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AN ANALYSIS OF THE TERMS AND LEVEL OF IMPLEMENTATION OF THE EUROPEAN UNION'S COLLECTIVE DISMISSAL DIRECTIVE AND THE UNITED STATES' WARN ACT. ANOTHER EXAMPLE FOR THE EUROPEAN UNION ON THE RELATIVE MERITS OF POLITICAL FEDERATION OVER CONFEDERATION?

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I. INTRODUCTION

A. *The Historical and Legal Traditions Underpinning the Approach of the European Union and the United States to Unexpected Employment Termination*

Business activities today transcend national borders and continents affecting the employment status of workers located thousands of miles from the site of the corporate decision maker. The European Union (E.U.) and the United States of America, recognizing the potential cost to workers who lose their jobs, in part, as a result of multinational undertakings, have enacted legislation to ease the economic impact upon displaced workers.

Some, but not all, Member States within the European Union have enacted legislation preventing the "unjust" dismissal of employees for reasons other than the employee's behavior or fault. The United States, however, has consistently followed the "employment at will" doctrine authored by legal scholar Horace G. Wood in 1877.[1] The concept had appeared earlier in the *Field Code*, which was adopted as part of the California Civil Code of 1872.[2] The doctrine was well described by the Tennessee Supreme Court in 1884 when it stated as follows: "All [employers] may dismiss their employees at will, be they many or few, for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of a legal wrong."[3]

In recent years, Tennessee's Court of Appeals, Middle Section, has described the doctrine as the "very foundation of the free enterprise system."[4] The doctrine is universally accepted in the United States, with a few limited public policy exceptions.[5] Legal commentators in the United States have argued that the doctrine was a natural response to the War Between the States (1861-1865) (the Civil War) and the guarantee contained in the XIII Amendment to the U.S. Constitution that "neither slavery nor involuntary servitude . . . shall exist in the United States."[6] The rationale was, if employers cannot compel employees to work for them, then the converse should likewise hold true: one cannot force an employer to continue employment of a person whose services the employer does not wish to retain, absent statutory public policy prohibitions.

The difference between the European tradition of "just cause" termination and the adherence to the "at-will" doctrine in the United States is manifested in their approaches toward inhibiting and/or minimizing the economic impact of nonemployee generated dismissal. Given the legal tradition in many, but not all, European nations of limiting employment dismissal to "just cause" situations, it is not surprising that the EU would precede the United States in initiating legislation to lessen the economic and social impact upon workers subject to collective dismissal.

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1. *See* HORACE GAY WOOD, LAW OF MASTER AND SERVANT: A TREATISE ON THE LAW OF MASTER AND SERVANT COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES § 134, at 272-73 (2d ed. 1877).

2. CAL. LABOR CODE § 2922 (West 1989); *see also* Hathaway v. Bennett, 10 N.Y. 108 (1854).

3. Payne v. Western & Atlantic R.R., 81 Tenn. 507, 519-20 (1884).

4. Whittaker v. Care-More, Inc., 621 S.W.2d 395, 396 (Tenn. Ct. App. 1981).

5. *See generally* Lex K. Larson, UNJUST DISMISSAL Release No. 21, § 10 (1996); Lawrence E. Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); D. Bruce Shine, *The Employment-At-Will Doctrine — Time to Terminate? But How?*, 18 TENN. BAR J., Nov. 1982, at 28.

6. F.A. Allen, *The Civil War Amendments: XIII-XV, in* AN AMERICAN PRIMER (Daniel J. Boorstin ed., 1985) (quoting to U.S. CONST. Amend. XIII, § 1).

B. *The Motivation of the European Union and the United States for Softening the Impact of Unexpected Employment Termination*

The philosophical foundation for E.U. Council Directive 75/129,[7] which relates to Collective Dismissals,[8] lies in part, in the Council's adoption of the Commission's Social Action Programme of 1974.[9] The Treaty of Rome[10] was intended to be a vehicle to "remove all artificial obstacles to the free movement of labour, goods and capital [that] . . . would in time ensure the optimum allocation of resources throughout the Community, the optimum rate of economic growth and thus an optimum social system."[11] However, economic considerations initially took precedence over social goals until the Community realized "a true common market requires that enterprises should compete . . . on equal terms. Equally . . . social costs fall directly or indirectly on enterprises, so that differences in social systems . . . [constitute] distortions to competition."[12] As a result, the E.U. Member States concluded that "if the European Community is to survive, it must have a greater social content than the original Rome Treaty blueprint envisaged."[13] The two goals, economic expansion and creation of a social protection system, represent two divergent approaches[14] to "an open market economy with free

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7. An excellent analysis of collective redundancy provisions in 12 of the 15 Member States as harmonized by Council Directive 75/129 EEC and relevant national legal provisions may be found in the privately printed monograph, RICHARD FULHAM, COLLECTIVE REDUNDANCIES PROVISIONS AND PROCEDURES IN THE EUROPEAN UNION (Amalgamated Engineering and Electrical Union (AEEU), 1995).

8. E.E.C. Council Directive 75/129 (98/59) of 17 February 1975 the Approximation of the Laws of the Member States Relating to Collective Redundancies, 1975 O.J. (L 48/29). On July 20, 1998, the Council adopted Directive 98/59, a codification of Directive 75/129, as amended by Directive 92/56, 1992 O.J. 16 (L 225, 12/081). The codified and new Directive became effective 20 days after its adoption and publication. The caselaw, articles, etc., that are cited in this article refer to Directive 75/129 and for the ease of the reader, we shall do so as well with the understanding that as of August 10, 1998 the proper citation should be Directive 98/59 EEC. Where the codification has made changes in the numbering of paragraphs within Articles of Directive 75/129 it will be noted by footnote.

9. *See* Council Resolution of 21 January 1974; Commission on Social Action Programme, Bulletin of the European Communities, Supp. 2/74.

10. Treaty Establishing the European Community, Feb. 7, 1992, O.J. (C224) 1 (1992) [1992] 1 C.M.L.R. 573 (1992) [hereinafter E.C. Treaty].

11. Michael Shanks, *Introductory Article: The Social Policy of the European Communities*, [1977] 14 C.M.L. REV. 375, 375 (1977). Shanks was Director-General for Social Affairs, European Commission from June 1973 to January 1976.

12. *Id.* at 376.

13. *Id.* at 377.

14. *See* Lord Wedderburn of Charlton, *European Community Law and Workers' Rights: Fact or Fake in 1992?*, 13 DUBLIN U. L. J. 7 (1991).

competition."[15] As one writer has noted, the Directive on Collective Dismissals seeks to utilize the influence of the State over the economic impact of job losses and as such, is geared more to an "employment policy perspective . . . than a workers' rights perspective."[16]

The 1975 E.U. Directive had its origin in the "economic liberalism of the Treaty directed against disparities in the conditions of competition."[17] The Directive's underpinnings are Article 100 (approximation) and Article 117 (harmonization) of the Treaty Establishing the European Community. Clearly, the social goal of Directive 75/129 E.E.C. partially stems from the Social Action Programme. However, the directive's initial acceptance was motivated by economic considerations for developing a level playing field for competitive forces within the European Community.

In 1972, the desire to develop a level playing field within the EU resulted in a movement towards harmonization of the laws of the EU Member States that dealt with collective dismissals. The Commission authorized the development of a report[18] "on legislative provisions protecting workers in the event of dismissal in the E.E.C. countries," which was completed in May 1972.[19] The Commission forwarded the report to the Council in July 1972. Recognizing the disparity among the then six Member States in protection of displaced workers, the report focused on social considerations in an effort to develop a level playing field. This approach was due to "the desirability of some degree of harmonisation as part of the process of improvement of the living and working conditions of the labor force."[20]

According to M.R. Freedland, Fellow of St. John's College, Oxford, the "proposals which followed from the Report formed part of the Social Action Programme set out in the EEC Council Resolution of January 21, 1974 . . . ."[21] The three year delay between the Report's issuance and the adoption of Council Directive 75/129 was, in part, a result of opposition from Great Britain. The United Kingdom opposed a provision within the proposed Directive that allowed public authorities to postpone or prohibit dismissals in certain circumstances.[22] A crucial compromise was achieved

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15. E.C Treaty, *supra* note 10, art. 3a(1).

16. Mark Freedland, *Employment Policy, in* EUROPEAN COMMUNITY LABOUR LAW: PRINCIPLES AND PERSPECTIVES 275, 289 (Paul Davies et al. eds., 1996).

17. Lesley Dolding, *Collective Redundancies and Community Law*, 21 INDUS.L.J. 310, 311 (1992) (quoting B.A. Hepple, *Community Measures for the Protection of Workers Against Dismissal*, 14 C.M.L. REV. 489 (1997)).

18. See M.R. Freedland, *Employment Protection: Redundancy Procedures and the EEC*, 5 INDUS. L.J. 24, 26 & n.19 (1976) (citing INST. FOR LAB. REL., BULL. NO. 4, at 171-203 (1973)).

19. *Id.*

20. *Id.* [(1974) O.J. C13/1].

21. *Id.* n.21 (footnote omitted).

22. *See id.* at 24-26.

during a session of the Council of Ministers in late 1974.[23] At that time an agreement was reached whereby Member States were given the option upon implementation of the Directive to grant or to decline to grant veto powers over collective dismissals to governmental units charged with enforcing the Council Directive.[24]

Parallel activity by the Commission with Council Directive 75/129 may be found in the Social Action Programme's draft Directive on the Retention of the Rights of Employees When Mergers, Takeovers and Amalgamations Occur.[25] The draft ultimately found enactment as Council Directive 77/187, Transfer of Business Directive, which is popularly referred to as the "Acquired Rights Directive."[26]

The impetus for addressing collective employee dismissals in the United States was a political reaction generated by organized labor and Congressional Democrats to corporate takeovers during the 1980s. The "take-over mania" that swept the United States during that period too often resulted in sudden plant consolidation, job loss and attendant social consequences upon workers and their communities. The unenacted Labor-Management Notification and Consultation Act of 1985,[27] forerunner to the legislation ultimately adopted by Congress, was intended to "prevent unjustified and sudden plant closing by raising the cost of closure to employers through the elimination of tax write-offs and credits."[28] The legislation sought to reduce the cost of unemployment benefits administered by states in addition to providing protection for displaced employees and their communities.[29] It is intriguing the unadopted legislation used the term "consultation" in its title, a word not previously used in U.S. labor relations legislative enactments, but exceedingly familiar in E.U. employment law.

During the 1980s researchers in the United States documented "health effects [upon workers] caused by stress following plant closures."[30] A legal publication issued within weeks of the enactment of the Workers

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23. *See id.*

24. *See* E.I.R.R. No. 13 (Jan. 75), at 4-6.

25. *See* O.J. 1974 (C8/27). This was subsequently adopted as Council Directive 77/187 EEC of 14 February 1977, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. O.J. 1977 (L61/27). On 29 June 1998, the Council adopted Directive 98/50 amending Directive 77/187. The deadline for implementation of legislation by the Member States is July 17, 2001. The date of entry into force of Directive 98/50 was July 17, 1998. O.J. 1998 (L 201).

26. Council Directive 77/187, 1977 O.J. (L61/26).

27. H.R. REP. NO. 99-253 at 815 (1985).

28. *Id.* at 815-16.

29. *See id.*

30. Notice Requirements for Plant closings and mass layoffs. 86 Lab. L. Rep. (CCH) 7 (1988).

Standard procedure within the I.L.O. requires, before adoption of an instrument, the subject "come up for discussion at two consecutive annual Conferences."[46] This process was followed, and a first draft was considered and adopted in June 1981.[47] A revised draft followed, and the proposed Convention and Recommendation were adopted during the I.L.O.'s 1982 Convention.[48] "Conventions are designed to influence directly national legislation and practice in those countries which have ratified them, Recommendations are conceived of more in the nature of guidelines, intended to set standards to be achieved over time."[49]

Before detailing the provisions of the I.L.O. Convention, it should be noted the adoption of the Recommendation "was only achieved by a compromise which took the form of consigning to the Recommendation some of the more radical (and, to the employers, more objectionable) proposals first designated for convention status."[50] Additionally, it should be observed that the I.L.O. instruments, that is Recommendations and Conventions, provide no enforceable rights to individuals absent their adoption and inclusion within national legislation.

Recommendation 119 sets forth the principle that workers should not be dismissed "unless there is a valid reason for such termination connected with the capacity or conduct of the workers or based on the operational requirements of the undertaking, establishment or service."[51] This recommendation is included verbatim in the 1982 Convention.[52] The Convention specifies that union membership, race, color, sex, marital status, family responsibility, pregnancy, religion, political opinion, national extraction or social origin, and absences due to maternity leave, illness, or injury are not valid reasons for termination.[53] Lack of union membership or refusal to join a labor organization is not included on the Convention's list of unacceptable grounds for termination.[54]

The 1982 I.L.O. Convention provides for a displaced worker to have an independent adjudicating tribunal to determine whether the dismissal was justified.[55] The burden of proving that the termination was not justified

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dismissal." *Id.*

46. *Id.* at 18.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* (footnote omitted).
51. *Id.* at 19.
52. *See* C 158 TERMINATION OF EMPLOYMENT CONVENTION, 1982, art. 4, *reprinted in* International Labour Organization, *Termination of Employment at the Initiative of the Employer*, 1982 I.L.C. 68 SESSION REPORT NO. V [hereinafter 1982 CONVENTION].
53. *See id.* arts. 5-6.
54. *See* Napier *supra* note 41, at 20.
55. *See* 1982 CONVENTION, *supra* note 52, art. 9.

was left to one of two alternatives, or both, to the selection of the respective national government ratifying the Convention. This procedure removes "the burden of proving that the termination was not justified" from the displaced worker.[56]

Those two options allow (1) for placing "the burden of proving the existence of a valid reason for the termination . . . on the employer"[57] and/or (2) places with the independent tribunal the task of reaching "a conclusion on the reason for the termination having regard to the evidence . . . and according to the procedures provided for by national law and practice . . . ."[58]

The 1982 I.L.O. Termination of Employment Convention mandates that a terminated worker "shall be entitled to a reasonable period of notice or compensation in lieu thereof . . . ."[59] This practice is followed in WARN. The notice or compensation provision in the I.L.O. Convention is not required where a worker is guilty of such serious misconduct that his or her continued presence during the notice period would be "unreasonable."[60]

Under the I.L.O. Convention, notification to competent public authorities of terminations "for reasons of an economic, technological, structural or similar nature"[61] shall occur "before carrying out the terminations . . . ."[62] The form and nature of the notice, as well as the period of time in which termination can occur after notice, are to "be specified by national laws or regulations."[63]

Lastly, consultation with "workers representatives concerned in good time . . . [providing] reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations"[64] are to occur. All of which shall take place "in accordance with national law and practice."[65] The I.L.O. Convention, unlike the E.U. Directive and the WARN Act, contemplates reinstatement as a remedy for unjustified dismissal,[66] coupled with a form of due process prior to termination.[67] Worker allowances and benefits associated with

56. *Id.* art. 9.2.
57. *Id.* art. 9.2(a).
58. *Id.* art. 9.2(b).
59. *Id.* art. 11.
60. *See id.*
61. *Id.* art. 14.1.
62. *Id.* art. 14.3.
63. *Id.*
64. *Id.* art. 13.1(a).
65. *Id.* art. 13.1(b).
66. *See id.* art. 10.
67. *See id.* art. 7.

termination are also contemplated.[68]

The 1982 Convention and its forerunner, R. 119 Termination of Employment Recommendation, appear to have served as the legislative and structural "shell" for the EU Council Directive 75/129 and the WARN Act of 1988. Since 1919 the I.L.O. has adopted 181 conventions, which are international treaties requiring national ratification. However, the U.S. Congress has only ratified twelve of them. Two of these were "shelved" by the I.L.O., but ten are currently in force.[69] The 1982 Termination of Employment Convention has not been ratified by the United States.

II. A STRUCTURAL COMPARISON OF E.U. DIRECTIVE 75/129, AS AMENDED, AND THE U.S. WORKERS ADJUSTMENT AND RETRAINING NOTIFICATION (WARN) ACT OF THE UNITED STATES

A. *The Differing Approaches in Legislative Structure*

Council Directives are not precise legislative enactments covering every potential factual and legal circumstance. The Member States are the legal forums in the EU where t's are crossed and i's are dotted by laws, regulations or administrative provisions. In the United States, the opposite is the case; Federal legislation is often detailed and precise. The WARN Act is an exception. The WARN Act consists of nine sections which cover a mere four pages, including historical and statutory notes as published in a leading statutory reference manual utilized daily by U.S. labor law practitioners.[70]

More representative of congressional enactments that have a single or limited purpose is the Age Discrimination in Employment Act of 1974,[71] which covers twenty-five pages in the above mentioned reference work.[72] A more expansive piece of legislation with a single purpose but having multiple enforcement and implementation structures built into the legislative scheme is the Vocational Rehabilitation and Other Rehabilitation Services Act of 1973.[73] This Act covers 162 pages, including historical and statutory notes.[74]

The legal "doctrine of federal preemption" is firmly grounded in the Commerce Clause of the U.S. Constitution and places in Congress the

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68. *See id.* art. 12.1(a). This subject will not be addressed here since it is outside the scope of this discussion on collective dismissals.

69. *See* Telephone interview with James Tisdale, Information Officer, I.L.O., (Oct. 8, 1998).

70. *See* FEDERAL LABOR LAWS 880-83 (20th ed., West Group, 1998).

71. 29 U.S.C. § 621 (West 1994).

72. *Id.*

73. 29 U.S.C. § 701.

74. *Id.*

"power . . . to regulate Commerce with foreign Nations, and among the several States."[75] Generally, congressional enactment in an area of interstate commerce preempts the "several States" from enacting legislation covering the same topic absent express statutory delegation of authority to the states. The magnitude of the scope of federal preemption is found, for example, in the congressional findings and declaration of policy of the Employee Income Retirement Security Act of 1974 (ERISA).[76] This Act preempts states from enacting legislation in the area of pension and welfare (employee benefit) plans. ERISA mandates that federal district courts shall have exclusive jurisdiction over civil actions involving the statute,[77] and the legislation supersedes all claims asserted under state law over congressionally defined employee benefit plans.

B. *The Jurisdictional Parameters*

Directive 75/129 defines "collective redundancies" as "dismissals effected by an employer for one or more reasons not related to the individual workers concerned[.]"[78] In the United States, redundancies are divided into two categories: those severed from their employment by a "plant closing"[79] and those whose employment has been lost due to "mass layoffs."[80] Under the WARN Act, the jurisdictional distinction grounding these two forms of employment loss are defined in the following manner:

> (1) the term "employer" means any business enterprise that employs—
> (A) 100 or more employees, excluding part-time employees; or
> (B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);
> (2) the term "plant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees;
> (3) the term "mass layoff" means a reduction in force which—

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75. U.S. CONST. art. I, § 8; *see also id.* U.S. CONST. amend. X (providing that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

76. 29 U.S.C. § 1001 (West 1994).

77. *See id.* § 1132(e).

78. E.U. Directive 75/129, *supra* note 8, art. 1.1(a).

79. 29 U.S.C. § 2101(a)(2) (West 1994).

80. *Id.* § 2101(a)(3).

Adjustment and Retraining Notification (WARN) Act on July 13, 1988,[31] noted:

> Social Service agencies have documented alarming increases in child abuse and spouse abuse occurring after plant closings and mass layoffs. Where the resulting unemployment lasts for an extended period of time, the frequency of desertion and divorce also increase dramatically. . . . A recent survey conducted by the General Accounting Office showed that the average length of notice provided to blue collar workers was only seven days. Nonunion firms, on the average, gave their blue collar workers only two days notice. In addition, one-third of all businesses shut down without any warning at all. The same GAO study provided solid evidence showing that this behavior was not necessarily compelled by economic reasons. Accordingly, only about eight percent of those firms with 100 or more workers that closed or had a permanent layoff went bankrupt or filed for financial reorganization around the time of dislocation.[32]

Within this context, the WARN Act was adopted in "response to Congressional findings that . . . plant closings and mass layoffs [were] a problem of national concern."[33] The WARN Act passed the U.S. Senate on July 6, 1988 by a vote of 72 to 23, with opposition from such well known Republican conservatives as Jesse Helms (R-NC), Phil Gramm (R-TX), and Strom Thurmond (R-SC).[34] Not one Democratic Senator voted against WARN, while numerous moderate Republicans "crossed the aisle" to join the then Democratic majority to achieve enactment.[35]

The E.U. Collective Dismissal Directive, while it was not acknowledged as a model for consideration by the U.S. Congress, did impose its shadow upon WARN's structure. Directive 75/129 has as its primary goal "avoiding collective redundancies or reducing the number of workers affected . . . ."[36] Secondarily, the Directive mandates that notice of potential job loss be given to the effected workers,[37] consultation with workers representatives on the impact of such job loss be conducted,[38] and notification be given to public authorities in the area in which the job loss

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31. 29 U.S.C. 2101.
32. *Id.*
33. *Id.*
34. *See* 134 CONG. REC. S8868-69 (July 6, 1988).
35. *See id.*
36. E.U. Directive 75/129, *supra* note 8, art. 2.2.
37. *See id.* art. 2(3).
38. *See id.*

might occur.[39] As with the E.U. Directive, the WARN Act requires notice be given to public authorities. The underpinnings for these two pieces of collective dismissal legislation lies in the cultural, political, and employment traditions of each jurisdiction.

C. *The International Labour Organization's Contribution to Softening the Impact of Unexpected Employment Termination in the European Union and the United States*

Having noted the divergent motivations of the United States and the European Union for alleviating social and economic problems arising from collective redundancies, one should not overlook the participation by both the United States and the Member States of the European Union in the U.N.-sponsored International Labour Organization (I.L.O.). The I.L.O.'s interest in non-employee instituted employment loss predates Council Directive 75/129 E.E.C. The I.L.O., established in 1919, is based on the belief that "labour should not be regarded merely as a commodity or article of commerce."[40] In 1963, the I.L.O. adopted R. 119, the Recommendation on Termination of Employment "expressed the core principle that termination of the employment relationship by the employer should not occur without good and sufficient cause . . . ."[41]

The I.L.O.'s adoption of R. 119 Termination of Employment Recommendation in 1963 and its impact upon future international standards and legislation in this area has been described as "relatively insignificant" by legal scholar Brian Bercusson, Faculty of Law, University of Manchester.[42] This writer disagrees, not withstanding the fact the International Labour Organization's Recommendations "do not have the binding force of I.L.O. Conventions and are not subject to ratification" by the Member States within the I.L.O.[43]

In 1979, the I.L.O.'s governing body determined that its 1963 Recommendation deserved priority, promotion, revision, and then revisited the issue.[44] As a result, termination of employment "at the initiative of the employer"[45] was placed on the agenda of the 1981 I.L.O. Conference.

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39. *See id.* art. 4.

40. Treaty of Peace, Between the Principal Allied and Associated Powers and Germany, June 28, 1919, Versailles, art. 247, 1919 Gr. Brit. T.S. No. 4 (Cmd. 153) [hereinafter Treaty of Versailles].

41. Brian Napier, *Dismissals—The New I.L.O. Standards*, 12 INDUS. L.J. 17 (1983).

42. Brian Bercusson, *The Conceptualization of European Labour Law*, 24 INDUS. L.J. 3, 6 (1995).

43. International Labour Organization, database on International Labour Standards, ILOLEX (visited Oct. 8, 1998) <http://ilolex.ilo.ch:1567>.

44. Napier, *supra* note 41, at 17-18.

45. *Id.* As Napier notes, "a convoluted way of describing what is, to all intents and purposes,

(A) is not the result of a plant closing; and
(B) results in an employment loss at the single site of employment during any 30-day period for
(i) at least 33 percent of the employees (excluding any part-time employee(s); and
(ii) at least 50 employees (excluding any part-time employees); or
(iii) at least 100 employees (excluding any part-time employees) . . . .[81]

Regulations issued by the U.S. Department of Labor (D.O.L.) pursuant to WARN's explicit delegation of authority[82] have concluded that some "mass layoff" situations will meet the "plant closing" definition thereby bringing into play a sixty-day notice requirement.[83]

Under Directive 75/129 EEC, a collective redundancy within the EU means "dismissals effected by an employer not related to the individual workers concerned" and which fall into one of two settings, to-wit:

(i) over a period of 30 days:
- at least 10 redundancies in establishments normally employing more than 20 and less than 100 workers
- at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers
- at least 30 in establishments normally employing 300 workers or more;

OR

(ii) over a period of 90 days:
- at least 20, irrespective of the number of workers normally employed in the establishments in question.[84]

The Member States may choose which of the above two schemes employed to implement the Directive's coverage.[85] Additionally, multiple terminations of individual workers subject to "an employment contract" are covered by the Directive "provided there are at least five redundancies."[86] Both legislative enactments contain exclusions from its coverage. The Council Directive does not apply to:

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81. *Id.* § 2101(a)-(b).
82. See id. § 2107(a).
83. *See* 20 C.F.R. § 639.3(b)-(c); 29 U.S.C. 2102(a).
84. E.U. Directive 75/129, *supra* note 8, art. 1.1(a).
85. *Id.*
86. *Id.* art. 1.1(b).

> (a) collective redundancies affected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts;
> (b) workers employed by public administrative bodies or by establishments governed by public law (or, in Member States where this concept is unknown, by equivalent bodies);
> (c) the crews of sea-going vessels . . . .[87]

The WARN Act exclusions are found in the legislation's definition of an employer in the terms of plant closing and mass layoff; separations not expressly covered by the statutory definitions are therefore excluded. An "employment loss" is initiated by a statutorily defined employer and occurs when "employment termination, other than discharge for cause, voluntary departure or retirement[,] a lay off exceeding 6 months or a reduction in hours of work of more than 50 percent during each month of any 6 month period."[88]

Part-time employees are not counted for determining coverage under WARN if a worker averages "fewer than 20 hours per week or [has] been employed for fewer than 6 of the 12 months preceding the date on which notice is required."[89] A part-time employee is, however, entitled to notice under WARN due to his or her status as an "affected employee."[90] Conversely, as noted by E.U. legal scholar Catherine Barnard "since no qualification [by the E.U. Directive] is imposed on the definition of a worker, it must be assumed that Member States cannot exclude, for example part-time workers from being counted when calculating the number of workers who are to be made redundant."[91] In the European Union, as in the United States, part-time workers are included as persons subject to coverage under the notice requirement of the Directive. Both the E.U. Directive and WARN utilize the term "affected employees" and define such workers as "employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer."[92] The E.U. Directive, however, uses the term "affected" only once and then merely to detail the Directive's primary goal to "avoid collective redundancies or reducing the number of workers affected."[93] Each statute, however, possesses the same intent.

Coverage of employees entitled to notice under WARN has been

87. *Id.* art. 1.2(a)-(c).
88. 29 U.S.C. § 2101(a)(6) (West 1994).
89. *Id.* § 2101(a)(8); *id.* § 2101(a)(5); *see also id.* § 2104(a)(7).
90. 29 U.S.C. § 2101(a)(5); *see also* 29 U.S.C. § 2104(a)(7).
91. CATHERINE BARNARD, E.C. EMPLOYMENT LAW 389 (1996).
92. 29 U.S.C. § 2101(a)(5).
93. E.U. Directive 75/129, *supra* note 8, art. 2.2.

expanded by judicial decision and regulations issued by the U.S. D.O.L. Seasonal employees hired on a recurrent basis who do not qualify as part-time[94] are included in the coverage umbrella.[95] Additionally, workers on temporary layoff or on leave and who have a reasonable expectation of recall are counted as affected employees.[96] In deciding if an employee has a reasonable expectation of recall federal district courts in the United States utilize the five-point criteria[97] developed by the National Labor Relations Board to determine whether laid off employees have the right to vote on union representation at their place of employment under the Labor Management Relations Act of 1947.[98] Indeed, an employee on lay-off in excess of the six-month limitation contained in WARN[99] under certain circumstances could suffer an "employment loss" and be considered an "employee" under a statutorily defined plant closing.[100] This will normally occur where the worker's layoff has been extended beyond the original six months.[101]

As noted earlier, in defining collective redundancies within the European Union, Member States possess two options for determining whether the Directive and its requirements shall come into play. An option exists under WARN, not as an alternative for the exercise of the Act's jurisdiction over collective dismissals but as an additional mode whereby jurisdiction will attach to an event.

Under WARN, employment losses for two or more groups of employees at a single site employing less than 100 may be added together to determine whether a mass layoff or plant closing has occurred.[102] Aggregation of smaller employment losses will occur where (1) each group has fewer than the statutory number of affected employees, (2) the employment loss will occur for each group within 90 days, and (3) the total number of affected employees exceed those required for jurisdiction to attach for a plant closing or mass layoff.[103] However, WARN will not apply if "the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by

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94. *See* 29 CFR § 639.3 (1998).

95. *See generally* Kalwagtis v. Preferred Meal Sys., 78 F. 3d 117 (3rd Cir. 1996); Marques v. Telles Ranch, 867 F. Supp. 1438 (N.D. Cal. 1994); Washington v. Aircap Indus. Corp., 831 F. Supp. 1292 (D.S.C. 1993).

96. *See* 20 C.F.R. § 639.3(a).

97. *See* Damron v. Rob Fork Mining Corp., 739 F. Supp. 341, 344-345 (E.D. Ky. 1990), *aff'd* 945 F.2d 121 (6th Cir. 1991) for relevant judicial discussion.

98. *See* 29 U.S.C. § 141 (West 1994).

99. *See id.* § 2101(a)(6)(B).

100. Kildea v. Electro Wire, 792 F. Supp. 1046, 1050 (E.D. Mich. 1992).

101. *See* 29 U.S.C. § 2102(c).

102. *See id.* § 2102 (d).

103. *See id.*

the employer to evade" the Act's coverage.[104] This latter provision has been the subject of litigation with a mixed result by trade unions in the United States.[105]

Directive 75/129 covers forms of termination other than mass layoffs and plant closings, such as early retirement inducements, provided the reason for such redundancy is not related to conduct of the individual worker.[106] Under WARN, coverage can attach when a worker experiences a "constructive discharge."[107] Constructive discharges have been found to exist where an employer has created a hostile or intolerable work environment or instituted practices calculated to force an employee to quit or resign.[108] Cases litigated in the United States have included situations where employers have created a hostile work environment through unduly pressuring workers into accepting employer-driven separation programs,[109] and/or offering continued employment by conditioning the offer to reduced terms and conditions of employment previously rejected.[110]

C. *The Notification Requirements*

Notification to affected employees whose collective redundancy is "contemplated" within the European Union or "who may be reasonably expected to experience an employment loss"[111] in the United States is a crucial element in each jurisdiction's scheme. As noted earlier, a key distinction lies in the fact that within the E.U., the employer provides notification prior to concluding who will be terminated and when, so that consultation may occur thereafter with worker representatives. In the United States, notification occurs after the employer-driven decision has been made, and no consultation takes place with workers or their representatives absent non-WARN legislative mandate. The divergent motivations of these two legislative schemes are demonstrated by the way each enactment addresses the issue of notification to workers and their

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104. *Id.*

105. *See generally* United Paperworkers Int'l Union v. Alden Corrugated Container Corp., 901 F. Supp. 426 (D. Mass. 1995); OCAW v. American Home Prod., 790 F. Supp. 1441 (N.D. Ind. 1992); UAW Local 1077 v. Shadyside Stamping, 6 IER Cases 1640 (S.D. Ohio), *aff'd* 947 F.2d 946 (6th Cir. 1991).

106. Colin Bourn, *Amending the Collective Dismissals Directive: A Case of Re-arranging the Deckchairs?*, 9 Int'l J. of Comp. Lab. L. Indus. Rel. 227, 234 (1993).

107. *See* 29 U.S.C. § 2101(a)(6).

108. *See id.* § 2101(a)(6).

109. *See generally* Carpenters Dist. Council v. Dillard Dep't Stores, 790 F. Supp. 663 (E.D. La.), *order amended*, 7 IER Cases 799 (E.D. La. 1992), *aff'd. in part, rev'd in part* 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 933 (1995).

110. *See* Auerbach v. Financial News Network/NBC Cable, C.A. #92-CIV-2553 (E.D. N.Y. 1992).

111. 29 U.S.C. § 2101(a)(5) (West 1994).

communities.

Notification under E.U. Directive 75/129 takes place earlier than notification under WARN. WARN assumes, absent some unforeseen circumstance, the redundancies will occur as projected by the employer. The Directive, however, seeks through notification a means by which dismissals might be reduced or averted. Nowhere within WARN's text is it mentioned that employer-projected redundancies might be averted by employee input. The debates in the U.S. Senate during consideration of WARN reflect as a "given" the right of employers to unilaterally close their doors and terminate their employees. The Directive's goal of reducing collective dismissals by means of information and consultation with worker representatives and their communities was specifically rejected by U.S. Senator Steven D. Symms (R. Idaho) during the debate over WARN's enactment. Senator Symms stated as follows:

> European employers, in recent surveys, believe strongly that one of the major factors contributing to their inability to remain competitive and thereby create enough jobs to keep up with the population growth is the limitations imposed by the labor market rigidities . . . .
>
> The message that comes from the Europeans . . . is that they need to get out from under this type of legislation. Instead of passing more of it, they are saying that they have to rid themselves from it.[112]

The primary sponsor of WARN in the Senate was Howard Metzenbaum (D-Ohio). A liberal Democrat, Senator Metzenbaum put the issue in perspective when he stated that "[i]t was never the intent of the author of the Legislation and the supporters of the Legislation to give Federal courts any authority to enjoin a plant closing or mass layoff . . . [W]e are prepared to accept the amendment."[113] The amendment addressed by Senator Metzenbaum's remarks appears in WARN as: "Under this chapter, a Federal court shall not have authority to enjoin a plant closing or mass layoff."[114] Under WARN, the decision to terminate employment lies exclusively with the employer.

Council Directive 75/129, in discussing the powers bestowed upon competent public authorities to extend or reduce the time frame in which redundancies may occur, provides that "Member States may grant the

112. 134 Cong. Rec. 58470 (daily ed. June 23, 1998) (Statements of Sen. Symms).
113. 134 Cong. Rec. 58611 (daily ed. June 27, 1998) (Statements of Sen. Metzenbaum).
114. 29 U.S.C. § 2104(b) (West 1994).

competent public authority wider powers of extension."[115] Extensions by a competent public authority within the European Union to enlarge or enjoin a scheduled date for the collective dismissals must, however, be given to the employer prior to the expiration date for which notification has been provided.

Although the notification process contained within each piece of legislation is similar, significant differences exist. Not only does Directive 75/129 mandate worker consultation, which WARN does not, but the Directive also envisages that consultation with worker representatives will be conducted in good time "with a view to reaching an agreement."[116]

In the United States, prior to enactment of WARN, employers with collective bargaining agreements with trade unions could lawfully close their entire business for any reason, including anti-union motivation.[117] Employers were required, however, to negotiate with their employees' trade unions over the "effects" of plant closings and mass layoffs.[118] While consultation under Directive 75/129 to occur with "a view to reaching an agreement," such collective bargaining/consultation need not result in an agreement between the parties in either jurisdiction. The requirement of U.S. employers to engage in such negotiation if their employees are represented by a trade union flows from the Labor Management Relations Act of 1947, as amended,[119] and remains undisturbed by WARN. The on-going nature of the obligation to bargain over the effects of plant closings or mass layoffs is specifically recognized by WARN.[120]

D. *Notification to Workers and Their Representatives upon Unexpected Employment Termination*

The European Union seeks through Directive 75/129 not only to avert redundancies, but actively encourages workers representatives to "make constructive proposals"[121] to prevent the projected terminations. Also, consultation within the European Union contemplates negotiations on aid for redeploying or retraining workers made redundant.[122] Additionally, E.U. Member States may provide in their respective national legislation for worker representatives to call upon the services of experts to advise them in the information and consultation process.

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115. E.U. Directive 75/129, *supra* note 8, art. 4.3 (found in Directive 98/59, art. 4.3).
116. *Id.* art. 2.1.
117. *See* Textile Workers Union of Am. v. Darlington Mfg. Co., 380 U.S. 263 (1965).
118. *See* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 681-682 (1981).
119. *See* 29 U.S.C. § 141.
120. *See id.* § 2105.
121. E.U. Directive 75/129, *supra* note 8, art. 2.3.
122. *See id.* art. 2.2.

In order to implement consultation within the European Community, employers shall provide, in writing, to their workers' representatives the following:

1. The reasons for the projected redundancies;
2. The number of categories of workers to be made redundant;
3. The number and categories of workers normally employed;
4. The period over which the projected redundancies are to be effected;
5. The criteria proposed for the selection of workers to be made redundant in so far as national legislation and/or practice confers the power therefore upon the employer;
6. The method for calculating any redundancy payments other than those arising out of national legislation and/or practice.[123]

On the other hand, WARN merely provides that an employer "shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice" to the labor organization representing the affected employees.[124] If no labor organization represents the employees, individual notice must be given within the same time frame to each affected employee by mailing the notice to an employee's last known address or by inclusion of the notice "in the employee's pay check."[125]

The D.O.L. has promulgated regulations pursuant to WARN on what must be included within the written notice mandated by the statute.[126] The content of the notification varies depending upon whether the affected worker is represented by a trade union or without representation. For those enjoying union representation the employer must provide the trade union, on behalf of its membership, the following:

- Name and address of the employment site.
- Name and telephone number of a company official to contact for further information.
- Whether planned action is expected to be permanent or temporary, and whether the entire plant is expected to be closed. The [D.O.L.] suggests that if the action is expected to be temporary the expected duration should be stated.
- The anticipated schedule for the separations with dates stated to the closest 14-day period.
- Job titles of positions to be affected, and names of the incumbents.

123. *Id.* art. 2.3.
124. 29 U.S.C. § 2102(a).
125. *Id.* § 2107(b).
126. *See id.* § 2107(a).

- It is also suggested that notice containing helpful information such as available dislocated worker assistance.[127]

For workers unrepresented by a trade union the statutory notice to each affected employee shall contain the following:

- Name and telephone number of a company official to contact for further information.
- Whether the planned action is expected to be permanent or temporary, and whether the entire plant is expected to be closed. The DOL suggests that if the action is expected to be temporary, the expected duration should be stated.
- The expected date when the plant closing or mass layoff will begin; and the expected date, within the closest 14-day period, when the individual employee will be separated.
- An indication of whether or not bumping rights exist.
- The DOL also suggests that notice contain helpful information such as available dislocated worker assistance.[128]

In Directive 75/129, three significant items of information must be provided to worker representatives for employees made redundant within the European Union. The latter two items exist by reason of the amendment to Directive 75/129, that is Council Directive 92/56 EEC. Comparable mandatory information does not require WARN as does the EU which mandates the employer to provide employees: the reasons for the projected redundancies; the criteria proposed for the selection of workers to be made redundant and or the method for calculating any redundancy payments other than those arising out of national legislation and/or practice.

The closest requirement under WARN to those listed above is the requirement that employees who are unrepresented by a trade union must be advised whether they possess "bumping rights" to move into jobs not being made redundant.[129] It is assumed that employees in the United States working under a collective bargaining agreement are aware of such rights or their union will advise them of their options.

Before going to the requirement existing in both schemes for providing notice to competent public authorities, the issue of consultation for EU employees unrepresented by a trade union should be briefly addressed.

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127. 20 C.F.R. § 639.7(c).
128. *Id.* § 639.7(d).
129. *Id.*

E. *Worker Consultation and Information Under EU Directive 75/129*

Under Directive 75/129, "'workers' representatives' means the workers' representatives provided for by the laws or practices of the Member States."[130] Immediately prior to the Council's adoption of Directive 92/56, the amendment to Directive 75/129, one legal scholar wrote as follows:

> [T]he Commission expressed concern about the consequences of having left the definition of "workers representatives" to the Member States in the original Directive. Of the [then] 12 Member States only Britain, Ireland and Denmark have no legislation compelling recognition of workers' representatives for information and consultation purposes, and in Denmark the matter is covered by collective agreement.[131]

As observed earlier, two years after the adoption of the Collective Dismissals Directive, the Council adopted the Acquired Rights Directive 77/187 EEC,[132] which has application when mergers, takeovers, and amalgamations of undertakings occur. Without delving into all the specific provisions covered by the Acquired Rights Directive, suffice it to note one requirement common to the Collective Dismissals Directive is that information and consultation between employers and their workers' representatives occur. The consultation contemplated by Directive 77/187 covers (1) reasons for the transfer; (2) legal, economic, and social implications of the transfer; and (3) measures envisaged in relation to the employees.[133]

Additionally, the seller/transferor will provide such information "in good time before the transfer is carried out."[134] If changes in the workers terms and conditions of employment are contemplated, the parties as provided for in Directive 75/129, shall consult "in good time on such measures with a view to seeking agreement."[135]

Further, as with Directive 75/129, the Acquired Rights Directive provides that "representatives of the employees' means the representatives of the employees provided for by the laws or practices of the Member States."[136] Thus, in those Member States where no provision existed in

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130. E.U. Directive 75/129, *supra* note 8, art. 1(b).
131. Bourn, *supra* note 106, at 237.
132. Directive 77/187, *supra* note 22 (now titled Directive 98/50 E.E.C.).
133. *Id.* § III, art. 6.1.
134. *Id.*
135. *Id.* § III, art. 6.2.
136. *Id.* § I, art. 1(b).

their national laws for the designation of employee/worker representatives, primarily the United Kingdom and Ireland, it could be argued that the social dimension of both Directives was "whittled away in workers' minds until it [was] a mere illusion."[137]

Prior to the adoption of Council Directive 75/129, the European Union entertained worker participation with management in a variety of proposals including, but not limited to, employee membership or representation on the boards of undertakings.[138] The initial legislative proposal for worker participation was the statute of a European Company (Societas Europaea or S.E.).[139]

Two years later in 1972, the Fifth Directive on the structure of public companies was announced by the Commission.[140] It was intended to compliment the S.E. and its four models of corporate governance. However by 1980, the Commission concluded the proposed Fifth Directive lacked acceptance, in no small measure due to the Directive's requirement of mandatory employee participation in corporate governance. The Commission continued their efforts to achieve employee participation in undertaking information and consultation with the "Verdling Directive"[141] and later the "Richard" proposal of 1983.[142] These efforts concluded, in part, with the European Works Council (EWC) proposal, a scheme to provide an alternative mode of worker consultation, contained in Directive 94/45 EEC.[143] The E.W.C. scheme was an outgrowth of the Maastricht Summit of 1992 and its Social Agreement, an agreement opposed most strenuously by the government of the United Kingdom, and from which it "opted-out."

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137. Bourn, *supra* note 106, at 230 (footnote omitted).

138. *See* C.W. Kolvenbach, *EEC Company Law, Harmonisation and Worker Participation*, 1990 U. PA. J. INT'L BUS. L. 709, 765-766.

139. *See* Manfred Weiss, *The European Community's Approach to Worker's Participation, in* DEVELOPING THE SOCIAL DIMENSION IN AN ENLARGED EUROPEAN UNION 107 (A.L. Neal & S. Foyn, Eds. 1995).

140. *See* 1972 O.J. (C131) 49.

141. *See* 1980 O.J. (C297) 3.

142. *See* 1983 O.J. (C217) 3. European Union social affairs ministers have tried unsuccessfully as recently as November 1998, to break the two decade plus deadlock over enactment of a pan-European companies statute. A compromise seems unlikely due to the fact "member states are keen to preserve their own models of worker participation, but Germany's unwillingness to compromise its tradition of including trade union representatives on management boards is the greatest obstacle to an accord." *Company Statute Plan Still Blocked*, EUROPEAN VOICE, Oct. 22-28, 1998, at 4. Efforts will continue, however, as one unidentified E.U. social affairs minister noted: "It is a slow process of approximating towards a deal, but we are not quite there yet." *Id.*

143. *See* Council Directive 94/45 EEC of 22 September 1994 On the Establishment of a European Works Council or a Procedure in Community-Scale Undertakings and Community-Scale Groups of Undertakings for the Purposes of Informing and Consulting Employees, 1994 O.J. (L 254) 64.

Enacting legislation to implement the EU mandate on informing and consulting employee representatives on transfers and collective redundancies took a long time to resolve in the United Kingdom. U.K. legislation providing worker consultation on collective redundancies originally existed, was subsequently repealed by the Thatcher government and ultimately included in the Trade Union and Labour Relations (Consolidation) Act of 1992, and as to transfers in the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE). "In both [pieces of legislation], the right to be consulted was originally limited to [employer] recognised trade unions."[144] As a result of the limitation on consultation to employer recognized unions, the Commission filed infringement proceedings against the United Kingdom in 1989. These were concluded in 1994 with two cases discussed in a single opinion by the European Court of Justice.[145]

Italy, however, often cited for its consistent failure to timely implement E.U. directives, outdid the United Kingdom by fully implementing Directive 75/129 in 1991.[146] The United Kingdom's extended posture as a "scofflaw" in terms of implementing consultation for its unrepresented workers can only be deemed, in a perverse sense, impressive. Thus, while structured worker consultation remained a bedrock of E.U. policy this right was a mere illusion in the United Kingdom.[147]

F. *Notification to Public Authorities*

Directive 75/129 requires notification to "the competent public authority in writing of any projected collective redundancies."[148] The notification is to include information required for workers' representatives, "particularly the reasons for the redundancies, the number of workers to be made redundant, the number of workers normally employed and the period over which the redundancies are to be effected."[149] Thereafter, "workers

144. EMPLOYMENT RELATIONS DIRECTORATE, U.K. DEP'T OF TRADE AND INDUSTRY, URN 97/988, EMPLOYEES' INFORMATION AND CONSULTATION RIGHTS ON TRANSFERS OF UNDER TAKINGS AND COLLECTIVE REDUNDANCIES (FEB. 1998) [hereinafter COLLECTIVE REDUNDANCIES REPORT].

145. *See* Cases C-382/92 (Business Transfers) and C-383/92 (Collective Redundancies), E.C. Commission v. United Kingdom, [1995] 1 C.M.L.R. 345 (1994) [hereinafter *Case C-382/92* and *Case C-383/92*, respectively].

146. *See* Bourn, *supra* note 106, at 235 n.31. Italy was subject to two actions before the E.C.J. under Treaty Article 169 for failure to timely implement Directive 75/129. Case 91/81, E.C. Commission v. Italy, [1982] 3 C.M.L.R. 468; Case 131/84, E.C. Commission v. Italy, [1986] 3 C.M.L.R. 693. Similar action was initiated by the Commission against Belgium. *See* Case 215/83, E.C. Commission v. Belgium, [1985] 3 C.M.L.R. 624. All three cases concluded the respective Member State had failed to fulfill its obligations under the EEC Treaty.

147. *See* Bourn, *supra* note 106, at 230.

148. E.U. Directive 75/129, *supra* note 8, art. 3.1.

149. *Id.*

representatives may send any comments they may have to the competent public authority."[150]

A similar notification procedure exists under WARN, except the competent public authority is clearly designated as both the state dislocated worker unit and the chief elected official of the unit of local government where the mass layoff or plant closing is to occur.[151] If more than one unit of local government exists in the geographic area in which the collective dismissals occur, the "local government" is that body to which "the employer pays the highest taxes for the year preceding the year" for which the determination is made.[152]

In the United States, as in the European Union, local government and state dislocated worker units[153] (collectively the "competent public authority") essentially receive the same information as that provided to trade unions, or where employees are unrepresented, the individual employees. Under WARN a modified written notice may be provided to the state dislocated worker unit and local government. However, the employer is required to maintain complete information "on site and readily accessible to the state dislocated worker unit and to the unit of general local government."[154]

One remedy provided under WARN for lack of notification to public authorities that is not found in Directive 75/129 is that local government may bring an action against an employer in their U.S. district court having venue for civil penalties due to the failure to provide notification.[155] The penalty shall not exceed $500 per day for each day the employer is in violation.[156] In one case that has been litigated and settled out of court, a county government joined with dislocated employees and sued the employer for failure to provide notice.[157]

Employers under WARN are to provide sixty days notice to their employees or their union prior to implementing a mass layoff or plant closing.[158] Failure can result in a penalty equal to the wages lost by each effected employee for every day that notice is not given or should have

150. *Id.* art. 3.2.

151. *See* 29 U.S.C. § 2102(a).

152. *Id.* § 2101(a).

153. While the location within state government of the dislocated worker unit will vary from state to state, it is consistently that unit of state government which has been designated or created within the respective state under Title III of the Job Training Partnership Act, 29 U.S.C. § 1651. *See* 29 U.S.C. § 2102(a)(2).

154. 20 C.F.R. § 639.7(e).

155. *See* 29 U.S.C. § 2104(a)(3)(West 1994).

156. *See id.* § 2104(a)(3).

157. *See* County of Cambria v. Navaco Indus., C.A. No. 93-189J (W.D. Pa. 1994).

158. *See* 29 U.S.C. § 2102(a)(West 1994).

equivalent bodies);
(c) the crews of sea-going vessels . . . .[172]

WARN, like the EU Directive, does not cover state or local governments or sea-going vessels and encompasses greater exemptions among employers otherwise covered by its terms. Those exemptions apply to providing a full sixty-day notice and fall into three categories or defenses: (1) faltering company exception, (2) unforeseeable business circumstances, and (3) natural disaster exception.

Each of the three WARN exceptions arguably find a parallel in the decision of the E.C.J. in *Dansk Metalarbejderforbund i Danmark H. v. Nielsen & Son.*[173] In *Nielsen*, the E.C.J. held an employer who has experienced financial difficulties should not be penalized for lack of clairvoyant powers to foresee its impending economic demise and resulting collective dismissals.[174] However, it should be observed the Directive's 1992 amendment, a direct result of *Nielsen*, deleted from Directive 75/129's coverage "terminations of an establishment's activities where that is the result of a judicial decision."[175] In *Nielsen*, the undertaking was in a court sanctioned reorganization due to the company's indebtedness/lack of operating capital.[176] The union for the undertaking's employees sought to terminate its members employment with their employer due to the undertaking's precarious financial condition.[177] The employer protested the action.[178] The E.C.J. rejected the union's tactic, arguing in a novel fashion that to sanction such action permitted "workers the possibility of bringing about [their own] dismissals against the will of [their] employer and without his being in a position to discharge his obligations under Articles 2 and 3 of the directive. It would lead to a result which precisely contrary to that sought by the directive, namely to avoid or reduce collective redundancies."[179]

Whether unforeseen economic circumstances remain a defense to liability under Directive 75/129 and its 1992 amendment is unresolved. The issue has not been addressed by the E.C.J. since *Nielsen*. Under WARN, as under the EU Directive, businesses are not required to foresee the unknown. However, the three WARN exceptions to providing the full sixty-day notice are strictly construed.

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172. E.U. Directive 75/129, *supra* note 8, art. 1.2.
173. Case 284/83, [1985] E.C.R. 553, [1986] 1 C.M.L.R. 91(1986).
174. *See id.* at 99-100.
175. Formerly art. 1.2(d) of Directive 75/129 EEC. *See* Directive 98/59, art. 4.4.
176. [1986] 1 C.M.L.R. 91, 92 (1986).
177. *See id.*
178. *See id.*
179. *Id.* at 99.

Exceptions for providing a sixty-day notice under WARN are not absolute; they merely legitimatize the employer providing a shorter notice period. The Act clearly contemplates affected employees be given "as much notice as is practicable and at that time (the employer) shall give a brief statement of the basis for reducing the notification period."[180] Employer's possessing legitimate reasons for not providing the full mandatory notice period, yet failing to provide affected employees written notice outlining the grounds for their entitlement, can lose their right to the exception.[181] Once separation of employment is a foregone conclusion, notice must be given without delay.[182] The burden of proof remains with the employer to prove its situation meets one of the three exceptions provided by the Act.[183]

The first exception, the "faltering company" defense, is defined by the Act as an employer "actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business."[184] It should be observed the faltering company exception "applies to plant closing but not to mass layoffs and should be narrowly construed."[185] In order to come under the exception, the employer must fall within one or more of the following categories:

- Seeking capital or business during the sixty-day notice period, including but not limited to arranging loans, issuance of capital generating stock, bonds, or other internally generated financing, or seeking money, credit, or business "through any other commercially reasonable method. The employer must be able to identify specific actions taken to obtain capital or business."[186]
- The expectation of additional business or financing must be realistic.[187]
- The additional business or financing must have been sufficient to avoid, postpone, or enable the employer to maintain the entity "for a reasonable period of time."[188]
- The employer must have "reasonably and in good faith"

180. 29 U.S.C. § 2102(b)(3) (West 1994).

181. *See* United Paperworkers v. Alden, 901 F. Supp. 426, 427 (D. Mass. 1995); Alarcon v. Keller Indus., Inc., 27 F. 3d 386, 387 (9th Cir. 1994).

182. *See* Jones v. Kayser Roth, 748 F. Supp. 1276, 1288 (E.D. Tenn. 1990).

183. *See* 20 C.F.R. § 639.9.

184. 29 U.S.C. § 2102(b).

185. 20 C.F.R. § 639.9(a).

186. *Id.* § 639.9(a)(1).

187. *See id.* § 639.9(a)(2).

188. *Id.* § 639.9(a)(3).

Under WARN failure to provide proper timely notification to employees, unions, and communities can result in payment by the employer of those wages an employee would have earned had the notification period been followed.[203] The period of violation for which the employer will be liable to each of its employees will be the number of days within which notification should have been given but was not, "up to a maximum of 60 days."[204] While the employer may deduct from the penalty "voluntary and unconditional"[205] payments made on behalf of the employee, there is no offset for other earnings received during the violation period, including but not limited to unemployment insurance received by the worker or other state benefits. Vacation benefits due an employee cannot be credited against the penalty, nor may worker compensation benefits paid or owing a worker as a result of an injury arising out of or in the course of his or her employment.[206] Nor may severance benefits by reason of a collective bargaining agreement be used to offset the penalty for lack of the notice.[207] One case has even held payments received as a WARN penalty do not constitute "wages" for purposes of state unemployment insurance benefits.[208] The obvious message is lack of timely notification by an employer will result in a penalty in every sense of the word.

It should be appreciated that payments for benefits, such as life and health insurance made to third parties/trustees on behalf of the employee are available to employers to offset notification penalties.[209] Courts are empowered to exercise their discretion and reduce penalties where "an employer in violation . . . proves that the act or omission was done in good faith."[210] However, an employer's subjective belief that things will get better is not sufficient justification to reduce liability and avail the employer of the good faith defense.[211]

As a further inducement to discourage lack of compliance, "aggrieved employees" or their unions may file complaints on their behalf seeking the notification penalties.[212] Attorneys fees and costs of litigation may be awarded to successful litigants.[213] Punitive damages to discourage future

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203. *See id.* § 2104(a)(1)(A).
204. *Id.*
205. *Id.* § 2104(a)(2)(B).
206. *See generally* USWA v. North Star Steel, 809 F. Supp. 5 (M.D. Pa. 1992).
207. *See id.*
208. *See* Capital Castings, Inc. v. Arizona Dep't of Employment Sec., 828 P.2d 781, 784, (Ariz. Ct. App. 1992).
209. *See* 29 U.S.C. § 2104(a)(2)(C).
210. *See id.* § 2104(a)(4).
211. *See Jones*, 748 F. Supp. at 1291-92.
212. *See* 29 U.S.C. § 2104(a)(5).
213. *See id.* § 2104(a)(6).

noncompliance by other employers are not available under WARN.[214] Unlike other labor/employment statutes, such as the Fair Labor Standards Act of 1938,[215] WARN does not provide the D.O.L. with enforcement power. All litigation to enforce WARN must be brought by aggrieved employees or their unions.[216] The D.O.L. merely has authority[217] to issue regulations, as cited throughout this discussion.

I. *Deadlines for Implementation*

WARN was signed by the U.S. President on August 4, 1988, but the legislation did not become effective until February 6, 1989.[218] The Secretary of Labor was authorized to promulgate prospective regulations upon the legislation's enactment.[219]

Under Directive 75/129, E.U. Member States were mandated to "bring into force the laws, regulations and administrative provisions needed in order to comply with this Directive within two years following its notification."[220] The notification occurred at Brussels on February 17, 1975. The Directive's amendment, Directive 92/56 EEC, enjoyed a similar two-year implementation period. As noted earlier, Directive 75/129 was not fully implemented within the Community until the United Kingdom adopted the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations of 1995, "which came into effect for collective redundancies and transfers taking place on or after 1 March 1996."[221]

III. THE UNITED KINGDOM'S EXTENDED PERIOD OF NONCOMPLIANCE WITH ITS TREATY OBLIGATION TO IMPLEMENT E.U. DIRECTIVE 75/129

The United Kingdom's aversion during the Thatcher/Major years to enhance or even stabilize trade union involvement in employment relationships is exemplified by its failure to acknowledge its Treaty obligations regarding worker information and consultation under Directive

214. *See* Finnan v. L.F. Rothschild & Co., 726 F. Supp. 460, 464-65 (S.D. N.Y. 1989).

215. 29 U.S.C. § 201.

216. *See* United Food & Commercial Workers Int'l Union Local 751 v. Brown Group, Inc., 116 S. Ct. 1529 (1996).

217. *See* 29 U.S.C. § 2107(a).

218. *See* WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT OF 1988, Pub. L. No. 100-379, 102 Stat. 895 (codified in 9 U.S.C. § 2101).

219. *See id.*

220. E. U. Directive 75/129, *supra* note 8, § IV, art. 6 (deleted in Council Directive 998/59, which took effect August 1998, art. 9).

221. Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations of 1995.

been given.[159] The statute uses the term "a 60-day period" without defining whether the statute contemplates calendar days or work days. Unfortunately, the regulations issued by the D.O.L. fail to directly address this issue.[160] As a result, litigation has occurred that has merely further clouded the issue.

Only one circuit, the Third Circuit, within the twelve nonspecialized circuits comprising the U.S. Court of Appeals has adopted the calendar days interpretation.[161] Four circuits have adopted the working days interpretation.[162] A sharp divergence has arisen within the Federal appellate court system on this aspect of the statute's interpretation.

Proponents of the calendar-day interpretation, most notably the Maurice and Jane Sugar Law Center of the National Lawyers Guild, who have litigated this issue on multiple occasions on behalf of workers made redundant, contend the calendar-day approach better serves displaced workers and accurately reflects congressional intent at time of WARN's passage. Specifically, the Sugar Center argues their interpretation "involves more damages, typically an additional 18 days in a 60-day period."[163]

The U.S. Supreme Court in 1994 denied a writ of certiorari in

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159. *See id.* § 2104(a).

160. *See* 20 C.F.R. § 639.2.

161. *See* United Steelworkers v. North Star Steel, 5 F.3d 39, 42 (3rd Cir. 1993), *cert. denied* 114 S.Ct. 1060 (1994).

162. *See* Carpenters Council v. Dillard Dep't Stores, 15 F.3d 1275, 1282 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 933 (1995); Saxion v. Titan-C Mfg. Inc., 86 F.3d 553, 559 (6th Cir. 1996); Breedlove v. Earthgrains Baking Co., 140 F.3d 797, 801 (8th Cir. 1998); Burns v. Stone Forest Indus., 147 F.3d 1182, 1184 (9th Cir. 1998).

163. LITIGATING THE WARN ACT: A PRACTITIONER'S GUIDE 32. Maurice and Jane Sugar Law Center For Economic and Social Justice: A Project of the National Lawyers Guild ed., (1996). The volume, privately published, hosts a plethora of valuable information for lawyers litigating WARN cases. The Center is located at 645 Griswold, Suite 1800, Detroit, MI 48226, (313) 962-6540. Additionally the Sugar Center contends:

> The calendar day reading is best defended by the purpose of WARN, that is, "to require advance notification of plant closing and mass layoffs," which would be subverted under a working day approach. Pursuant to that approach, employers pay the same amount in damages for violating WARN as they would have paid in wages for conforming to it, thereby reducing or removing their incentives to comply. Conversely, a calendar days interpretation would not result in equal damages; ostensibly, the larger payments required in cases of violations would provide an incentive towards compliance. The contract suggest that if Congress meant to require notice and not just to compensate for its default, the punitive and deterrent calendar days reading must have been intended.

Id. at 32-33.

Carpenters Council v. Dillard Department Stores,[164] which sought to resolve the calendar- versus working-day issue. The continued confusion on the question encouraged the Sugar Center to seek, unsuccessfully, review in two recent cases, *Breedlove v. Earthgrains Baking Co.*[165] and *Burns v. Stone Forest Industries, Inc.*[166] The calendar-day interpretation has been unsuccessfully urged by the D.O.L. in federal circuit courts of appeal.[167]

WARN, however, does encourage early compliance by employers with its notification procedures for individual workers, trade unions, and competent public authorities. Regulations issued by the D.O.L. approve incomplete notice "more than 60 days in advance," provided a subsequent complete notice is given "at least 60 days in advance of a covered employment action."[168] Likewise, conditional notice may be provided to the appropriate parties and is dependent "upon the occurrence of an event, such as the renewal of a major contract, only when the event is definite and the consequences of its occurrence" will result in a plant closing or mass layoff.[169] Lastly, it should be noted that whether it is a notice to workers, their union, or competent public authorities, an employer has an obligation under WARN to provide the best information available at the time notice is given.[170] Inadequate notice has been equated with no notice by judicial decision in the United States.[171]

G. *Exclusions of Coverage*

EU Directive 75/129, as noted previously, contains three exclusions to its coverage to-wit:

> (a) collective redundancies affected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts;
>
> (b) workers employed by public administrative bodies or by establishments governed by public law (or, in Member States where this concept is unknown, by

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164. *Dillard*, 115 S. Ct. at 933.

165. S. Ct. Docket No. 98-77 (denied Oct. 5, 1998).

166. S. Ct. Docket No. 98-556 (denied Dec. 7, 1998).

167. *Newsletter of the Labor and Employment Committee*, NAT'L LAWYERS GUILD, Oct. 1998, at 11.

168. 20 C.F.R. § 639.7(2).

169. *Id.* § 639.7(3).

170. *See id.* § 639.7(4).

171. *See* U.E. v. Maxim, Inc., 5 IER Cases 629, 630-31 (D.C. Mass. 1990); Washington v. Aircap, 831 F. Supp. 1292 (D.S.C. 1993).

believed giving the notice would have inhibited its ability to obtain the financing or business or its source would not do business with a "troubled company."[189]

Notwithstanding the above, an exception is not available to an undertaking with "access to capital markets or with cash reserves."[190] The condition of the operating unit alone is not the deciding factor. The entity must be viewed on a company-wide basis.[191] Additionally, withholding notification merely to sell or liquidate a business in a more positive market setting will not entitle the undertaking coverage under the faltering company exception.[192]

The second exception, commonly called the unforeseeable business circumstance defense, is a plant closing or mass layoff "before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required."[193] The circumstances under this category must have been reasonably unforeseeable by the employer at the time the employer would otherwise have been required to provide notice. The exception has been judicially recognized as an event caused by a sudden, dramatic or unexpected incident beyond the employer's control. In one case, the release of nitrogen dioxide, a potentially lethal gas, causing the shutdown of a plant met the definition.[194] In another case, a hospital closed its doors suddenly without notice to its employees due to lack of continued financial support from an eleemosynary foundation. The foundation was concerned over its continued Internal Revenue Service tax exempt status by providing funds to the financially troubled hospital.[195] A federal district court concluded, while the underpinning for the foundation's decision may have been legally incorrect, the hospital had no control over the foundation's decision-making process, and the defense was available.

The D.O.L. has characterized such unforeseeable circumstances as including (1) a principal client's sudden and unexpected termination of a major contract, (2) a strike at a major supplier, (3) an unanticipated and dramatic major economic downturn, and (4) a government-ordered closing of an employment site without prior notice.[196] The test for determining

189. *Id.* § 639.9(a)(4).
190. *Id.*
191. *Id.*
192. *See id.*
193. *See* I.U.E. v. Midwest Fasteners, 763 F. Supp. 78, 82 (D.N.J. 1990).
194. *See* Bradley v. Sequoyah Fuels Corp., 847 F. Supp. 863 (E.D. Ok. 1994).
195. *See* Jurcev v. Central Community Hosp., 7 F.3d 618, 620 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 901 (1994).
196. *See* 20 C.F.R. § 639.9(b)(1).

whether the business circumstances qualify for this exception "focuses on an employer's business judgment."[197] The D.O.L. Regulations provide that "[t]he employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market."[198]

The third and final exception is the "natural disaster" defense, which the Act defines "as a flood, earthquake or the drought currently ravaging the farmlands of the United States."[199] Why the drought "ravaging" the farms of America in the 1980s was included in the Act can only be attributed to the political power in the U.S. Congress of the agricultural business community. The DOL Regulations further quantify the exception by noting its application only where "an employer (can) . . . demonstrate that its plant closing or mass layoff is a direct result of a natural disaster."[200]

As previously noted, Directive 75/129 contains no "special circumstances" defense. The United Kingdom has, however, recognized special circumstances defenses that are narrowly construed and "must be uncommon or out of the ordinary—a sudden and unexpected, rather than a predictable disaster . . . . The fact that dismissals were triggered by the employer becoming insolvent is not of itself a special circumstance."[201] In E.C.J. Case C-382-92, which sought implementation of Directive 75/129 in the United Kingdom, this deviation from the directive was not raised by the Commission. While the Directive does not mention redundancies by reason of a strike, WARN does and excludes application/coverage "when permanently replacing a person who is deemed to be an economic striker."[202] Strikers in the United States generally fall into one of two classifications: economic strikers or unfair labor practice strikers.

H. *Statutory Penalties for Failure to Comply*

Directive 75/129 is limited to setting minimum standards for information and consultation in the event of collective redundancies. It leaves the issue of entitlement for displaced workers to compensatory redundancy payments to the E.U. Member States. WARN provides for lost-wage payments for lack of proper notice, an entitlement separate and apart from unemployment insurance, which is administered by the states within a federally designed scheme.

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197. *Id.* § 639(b)(2).

198. *Id.*

199. 29 U.S.C. § 2102(b)(B).

200. 20 C.F.R. § 639.9(c)(2).

201. SIMON DEAKIN & GILLIAN S. MORRIS, LABOUR LAW 691 (1995) (footnote omitted); *see also* Trade Union and Labour Relations (Consolidation) Act 1992, §§ 187(7), 189(6) (Eng.).

202. 29 U.S.C. § 2103(2).

75/129. Margaret Thatcher's view, upon taking office, of the U.K. trade union movement was described in pithy fashion in her memoirs as follows: "We also had to deal with the problem of trade union power, made worse by successive Labor governments and exploited by the communist and militants who had risen to key positions within the trade union movement - positions they ruthlessly exploited . . . ."[222]

Recognizing that worker information and consultation has its E.U. genesis in the Social Charter, one is not surprised by Baroness Thatcher's observation:

> The Social Charter was quite simply a socialist charter—devised by socialist in the Commission and favored predominantly by socialist member states. I had been prepared to go along (with some misgivings) with the assertion in Council communiques of the importance of the "social dimension" of the Single Market. But I always considered that this meant the advantages in terms of jobs and living standards which would flow from freer trade.[223]

A. *The Thatcher Years, 1979-1990*

The Thatcher electoral victory of May 4, 1979, resulted in a hostile atmosphere in the United Kingdom to the E.U. goal of employer information and consultation with workers and their representatives. At the time Council Directive 75/129 was adopted, the U.K. Industrial Relations Act 1971 was in limbo, having been repealed in 1974, with its successor the Employment Protection Act 1975 not yet law. Each of these pieces of legislation "provided a mechanism for the appointment of workers' representatives in the event that an employer might refuse to recognize such representatives."[224] The statutory mechanism for appointment of worker representatives in nonunion settings was repealed by the Thatcher initiated Employment Protection Act 1980.[225]

With enactment of the Employment Protection Act 1980, recognition of worker representatives became dependent on the will of employers. As recognized by one legal text:

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222. MARGARET THATCHER, THE DOWNING STREET YEARS 97-98 (1993).

223. *Id.* at 750-51.

224. Case C-383/92, Re Business Transfers: EC Commission v. United Kingdom, [1995] I C.M.L.R. 345, 356 (1995).

225. *See id.*

> [T]he reach of collective bargaining narrowed considerably during the 1980's due cumulatively to a reduction in the proportion of workplaces where trade unions are recognized for at least some employees (from two-thirds in 1980 to just over half (53%) in 1990 and in the proportion of employees covered by collective agreements from 64% in 1984 to 47% in 1990), a trend which seems likely to have continued during the first half of the 1990's . . . .[226]

Advocate General Walter Van Gerven in *Cases C-382/92 and C-383/92*[227] described the situation in the United Kingdom from 1980 to the mid-1990s as follows:

> [T]he present rules largely deprive Article 6 of Directive 77/187 and Articles 2 and 3 of Directive 75/129 of their effectiveness. By making recognition of representatives dependent on the will of employers, the obligations set out in those articles are undermined . . . . There is, however, a huge difference between leaving Member States free to provide for workers' representatives in accordance with their own legal systems and leaving them free not to provide for any such representatives at all.[228]

He further stated that "no inference c[ould] be drawn from . . . Article 1(1)(b) of Directive 75/129 to the effect that worker representation can depend on the consent of employers."[229] Yet, within the United Kingdom for nearly two decades, notwithstanding Directive 75/129, worker representation was dependant upon employer sufferance.

The lack of worker representation and consultation in the United Kingdom did not arrive initially at the E.C.J. as a result of the lack of harmonization on directives relating to collective dismissals (75/129) or acquired rights (77/187). In 1982, the E.C.J. heard an action brought by the Commission against the United Kingdom for a declaration under Article 169 EEC concerning the inability of a worker in the United Kingdom to have his or her work judicially declared to be of equal value to another's in order to receive equal pay for that equal work.[230] In that case, the E.C.J. dealt with Directive 75/117 EEC, which is intended to eliminate all

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226. DEAKIN & MORRIS, *supra* note 201, at 667.

227. [1995] 1 C.M.L.R. 345 (1994).

228. EC Commission v. United Kingdom, 1 C.M.L.R. at 356.

229. *Id.* at 357.

230. Case 61/81, Re Equal Pay for Equal Work: EC Commission v. United Kingdom, E.C.R. 2601, [1982] 3 C.M.L.R. 284 (1982).

discrimination in worker pay based upon gender.[231] Under Article 6 of Directive 75/117, Member States are required to empower an entity of government within its jurisdiction to decide whether different jobs are of equal value.[232] The E.C.J. held that an individual has the right to initiate a claim in a national court, notwithstanding objections from their employer.[233] "The only way in the United Kingdom in which it was possible to determine whether two work functions were of equal value was by means of a job classification system which could be introduced only with [the] employer's consent."[234] The United Kingdom argued that the Directive in no way affected national laws and practices. The E.C.J., however, stated that it "c[ould not] endorse that view,"[235] and swiftly imposed a remedy by holding that "[t]he Member States must endow an authority with the requisite jurisdiction to decide whether work has the same value as other work, after obtaining such information as may be required."[236]

It should be observed the English language version of Directive 75/129 refers not to collective dismissals but to collective "redundancies."[237] The term "redundancy" in U.K. law is defined in the Redundancy Payments Act 1965 and is limited in scope.[238] The Directive's definition of collective redundancies is far more expansive.[239] When implementing the Directive, through passage of the Employment Protection Act 1975, the United Kingdom adopted the 1965 Act's definition of redundancy.[240] Thus, from 1975 forward, the implementation of Directive 75/129 in the United Kingdom was at odds with the scope of coverage intended by the Commission. Compounding the error, the courts in the United Kingdom "drew a distinction between dismissals by reason of redundancy, and dismissals by reason changes in the work resulting from reorganisation. The latter were deemed to fall *outside* the scope of redundancy and hence did not engage the provisions the UK law introduced to implement the 1975 Directive."[241]

A third element of contention resulting in lack of implementation of Directive 75/129 in the United Kingdom arose over the distinction between the words "contemplating" and "proposing." Under Article 2(1) of

231. *See id.*
232. *Id.*
233. *Id.* at 299.
234. EC Commission v. United Kingdom, 1 C.M.L.R. at 360.
235. Commission v. United Kingdom, 3 C.M.L.R. at 299.
236. *Id.*
237. *See id.*
238. *See id.*
239. *See* BRIAN BERCUSSON, EUROPEAN LABOUR LAW 226-27 (1996).
240. *See id.* at 227.
241. *Id.* at 228 (footnote omitted).

Directive 75/129, an employer when "contemplating collective redundancies . . . shall begin consultations with workers' representatives with a view to reaching an agreement."[242]

Sections 188 to 198 of the Trade Union and Labour Relations (Consolidation) Act 1992 sought to replace Sections 99 to 107 of the Employment Protection Act 1975 (EPA), the latter being an earlier attempt to implement Directive 75/129 in the United Kingdom.[243] The obligation for consultation in both pieces of legislation did not arise until an employer was "proposing" to dismiss employees as redundant.[244] The distinction in scope between contemplating and proposing gave rise to alternative judicial interpretations. One case favoring a narrow view held as follows:

> We cannot read [s 99(8) EPA] as requiring an employer to do anything about consulting a trade union in respect of its employees unless and until a proposal to dismiss one or more of them on the ground of redundancy is at least in the mind of the employer. When that occurs, the obligation under the statutory provisions arises.[245]

The broader view was argued by the employees' union in another case,[246] which contended that the court should, if possible, "construe United Kingdom legislation so as to comply with the United Kingdom's obligations under an EEC directive."[247] Rejecting the trade union position, the Court, in convoluted fashion, wrote that "the phrase 'an employer proposing to dismiss as redundant' cannot include one who is merely thinking about the possibility of redundancies. [One] cannot construe the word 'proposing' to embrace the full range of possible meaning of the word 'contemplating' but . . . can construe 'contemplating' in a sense equivalent to 'proposing.' "[248]

Nine months later in a case of great national import over the proposed closing of thirty-one collieries by British Coal Corporation (B.C.C.), the narrow view was rejected.[249] Three coal mining unions protested the lack of consultation by B.C.C. and adherence to previously established national

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242. EU Directive, *supra* note 8 art. 2(1).

243. Regina v. British Coal Corp. & The Secretary of State for Trade & Indus., [1993] 1 C.M.L.R. 721, 730 (1993).

244. *Id.*

245. USDAW v. Leancut Bacon, (1981) I.R.L.R. 295, at para. [24].

246. *See* Re Hartlebury Printers Ltd. & Others, [1994] 2 C.M.L.R. 704 (1994).

247. *Id.* at 712.

248. *Id.* at 713.

249. Regina v. British Coal Corp. & The Secretary of State for Trade & Indus., [1993] 1 C.M.L.R. 721 (1993).

procedures in the industry.[250] Lord Justice Glidewell wrote as follows:

> [T]he difference between the wording of the directive and the wording of section 188 of the Act of 1992 is such that the section cannot be interpreted as having the same meaning as the directive.
>
> I say this because in the directive consultation is to begin as soon as an employer contemplates redundancies, whereas under the Act it only needs to begin when he proposes to dismiss as redundant an employee. The verb "proposes" in its ordinary usage relates to a state of mind which is much more certain and further along the decision-making process than the verb "contemplate"; in other words, the directive envisages consultation at an early stage when the employer is first envisaging the possibility that he may have to make employees redundant. Section 188 applies when he has decided that, whether because he has to close a plant or for some other reason, it is his intention, however, reluctant, to make employees redundant.[251]

Because of the foregoing interpretation and the inability of workers to have a representative in dismissal settings where their employer had refused to recognize their right of representation by a trade union, Directive 75/129 had limited impact in the United Kingdom.

With these obvious limitations to Directive 75/129's application in the United Kingdom, the Commission pursuant to Article 169 E.C. instituted proceedings against the United Kingdom on November 27, 1989. The E.C.J. rendered its judgment on June 8, 1994. Once the case reached the E.C.J., the United Kingdom accepted the proposition that its narrow definition of redundancy in the 1965 Act when applied to its 1975 Act "constitute[d] a defective implementation"[252] of Directive 75/129. As for the ability of an employer to evade consultation with its employees, the United Kingdom accepted "this has been a shortcoming in its legislation, and one which has already been put right."[253]

Notwithstanding its acknowledgment of extreme tardiness in implementing Directive 75/129, workers in the United Kingdom remained dispossessed of their E.U. rights during this extended period of noncompliance. In an article published prior to the E.C.J.'s 1994 judgment, insolvency professionals in the U.K. were to advise their clients to

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250. *See id.* at 722-23.

251. *Id.* at 751.

252. *Cases C-382/92 and C-383/92*, 1 C.M.L.R. at 371.

253. *Id.* (arguably by the Trade Union and Labour Relations (Consolidation) Act, 1992 (TULRCA)).

"[c]onsider causing the company to withdraw recognition from the trade union prior to making the redundancies. If this were done before the *proposal* to effect redundancies was made, the obligation to consult *may* not arise."[254]

The primary focus of the article was on Sections 188 to 189 of the Trade Union and Labour Relations (Consolidation) Act 1992, which mandated consultation by employers with their recognized trade unions.[255] Under Section 188(6) employers in the course of their consultation were required to "consider any representations made by the trade union . . . to reply to those representations" and if rejected, state why.[256] This statutory attempt to conform in exceedingly limited fashion to Article 2(1) of Directive 75/129 in the United Kingdom was deemed by the insolvency writer as "contentious and highly impracticable."[257]

Thus, faced with a U.K. mindset that Directive 75/129 "was not intended to amend national rules or practices concerning the designation of workers' representatives,"[258] the E.C.J. responded by stating the United Kingdom's "point of view cannot be accepted."[259] The Court also noted the ability of an "employer to frustrate the protection provided for workers by Article 2 and 3 of the directive, must be regarded as contrary to those articles."

As previously noted, the United Kingdom by including the definition of "redundancy" from the Redundancy Payments Act 1965 in the Employment Protection Act 1975 as synonymous to collective dismissals "failed to give full effect to the directive on this point."[260] The United Kingdom acknowledged this before the E.C.J., with the Court holding the definition "does not cover all the cases of 'collective redundancy' covered by the directive."[261] Moving to the EPA's failure to require the Directive's mandated consultation with workers' representatives "with a view to reaching an agreement," the E.C.J. simply held the EPA did not require an employer to consult with his employees toward reaching an agreement.[262]

Lastly, noting the failure to provide sufficient deterrent when "an employer [failed] to comply with his obligations to consult and inform the workers' representatives,"[263] the United Kingdom conceded "its legislation

254. A. Owen, *Collective Redundancies and Insolvency*, INSOLVENCY LAW AND PRACTICE 75, 80 (1992).
255. *See id.* at 75.
256. *Id.*
257. *Id.* at 76.
258. *Cases C-382/92 and C-383/92*, 1 C.M.L.R. at 385.
259. *Id.*
260. *Id.*
261. *Id.* at 387-88.
262. *Id.* at 388.
263. *Id.*

was at variance with Treaty requirements."[264] The E.C.J. forcefully observed Member States have an obligation to see "infringements of Community law are penalised."[265] Accordingly, the Court held that "the United Kingdom legislation largely deprives that sanction of its practical effect and its deterrent value."[266]

The E.C.J. concluded that the United Kingdom failed to fulfill its obligations under the directive and under Article 5 [EEC].[267] A similar failure of the United Kingdom to effectively implement Directive 77/187 was found to exist in companion Case 382/92 concerning the failure on the part of the United Kingdom to implement the Acquired Rights Directive.[268] Rejecting the suggestion of its Advocate General in Case 382/92,[269] but accepting it in Case 383/92,[270] the E.C.J. ordered the United Kingdom to pay costs in both cases.[271] With the E.C.J. decision in 1994, the task of getting the United Kingdom back on course with Directives 75/129 and 77/187 fell upon Thatcher's successor, John Major.

B. *The Major Government Response to the European Court of Justice Decision in Case C-383/92*

Under the authority of the U.K.'s European Communities Act 1972 (ECA), the Major Government amended Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) by issuance in October 1995 of regulations to implement Directives 75/129 and 77/187. The regulations, The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, were issued as secondary (as opposed to primary) legislation by the Secretary of State for Trade and Industry.

Shortly thereafter, in March 1996, three unions in the United Kingdom filed proceedings to challenge the Regulations.[272] Without going into great detail, the Regulations sought to implement Directive 75/129 by requiring that the dismissal of 20 or more employees by reason of a redundancy would bring into play worker information and consultation. The applicants argued the earlier enacted TULRCA required consultation with the employer recognized trade union over a single job loss. Therefore, the

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264. *Id.*
265. *Id.* at 389.
266. *Id.*
267. *Id.* at 372.
268. *See id.*
269. *See id.* at 373.
270. *See id.*
271. *See id.* at 390.
272. R. v. Secretary of State for Trade & Indus., ex parte UNISON, [1997] 1 C.M.L.R. 459 (1997) [hereinafter *UNISON*].

Secretary's action in raising the consultation criteria from one to twenty or more employees over a period of ninety days or less was *intra vires* "under the powers conferred upon him by Section 2(2), read with Section 2(4) of the European Communities Act 1972 . . . ."[273] The High Court (Queen's Bench Division) upheld the Secretary's authority, citing the ability of a Member State under Directive 75/129 to select from alternative methods for defining collective redundancies under Article 1.1.[274] The Regulations implemented one of the two approved methods contained within the directive. The High Court in *R. v. Secretary of State for Trade & Industry ex parte UNISON* discussed the statutory underpinnings of the European Communities Act 1972 that legitimatize the Secretary of State's ability to initiate secondary legislation.[275] Given the "very general and wide powers"[276] possessed by the Secretary of State by reason of the E.C.A., one cannot help but conclude Directive 75/129 languished so long in the United Kingdom due to the Thatcher and Major aversion to worker consultation by worker not employer designated representatives.

Facing the issue of worker designated representation and the selection thereof, 1995 Regulations, Section 3(2), mandate consultation shall occur with such representatives "in good time" "with a view to reaching an agreement," as required by Directive 75/129.[277] The representatives shall be "employee representatives elected by them" or representatives of the trade union recognized by the employer, "as the employer chooses."[278] The three unions in *UNISON* argued the process allows the potential for employers to "cherry-pick" representatives of its choice and not that of the employees.[279] Also, the unions raised the spectre of employers casting groups of employees in antagonistic postures, fearing the possibility that employees negotiating over their dismissal will entice the employer to select another group of employees be designated redundant with whom

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273. *Id.* at 467.

274. *Id.* at 468.

275. *Id* at 471. The European Communities Act 1972 empowers the Secretary of State, pursuant to Section 2(2) to make provision by regulations:

> (a) for the purpose of implementing any Community obligation of the United Kingdom or enabling any such obligation to be implemented . . . etc.
> (b) for the purpose of dealing with matters arising out of or related to any such obligation, or rights . . . etc. European Communities Act 1972, European Communities Act, § 2(2).

276. *UNISON*, 1 C.M.L.R. at 471.

277. *Id.* at 478.

278. *Id.*

279. *Id.* at 474.

there has been no consultation.[280]

The unions' concerns over the representative selection process were rejected on the premise that the Directive is no more specific on this subject than the Regulations.[281] The High Court adopted the argument of the Treasury Solicitor, S. Richards, that Directive 75/129 was intended to achieve "partial harmonisation" and "not intended to establish a uniform level of protection throughout the Community on the basis of common criteria."[282] Utilizing this same line of thinking, the High Court also rejected the unions' arguments that the regulations failed to provide sufficient detail for the employee electoral process.[283]

C. *Progress Toward Worker Information and Consultation Under Tony Blair*

Following the election of Tony Blair in May 1997, the Labour Government in February 1998 issued a document entitled "*Public Consultation Document on Employees' Information and Consultation Rights on Transfers of Undertakings and Collective Redundancies.*"[284] The document deemed that the 1995 Regulations were "an inadequate response to the ECJ's judgments, and for introducing unnecessary and unwelcome confusion and complexity in the legislation, causing uncertainty for employers and insecurity for employees."[285] The arguments for change appear to reflect, in part, the arguments of the three trade unions in *UNISON*.

In May 1998, the President of the Board of Trade presented to Parliament a White Paper entitled "*Fairness at Work*,"[286] which set forth the Blair Government's proposals on collective redundancies and other work place issues. In its foreword, Prime Minister Blair states that he seeks a "culture of fairness and opportunity at work so that Britain can harness the talents of all our people."[287] However, he warns there can be no "return to the laws of the past."[288] Keeping in step with the E.U. argument that its social dimension is based, in part, upon competitiveness, the U.K. White Paper calls for "a culture in all businesses . . . in which fairness is second

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280. *Id.*
281. *Id.* at 479.
282. *Id.*
283. *Id.* at 480.
284. COLLECTIVE REDUNDANCIES REPORT, *supra* note 144.
285. *Id.*
286. *(U.K.) Department of Trade & Industry, The Stationery Office, Fairness at Work*, (May 1998) <http://www.dti.gov.U.K.>[hereinafter *Fairness at Work*].
287. *Id.* at foreward.
288. *Id.* at foreward.

nature and underpins competitiveness."[289]

Chapter Four, Collective Rights, states that "trade unions can be a force for fair treatment, and a means of driving towards innovation and partnerships."[290] The Blair Government "believes every employee should be free to decide to join a trade union . . . . [E]qually every employee should be free not to join . . . . There will be no return to the closed shop."[291]

Legislation is promised "to provide for representation and recognition where a majority of the relevant workforce wants it."[292] A detailed legal scheme is proposed whereby employees can select union representation, but only after efforts by the social partners (management/labor) to achieve a voluntary agreement prove unsuccessful in bargaining units of twenty or more employees.[293] A proposal to make unlawful discrimination on the "grounds of trade union membership, non-membership or activities" is promised.[294]

The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, the Major Government's reaction to the E.C.J. decision of 1994, are noted as being "widely criticised and the (Blair) Government intends to amend them."[295]

Prime Minister's Blair White Paper appears committed to implement all aspects of Directive 75/129, as codified by the E.U. Council on July 20, 1998 and now designated as Council Directive 98/59.[296] However, while acknowledging its desire to achieve agreement on a European Company Statute, Blair's agenda "is not persuaded of the need for a directive on information and consultation in companies operating only at a national level."[297] This position puts the United Kingdom at odds with the proposal of E.U. Social Affairs Commissioner Padraig Flynn "to bolster the rights of workers in firms operating in only one EU country."[298] A similar position to that of the United Kingdom is urged by UNICE, the European employers' federation.[299]

While Baroness Thatcher of Kesteven sits in the House of Lords, and John Major, M.P., awaits elevation to this diminishing body which enjoys

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289. *Id.* at para. [1.8].
290. *Id.* at para. [4.7].
291. *Id.* at para. [4.8].
292. *Id.* at para. [4.11].
293. *Id.* at paras. [4.17-.18], annex 1.
294. *Id.* at para. [4.25].
295. *Id.* at para. [4.32].
296. *See* E.C. Directive 75/129, *supra* note 8 and accompanying text.
297. *Fairness at Work*, *supra* note 252, at para. [4.5].
298. *U.K. Government Rallies Opposition to Worker Consultation Proposals*, EUROPEAN VOICE, Oct. 29 - Nov. 4, 1998, at 7.
299. *Id.*

occasional episodes of rebellion, the issue of implementation of Directive 98/59 appears to be resolved in the United Kingdom. Further implementation of expanding concepts of worker information and consultation remain potentially contentious between the European Union and the United Kingdom.

IV. RESOLUTION OF WORKER INFORMATION AND CONSULTATION ISSUES WITHIN THE EUROPEAN UNION IS DEPENDENT UPON THE DEGREE OF FEDERALISM THE COMMUNITY WILL ADOPT

While our discussion has focused primarily upon collective redundancies, the thread of worker information and consultation runs through the topic. As the Commission has recently stated, "[i]nformation and consultation of employees has been a major pre-occupation of the European Community's for many years."[300]

Directive 98/59 is linked by necessity with Directives 77/187 and 94/45 EEC; each of which are grounded on the proposition that "information and consultation are factors for productivity as they contribute to the creation of a highly skilled and committed workforce."[301] While acknowledging that most EU Member States have a statutory or negotiated legal framework aimed at ensuring information and consultation, the Commission has observed, that in many Member States "social rights are not always respected in practice."[302] Thus, according to the Commission, "[EU] Community law is fragmented . . . [and] the current Community provisions do not contain adequate provisions for sanctioning decisions which are taken in contravention of workers' rights to information and consultation."[303] To overcome this lack of compliance, the Commission proposes another directive to achieve its elusive goal, arguing its proposal recognizes the principles of proportionality and subsidiarity to gain palatability among the Member States.

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300. *Proposal for a Council Directive Establishing a General Framework for Informing and Consulting Employees in the European Community*, Nov. 13, 1998, *available at* <http:europa.eu.int/eur-lex/en/com/dat/1998/en-598PC0612.html>.

301. *Id.* at II, The Basis for the Proposal; *see Green Paper, Partnership for a New Organization at Work*, adopted by E.U. Commission, Apr., 1997, *available in* <http://europa.eu.int/comm/dg05/soc-dial/social/greenen.htm> [hereinafter *Green Paper*].

302. Green Paper, *supra* note 302.

303. *Id.*

A. *Why Was the European Union Unable to Achieve Community-Wide Implementation of Worker Information and Consultation in a Timely Manner?*

The Commission's fundamental problem is its inability to enforce its goals upon E.U. Member States, once enacted by the Council. The Treaty structurally and willfully denies the Community such power. The European Union, for this American, seems similar to the United States between November 15, 1777 and September 17, 1787, during its decade under the Articles of Confederation. That decade in which America's War of Independence was waged against King George III was also one marked by national structural government failure and frustration. The Constitution of the United States arose out of that experience. Under the Articles of Confederation, as currently in the European Union, each state retained "its sovereignty, freedom and independence."[304] A "firm league of friendship"[305] was created with "free ingress and regress to and from any other state"[306] with corresponding privileges of trade and commerce.[307] Confederation did not work. A central government with power to force states to comply with national laws was necessary. In the 1700's the United States was a homogenous community sharing common boundaries, traditions, religion and social structure. The European Union currently enjoys none of those attributes. However, the E.U. Member States share a common desire to harmonize a diverse economy with areas of insignificant growth, areas lacking potential for growth, and currently consistent high unemployment.

A 1997 Commission Green Paper noted employment in the Member States increased in 15 of the 20 years since 1977 to 16 million new jobs.[308] However, 8 million jobs in the E.U. were lost during this period of economic downturn, leaving a net growth of only 8 million while the community's working age population during the same period increased by 28 million.[309]

David Currie, Professor of Economics at the London Business School, has wisely observed that "the relevant debate concerns the form of federation that we want, not whether we want one. The choice for Europe

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304. Articles of Confederation, art. II.

305. *Id.* art. III.

306. *Id.* art. IV.

307. *Id.* art. IV.

308. *Green Paper, supra* note 302.

309. *Id.* Current unemployment in the European Union stands at 9.8%. *Europe Delays Decisions on Admitting Ex-Communist Countries,* N.Y. TIMES, Dec. 13, 1998, at 11. In the United States, unemployment was at 4.6% for October 1998. Issue No. 1000, *CCH Labor Law Reports* No. 637, Dec. 9, 1998, at 5.

is not between a federation and a non-federation, but rather the degree of federalism."[310] The EMU, according to Bernard Connolly, former Commission economist, "is a way of producing political union via single currency."[311] The lack of a monetary union within the "several States" undermined the Articles of Confederation.

Those who wish to prevent within the E.U. the creation of a "superstate," in the Jean Monnet vision, will find solace in former U.K. Foreign Secretary Douglas Hurd's comments:

> We are not talking about a European federal union which delegates powers to its component parts. We are dealing with nation states which have successively pooled into a European centre their authority over certain sectors of policy in order to secure for their citizens benefits which the individual state cannot by itself achieve, but have retained the rest of that authority for themselves.[312]

Worker consultation and information, whether it be directed toward collective redundancies, job security following a business transfer, or in corporate/undertaking governance, is dependent in its level of implementation and acceptance upon the degree of political federation within the European Union. While the United Kingdom is ending close to two decades of isolation from E.U. social policy-making, the current government will not necessarily move toward "closer political integration with European Union, or a substantial move towards the European social model."[313] Worker information and consultation will continue to evade resolution until the overriding issue of the degree of political federation within the EU is resolved. Proposed new directives by the Commission on information and consultation will merely give rise to contentious debate until Member States decide on the "eventual balance between the nation state and the institutions of the EU, the conflict will simmer."[314]

B. *Where Are Workers Best Protected When Unexpected Job Loss Occurs? In the European Union or the United States?*

Where then is the redundant worker best protected? In the European Union under Directive 98/59 or in the United States pursuant to the WARN Act? Are we comparing apples and oranges? Probably. The

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310. *Special Report: Does EMU Need Political Union?*, PROSPECT, June 1998, at 64.
311. *Here It Comes, But Will It Work?*, PROSPECT, Dec. 1997, at 37.
312. D. Hurd, *Endstation Europa*, PROSPECT, Aug./Sept. 1998, at 15.
313. *Britain, Out of Harmony Again*, THE ECONOMIST, Nov. 28, 1998, at 59.
314. Hurd, *supra* note 273, at 14.

Annex[315] to the Commission's latest proposed directive details by chart, Table 1, national provisions within Member States of the European Union on information and consultation. The document demonstrates redundant workers in Germany, Belgium, Luxembourg, Netherlands, Denmark, France, Sweden, Finland, Austria, and Spain enjoy greater protection than similarly displaced workers in Ireland, Italy, Portugal, Greece, and the United Kingdom.[316]

Consultation under WARN does not exist. However, the statute provides uniform application, benefits, and penalties whether the undertaking is in Maine, Montana, or Mississippi. Employers in the United States face identical impediments and obligations that impact upon their competitiveness, unlike E.U. employers. However, displaced European workers, on the whole but not individually, enjoy greater protection and benefits than redundant workers in the United States. That point is clear. The U.S. federal system after 200 years of political evolution provides a level playing field. The glowing goals of the Commission constitute half promises. For example, redundant workers in County Mayo, Ireland, when compared to other more advantageously placed workers in the European Union. The inequity in implementation of Directive 75/129 in the European Union served to place employers at a competitive disadvantage with competitors in Member States less inclined to implement the spirit of the E.U.'s social dimension, notwithstanding the E.U. goal of leveling, for competitive reasons, the social cost among its Member States.

V. CONCLUSION

Inequality of treatment of people generated by geographic residency in "an ever closer union among the peoples of Europe"[317] will not be resolved by new Community directives where acceptance is left to Member States whose past track record has been that of delay or non-implementation.

A U.S. college history text has observed that the Articles of Confederation "did not possess a republican form of government, that is, a government based on peoples as constituent power."[318] The European Union, like the Articles, is not based on the constituent power of the peoples of Europe, but rather independent states who have retained their primary attributes of national sovereignty. The European Union of 1998 could be described, as the Articles of Confederation in that U.S. history

315. *Proposal, supra* note 264.

316. *Id.*

317. Treaty Establishing the European Community, Preface, Feb. 7, 1992, O.J. (C224) (1992), [1992] 1 C.M.L.R. 573 (1992).

318. ALFRED HINSEY KELLY ET AL., 1 THE AMERICAN CONSTITUTION ITS ORIGINS AND DEVELOPMENT 77 (7th ed. 1991).

text, as being "concerned with relations among states rather than with proper balance between power and liberty in the constitutional structure."[319] The European Monetary Union is a major effort to overcome one aspect of national identity, monetary policy exercised through a national currency.

While the euro's future cannot be safely predicted, its introduction as a common currency in eleven of the fifteen E.U. Member States "symbolizes a colossal achievement."[320] It is not, however, a political statement but rather "a mere prosaic economic tool."[321] While motivated by a desire in the E.U. to challenge the dollar's supremacy in the world financial system, it lacks the political structure and will that stands behind the U.S. dollar. This lack of a political base behind the euro was well described by Martin Walker, European editor of the *Guardian*, when he wrote that "the EU will continue to play the curious double role of economic giant and political dwarf."[322]

For as the headline introducing Walker's piece so clearly observes, "until the euro acquires a political voice, Europe will continue to play a support role to the [United States] in world affairs."[323] A position not desired by the Brussels-based E.U. leadership. An *á la carte* approach to the EC Treaty, as exemplified by the United Kingdom and Italy's tardy implementation of worker information and consultation, frustrates the goal of equality of treatment for citizens within the respective E.U. Member States.

European Unionist may object to the E.U.'s comparison to a failed period of governmental structure in U.S. history, however, it is too obvious to be overlooked or disregarded. In discussing the Articles of Confederation, a subject of Her Majesty, born of a British father of nobility and an American mother of wealth, Sir Winston S. Churchill, accurately observed the motivation behind the scraping of the Articles and the adoption of the Constitution was necessitated by the realization that an "efficient government must be established before disaster overtook America."[324]

Disaster is not in the immediate future of the European Union. However, frustration among the people of Europe is possible. The scope of the European Union sought by those at the Commission in Brussels must come in harmony with the parameters of the Community as

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319. *Id., see also* I. Buruma, *National Success*, PROSPECT, Dec. 1998, at 36.

320. *Shiny, Prosperous 'Euroland' Has Some Cracks in Facade*, N.Y. TIMES, Jan. 3, 1999, at 1.

321. *Id.*

322. M. Walker, *Taming the Dollar*, PROSPECT, Jan. 1999, at 25.

323. *Id.* at 22.

324. 3 WINSTON S. CHURCHILL, A HISTORY OF THE ENGLISH SPEAKING PEOPLES 258 (1957).

envisaged by the national leadership of its Member States. As the Treaty states, no action shall be taken by the Community which goes "beyond what is necessary to achieve the objectives of this Treaty."[325] The problems in implementing worker information and consultation, including Directive 98/59 and the proposed directive of November 13, 1998, highlights the underlying conflict between the Community's goal and the "objective" of the Treaty as envisaged by E.U. Brussels-based leadership and that of the leadership of some but not all the Member States. A uniform resolution of the degree of political federation that Member States desire to achieve is necessary to conclusively determine the direction and implementation of worker information and consultation. In addition a host of other looming issues, such as tax harmonization, are well on their way to becoming contentious and divisive to the European Union's continued development, and they too seek an identical resolution. The success to date of the European Union in achieving a community-wide social dimension has been due in no small part as a result of the success of the E.C.J. to impose upon the Community a Rule of Law and to develop a body of Community Law. That process however must be constrained by the Treaty and the scope of the Court's jurisdiction. The E.C.J. is limited in its activism by the level of acceptance of its decisions. Those decisions must find their grounding in the Treaty or in its rational reading. "Pushing the envelope" on the social dimension of the Community requires a uniformity of purpose among the Member States, as evidenced by the tardy and weak implementation of worker information and consultation.

In the not too distant future, the European Community will face the inherent conflict grounded in the Treaty's adherence to confederation and the desire of a significant number of Member States to uniformly implement the European Union's social dimension within a context more compatible to a political federation then an economic confederation. Is there room in the Treaty for both viewpoints? Does the Treaty need to be renegotiated to resolve this conflict? For the continued success of the European Union the questions await a uniform response.

325. EC Treaty, art. 3b.