VOLUNTARY PLANT CLOSINGS AND WORKFORCE REDUCTIONS IN THE EUROPEAN COMMUNITIES

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The Community cannot act at its discretion to deal with workforce reductions; it needs the legal power to act under the provisions of the EEC Treaty. The legal power of the Community to act in the field of social law was contested originally. Therefore, the first instrument of the Community which is of interest for our discussion here did not emerge in the field of labor law, but in the field of company law, since the Community has clear legal power to harmonize company law and to create instruments to permit trans-frontier mergers and trans-frontier cooperation of companies. In this connection mention should therefore be made of the European Company Statute which includes comprehensive rules on employee participation, offers possibilities for trans-border collective bargaining, and embodies an elaborate system of Works Councils.[1]

I should particularly specify one instrument which also is mentioned in the European Companies Statute. It is a "Group Works Council."[2] The Group Works Council is well known in the Netherlands. The so-called "Koncern ondernemingsraad" spread from the European Company to Germany in 1972 and then to France in 1982, where such an institution now exists. You can gather that our discussion is indirectly influenced by the European Company draft statute.

A second instrument of company law that should also be mentioned is the so-called draft Fifth Directive on the structure of stock corporations.[3] This directive seeks to ensure that management, when

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[1] Amended proposal of a Regulation embodying a Statute for European Companies of 1975, EUR. COMM. BULL. 4/1975 (Supp.). *Cf.* BLANPAIN, PIPKORN, & VANACHTER, WORKER PARTICIPATION IN THE EUROPEAN COMMUNITY 8 (Bulletin of Comparative Labour Relations Nov. 13, 1984).

[2] Art. 130 of the proposed regulation.

[3] Amended proposal for a Fifth Direcive founded on article 54(3)(g) of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs, 26 O.J. EUR. COMM. (No. C 240) 2 (1983). *Cf.* Welch, *The Fifth Draft Directive - A False Dawn?* 8 EUR. L. REV. 83 (1983); *see* BLANPAIN, PIPKORN & VANACHTEN, *supra* note 1, at 49.

making decisions, takes into account interests other than those of the capital owners. The idea behind the directive is that, to be legitimate, management decisions should include the participants of to the workers and, therefore, the directive initially envisaged worker representatives in the boardroom. But discussion of this proposal resulted in accepting, instead of employee representatives in the boardroom, employees' representation through works councils. In any event, those employee representatives, either in the boardroom or in the works councils, are to be informed and consulted when important decisions affecting the enterprise are made, such as at plant closings.

Now let us turn to labor law. There was indeed a big dispute when the EEC Treaty was negotiated, which is still reflected in article 117 of the EEC Treaty. The issue was whether social harmonization is a condition precedent for the establishment of a common market, or whether social harmonization follows automatically thereafter. Many developments have now given emphasis to the first thesis, so that the Community can intervene on the basis of article 100 of the EEC Treaty which provides that legal divergencies which have an impact on the common market need to be eliminated. There is indeed much evidence that divergencies in the system of labor protection have an impact on the functioning of the Common Market, and therefore need to be eliminated.

There have also been factual developments. Although Professor Blanpain mentioned more recent ones, I only specify one case of 1972: the AKZO case. AKZO, a Dutch concern, envisaged proceeding first to plant closings in Germany, but the German representatives said, "no, do that in Holland"; the Dutch employee representatives replied, "oh, don't do that in Holland. If you want to proceed to plant closings, do them in Germany." It should be noted that this was a good example of lack of trade union solidarity.

The final outcome was that plants were closed in Belgium because, as you heard from Mr. Desolre's comments the Belgian law was only subsequently modified to protect workers sufficiently against dismissals. The AKZO case gave rise to extensive discussion in the European Parliament[4] and served, indeed, as strong support for the thesis that the divergency in the legislation in the member states could affect the functioning of the Common Market and lead to production shifts from one country to another. This is the so-called "Delaware

[4] O.J. EUR. COMM. (No. 148) (1972) (Debates of European Parliment).

effect" which is well known to our American friends. The effect of such legal incentives on shifts in production needed to be eliminated; everybody agreed this should be effected under rules on the approximation of legislations in the EEC.

Further, there were political developments. In 1972, the eve of the first Community enlargement, the Heads of State declared, at the Summit Conference in Paris, that the creation of a social union was as important as the creation of an economic and monetary union.[5] In 1974 the Council adopted a social action program which provides for the effective participation of employees during the life of the undertaking. Another development that occurred a judicial one. The Court of Justice held in the second Deferenne case[6] that the Community had the power to eliminate discrimination, even when not obvious, in the area of equal pay to men and women. Obvious discriminations are directly forbidden by article 119 of the EEC Treaty, but hidden discriminations were to be eliminated through the harmonization of legislation under articles 100 and 235. Accordingly, these articles were said to lead to the realization of the social objectives of the EEC, set forth in article 117. Thus, it was made certain that the Community has power, in acting under article 100, to bring about the social objectives of the EEC. The concrete outcome of this development was, as has been mentioned, a Directive of 1975 on collective redundancies,[7] which the Council adopted and the member states incorporated in their legislation. However, we did have some problems. One concerned Belgium, as already mentioned; another one concerned Italy.

Let me make some remarks on the situation in Italy because the Italian Government transformed the Mass Dismissals Directive by means of collective agreements. The question in a case involving Italy,[8] which was prior to the already-mentioned Belgian case, concerned whether collective agreements are the proper way of implementing the Mass Dismissal Directive or whether legislative action was needed. It was

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[5] Final Declaration of the Summit Conference in Paris, 10 EUR. COMM. BULL. 24 (1972).

[6] Gabrielle Defrenne v. Societé Anonyme Belgede Navigation Aerienne Sabena, 1976 E. Comm. Ct. J. Rep. 455 (Preliminary Ruling).

[7] Council Directive of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, 18 O.J. EUR. COMM. (No. L 48) 29 (1975).

[8] Comm'n of the European Communities v. Italian Republic, 1982 E. Comm. Ct. J. Rep. 2133.

not easy to give a straightforward answer because the legal status of collective agreements was considerably different from one country to another. In some countries' collective agreements have legal force as soon as they are declared generally applicable. This is the case in Germany, and as far as I know, in Belgium. There are other countries in which the status of collective agreements, is extremely uncertain.

In the case before the Court of Justice of the European Communities[9] of the implementation of the directive in Italy, indeed, the Advocate General argued that collective agreements are not the proper way of implementing the Directive on Mass Dismissal. The Court did not go that far and, I think, rightly so. The Court only complained that the collective agreements did not cover all employees. The Court accepted collective agreements, providing they cover all the employees which were meant to benefit from the Directive. The Commission has drawn some conclusions from this approach and has pointed out that collective agreements are, for instance, a good way to implement the so-called draft Fifth Company Directive regarding employee participation. There must, however, exist legal means to ensure that the workers really receive the rights provided for by this Directive. In situations where the collective agreements do not cover all the workers, or where their content is insufficient, other legal instruments have to be added.

It is useful to reiterate a distinction, a distinction which we have already made between the two obligations of the employer under the Mass Dismissals Directive. One obligation is to inform the public authorities, but it is an obligation to provide information only. I think The Netherlands is not the only country which imposes a more far reaching obligation of asking for the consent of such authorities before dismissal may occurr; in France the situation is similar to the one in The Netherlands. Surprisingly, in France labor law questions are dealt with by public tribunals. This is not conceivable under the German legal system, but this is a matter for discussion later on.

In any event, no one is obliged under the Mass Dismissal Directive to create a system of administrative authorization. All that is required is that the public authorities be informed. As Mr. Yemin has correctly pointed out in his book, the reason for this requirement is that in exercising their duties and looking to ensure full employment public authorities need to know what is imminent.

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[9] *Id.*

The second obligation of the employer is to inform the employee representatives and to consult them in order to reach an agreement. I found the distinction made by Dean Beaird about the economic decision itself and its social effects very interesting. This distinction underlines all our work in this area, which is now quite clearly out lined in the "Vredeling Draft Directive," or rather the former "Vredeling Directive" or "Richard Sutherland Directive," or whatever one may call it.

The distinction between the economic decision and its social consequences has come up through a case which was commenced by the Danish unions.[10] The case was not complicated. It involved a case of bankruptcy, where neither the employer nor the trustee in bankruptcy consulted the employee representatives before dismissing the employees. The issue was whether or not the employer had an obligation to consult them before the bankruptcy. The Court answered in the negative. It answered that the Directive protects the employees. However, it would be a misuse of this Directive to pretend there should be a consultation if the dismissal is not intentional, but a result of a judicial decision.

A distinction should be made between the obligations to inform the public authorities, on the one hand, and the employee representatives on the other. The employer must already have a draft the moment he informs the authorities and the consultation must take place at an earlier stage. Thus, he has to enter into consultation and negotiation with the employee representatives just before having his draft decision completed. This requirement is a consequence of the judgment of the E.C. Court of Justice in the action brought by the Danish Unions, February 12, 1985.

Of course, the Community did not end its consideration of the question of dismissal with the Directive of 1975. The Directive of 1977 deals with acquired rights in cases of transfer of undertakings,[11] but this is not the focus of our discussion today. However, we do have to deal with the situation where the functions of the employer are not concentrated within one person or management body, but

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[10] C.J.E.C. 284/83, Dansk Metalarbejderforbund v. Nielsen, Case 284/83 of the Court of Justice of the European Communities (judgment of Feb. 12, 1985) (unrecorded case).

[11] Council Directive of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, 20 O.J. EUR. COMM. (No. L 61) 26 (1977).

where they are split into different levels of the decisionmaking process of an undertaking with a complex structure. Its relation with the problem raised by groups of companies is clear. As you know, personnel decisions are normally made at the local level, but this is true only to a certain extent. For senior staff, the decision is quite often made at the top level. For example, Detroit decides who becomes manager at the different plants of Ford; it is not the local workers who decide on the senior jobs of its management, at least not officially. In reality, an employer's functions are split into different levels. Economic decisions are most often made at the group level, whereas the local level decides how those decisions will affect local workers. In short, higher management decides if closings and dismissals are necessary; lower management more often decides which employees will be dismissed.

Originally, the draft Vredeling Directive[12] was intended to cope with these situations; subsequently the approach was made on a larger scale. Now it is no longer a secret that what is envisaged is the duty by the employer to inform employees regarding the running of the undertaking, including their consultation prior to any important decision.

Concerning the decision to inform or consult, it is appropriate to emphasize the distinction between the economic decision itself and its social effects. The employer has an obligation to consult employee representatives, but the draft directive does not go further. Regarding the social consequences, the draft Directive reiterates the obligation imposed on the employer by the directive of 1975 to consult employee representatives with the aim of reaching an agreement. This involves more than only a simple consultation; the employer must bargain to find a solution. What happens if no solution is found? In the draft Mass Dismissals Directive the Commission initially sought to create an arbitration procedure as was envisaged for the European company, but this attempt failed since the Council Ministers of the Community rejected it. The Germans will use arbitration, since their system makes use of arbitration; in fact, other member states will since it is left to the discretion of the member states. Under the draft Vredeling Directive, it would be the same. Nothing is provided if no agreement is reached. The limits of the obligation to find a solution are quite clear.

What remains doubtful is who should give the information requested and how it should work. The initial directive provided that

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[12] 23 O.J. EUR. COMM. (No. C 297) 2 (1980).

if the local management failed to give information or to consult the employee representatives, they had a right of direct access to top management. In its deliberation on the subject the European Parliament imposed an obligation on the dominant undertaking to provide information to the local management, to facilitate meaningful consultation at the local level. The revised draft directive[13] took advantage of this view and provided in the explanation of the draft that, indeed, these rules intend that local management be a real decisionmaker.

Accordingly, under the revised draft Directive the dominant undertaking will have to provide information and the local management will have to transmit it to the employee representatives. However, the experts of the member states considered this too difficult. The Irish president of the Council suggested in 1984 that the employer provide this information, and that "connected persons" be required to give him the information he needs. It is too early to comment on all the details of the draft Directive. You have certainly read in the newspapers that the directive is blocked since one member, the United Kingdom, opposes it.

I do not think this means the end of the "Vredeling" Directive since at the Community level things move in such a way that this impasse may come to an end. Another case may serve as a precedent, the so-called "Economic Interest Grouping." It concerns cross-frontier cooperation of undertakings and is not related to labor law. For a long time, this 1974 proposal of the Commission was almost forgotten; now it has been adopted by the Council.[14] At the European level things do not move as quickly as they may at the national level, but nuances have to be made. I am still very hopeful that the British resistance to proposed "Vredeling" Directive will be overcome in the near future.

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[13] Amendment to the proposal for a Council Directive on procedures for informing and consulting employers, 26 O.J. EUR. COMM. (No. C 217) 3 (1983). *Cf.* VREDELING & BLANPAIN, THE VREDELING PROPOSAL (1983); Pipkorn, *The Draft Directive on Procedures for Informing and Consulting Employees*, 20 COMMON MKT. L. REV. 725 (1983).

[14] Council Regulation (EEC) No. 2137/85 of 25 July 1985 on the European Economic Interest Grouping, 28 O.J. EUR. COMM. (No. L 199) 1 (1985).