have been made available but for the subsidiary's failure to act.

The draft directive would impose the three obligations discussed above on multinational parent corporations irrespective of whether

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34. The Proposal states that:

> The decisions referred to in paragraph (1) shall be those relating to: (a) the closure or transfer of an establishment or major parts thereof; (b) revisions, extensions or substantial modifications to the activities of the undertaking; (c) major modifications with regard to organization; (d) the introduction of long-term cooperation with other undertakings or the cessation of such cooperation.

Id. at art. 6, para. 2.

35. *See* Schneebaum, *supra* note 15, at 323 (citing 17 C.F.R. § 240.10b-5 (1981)). It has been argued that if management is required to disclose future plans to employees' representatives within the European Community, this information could be publicly disseminated to avoid purported insider trading. *Id.*

36. Vredeling Proposal, *supra* note 10, at art. 6, para. 4.

37. The Proposal states that:

> Where the management of the subsidiaries does not communicate to the employees' representatives the information required under paragraph (3) or does not arrange consultations as required under paragraph (4), such representatives shall be authorized to open consultations, through authorized delegates, with a view to obtaining such information and, where appropriate, to reaching agreement on the measures planned with regard to the employees concerned.

Id. at art. 6, para. 5.

they are located within the European Community.[38] Imposing these requirements on parent corporations located outside the European Community may lead to a serious problem of enforcement jurisdiction. The jurisdiction of the courts of the European Community does not extend beyond its borders. Although parent corporations outside the European Community might voluntarily comply with the provisions of the draft directive, provisions which allow sanctions against corporations failing to comply might not be recognized by non-European authorities.[39] If these authorities were unwilling to recognize such provisions, it would be pointless to expect them to enforce these same provisions.

Embodied within Article 8 of the Vredeling Proposal is the Commission's attempt to solve the problem of enforcement jurisdiction. That section provides:

> Where the management of the dominant undertaking whose decision-making centre is located outside the Community and which controls one or more subsidiaries in the Community does not ensure the presence within the Community of at least one person able to fulfill the requirements as regards disclosure of information and consultation laid down by this Directive, the management of the subsidiary that employs the largest number of employees within the Community shall be responsible for fulfilling the obligations imposed on the management of the dominant undertaking by this Directive.[40]

Thus, whenever employees' representatives seek information located beyond the borders of the European Community, the Vredeling Proposal would obligate those corporations located within the Community to obtain the information and disclose it. With the adoption of this provision, the European Community effectively avoids imposing any obligations directly on foreign undertakings.

Under this provision, a foreign parent company would have two alternatives prior to rendering any decision subject to the disclosure

38. *Id.* Because no distinction is drawn, multinational parent corporations would have to comply in order to operate their subsidiaries within the European Economic Community.

39. The Vredeling Proposal provides that only "Member States shall provide for appropriate penalties for failure to comply with the obligations . . . [of the information disclosure requirements]." *Id.* at art. 5, para. 5. The Proposal also provides that only "Member States shall provide for appropriate penalties in case of failure to fulfill the obligations . . . [of the consultation requirements]." *Id.* at art. 6, para. 6. Employees' representatives are entitled to an appeal to a court "or other competent national authorities for measures to be taken to protect their interests." *Id.* There is no enforcement provision which would include foreign or non-European Community parent undertakings.

40. *Id.* at art. 8.

and consultation requirements of the Proposal. First, the parent company could appoint an agent or representative in Europe to consult with the employees' representative. This presupposes, of course, that the agent appointed by the parent has sufficient knowledge about the company's decision. Second, the parent company could communicate its knowledge and information to its largest European subsidiary.[41] Thus, it is incumbent on the foreign parent corporation to make the important decisions concerning the manner in which confidential information will be distributed within the company's infrastructure.

In most instances, the periodic disclosure requirements of the Vredeling Proposal would not create problems of confidentiality. In a number of cases, however, the dissemination of information relating to proposed corporate policies, before such policies are adopted formally, may well undermine the interests of the corporation.[42] The security of complex commercial and financial dealings of the corporation could be jeopardized at the expense of the Vredeling Proposal's disclosure and consultation requirements. Employees' representatives who will have access to confidential corporate information are merely directed to exercise "discretion."[43] Although member States are empowered to "impose appropriate penalties in cases of infringement of the secrecy requirement,"[44] there is no sanction that could adequately restore the company to the competitive position it would have lost.[45]

Despite the criticism of the Vredeling Proposal by business organizations, the Proposal was sent to the European Parliament and the Economic and Social Committee in 1981 and was then reviewed by three parliamentary committees.[46] In September, 1982, the proposed

41. The Proposal imposes the duty on the largest subsidiary to consult with employees' representatives and provide the necessary information even though the subsidiary may in no way be affected by the decision of the parent undertaking. *Id.*

42. *See, e.g., Continental Oil Co. v. Federal Power Commission*, 519 F.2d 31, 35 (5th Cir. 1975) (harm to competitive position); *Chrysler Corp. v. Schlesinger*, 412 F. Supp. 171, 176 (D. Del. 1976) (disclosure of trade secret and commercial or financial information causing competitive harm).

43. Vredeling Proposal, *supra* note 10, at art. 15, paras. 1-3.

44. *Id.*

45. *See* NATIONAL FOREIGN TRADE COUNCIL, MEMORANDUM CONCERNING PROPOSED EC DIRECTIVE ON CONSULTATIONS WITH EMPLOYEES 7 (Feb. 19, 1981). According to the National Foreign Trade Council, "the directive would deter corporate management from innovative competitiveness of European Community enterprises in comparison with companies in other parts of the world." *Id.* at 5.

46. *Report on the Vredeling Proposal*, EUR. PARL. DOC. (No. 1-324) (1982). The three parliamentary committees which reviewed the Vredeling Proposal and prepared reports were

revisions of both the European Commission and the Economic and Social Committee were sent before the planning session of Parliament. After much debate, Parliament voted to defer further review of the Proposal until the October session. In October, 1982, Parliament approved a text containing some significant alterations to the original draft directive.[47] The most significant changes included the following:

> 1) The minumum size of an enterprise to "trigger" obligations under the Proposal would be 100 employees in any European Community enterprise and 1,000 employees in the entire group;
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> 2) employees' representatives would be freely elected by the workforce at large;
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> 3) instead of holding the largest European Community subsidiary of a foreign parent undertaking responsible for meeting the disclosure and consultation requirements, the same requirements would be imposed on management of the local subsidiary affected by the decisions;
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> 4) the scope of consultation obligations would be clarified;
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> 5) consultations would be limited to the effects of a proposed decision on the workforce without considering the decision itself;
>
> 6) there would be limitations on "by-pass" provisions that give European Community employees' representatives access to the parent company's management by granting the right to make a written demand for information only when the subsidiary refuses to supply it; and
>
> 7) business and trade secrets, including information that could impact on market share prices, would be exempt from mandatory disclosure.[48]

The approval of such a text by Parliament was not, however, determinative of the Proposal's final adoption through the legislative process. In October 1982 Parliament elected not to follow the usual E.E.C. procedures which would have completed the legislative process for a proposed directive as required under the Treaty of Rome.[49] Instead of formally adopting the text and sending it on to the European Council, Parliament elected to ask Commissioner Richard to state his opinion on the various amendments to the proposed direc-

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the Committee on Social Affairs and Employment, the Committee on Economic and Monetary Affairs, and the Committee on Legal Affairs. *See id.*

47. *See id.*

48. *See generally* 25 O.J. EUR. COMM. (No. C 292) 33 (1982) for Parliament's changes to the Vredeling Proposal.

49. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 54(2), 298 U.N.T.S. 3.

tive. Since the Commissioner is empowered to propose his own modifications,[50] he undertook the responsibility of consulting labor and industrial groups and reported back to Parliament during the November 1982 session. Since Parliament's actions in this area are strictly advisory, the Commissioner is not under any obligation to follow the decision of the European Parliament. In fact, substantial portions of the watered-down draft finally adopted by the European Parliament in the fall of 1982 were rejected by Commissioner Richard.[51]

During the early months of 1983, the most controversial passages of the proposed directive were reviewed by Commissioner Richard and his staff. In addition, the Commissioner met with European and American business leaders.[52] After nearly three years of debate and negotiation, the amended proposal for a Council Directive on procedures for informing and consulting employees was finally adopted by the European Commission on July 8, 1983.[53]

II. THE AMENDED VREDELING PROPOSAL

A. Scope of the Draft Directive

According to the amended proposal adopted by the Commission, the directive is applicable to groups of undertakings which employ, in their entirety, at least 1,000 employees within the European Community,[54] and to single undertakings operating through distinct plants or "establishments" and employing the same number of employees in the Community.[55] Under Article 4 of the original propo-

50. *Id.* at art. 149. Parliament appears to have wanted assurances that the Commissioner's modifications would not differ substantially from those it had already approved.

51. Under European Community procedures, it is the Commission's duty to make recommendations to the Council. Only the Council, which is composed of cabinet ministers from each member country, has the power to enact a binding, Community-wide directive. Even then, each directive must be written into enabling legislation within each country in the Community.

52. The Commissioner's efforts were aimed at satisfying the needs of both corporate management and employees' representatives. Commissioner Richard attended a variety of meetings held in the United States with the U.S. Chamber of Commerce, the U.S. Council for International Business, and the American Bar Association. Chadwin, *supra* note 17, at 63.

53. The amended proposal was submitted to the European Council on July 17, 1983. *See* Amended Vredeling Proposal, *supra* note 13.

54. The term "undertakings" includes both the parent undertaking and its subsidiaries. *See* Amended Vredeling Proposal, *supra* note 13, at art. 1(a).

55. The Amended Proposal provides that:

> 1. This Directive relates to procedures for informing and consulting the employees —of a subsidiary in the Community when a total of at least 1,000 workers is employed in the Community by the parent undertaking and its subsidiaries taken as a whole

sal, the draft directive would have applied to dominant undertakings employing in their entirety at least 100 workers in the Community.[56] The minimum of 1,000 employees was introduced at the request of the European Parliament in an effort to exempt smaller enterprises from the procedures listed in the directive.

The draft directive does not concern itself with the information and consultation of employees of a parent corporation unless they are employed in a plant distinct from the parent's main office.[57] The Commission apparently believed such provisions were unnecessary because national laws have already been promulgated to safeguard the interests of these employees. Under Section 2 of the original proposal, the directive would have applied the information and consultation procedures to groups of undertakings and transnational multiplant undertakings.[58] In Section 3, however, basically identical provisions were to be applied to groups of undertakings and multiplant undertakings all of which are located within the same member State.[59] This distinction is attributable to the fact that the original draft proposal was targeted only at transnational undertakings and groups of undertakings. It became apparent to the drafters of the amended proposal that it was also necessary to include those under-

—of an undertaking having in the Community one or more establishments when a total of at least 1,000 workers is employed in the Community by the undertaking as a whole.

2. When the decision-making centre of an undertaking is located in a non-member country its management may be represented in the Community by an agent authorized to fulfill the requirements regarding information and consultation laid down by this Directive. In the absence of such an agent the management of each subsidiary concerned in the Community shall be held responsible for the obligations arising from Articles 3 and 4.

Id. at art. 2.

56. The Proposal originally proved that:

The management of a dominant undertaking whose decision-making centre is located in a Member State of the Community and which has one or more subsidiaries in at least one other Member State shall be required to disclose, via the management of those subsidiaries, information to employees' representatives in all subsidiaries employing at least 100 employees in the Community in accordance with Article 5 and to consult them in accordance with Article 6.

Vredeling Proposal, *supra* note 10, at art. 4

57. Amended Vredeling Proposal, *supra* note 13, at art. 2. For text see *supra* note 55.

58. Vredeling Proposal, *supra* note 10, at art. 4. For text see *supra* note 56.

59. The Proposal originally provided that:

The management of a dominant undertaking whose decision-making centre is located in a Member State of the Community and which has one or more subsidiaries in the same Member State shall be required, via the management of its subsidiaries, to disclose information to employees' representatives in all subsidiaries employing at least 100 employees in that State in accordance with Article 11 and to consult them in accordance with Article 12.

Id. at art. 10.

takings that confine their operations to a single Member State. For this reason, the Commission merged Sections 2 and 3.

In the situation where a parent corporation has its decision-making center located outside Europe, it was necessary to include a separate provision in the amended proposal governing the information and consultation procedures.[60] In such a case, the procedures may be satisfied in one of two ways. First, the management of the parent corporation can appoint an authorized agent in the Community responsible for carrying out the procedures on behalf of that corporation. Second, if an agent is unavailable, the management of each subsidiary will be held liable for complying with the information and consultation procedures as required by the draft directive.[61] Under the initial draft, the management of the subsidiary employing the largest number of employees within the Community was to be held responsible for satisfying the requirements of the consultation and information procedures imposed on the management of the parent corporation.[62] This provision was modified at the request of Parliament because it seemed unduly burdensome to saddle the subsidiary having the greatest workforce with the parent undertaking's obligation.[63]

The element which triggers the application of the information and consultation requirements for multiplant undertakings is the existence of entities which are geographically distinct parts of the undertaking.[64] Under Article 6 of the amended draft which deals with those undertakings, the provisions for parent corporations and subsidiaries shall apply *mutatis mutandis*.[65] Under the original draft directive, the information and consultation requirements applied only to those subsidiaries and establishments employing at least 100 workers in the Community.[66] This minimum has been deleted in the amended draft. Member States have the option of limiting the information and consultation procedures provided for in the draft directive to subsidiaries and establishments which satisfy the requirements

60. Amended Vredeling Proposal, *supra* note 13, at art. 2(2). For text see *supra* note 55.

61. *Id.*

62. Vredeling Proposal, *supra* note 10, at art. 8.

63. *See* Amended Vredeling Proposal, *supra* note 13, at art. 2(2). For text see *supra* note 55.

64. *Id.* at art. 1, para. b. The entities are termed "establishments." *Id.*

65. *Id.* at art. 6. *Mutatis mutandis* is defined as: "With the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like." BLACK'S LAW DICTIONARY 919 (5th ed. 1979).

66. Vredeling Proposal, *supra* note 10, at art. 4. For text see *supra* note 56.

for electing or designating a body to represent the employees.[67] This facilitates the implementation of the obligations provided for in the draft directive within the context of employee organizations.

Under Article 8 of the amended draft, member States are free to promulgate laws which are more favorable to the employees than those laid down in the draft directive.[68] In addition, Article 8 allows member States to enact special provisions for undertakings of a political, religious, scientific, or other non-economic character. This provision was requested by the European Parliament in order to take account of the fact that in the Federal Republic of Germany such undertakings are largely exempted from the application of the provisions of the Works Council Act of 1972 on information and consultation.[69] These exemptions help ensure the freedom to which the undertaking is entitled under national law from interference by employees' representatives.[70]

B. Disclosure of Information

Article 3 of the amended proposal mandates that management of a parent undertaking forward general information which gives a clear picture of its activities and those of its subsidiaries to the management of the subsidiaries located within the European Community.[71] The management of each subsidiary shall then disclose this

67. Amended Vredeling Proposal, *supra* note 13, at art. 5, para. 4. "Member States may limit the obligations laid down in Articles 3 and 4 to the subsidiaries which, in respect of the number of employees, fulfill the conditions for the election or designation of a collegiate body representing the employees existing under national law of practices." *Id.*

68. The Amended Proposal states:

> 1. This Directive shall be without prejudice to measures taken pursuant to Council Directive 75/129/EEC of 17.02.1975 on the approximation of the laws of the Member States relating to collective redundancies (1) and Directive 77/187/EEC of 14.02.1977 on the safeguarding of employees' rights in the event of transfers (2) or introduce laws, regulations or administrative provisions which are more favourable to employees.
> 2. In implementing this Directive, Member States may lay down special provisions for undertakings and establishments whose direct and main objectives are:
> (a) political, religious humanitarian, charitable, educational, scientific or artistic, or
> (b) related to public information or expression of opinion. The special provisions may only be such as are necessary to ensure that such undertakings enjoy the freedom to which they are entitled under the laws of the Member States to which they are subject.
> 3. This Directive shall be without prejudice to the application of national laws concerning bankruptcy, winding up proceeding arrangements, compositions or other similar proceeding insofar as these proceedings result from judicial decisions.

Id. at art. 8.

69. The German Works Council Act of 1972, at art. 118.

70. *Id.*

71. The Amended Proposal provides that:

information to the employees' representatives within the subsidiary. According to the amended draft directive, such disclosure must take place annually, while the initial draft required disclosure every six months. Similarly, the draft directive requires that specific information be disclosed to the employees' representatives.[72] Although it is uncertain whether the specific information required can be utilized effectively by employees' representatives, it is arguable that even an annual disclosure can be a burden on management. Furthermore, disclosing specific information on issues such as plant closures may have an adverse impact on the level of productivity and morale among employees.

Whenever the management fails to fulfill its disclosure obligations, the representatives of the employees may approach the management of the parent company and demand in writing that the relevant information be communicated without delay. The information is then to be given to the management of the subsidiary and submitted to the employees.[73]

The initial proposal obligated the management of the parent company to supply information which had not been properly disclosed directly to the employees' representatives who requested it.[74] This so-called "by-pass" procedure was greeted with disapproval by the European Parliament because the procedure might undermine the authority of local management. Moreover, the draft directive obligates member States to provide for "appropriate penalties for failure to comply with the information requirements."[75]

> At least once a year, at a fixed date, the management of a parent undertaking shall forward in an intelligible form general information giving a clear picture of the activities of the parent undertaking and its subsidiaries as a whole to the management of each of its subsidiaries in the Community, with a view to the communication of its information to the employees' representatives as provided in paragraph 4 below. For the same purpose, the management of the parent undertaking shall forward to the management of each subsidiary concerned specific information on a particular sector of production area in which the subsidiary is active.

Amended Vredeling Proposal, *supra* note 13, at art. 3, para. 1.

72. The draft directive specifies that the details of the economic and financial conditions, the employment situation, and possible trends should be included. *Id.* at art. 3, paras. 2-3.

73. The Amended Proposal provides that:

> If the management of the subsidiary fails to fulfill its obligation to communicate information required to its employees' representatives within 30 days of the date fixed, referred to in paragraph 1, or of the date of communication in the case of the up-dated information referred to in paragraph 3, the employees' representatives of the subsidiary may approach in writing the management of the parent undertaking. That undertaking shall be obligated to communicate the relevant information without delay to the management of the subsidiary.

Id. at art. 3, para. 5.

74. Vredeling Proposal, *supra* note 10, at art. 5, para. 4. For text see *supra* note 67.

75. Amended Vredeling Proposal, *supra* note 13, at art. 3, para. 7.

In the situation where a parent company is also a subsidiary of some other corporation, the company is theoretically obliged to provide the information required by the directive with respect to its own activities and those of its subsidiaries. This responsibility terminates, however, when the other parent corporation itself fulfills the directive's requirement by providing information on its activities and *all* its subsidiaries. The provision ensures, *inter alia*, that such subgroups are within the purview of the information procedures of the directive.[76]

C. The Duty to Consult

Consultation procedures provided for in the draft directive are triggered each time the management of the parent undertaking proposes 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 . . . ."[77] In this situation, the management of the parent company must forward "precise information" to the management of each subsidiary involved in "good time" before a final decision is made. This is necessary so that the information can be passed on to employees' representatives and thereby afford them an opportunity to give their opinion on the proposed decision.

In addition to specifying the type of informaton to be disclosed it requires the reasons for the proposed decision and its consequences for the workers also be included. The proposal also indicates the type of decision which might trigger the consultation procedure. Decisions which might cause employees to be adversely affected, include plant closures, modifications of the undertaking's activities, and modifications affecting the internal structure or production methods.[78]

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76. *Id.* at art. 3, para. 6. "The terms of this article apply equally where the parent undertaking is at the same time the subsidiary of another parent undertaking, unless that undertaking is itself meeting the obligations resulting from this article." *Id.*

77. *Id.* at art. 4, para. 1.

78. The Amended Proposal states such proposed decisons may in particular relate to:

(a) the closure or transfer of an establishment or major parts thereof;
(b) restrictions or substantial modifications to the activities of the undertaking;
(c) major modifications with regard to organization, working practices or production methods including modifications resulting from the introduction of new technologies;
(d) the introduction of long-term cooperation with other under-takings or the cessation of such cooperation; and
(e) measures relating to workers' health and to industrial safety.

Id. at art. 4, para. 2.

Any decisions in these areas should activate the consultation procedure.

The subsidiaries concerned with a decision such as a plant closure are not only those where the closure takes place, but also those to which the activities of the closed plant are transferred. As a result the management of each subsidiary involved must communicate the information it has received to the employees' representatives and ask for their opinion. To fulfill this requirement, management must give employees' representatives at least thirty days in which to act.[79] The proposed decision cannot be implemented before the opinion of the employees' representatives is received or before the end of the prescribed period for the delivery of that opinion.[80]

Given the fact that the management of the parent company and of the subsidiary are free to disregard the opinion of the employees' representatives, it is doubtful whether the consultation procedure is of much benefit to employees. It should be noted that the draft directive does not confer on the employees any right in the entrepreneurial decision-making process. Neither does the draft directive impose on the management of the subsidiary an obligation to enter into bona fide negotiations with the employees on the substance of such decisions. The draft directive only provides an obligation "to hold consultations with [employees' representatives] with a view to attempting to reach agreement on the measures planned in respect of employees."[81] The amended proposal merely distinguishes between the obligation of the management of the subsidiary to ask for the opinion of the employees on the proposed decision, on the one hand, and the obligation to conduct consultations with the employees' representatives on the other.

Under Article 4 of the amended draft, information on the proposed decision affecting the interests of employees can be withheld if

79. The Amended Proposal states:

> Without prejudice to Article 7(1) the management of each subsidiary concerned shall be required to communicate in writing the information referred to in paragraph 1, without delay, to the employees' representatives, to ask for their opinion within a period of at least 30 days from the day on which the information is communicated, and to hold consultations with them with a view to attempting to reach agreement on the measures planned in respect of the employees. The provisions of the second subparagraph of Article 3(4) shall apply *multatis mutandis.*

Id. at art. 4, para. 3.

80. *Id.* at art. 4, para. 5. "The proposed decision referred to in paragraph 1 shall not be implemented before the opinion is received or failing that before the end of the given period specified according to paragraph 3 above." *Id.*

81. *Id.* at art. 4, para. 3.

it is confidential.[82] In this situation, the obligation to consult the employees on the proposed decision does not arise. The management of the subsidiary concerned is, however, required to hold consultations and to enter into negotiations on the measures planned regarding workers at least thirty days before any decision resulting from confidential business strategy and affecting the work conditions is effectively carried out.[83] Thus, the interests of the undertaking in maintaining the secrecy of its business strategy must be balanced against the interests of the employees and their right to be well-informed and consulted prior to the time their employment or working conditions are to be modified.

In the event that the management of the subsidiary neglects to fulfill its obligation to inform and consult on decisions adversely affecting employees, employees' representatives are entitled to appeal to a tribunal "to compel the management of the subsidiary to fulfill its obligations."[84] The purpose of this provision is to enable employees' representatives to preserve their right to be informed and consulted before the implementation of the proposed decision by management. Although a time limit has been imposed to prevent further delay in implementing the decision, the draft directive fails to specify the proper procedure for obtaining injunctive relief in those member States where injunctions are either unavailable or not speedily available in the area of labor law.

D. Maintaining Confidentiality of Business Information

Perhaps the greatest criticism of the initial proposal was that business secrets could not be omitted from the information to be disseminated to the employees' representatives. Under the original proposal, employees' representatives were obligated simply to maintain

82. *See also id.* at art. 7, para. 1.

83. The Amended Proposal provides:

> When information concerning a decision within the meaning of paragraph 1 is withheld because it is secret in the sense of Article 7, paragraph 1, the management of the subsidiary is nonetheless required, at least 30 days before putting into effect any decision directly affecting employment or working conditions of the employees, to hold consultations with the employees' representatives, with a view to attempting to reach agreement on the measures planned in respect of the employee.

Id. at art. 4, para. 6.

84. The Amended Proposal provides:

> Member States shall provide for the employees' representative to have the right, when the obligations of paragrpah (3) have not been met, to appeal to a tribunal or other competent national authority for measures to be taken in a maximum period of 30 days to compel the management of the subsidiary to fulfill its obligations on information and consultation under paragraph 3 above.

Id. at art. 4, para. 4.

discretion with information of a confidential nature.[85] The amended proposal now provides that management is authorized not to communicate information which would substantially damage the undertaking's interests or lead to the demise of its plans.[86] The wording is sufficiently broad to cover the interests of both subsidiaries and the parent company. It includes not only business secrets, but also information which a company could not disclose without first violating legal obligations to which it is subject. Among these obligations are the rules prohibiting the disclosure of insider information in those member States where such rules have been enacted.[87]

It is arguable that the draft directive would be rendered meaningless in practice if management were the sole judge of the secret nature of information subject to disclosure. For this reason, the Commission has provided that the employees' representatives shall have the right to appeal to a tribunal for the settlement of such disputes. This procedure, which had also been provided for under the original proposal, affords employees' representatives a means to determine whether purported confidential information is subject to disclosure.[88]

E. Election of Employees' Representatives

One of the points on which the Commission did not follow the recommendation of the European Parliament deals with the rules concerning who is qualified to act as employees' representatives. Under the Proposal, the Commission adopted the view that this

85. *Id.* The original Proposal provided:

1. Members and former members of bodies representing employees and delegates authorized by them shall be required to maintain discretion as regards information of a confidential nature. Where they communicate information to third parties they shall take account of the interests of the undertaking and shall not be such as to divulge secrets regarding the undertaking or its business.
2. The Member States shall empower a tribunal or other national body to settle disputes concerning the confidentiality of certain information.
3. The Member States shall impose appropriate penalties in cases of infringement of the secrecy requirement.

Vredeling Proposal, *supra* note 10, at art. 15.

86. The Amended Proposal states: "The management of an undertaking shall be authorized not to communicate secret information. Information may only be treated as secret which, if disclosed, could substantially damage the undertaking's interests or lead to the failure of its plans." Amended Vredeling Proposal, *supra* note 13, at art. 7, para. 1.

87. *See supra* note 35 and accompanying text.

88. *See* Amended Vredeling Proposal, *supra* note 13, at art. 7, para. 3. "Member States shall ensure that a tribunal or other competent national authority can settle disputes concerning the secret character of any information withheld in application of paragraph 1, or the confidential character of information declared as confidential for the purpose of paragraph 2." *Id.*

question can best be resolved in accordance with the practices of the member States involved. Although Parliament voted in favor of introducing a system of direct elections of employees' representatives by secret ballot, the Commission chose otherwise. In so doing, the Commission opined that the Vredeling Proposal was never designed to alter the industrial relations systems existing in Europe. Instead, the Commission aptly noted that the Proposal was designed in accordance with the methods of electing representatives which presently exist under national laws. Any decision contrary to that of the Commission's could arguably serve to disrupt European national systems of jurisprudence and undermine the intentions of the original sponsor of the Vredeling Proposal.

Under Article 5 of the draft directive, however, provisions were adopted to ensure that the information and consultation procedures were compatible with the primary objectives of the directive. Specifically, a body representing all the employees of a parent company and its subsidiaries within the European Community may be created by agreements negotiated between the management of the companies and the employees' representatives.[89] The purpose underlying this provision is to allow both management and employee representatives the option of creating an institutional platform which will carry out the information and consultation procedures required by the directive thoughout the European Community.[90] This particular provision may have a positive affect on the prospects of establishing a Community-wide national industrial relations organization.

Finally, the draft allows member States to provide that the information and consultation procedures may take place directly with the employees.[91] Thus, under this provision, employee representatives need not exist solely for the purposes of the draft directive. This will be the case for those undertakings where there is no representation and where the information and consultation rights are conferred directly on the employees.

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89. *Id.* at art. 5, para. 3. "A body representing all the employees of the parent undertaking and its subsidiaries within the Community may be created by means of agreements to be concluded between the management of the undertaking concerned and the employees' representatives. If such a body is created, paragraphs 1 and 2 shall be applicable." *Id.*

90. This practice can be analogized to the national group works councils which currently exist in some European countries.

91. *Id.* at art. 5, para. 5. "Member States may provide that the information and consultation procedures referred to in Articles 3(4) and (5) and Article 4(3) to (6) may take place directly with the employees, without prejudice to the application of the other provisions of this Directive." *Id.*

F. Extraterritorial Effects of the Vredeling Proposal

The Vredeling Proposal has been criticized for having extraterritorial effects that could be contrary to international law. Where a parent company located in one of the member States of the Community has a subsidiary or "establishment" located in another member State, it is clear that the parent company is established within the Community and must therefore respect the law applicable to the activities of its subsidiary. The questions of extraterritoriality arise when a non-Eurpean Community parent company attempts to exercise its power of control over a subsidiary located within the Community. The mere exercise of control by the parent company over its subsidiary is arguably an insufficient ground upon which to extend the prescriptive jurisdiction of the Community and its member States to regulate the activities of the parent company.

Under Article 3(5) of the amended draft directive, employees' representatives who are left uninformed about the prospective corporate decisions of the subsidiary may direct their concerns in writing to the management of the parent undertaking.[92] The article clearly states that, that undertaking, meaning the parent corporation, "shall be obligated to communicate the relevant information *without delay* to the management of the subsidiary."[93] Similarly, Article 4(1) of the amended proposal clearly provides that "the management of a parent undertaking . . . shall be required to forward precise information to the management of each subsidiary concerned in good time before the final decision is taken . . . ."[94] Thus, the Vredeling Proposal places a responsibility on the parent corporation of a transnational enterprise, whether inside or outside of the European Community, to transmit information about the activities of the enterprise as a whole and about decisions likely to have serious conse-

92. *Id.* at art. 3, para. 5. For text see *supra* note 73.

93. *Id.* (emphasis added).

94. The provision states in full that:

> Where the management of a parent undertaking proposes to take 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, it shall be required to forward precise information to the management of each subsidiary concerned in good time before the final decision is taken with a view to the communication of this information to the employees' representatives as provided in paragraph 3 below. This information shall in particular give detail of:
> —the grounds for the proposed decision;
> —the legal, economic and social consequences of such decision for the employed concerned;
> —the measures planned in respect of such employees.

Id. at art. 4, para. 1.

quences for the interests of the subsidiaries' employees. Where the parent corporation is a non-European Community member, it can be argued that these provisions would extend the Community's legal authority beyond the territorial boundaries of its member States.

In essence, these provisions impose unreasonable extraterritorial obligations on parent undertakings located outside the European Community. Admittedly, the proposal provides that where a parent undertaking is located outside of the European Community its management may be represented in the Community by appointing an agent who is responsible for fulfilling its obligations or in the absence of such an agent, the management of each subsidiary will be held liable for the same obligations regarding information and consultation.[95] This does not, however, excuse the Proposal's seemingly extraterritorial reach because it is the parent corporation, rather than the subsidiary, which has the information that must be transmitted under the draft directive. To penalize a subsidiary because of the negligence of the parent undertaking which is beyond the jurisdiction of the Community serves to unjustly penalize a party for an act wholly out of its control.

III. THE "NEW APPROACH" TO THE VREDELING PROPOSAL AND ITS AFTERMATH

Because the Commission's amended proposal encountered growing political and substantive objections from some member States, it became clear that the initiative had little or no chance of adoption by the Council in the absence of major modifications.[96] Perhaps the strongest opposition came from the British government whose criticism was not based so much on the contents of the proposal, but rather, on the principle compelling companies to disseminate their investment and production schedules to employees' representatives.[97] The British government has taken the position that the dissemination of such information can be accomplished through voluntary action.[98] In adhering to this position, the British govern-

95. *Id.* at art. 2, para. 2. For text see *supra* note 55.

96. For a directive, such as the Vredeling Proposal, the unanimous support of the ten member States is required. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 149, 298 U.N.T.S. 11. Article 149 states in part that: "Where, in pursuance of this Treaty, the Council acts on a proposal from the Commission, unanimity shall be required for an act constituting an amendment to that proposal." *Id.*

97. Sweet, *Labor Consultation in the European Community*, 20 AREA DEVELOPMENT 54 (1985).

98. *Id.*

ment has urged employers to institute consultation programs in which corporate information can be voluntarily given to employees' representatives.[99]

The British government was not alone in expressing its opposition to the proposed directive. West Germany and Denmark have expressed similar reservations over the initiative, albeit to a lesser degree, because of their political opposition to a directive that would regulate European industrial relations.[100]

In an attempt to foster unanimity among member States, the Irish Presidency of the European Council[101] set up an Ad Hoc Working Group to discuss additional modifications to the July 1983 amended proposal.[102] The Ad Hoc Working Group was to address various technical issues raised by the proposal and clarify positions of member States, thereby allowing the Labor and Social Affairs Council to take greater steps toward the implementation of the proposal.[103] Since the first meeting of the Ad Hoc Working Group, a "new approach" to the highly controversial Vredeling Proposal emerged. The "new approach" most notably affected the provisions of the initial proposal dealing with the supply of information to workers on a regular basis and for consultations with workers' representatives before corporate policy decisions were implemented.[104] In addition, the "new approach" was an attempt to buttress the criticism of the Commission's 1983 amended proposal which failed to meet the expectations of some member States regarding industrial relations practices in Europe.

In its detailed report to the Working Party on Social Questions, the Ad Hoc Working Group discussed various suggestions for revis-

99. *Id.*

100. *Id. See also* Eur. Rep., Bus. Brief, No. 1136 (May 31, 1985) (copy on file with California Western International Law Journal).

101. The Irish Republic assumed the Presidency of the Council in June, 1984. Mr. Ruairi Quinn, the Irish Minister for Labor, had always expressed interest in the proposed Vredeling Directive and, after assuming the Presidency of the Council of Ministers for Labor and Social Affairs, he decided to set up an ad hoc group to work on the proposal. *New Approach on "Vredeling"*, 133 EUR. IND. REL. REV. 10, 10 (1985) [hereinafter cited as *New Approach*].

102. Eur. Rep., Bus. Brief, No. 1091 (May 31, 1985) (copy on file with California Western International Law Journal). The working group was chaired by well-known industrial relations expert Dr. Mary Redmond.

103. The Ad Hoc Working Group met six times between September 14 and November 27, 1984, on which date it submitted a detailed report to the Working Party on Social Questions. *Id.*

104. Eur. Rep., Bus. Brief, No. 1091 (Dec. 11, 1984) (copy on file with California Western International Law Journal).

ing the 1983 amended proposal.[105] Under this "new approach" to the Vredeling Proposal, the term "multinational" would appear for the first time since the original draft.[106] Unlike the original preamble, which was riddled with definitions of "parent undertaking" and "subsidiaries," the "new approach" greatly simplified the initiative by focusing on the rights and responsibilities of employers to employees in all companies employing individuals above a given threshold.[107] Perhaps the most striking aspect of the Group's suggested change is that it deletes the terms "parent undertaking and subsidiary," "establishment," "decision-making centre" and "management"[108] because they are unnecessary given the fact that the new draft would abandon the company law approach in favor of a less legal approach.[109]

An example of the simplicity of the "new approach" is illustrated by the Group's suggested Article 2 which delineates the scope of the draft Directive.[110] Article 2 clearly states that "all employees

105. *Id.* at 111. Although these suggestions represented a major new initiative to provide progress on the draft, they did not have any official status, and as such, merely reflect the discussions within the Ad Hoc Working Group and the personal ideas of the Irish Presidency.

106. *Id.* at 112.

107. *New Approach*, *supra* note 101, at 11. The simplicity of the "new approach" is best exemplified by the Group's suggested changes to Article 7 of the 1983 amended draft. For example, from that article, which relates to the disclosure of confidential information, the Group suggested deleting reference to "secret information" so as to clear up the potential ambiguity resulting from a distinction between "secrecy" and "confidentiality." *Id.* at 13. The simplicity of the "new approach" is readily apparent in light of the Ad Hoc Working Group's suggested Article 2. That suggested article reads in pertinent part:

> (A) Connected persons: a person shall be connected with an employer if he has a right to participate in a distribution of profits or to participate in the appointment of a governing body of an employer or if he has any such rights in connection with an employer.
>
> (B) Employees' representatives: the employees' representatives shall mean the representatives of the employees provided for by the laws or practice of the Member States, with the exception of members of administrative, managing or supervisory boards of companies who sit on such bodies in certain Member States as employees' representatives.

Id. at 112.

108. *Compare* Amended Vredeling Proposal, *supra* note 13.

109. *New Approach*, *supra* note 101, at 11.

110. This paragraph states:

> (a) The duties imposed by this Directive on an employer shall apply only to an employer who at the date the duty is to be performed either:
> —has within the Community at least [1,000] employees; or
> —is one of a number of persons whose accounts are required to be consolidated . . . and the aggregate of the employees within the Community of those persons is at least [1,000], . . . the employees to be engaged in activities predominantly commercial;
> and
> —in either case the employer employs not less than [150] employees at his place of employment.

in undertakings over a certain size are covered by the draft Directive's provisions, even when these undertakings operate as a single unit."[111] In contrast to the "new approach," the prior drafts had applied only to parent undertakings with complex structures and not to those undertakings which operated without any subsidiaries.

With regard to Articles 3 and 4 of the prior drafts, the Ad Hoc Working Group expanded the types of corporate information to be disclosed to employees' representatives and the circumstances under which a subsidiary is required to consult with employees' representatives. Article 3, which deals with disclosure of corporate information, would obligate an employer to provide its employees' representatives "with information relating to the employers' business as it affects the employees of the employer including any such information then known to any person connected with the employer."[112] Under the "new approach" to Vredeling, the term "employers' business" would replace the phrase "parent undertaking and its subsidiaries as a whole."[113] More importantly, the types of information to be disclosed have been expanded to identify the specific power source of those decisions affecting employees within the corporate structure.[114] The disclosure of such additional information is likely to benefit employees' representatives, who might otherwise lack knowledge regarding where policy decisions are made, by increasing their awareness of the reasons underlying corporate policy.[115] Finally,

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(b) A person acting on behalf of himself and others as agent is to be considered with them as one person for the above purpose.

Id. It should be noted that the number in brackets indicates the various size thresholds, one of the principal areas necessitating future discussion.

111. *Id.*

112. *Id.* at 113. If the suggested change is approved, Article 3 would read as follows:

1. At least once a year the employer shall provide its employees' representatives with information relating to the employers' business as it affects the employees of the employer, including any such information then known to any person connected with the employer. This information shall relate in particular to:
—structure to the extent necessary to disclose who within the employer and who among persons connected with the employer has power, whether acting alone or in concert, to make decisions affecting the employee of the employers;
—the economic and financial situation such as that which arises from the annual accounts or annual consolidated accounts;
—the foreseeable development of the business and of production and sales
—the employment situation and foreseeable trends; and
—an indication of foreseeable investment trends.
2. Employee's representatives shall have the right to obtain explanations of the information which has been provided to them.

Id.

113. Compare the suggested changes to art. 3, *supra* note 112, with Amended Vredeling Proposal, *supra* note 13, at art. 3, para. 1. For text see *supra* note 71.

114. *New Approach*, *supra* note 101, at 12.

115. The suggested changes regarding the disclosure of information on decision-making

paragraph 2 would grant employees' representatives the right to explanations regarding the information they receive.[116]

Because the 1983 amended proposal provided that "representatives may [only] ask the management for *oral* explanations of the information communicated,"[117] it appears that the "new approach" may strengthen the role representatives play in corporate decision-making. However, where management has failed to communicate the required information, it appears that the employees' representatives can do no more to enforce their right than that which was provided to them under the 1983 amended draft—they "*may* approach in writing the management of the parent undertaking."[118] Thus, the "new approach" which grants employee representatives the "right" to receive an explanation from management is without significance until they are given a similar right of recourse to demand that management honor their request.

The "new approach" is best illustrated by the suggested changes to Article 4 of the 1983 amended proposal. Article 4, which deals with an undertaking's duty to consult with employees' representatives when decisions are "liable to have serious consequences on the interest of its employees,"[119] would now be changed to read:

> Where an employer or any person connected with an employer proposes to make a decision which is liable to have serious consequences on the interests of its employees, the employer shall provide precise information in writing to the employees' representatives. This information shall be provided in good time before the final decision is taken so that the employees' representatives may have the opportunity to give an opinion on the proposed decision and so that consultations with the employees' representatives may be held with a view to reaching an agreement and to mitigating the consequences of the decision.[120]

The suggested language would require management to provide pertinent information to representatives for the purposes of alleviating the possible harsh consequences of its decisions. Thus, a mere good faith duty to consult with employees' representatives appears sufficient.[121]

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centers, which were added by the Irish Presidency, are not representative of the Ad Hoc Working Group's discussions. *Id.*

116. *Id.*

117. *See* Amended Vredeling Proposal, *supra* note 13, at art. 3, para. 4 (emphasis added).

118. *See id.* at art. 3, para. 5 (emphasis added).

119. *See id.* at art 4, para. 1.

120. *New Approach*, *supra* note 101, at 12.

121. Article 4 of the 1983 amended proposal did not address whether management had a good faith duty to consult. *See* Amended Vredeling Proposal, *supra* note 13, at art. 4, para. 1.

In addition, the suggested Article 4 would mandate that information relating to the decision be "in writing," a requirement not imposed under the 1983 draft.

Although the provisions of Article 4 relating to the disclosure of corporate information were basically left unchanged, the Ad Hoc Working Group did object to Article 4(4) of the amended draft which permitted employees' representatives to appeal to "a tribunal or other competent national authority" as a means of forcing management to comply with its duty to inform and consult with representatives on major corporate decisions within thirty days of the prescribed date.[122] The Group suggested a change which requires member States to individually implement enforcement measures.[123] The suggested change would raise the issue of the types of sanctions which could be imposed on managment for its non-compliance. Even more important is the question of whether such sanctions are properly enforceable. Given the various sanctions that could be applied, the "new approach" circumvents the issue by merely requiring member States to "provide appropriate measures" to ensure compliance by management.[124] The use of such broad language as a standard for dealing with the question of sanctions, while not significant in itself, may lead to the imposition of inconsistent, arbitrarily-chosen sanctions throughout the European Community—a result contrary to achieving a uniform system of procedure for European industry.

The drafting of a "new" Article 6 represents the most significant change resulting from the Ad Hoc Working Group's discussion: "Any person connected with an employer shall supply the employer at the place of employment with such information possessed by him as may be necessary to enable the employer to discharge his duties. . . ."[125] Given the "new approach," a parent undertaking would

122. It should be noted that the remaining provisions of Article 4 relating to the types of information to be disclosed or the types of decisions over which management is required to consult with employees' representatives have not been significantly changed. *New Approach*, *supra* note 101, at 12.

123. The Ad Hoc Working Group's suggested change, Article 4(4) would now read as follows:

> Member States shall provide appropriate measures to require the employer to comply with his obligations. They shall ensure that the decision shall not be implemented until the employees' representatives have been afforded the opportunity to give their opinion on the proposed decision or failing that until a period of 30 days has elapsed after the date of communication of the information to the employees' representatives.

Id.

124. The enforceability of sanctions is particularly problematic in cases of infringement. *See id.* at 14.

125. *Id.* A different proposal presented to the Ad Hoc Working Group would have

now be required to supply that information necessary for an employer to satisfy those obligations enumerated in Article 3 which relate to disclosure.[126] Under the original Article 3(5), the controversial "by pass" provision would have permitted the employees' representatives of a subsidiary to directly address central management in writing if local management had failed to satisfy its disclosure obligations within the prescribed time.[127] Article 6, as suggested, would relieve employees' representatives from the task of approaching central management in writing because it would be incumbent on the parent corporation to disseminate that information to its subsidiary, which in turn would be made available to employees' representatives.[128]

In addition to the Ad Hoc Working Group's Article 2(2) that the draft directive should apply to all undertakings over a certain threshold, Article 8(1) exemplifies the second most notable change of the "new approach."[129] It allows the proposal's requirements to be replaced by collective agreement.[130] The idea that the rights and obligations of the proposal may be replaced by collectively agreed-upon procedures is completely new. Although the issue arose as to whether a collective agreement could effectively implement a Directive under the Treaty of Rome,[131] it has been suggested that Article 8(1) was drafted as a concession to such member States as the United

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granted employees a right of compensation as *the only appropriate sanction* for non-compliance with Article 4. *Id.* at 12.

126. *Id.* at 13.

127. *See* Vredeling Proposal, *supra* note 10, at art. 3, para. 5.

128. *New Approach*, *supra* note 101, at 13. The Ad Hoc Working Group withdrew the original "bypass" provision from consideration as a practical matter. *See id.*

129. Specifically, it provides:

> Member States shall provide appropriate measures to require the employer and any person connected with an employer to comply with his or their obligations. The rights and obligations respectively given and imposed by this Directive may be replaced by the provisions of a collective agreement relating to information and consultation of employees provided that any such agreement is authorized by a national authority competent to do so and that its procedures and its remedies are as beneficial as those provided by this Directive.

Id.

130. *Id.*

131. Article 189 provides that: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." Treaty of Rome, *supra* note 49, at art. 189. In addressing the issue, the Legal Service of the Council issued an opinion which concluded that:

> (i) Collective agreements which are not binding at law cannot be regarded as giving effect to Directives;
>
> (ii) Collective agreements which are binding at law, either by virtue of their inherent character or by virtue of measures adopted by the member states, can be regarded as an acceptable means of giving effect to the Directive provided that they secure the execution of all the obligations incumbent on the member state,

Kingdom and the Irish Republic which ascribe to the notion that statutory intervention could harm industrial relations which traditionally have been conducted on a voluntary basis.[132]

The suggestions of the Ad Hoc Working Group, which eventually became part of the Irish Presidency's initiative, have unquestionably broken the deadlock on the original Vredeling Proposal. Although progress was made, the initiative remains only a suggestion, not a proposal. The Irish Presidency was hopeful, however, that the Ad Hoc Working Group's analysis of certain issues in the amended draft and its clarification of the positions of the member States would provide the Labor and Social Affairs Council with an opportunity to take the final steps towards implementing the Vredeling Proposal.

On December 13, 1984, the Council of Ministers for Labor and Social Affairs met and discussed the various alternatives for revising the 1983 amended proposal.[133] This discussion was primarily based on a report written by the Council's Committee of Permanent Representatives and submitted to the Council of Ministers in which policy issues and alternative resolutions were carefully examined. Although the Council of Social Affairs Ministers was unable to come to any substantive decision based on the "new approach," it did agree that each member State would respond to the complex legal issues raised by the Ad Hoc Working Group.[134]

At the meeting of the Council of Social Affairs' experts group held on January 30, 1985, the various replies by members States were reviewed.[135] At that time, each member State was favorably disposed

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which of course remains responsible for the full and proper execution of the Directive.

Thus, collective agreements may implement directives if the provision is subject to judicial review. *New Approach, supra* note 101, at 13.

132. *New Approach, supra* note 101, at 13.

133. *Id.*

134. Eur. Rep., Bus. Brief, No. 1093 (Dec. 19, 1984).

135. *Id. See also* Eur. Rep., Bus. Brief, No. 1091 (Dec. 11, 1984). Based on the report presented by the Ad Hoc Working Group, the Council of Ministers was to examine a series of complex legal issues among which the most important are the following:

(a) whether it is useful to continue further discussion of the Vredeling Proposal on the basis of the "new approach";
(b) whether those Member States, which traditionally have advocated that the disclosure of corporate information be done on a voluntary basis, would be in favor of the proposed directive were it possible to implement it through collective agreements;
(c) whether the Member States agree that greater coordination between the proposed initiative and other EC directives is necessary;
(d) whether the terms used in the proposed directive should be defined by the individual Member States;
(e) whether a "by-pass" clause should be incorporated into the proposed directives,

to continue working on the Vredeling Proposal on the basis of the "new approach" which emerged from the discussions within the Ad Hoc Working Group.[136] Despite this progress, it became apparent in Europe that the positions of the United Kingdom and Denmark remained unchanged.[137] In 1985, with a new Italian Presidency of the Council, it was made clear that further negotiations on the proposed Directive would cease until such time as the Commission determined whether the "new approach," if it was substantially different from the original proposal, would be drafted as a new proposal.[138] In short, further progress on the proposal has come to a standstill.[139]

CONCLUSION

The European Economic Community has witnessed the birth of the Vredeling Proposal, a draft directive on procedures for informing and consulting employees. Although the intention of the proposal's original sponsor Henk Vredeling was to draft a directive aimed at safeguarding the rights of employees, it appears that compliance with

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thereby permitting employee representatives to speak directly with corporate management of the parent company;

(f) whether the proposed directive should list in detail the sanctions that could be imposed against companies which fail to comply; and

(g) whether an employer has a right to withhold from employee representatives certain types of corporate information.

Id.

136. Eur. Rep., Bus. Brief, No. 1103 (Feb. 1, 1985).

137. Eur. Rep., Bus. Brief, No. 1136 (May 31, 1985).

138. *Id.* Another idea suggested by the Italian Presidency was to downgrade the legal form of the Vredeling Proposal from a binding Directive to a Recommendation. This plan, however, was abandoned when neither the member States which endorsed the Commission's proposal for a Directive nor the United Kingdom and Denmark expressed any enthusiasm over it.

Much of the opposition from the member States which originally had favored the proposal can be attributed to their concern that converting the Vredeling Directive into a Vredeling Recommendation would conflict with the proposals of the European Parliament and the Commission. *See* Commission of the European Communities, Spokesman's Service, Written Question No. 587/85 (1985).

139. The belief that little or no progress was being made on the Vredeling Proposal became a reality when the proposal did not appear on the agenda of the Council of Social Affairs Ministers on December 5, 1985. Given the opposition to the draft directive from the United Kingdom and Denmark, meetings between the Presidency's experts were not organized. In fact, the European Commission has not even required the Presidency to hold meetings because it appears dubious whether any further progress can be achieved. Recognizing that the government of the United Kingdom, in conjunction with the Confederation of British Industry, has consistently opposed "every term, word, comma . . . in the proposal until the momentum behind it ran out of steam," the Commission is now willing to wait until the political climate in Europe changes in favor of adopting the draft Directive. The question of how long the Commission will wait still remains unanswered. What is certain, however, is that practically nothing will occur within the next few months. *See*, Eur. Rep., Bus. Brief, No. 1180 (Nov. 29, 1985); J. Com., Nov. 22, 1985, at 4A, col. 2.

the Proposal would be costly and confusing for many transnational enterprises seeking to conduct business within the European Community. Although the European Commission's amended draft directive represents a more refined version of the original proposal, additional modifications are necessary.

Critics have argued that the Vredeling Proposal is merely a means by which the European labor movement can impose transnational collective bargaining or European style "works councils" on multinational enterprises. The draft directive fails to take into consideration the fact that organized labor in different countries often have conflicting interests. The threat imposed on non-European Community parent undertakings which have subsidiaries in the European Community to comply with those draft provisions requiring the disclosure of information and consultation with employees could very well inhibit investment in the Community rather than foster the growth of employment.

The interests of employees with respect to their right to receive information and consult with management on those policy issues having an effect on their employment must be carefully balanced with the interests of management to make decisions which are deemed beneficial to the undertaking as a whole. Should the balancing of these interests not be tempered with sound judgment, multinational corporations may decide to gradually withdraw their investment capital from those member States in which they currently have subsidiaries. The final result is certain to have a negative impact on the state of the European Community—a result directly contrary to that intended by Vredeling.