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Employee Participation in Corporate Decision Making: *The Dutch Model*

I. Introduction

The election of United Auto Workers Union President Douglas A. Fraser to Chrysler Corp.'s Board yesterday stirred up more excitement at the company's annual meeting than all of the financial problems threatening the auto maker.

Mr. Fraser's election had been all but assured since last fall when Chrysler management agreed to nominate him. But the fact he was about to become the first union representative on the board of a major U.S. corporation prompted heated debate among 700 stockholders attending yesterday's four-hour meeting here. Some described the election as a "giant step down the road to socialism," while others hailed it as precisely the right medicine for Chrysler.¹

The election of Mr. Fraser to the Chrysler Board of Directors presented many Americans, in somewhat dramatic fashion, with the question of whether and to what extent "labor" should participate in corporate decision making. To many Americans, the idea of employee participation in corporate decision making at the highest levels is anathema. To others the prospect of effective cooperation between employees and management raises the possibility of increased productivity. Others again view the influence of employees in matters affecting their work and destiny in terms of social justice and improvement of the quality of life.

The vigorous social, political and economic debate in this country, stirred by the recent election of Mr. Fraser, focuses on the pro's and con's of labor representation on boards of directors. An issue hardly raised in this debate is whether, assuming one accepts the idea of some form of employee partic-

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¹Wall St. J., May 14, 1980.

ipation in corporate decision making, membership on the board of directors is the only way to accomplish that goal.²

In this article we will describe and comment upon an existing statutory plan which mandates employee participation in management.³ Our purpose is to show that the Chrysler "example" is not unique in the industrial world and debate that membership on the board is not necessarily the only way to provide for effective employee participation.

We are somewhat fortunate when considering this complicated issue of employee participation in management, that various "western" countries having "capitalistic" economies similar to the United States system, provide for some form of employee participation in the corporate decision making arena. This involvement is in areas of policy matters, as opposed to the traditional role of labor organizations in collective bargaining with respect to wages and working conditions. Most of the countries having such legislative schemes are Western European nations; among them is the Netherlands, a constitutional monarchy with a parliamentary system of government and a long democratic tradition. The Netherlands is one of the ten member states of the European Common Market⁴ and seat of such multinational giants as Unilever, Shell, and Philips. In addition, many Fortune 500 United States corporations have subsidiaries and branches in the Netherlands which are subject to the statutory scheme discussed below.

The Act⁵ sets forth the Dutch approach to employee participation in matters which, at least to most American readers, would ordinarily be considered within the exclusive domain of management, or the shareholders. In many respects, this statute greatly alters the employees' (as a group) role in the overall functioning of an enterprise.⁶

²The Corporate Democracy Act of 1980 introduced by Rep. Rosenthal provides for directors accountable to various interest groups, among which, employees. Mr. Fraser also seems to think only in terms of "representation on corporate boards." *NEWSWEEK* May 26, 1980.

³Wet op de ondernemingsraden, 1979 (translated as "Works Councils Act, 1979, [hereinafter the Act]. A complete English translation of the Act by the present authors will be published by Commerce Clearing House early in 1981.)

⁴Denmark, Federal Republic of Germany, the Netherlands, Belgium, Luxembourg, United Kingdom, Ireland, France, Italy and as of January 1, 1981, Greece.

⁵The Act came into force on September 1, 1979.

⁶There are basically two ways by which to establish employee participation through works councils: one is by mandating their creation by law; the other is through negotiation of collective labor agreements. Germany and the Netherlands are examples of the legislative approach, Scandinavian countries of the second. Without going into detail, it should be noted here that although most European countries have some form of employee representation, the rights and powers granted to employee councils differ very much from country to country. On the one extreme one finds systems providing for councils with far reaching powers throughout the economy on the basis of generalized criteria, (e.g., the Federal Republic of Germany and the Netherlands), while on the other hand, there are systems where councils have few powers limited to receipt of information (e.g., Belgium and France) or councils only in selected enterprises or sectors of the economy (e.g., the United Kingdom and Switzerland).

II. Background

A. Dutch Corporation Law

Before dealing in more detail with the legislation regarding works councils, we must briefly describe the legal structure of Dutch Corporations.⁷

Although the Act applies to all forms of enterprise, including partnerships and sole proprietorships, we shall focus in this article on companies with limited liability. In the Netherlands there are two types of limited liability companies: the public company *Naamloze Vennootschap* (N.V.) and the private company *Besloten Vennootschap* (B.V.). Both forms are very similar in structure and for purposes of this article there is no need to distinguish between the two.

The rules that govern Dutch companies are contained in various Code provisions⁸ and in the articles of association of each company (the subject dealt with in articles of association are similar to those included in the articles of incorporation and by-laws of United States corporations). The capital of companies is divided into shares and the rights of shareholders are defined in the Code and articles of association.

With regard to corporate management, Dutch company law provides for the option of a two-tier system: a mandatory management board and an optional supervisory board. The management board, which is the most important center of authority in the decision-making process of Dutch companies, consists of one or more managing directors who are appointed by the shareholders. The duties of the board are the management and representation of the company. It has broad powers to exercise its duties and is not obligated to obey instructions given by either the shareholders or the supervisory board that go beyond the general course of business. It is worth noting that the management board of Dutch companies should not be confused with the board of directors of United States corporations; in the Netherlands, managing directors in most instances are employed full-time by the company and, unless otherwise provided in the articles of association, have full authority to represent the company regardless of whether board resolutions to that effect have been adopted.

Although companies are not required by law to establish a supervisory board, it is not unusual for companies in the Netherlands to have such a board. Its duty is primarily to assist the management board with advice and to supervise the management of the company and the general course of business. Its members are appointed by the shareholders. Unlike managing directors, members of the supervisory board are not employees of the

⁷For comprehensive overview, see SCHUIT, *et al.*, *DUTCH BUSINESS LAW*, 1978, particularly Chapter IX: *Enterprise Forms—Company Law*.

⁸Book II of the Dutch Civil Code deals with "legal entities"; articles 64 through 174 concern N.V.s; articles 175 through 284 concern B.V.s; articles 306 through 343 deal specifically with the "annual accounts."

company and are usually not involved in the company's affairs on a day-to-day basis.

It should be noted here that different rules regarding the management board and supervisory board apply when a company is a so-called "large" company, as will be discussed below.

B. History of the Works Councils Acts

The 1979 Act is a revised version of the 1971 statute⁹ which replaced the initial 1950 statute.¹⁰ The 1950 legislation, which was enacted in the post-war period in which there was strong cooperation between trade unions, employers and the government in a joint effort to rebuild the country's economy, required certain companies to establish works councils: a body consisting of some employees, elected by their fellow employees, and a member of the management board. The purpose of these councils was to provide a forum for deliberation and cooperation in the interest of "proper" functioning of the enterprise.

In the years after enactment of the original statute in 1950, many companies refused to establish works councils and the Act did not provide for sanctions. In addition, there was a growing sentiment that the primary function of the works councils should be representation of the various interests of employees, and that their powers should be extended accordingly, rather than to provide merely a meeting place for employees and management to discuss the general course of business of the enterprise.¹¹ This led to the enactment of the 1971 statute¹² which contained sanctions for violation of the requirement to establish a works council and which extended the role of the councils to include representation of the employees vis-à-vis the management board. The resulting, somewhat dualistic character of the councils—their purpose being at the same time cooperation and joint consultation with the management board as well as representation of employees—was emphasized by the fact that the Act provided that a member of the management board would be the chairman of the council and, as a result, would be present at all meetings. Pressure by the trade unions and practical experience with the 1971 Act led to enactment of the 1979 Act which totally removes members of the management board from the councils. However, the purpose of the councils remains the same, i.e., "to promote consultation with and representation of person employed in the enterprise . . . in the interest of a proper functioning of the enterprise in all its objectives."¹³ As will be discussed below, consultation between the

⁹OFFICIAL GAZETTE 1971, 54, April 1, 1971.

¹⁰OFFICIAL GAZETTE 1950, 174, May 4, 1950.

¹¹Report by the Committee on the Revision of Company Law (Commissie tot Herziening van het Vennootschapsrecht), 1965. This Committee was established by the Minister of Justice on April 8, 1960. Also, SER-Advice concerning The Extension of Powers to Works Councils, 1968.

¹²See note 9 *supra*.

¹³The Act, ch. II, art. 2, § 1.

employees represented by the works council, and the management board, will now take place in a newly created "consultation meeting."¹⁴ Besides various other specific changes and additions, both the 1971 and the 1979 Acts considerably extended the rights and powers of works councils.

In November 1979, the Dutch government introduced in Parliament a bill which, if enacted, would extend parts of the Act to small companies.¹⁵ Where appropriate, we shall indicate the changes that this legislation¹⁶ would effect.¹⁷ It should be noted that neither the employers' organizations nor the trade unions are happy with the proposal; the first group arguing that the extension goes too far, the second group arguing that more companies (i.e., even smaller ones) should be included as well.¹⁸

III. The Provisions of the 1979 Act

A. Membership on the Works Council; Conflict Resolution

The statute requires that every company or group of companies employing at least 100 persons must provide for a works council.¹⁹ To be elected to a works council, persons must have been employed in the enterprise for at least one year, and to vote in elections for works council members a person must have been employed at least six months.²⁰

Members of the management board of companies have no right to vote, are not eligible for membership on the council, and, as mentioned earlier, a member of the management board is no longer chairman of the council. The council chairman is now to be elected by the members of the council from among its membership.²¹ Some commentators have expressed fears that the removal of representatives of management will lead to a more antagonistic attitude of the councils vis-à-vis management. However, to

¹⁴*Id.*, ch. IV, art. 23.

¹⁵Draft No. 15893.

¹⁶The draft shall be referred to as the "small companies bill."

¹⁷The "small companies bill" would extend application of the Act to companies having at least 35 employees. Some provisions of the Act, however, would not apply where it concerns companies employing between 35 and 100 persons. Some industries, e.g., the sugar industry and the steel industry already have some form of participation in small companies through collective labor agreements.

In addition, the "small companies bill" provides for a new and very simple system of participation—different from that provided in the Act—which shall apply to companies employing between 10 and 35 employees. Basically, in those companies, at least two meetings per year between management and employees must be held. At those meetings, the affairs of the company and the expectations for the future shall be discussed. Furthermore, management must seek the advice of the employees in the event management considers making a decision which could substantially affect the employment situation or the position of at least one quarter of the labor force.

¹⁸O.R.—Gald (a monthly magazine especially for topics concerning works councils), February 1980.

¹⁹The Act, ch. II, art. 2, § 1.

²⁰The number of members of a works council is enumerated in the Act and relates to the number of persons employed in the enterprise; e.g., 100-200 employees: 7 member council, 400-600 employees: 11 member council, *Id.* ch. III, art. 6, § 1.

²¹*Id.*, ch. III, art. 7.

date, there do not seem to be indications that this change has fundamentally altered the attitude of the works councils.

The statute explicitly requires the composition of a works council to be representative, to the fullest extent possible, of all groups of persons employed in the enterprise.²² That is, in an enterprise in which many types of work are done—office management, secretarial work, production, transportation, etc.—the council should consist of members representative of each of the various groups employed in the enterprise.

The Dutch legislature, in enacting this statute, recognized the realistic possibility that a company's management and a works council could come into conflict with each other. As a result, the statute provides various modes of conflict resolution. The most important of these is the establishment of bodies known as Industrial Committees which are established by industry sector.²³ These Committees, to be established by the "Social and Economic Council"²⁴ are created specially to deal with various matters pertaining to works councils and are given broad conflict resolution powers by the statute.²⁵ They are to consist of at least six members, half of whom are to be appointed by organizations representing employees (trade unions). In addition, the statute provides instances in which decisions by management may be appealed to the Dutch court system. Where appropriate, we shall specifically indicate the instances where the Industrial Committees or the courts play a major role.

B. The Functioning of Works Councils and the Positions of Their Members

Works councils are designed to be self-governing and the statute requires that they adopt by-laws governing their affairs.²⁶ To facilitate the functioning of the works councils, companies are required to make facilities available for use by the works councils.²⁷ The statute provides that works councils shall meet during normal business hours and council members are to receive their regular salaries for time spent attending works council meetings or carrying out related activities.²⁸ The company bears the cost of the works councils.²⁹

The statute does not restrict the frequency with which works council members may meet for consultation and deliberation among themselves.

²²*Id.*, ch. III, art. 9, § 4.

²³*Id.*, ch. VII, art. 37, §§ 1, 2.

²⁴This council [hereinafter referred to as the SER] is abbreviated from its name in Dutch. It is composed of 45 members: 15 are appointed by organizations of employers, 15 by the trade unions, and 15, as independent experts, by the government. It plays a major role in economic and social affairs in the Netherlands and in the implementation of the Act.

²⁵These broad powers appear throughout the Act *but see* as limited examples, ch. I, art. I, §§ 4, 5 and 6; ch. II, art. 5, § 1; ch. III, art. 6, § 1.

²⁶The Act, ch. III, art. 8, § 1.

²⁷*Id.*, ch. III, art. 17, § 1.

²⁸*Id.*, ch. III, art. 18, §§ 2, 3.

²⁹*Id.*, ch. III, art. 22, § 1.

Instead, it establishes a minimum of sixty hours per year for such meetings. Members of a council are additionally entitled to interrupt their work for at least five days per year in order to receive education and training related to their duties as council members.³⁰ This perspective is interesting and important to note: the statute clearly encourages frequent and careful discussion among works council members and mandates that companies permit sufficient time for this to be accomplished. Provisions such as this suggest an expectation that any business loss resulting from time spent in conducting works council activities is offset by the long-term economic and social benefits of permitting effective deliberations by the works councils.

The Act contains several very important provisions requiring the management board to furnish to the works council, at the request of the council, all information it needs for the performance of its duties.³¹ In particular, information must be furnished pertaining, among other things, to the legal and factual organization of the company and the names and addresses of its executives (at the beginning of each term office),³² to the financial statements, budgets, the expectations which the management board has for the future, investment plans, long-term plans (twice per year),³³ the employment situation and social policy (once per year).³⁴

In addition to these obligations upon the management board to make funds, time, space, and information available for the works councils to carry out their functions, the statute prohibits a company from in any way prejudicing persons who run for, serve, or have served on works councils.³⁵ Such persons may only be fired from their employment basically if: (1) they consent; (2) there is some compelling reason; (3) the entire enterprise is being terminated; or (4) that part of the enterprise is being terminated.³⁶ These provisions of the statute clearly reflect the legislative intention to prevent interference with the proper functioning of the works council system through direct or indirect intimidation by the management board.³⁷

Under the Act, members of a works council are obliged to observe secrecy regarding affairs of which they learn in their capacity as council members.³⁸ In the past, this obligation has not always been kept, causing serious concerns among management which is required under the terms of the Act to provide extensive "sensitive" information to the councils.

³⁰*Id.*, ch. III, art. 18, § 2; if the works council deems sixty hours for consultation and deliberation, or five days for education and training not sufficient, agreement has to be reached with the management board on the number of hours or days that may be spent on those matters. If no agreement can be reached, the Industrial Committee decides.

³¹The Act, ch. IVB, art. 31, § 1.

³²*Id.* ch. IVB, art. 31, § 2.

³³*Id.* ch. IVB, art. 31a, § 1.

³⁴*Id.* ch. IVB, art. 31b, § 1.

³⁵*Id.* ch. III, art. 21, § 1.

³⁶*Id.* ch. IX, art. 21, §§ 2 and 3.

³⁷For discussion of Dutch Labor law, see DUTCH BUSINESS LAW, Chapter XXV: Labour.

³⁸*Id.* ch. II, art. 20, § 1.

C. Role of the Works Councils

(1) CONSULTATION MEETINGS

Of course, significant portions of the Act describe the role and powers of the works councils. The statute enacts a concept described as joint consultation meetings (a concept that did not exist under the prior Act) to take place between works council and members of the management board.³⁹ This concept was created to ensure that after the removal, by the 1979 Act, of a member of the management board from the council, the council would not merely become the representative body of employees. Although such meetings may be requested by either party, as frequently as desired, at least six meetings per year must be held. The language of the statute concerning these meetings is, as with earlier described sections, permissive in scope and clearly designed to encourage consultation on the broadest range of subjects.⁴⁰ It is clear that consultation meetings are intended to provide a forum for open discussion between a company's management and its employees on all matters concerning the enterprise. The role of the works council is not simply to be advised by management and listen, but to actively participate, through open deliberation, in seeking solutions for issues facing the company.

At least two meetings per year, the general course of business of the enterprise is to be discussed.⁴¹ In connection with such meetings, the management board must provide the works council with complete and detailed information concerning past activities and results, expectations for the future and all forthcoming domestic and foreign investments.

(2) ADVISORY POWERS

In addition to requiring general discussion and consultation, the statute provides that before a company's management board may render a decision on certain specified subjects, it must seek the advice of the works council.⁴² The works council must be advised in advance of the reasons for the decision being contemplated, the consequences it will have for the employees and the measures management intends to take in light of those consequences.⁴³

³⁹*Id.* ch. IV.

⁴⁰"At the meetings . . . those matters concerning the enterprise shall be considered on which either the entrepreneur or the works council deems consultations desirable. . . ." *Id.*, ch. IV, art. 23, § 3.

⁴¹At those meetings, members of the supervisory board, if such a board exists, must be present. If half or more of the shares are held by another company, the members of the management board of the parent company, or persons representing them, must be present.

⁴²The Act, Chapter IVA; the prior Act provided that no advice needed to be sought if this would substantially harm the interest of the enterprise or of persons directly connected with it. This escape provision which was also part of certain other provisions of the 1971 Act, was deleted completely in the 1979 Act.

⁴³*Id.*, ch. IVA, art. 25, § 3.

Additionally, the works council's advice must be sought in a timely fashion to permit both careful consideration by it of the issues presented and also to permit its advice to effect the ultimate decision making.⁴⁴ The works council's advice must be sought on a variety of decisions concerning, among other things:

- (a) transfer of control of the enterprise or any part thereof;
- (b) establishment, take-over or relinquishment of control of another enterprise, or the beginning, substantially changing or discontinuing long-term cooperation, including a substantial financial participation, with another enterprise;⁴⁵
- (c) discontinuation of the activities of the enterprise or a major part thereof;
- (d) substantial reduction, expansion or other change in the activities of the enterprise;
- (e) substantial change in the organization of the enterprise or in the allocation of responsibilities within the enterprise;
- (f) change of the location where the enterprise carries on its activities;
- (g) major capital investments;
- (h) seeking of substantial credit;
- (i) seeking of a request for advice from an expert outside the enterprise on any of the aforesaid subjects; and
- (j) the appointment or removal of members of the management board.⁴⁶

The works council shall not render its advice on the proposed decision until there has been at least one joint consultation meeting (as described above) with the management board.⁴⁷ This provision again emphasizes the statutory goal of seeking active and considered employee participation in the company decision making process. If, having obtained the advice of the works council, the company's management makes a decision contrary to that advice, it shall promptly advise the council of its decision and explain why it has not followed the council's advice. Where the company's management has made a final decision which is in fact contrary to the advice given, it may not implement such decision for thirty days, during which time the works council may appeal the decision to the "Enterprise Chamber" of the Amsterdam Court of Appeal.⁴⁸ The sole basis for an appeal to the Enterprise Chamber is that the management board could not have "rea-

⁴⁴*Id.*, ch. IVA, art. 25, § 2.

⁴⁵This does not apply, basically, when the "other enterprise" has its seat abroad and the decision will not lead to consequences enumerated in "(c)" through "(i)" with regard to an enterprise in the Netherlands.

⁴⁶The Act, ch. IVA, art. 25, § 1.

⁴⁷*Id.*, ch. IVA, art. 25, § 4.

⁴⁸*Id.*, ch. IVA, art. 26; The Enterprise Chamber consists of three "professional" judges and two lay judges who are experts in the business and accounting field. The Enterprise Chamber also has jurisdiction when, among other things, a dispute has arisen between shareholders and management concerning the annual financial statements of a company.

sonably reached a decision had it weighed all the interests involved."⁴⁹ There is no right of appeal when the decision concerns appointment or removal of members of the management board, *see* (j) *supra*.

This concept, of the right of appeal of a decision rendered by the company's management board, is furthest removed from the American notion of corporate decision making. The company is precluded from immediately implementing a decision which is contrary to the advice given by the works council. Instead, its decision is subject to outside review by a court.⁵⁰

In reviewing the decision, the Enterprise Chamber may issue an order requiring the enterprise to withdraw the decision in whole or in part and to reverse specified consequences of that decision or enjoining the company from taking any acts to implement its decision. Decisions of the Enterprise Chamber may be appealed to the Supreme Court of the Netherlands. We know of only one appeal that was taken to the Enterprise Chamber; that appeal was granted.⁵¹

(3) CO-DETERMINATION

In addition to these broad powers provided to the works councils, a management board must obtain the consent of the works council for any decision it proposes to make primarily concerning the following:⁵² (a) pension, profit sharing or savings plans; (b) rules pertaining to working hours or vacations; (c) a remuneration or job classification system; (d) rules pertaining to safety, and health; (e) rules pertaining to hiring, dismissal or promotion policies; (f) rules pertaining to employee training; (g) rules pertaining to employee performance reviews; (h) rules pertaining to the handling of complaints; and (i) rules pertaining to the position of juveniles within the enterprise.⁵³ Unlike the broad range of subjects which may be considered at a joint consultation meeting and those as to which the management board must seek the advice of the works council, these particular areas are among those most traditionally associated with discussions between "labor" and "management" in that they more directly affect terms and conditions of employment within an enterprise. The primary difference is that in collective labor negotiations, decisions and policies are made once a year or every so many years and continue in force until the following round of negotiations. Under this statute, a continuing dialogue is contemplated. It should

⁴⁹*Id.*

⁵⁰An interesting, but as yet unsettled question, is whether the company has the power (during the one month stay of a decision) to enter into legally enforceable contracts which would implement the decision concerned.

⁵¹This one appeal concerned primarily a procedural question rather than a substantive issue.

⁵²Only when applicable to all employees or a group of employees—not individuals.

Under the "small companies bill" (*See* § II, *supra*) advice must be sought only if, and to the extent that, the decision could substantially affect the employment situation of at least one-quarter of the labor force. In addition, the management would not be precluded from implementing a decision contrary to the advice given by the works council and the works council would not be provided the same appeal rights.

⁵³The Act, ch. IVA, art. 27.

be noted that co-determination is not required when, and to the extent that, the issue concerned has already been determined in a collective labor agreement.⁵⁴

As in the case of the advisory powers of the works council, the council must be advised in advance of the reasons and consequences of the decisions, and there must be at least one consultation meeting on the subject concerned.⁵⁵ If the works council does not consent to the decision proposed by the management board, the board may request the Industrial Committee to approve the decision, in which case such approval shall take the place of the consent of the works council.⁵⁶ A decision made without consent of either the works council or the Industrial Committee (or, on appeal the Minister of Social Affairs) is null and void.⁵⁷

IV. Large Companies

It follows from the above outline regarding the powers entrusted to the works councils pursuant to the Works Councils Act that the Dutch approach differs from the Chrysler situation (and also from the situation under the German *Mitbestimmungsgesetz*) in that there is no direct participation of labor in the management of companies. There is one important type of company in the Netherlands, however, where employees can at least influence the appointment of persons that are, to a certain extent, involved in the management of a company.

As mentioned earlier, Dutch corporations have a management board and, in addition thereto, may also have a "supervisory board." For most corporations the establishment of a supervisory board is optional and its powers are generally limited to advising the management board, supervising its policies and the general course of the company's affairs.

The Dutch Code provides, however, that certain large companies—being defined, basically, as companies of which the issued share capital plus reserves amounts to Dfl. 10,000,000, which have established a works council and which employ in the Netherlands at least 100 employees—are obliged to establish a supervisory board.⁵⁸ The board's statutory rights include the appointment and dismissal of members of the management board and the adoption of the annual financial statements of the company. Further, the management board must obtain the approval of the supervisory board for a number of major decisions (e.g., concerning dismissal of a substantial number of employees, large investments).

⁵⁴*Id.*

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷*Id.*

⁵⁸ Articles 158 through 165 of Book II of the Dutch Civil Code deal with large N.V.s, while Articles 263 through 275 deal with large B.V.s. The N.V. provisions are not materially different from the B.V. provisions.

The supervisory boards of large companies are considered representative of both the shareholders and the employees. Their membership is, therefore, not elected by the shareholders, but by the supervisory board itself while the shareholders and the works council have the right to make recommendations to the board when a position needs to be filled. Moreover, the supervisory board must notify the shareholders and the works council of the person it wishes to appoint and both the shareholders and the works council can veto such appointment if they think that the person concerned is not suitable for the task or that by his appointment the board would not be "properly constituted." If, despite a veto, the supervisory board nevertheless wishes to appoint a certain person, it can request the SER to declare that the objections are not justified.⁵⁹

There are currently more than 350 companies to which the above rules, which were enacted in 1971 and which are part of the Civil Code, apply in whole or in part. As far as we know, there have been two instances where the appointment of members of supervisory boards has led to major controversies;⁶⁰ in the great majority of cases, however, the system seems to be working satisfactorily.

V. Comparisons and Practical Problems

A. *The Dutch System Compared with the Chrysler Situation*

The most significant differences between the Dutch approach and the situation that resulted from the election of Mr. Fraser are the following:

(1) Although in practice a large number of members of works councils are members of a trade union, and are supported by their union in their activities on the council, there is no direct relationship between the unions and the representation of employees within an enterprise.⁶¹ Since moreover, all members of a works council of a company are employees of that company, works councils are not faced with a conflict of interests between employees in several companies belonging to the same industry. Mr. Fraser has described his role on the Chrysler Board as "workers' " representative.⁶² But, which workers does he represent? The employees of Chrysler

⁵⁹It should be noted here that certain large companies are fully exempted from the mandatory rules regarding the appointment and powers of a supervisory board. The most important group that is exempted consists of Dutch holding companies, provided that a majority of the employees of such holding companies (and of companies belonging to the same group) is not employed within the Netherlands. Other large companies are partially exempted from the rules: the rules dealing with the appointment of members of the management board and with the adoption of the annual accounts do not apply to those large Dutch companies that are controlled by foreign companies, provided again that the majority of employees of the domestic company and of the foreign controlling companies is not employed within the Netherlands.

⁶⁰In these two cases, the SER declared the objections not justified.

⁶¹With the exception of a few industries, there is not a closed shop system in the Netherlands.

⁶²NEWSWEEK, May 26, 1980.

or all members of the UAW, of which the majority is employed by competitors of Chrysler.

Apart from this potential conflict, it is not altogether clear which (groups of) Chrysler employees are represented by Mr. Fraser. We would assume that non-UAW members are not included. Whatever one may think of the system in the Netherlands, it at least provides a forum for discussion in which representatives of all levels and groups within a company participate.

(2) Another, frequently discussed, conflict in the Chrysler situation that is avoided in the Dutch approach, follows from the fact that under the present system of United States corporate law, directors, in principle, are exclusively responsible to shareholders. Without new legislation, the Chrysler approach, in our view, remains unacceptable from a legal standpoint, even in those cases where the "workers' director" has made it clear before his election that he shall solely represent the interests of the workers.

(3) Although, at first sight, direct participation through membership on the board of directors seems to be preferable to a complicated system of rules providing for representation through councils and meetings, there can be no doubt that the powers of works councils, as described above, are considerably greater than those of one director on a multi-member board could be.

B. Some Practical Problems of the Dutch System

(1) As had been anticipated, the Dutch legislation had given rise to much debate and many differing opinions.⁶³ While generally speaking, employees are quite content with the approach chosen, one of the major objections of employers concerns the bureaucratic and formalistic character of the Act. The various obligations placed on the management board, including those to provide the works council extensive information and documentation, as well as the prescribed consultation procedures, place a great burden on management and cause the decision making process to be very time and paper consuming. The extent to which works councils are willing to play the game according to somewhat more flexible rules depends largely on the industry and the particular company involved. Broadly speaking, the experience in, for example, the insurance industry, is more positive in this regard than that in the chemical industry.

(2) A factor of major concern is the timing of decision making. As outlined above, management must give the works council ample opportunity to render advice on certain important decisions management proposes to make. Before the council renders its advice, a consultation meeting must be held. More importantly, when a decision is not in accordance with the

⁶³We shall not treat here the somewhat abstract issue of the equality of labor and capital. Even those who feel that "equality" is one of the philosophies underlying the legislation will have to admit that, particularly in public corporations where, practically speaking, the powers of shareholders are rather limited, the Act has resulted in inequality, this time in favor of labor.

council's advice, implementation of the decision must be suspended for one month. These provisions can make it practically impossible to deviate from the advice.⁶⁴ They also place a burden on the relationship between foreign parent companies and their Dutch subsidiaries. In a situation where the parent has decided, for example, that a major investment should be made promptly, the Dutch management board may have to inform the parent that the decision cannot immediately be taken. We, therefore, feel that it is of the utmost importance that parent companies are fully aware of the existence and implications of the Act.

VI. Common Market Developments

Without going into great detail, we think it useful to briefly mention two pieces of pending Common Market legislation which may have a direct impact on the role and functioning of works councils in the Common Market and the whole area of employee participation in the ten member-states. Article 54.3(g) of the Common Market Treaty⁶⁵ requires the coordination of the provisions of the national company laws of the member-states. In this regard, the Council of Ministers⁶⁶ may issue "directives" for the "approximation" of the company laws of the member-states.⁶⁷ In the field of company law, the European Commission⁶⁸ has proposed several directives to the Council of which the first three have been adopted by the Council.⁶⁹

The fifth directive, probably the most fundamental one in the area of company law, concerns the structure of corporations and the powers and obligations of the various organs and was presented by the Commission to the Council on October 9, 1972.⁷⁰ It is uncertain and impossible to predict when and in what form the draft will be adopted by the Council. The draft

⁶⁴Apart from the timing problems, there may be interpretation problems too: first, is this a decision of the type for which the works council has to be consulted? Second, who makes the decision? If the decision is to be made by the shareholders, it may not be necessary to ask the council's advice. Third, does the decision finally made by the management board deviate from the advice?

⁶⁵The Treaty establishing the European Economic Community, signed in Rome in 1958.

⁶⁶The Council is made up of representatives of the member-states. Delegates are chosen according to the nature of the subject matter under discussion (*e.g.* agricultural; social; anti-trust). The Council has very broad legislative powers, which are set forth in articles 145 *et seq.* of the Common Market Treaty.

⁶⁷According to article 189 of the Common Market Treaty, directives shall be binding, as to the result to be achieved, upon each member-state to which it is addressed, but shall leave to the national authorities the choice of form and methods. "Approximation" of national laws and on "directives," *cf.* (CCH) COMMON MARKET REP. 1.

⁶⁸The functions of the Commission, consisting of 14 members, are defined in article 155 of the Common Market Treaty and aim at ensuring the proper functioning and development of the Common Market.

⁶⁹It concerns the following directives: 68/151, OFFICIAL JOURNAL 1968 L65/8; 77/91, OFFICIAL JOURNAL 1977 L26/1; 78/885, OFFICIAL JOURNAL 1968 L295/36. These directives deal with various matters ranging from the public disclosure of the articles of incorporation and the raising of capital to mergers.

⁷⁰OFFICIAL JOURNAL 1972 C131/49.

was published shortly before the United Kingdom, Ireland and Denmark joined the Common Market in 1973 and has met a great deal of resistance, especially from the three new member-states. This was one of the main reasons for the Commission to publish, in 1975, a so-called "green paper" dealing with the subjects covered by the draft and also with a variety of other matters related to the directive.⁷¹ In the "green paper" the Commission sticks to its principles as outlined in the draft directive, but makes some suggestions to facilitate the reception of its proposals in the laws of the member-states.

The draft applies only to N.V.s⁷² and their counterparts in other member-states.⁷³ All Common Market countries except, practically speaking, Germany and the Netherlands have as corporate organs only two bodies: the shareholders meeting and the executive body. The Commission's proposal now aims at making the two-tier system, i.e. three bodies, compulsory for all N.V.s and their counterparts throughout the Common Market: besides the shareholders meeting there must be a "management organ" and a "supervisory organ." What is important for our subject matter, is that the proposal provides minimum requirements for the participation of employees in the appointment of members of the supervisory organ of companies having at least 500 employees.⁷⁴ For those companies, the member-states can choose between two systems, basically as follows:

- (a) at least one third of the members of the supervisory board shall be appointed by the employees, or their representatives, or upon proposal by the employees, or their representatives. The other members can be appointed by the shareholders meeting or otherwise.
- (b) The members are appointed in the same manner as provided for members of the supervisory board of "large companies" in the Netherlands.⁷⁵

Under the draft directive, the supervisory board, among other things, has the power to appoint and dismiss members of the management board;⁷⁶ to be informed regularly by the management board on the company's affairs;⁷⁷ and to approve important decisions (e.g., relating to the closure of the enterprise or substantial parts thereof; changes in organization; long-term cooperation with other enterprises.⁷⁸

The above brief outline shows that enactment of the fifth directive in its present form would not affect Dutch company law, and the rights of

⁷¹The "green paper" was published in Supplement 8/75 to the Common Market Bulletin and contains interesting comparisons between the legislation of the member-states on the structure of corporations on participation of employees and on collective labor agreements.

⁷²Section IIA, *supra*.

⁷³E.g. the *Aktiengesellschaft* in Germany; the *Societe Anonyme* in France.

⁷⁴Article 4 of the draft directive.

⁷⁵Section IV, *supra*.

⁷⁶Art. 3 and art. 13.

⁷⁷Art. 11.

⁷⁸Art. 12.

employees and works councils in large Dutch companies, to the extent it would alter the structure of and employee participation in large companies in most other member-states. As a matter of fact, Dutch and German legislation served as examples for the drafters of the directive.⁷⁹

Another interesting development which deserves mention here, is the recent proposal by the Commission for a directive on procedures for informing and consulting the employees of undertakings with a complex and, in particular, with a transnational structure. The proposal, also called the "Vredeling-proposal" after the Dutch member of the Commission who until January 1, 1981 was responsible for social affairs, was presented to the Council on October 24, 1980.⁸⁰ According to this proposal, the management⁸¹ of a dominant undertaking⁸² whose decision making center⁸³ is located in a member-state and which has at least one subsidiary or establishment in another member-state, or in the same member-state, shall be obliged via the management of its subsidiaries or establishments to disclose information and to consult employees' representatives in all subsidiaries or establishments employing at least 100 employees.⁸⁴

The information and consultation procedures concern a wide range of subjects. Every six months management must provide relevant information giving a clear picture of the activities of the group as a whole. The information shall, in particular, relate to, among other things, the economic and financial situation; the current and future situation regarding production, sales and employment; production, investment and rationalization plans, the introduction of new working methods and "all plans liable to have a substantial effect on the employees' interests."⁸⁵ The information to be furnished is very similar to that to be furnished under articles 31 *et seq.* of the Dutch Act.⁸⁶

With respect to the consultation procedures,⁸⁷ the draft provides that management, when proposing to make a decision liable to have substantial effect on the interests of employees, must furnish information setting forth

⁷⁹It is interesting to note that in 1978, *i.e.* three years after publication of the "green paper," the United Kingdom government published a "white paper"—Report of the Committee of Inquiry on Industrial Democracy. Among other things, it suggests the introduction of a two-tier system for certain large companies and employee representation in the supervisory board (policy board).

⁸⁰OFFICIAL JOURNAL 1980 C297/3.

⁸¹Defined in article 2(b) as "the person or persons responsible for the management of an undertaking under the national legislation to which it is subject."

⁸²Defined in article 3, basically, as undertakings that hold the majority of votes or otherwise, through the power to appoint at least half of the members of the management or supervisory board where these members hold the majority of voting rights, control other undertakings (subsidiaries).

⁸³Defined in article 2(c) as the place where the management of an undertaking actually performs its functions.

⁸⁴Art. 4 (transnational enterprises); art. 10 (national enterprises).

⁸⁵Art. 5 (transnational enterprises); art. 11 (national enterprises).

⁸⁶Section IIIB, *supra*.

⁸⁷These are dealt with in article 6 (transnational enterprises) and article 12 (national enterprises).

the grounds for and consequences of the decision and the measures planned in respect of the employees concerned. The information must be forwarded at least forty days before implementation of the decision. If the employees' representatives so request, consultations have to be held with a view to reaching agreement on the measures planned with regard to the employees concerned. The decisions listed in the directive as decisions to which the procedure in particular applies are basically the same as those discussed *supra* in Section IIIC(2), particularly under (b) through (f), with respect to the advisory powers of Dutch works councils.

It is important to note that the draft directive would also apply to transnational enterprises of which the decision making center is located outside the Common Market and which have at least one subsidiary or establishment within the Common Market. If the enterprises have not designated a person in the Common Market able to fulfill the requirements of the directive, the management of the subsidiary or establishment that employs the largest number of employees within the Common Market shall be responsible for fulfilling all the obligations under the directive.⁸⁸

The draft provides that confidential information shall not be divulged by the employees' representatives and that the member-states shall impose penalties in case of infringement.

Although the rights granted to employees by the proposal somewhat resemble the rights to be informed and some of the advisory powers granted to works councils by the Dutch Act, there can be no doubt that the Dutch legislation goes much further, as the description in Sections III and IV of this article shows.

Several national business associations, and particularly the Confederation of British Industry, have already strongly protested the Commission proposal⁸⁹ and it may take several years before the directive, in its present or in a different form, becomes law.⁹⁰

The result of enactment (if ever) of the directives discussed above, which discussion necessarily was very general, would be that employees in certain large companies could, indirectly, participate to some extent in corporate decision making through the supervisory board, and that employees in those and other, somewhat smaller companies would be entitled to receive a great deal of information and to be consulted on certain matters. These results would not fundamentally alter, but rather confirm part of the existing system in the Netherlands. Even after the two drafts have become law, the Dutch system will remain unique in that it has created a "fourth"

⁸⁸ Art. 8.

⁸⁹ *Common Market Rep.*, Euromarket News, No. 614, (October 22, 1980).

⁹⁰ Other reports, however, say that of the member-states only France and the United Kingdom are against the proposal in its present form and that members of the Commission are hopeful that objections will be worked out shortly so that the draft can be adopted before the summer of 1981: *Financial Times*, Community Markets, No. 14, November 1980.

corporate organ, i.e. the works council, having strong, direct, powers with regard to corporate decision making.

VII. Conclusion

When seen from the perspective of the Dutch statute, the election of Douglas Fraser to the Board of Directors of Chrysler Corporation should not be viewed as such a revolutionary occurrence. After all, he is but one voice and one vote on a multi-member board. Corporate decisions can continue to be made without the acquiescence of the company's employees. Certainly the Dutch statute goes significantly further towards granting employees active and ongoing decision making rights within a company.

Although the Dutch approach to employee participation in corporate decision making seems, at least at first, to be a radical departure from "normal" corporate operations, the Dutch experience to date suggests that no major disruptions necessarily result from such a scheme, although conflicts between management and works councils do occur from time to time, especially in cases where the councils felt they were not, at all, or insufficiently informed of certain developments. Although no cause and effect relationship can be demonstrated at this time, available productivity information indicates that the Dutch labor force, as a whole, has increased its productivity in recent years. Additionally, labor unrest and protracted strikes have been relatively rare in the Netherlands. Could this be an outgrowth of employees' greater sense of participation and involvement with the economic well-being of their particular enterprise? We do not claim to know the answer. But we do know that there is a feeling among the unions that the Act does not go far enough. One of the major questions for the future will be whether the works councils should by law become a truly independent corporate organ only concerned with the representation of employees. There are even those urging direct employee participation at the top level, i.e. through employees' membership on the supervisory board.

Whether the trade unions would be prepared to support the idea of employee representatives carrying such responsibilities is, at this stage, unclear. What lies ahead is highly uncertain although Common Market developments will undoubtedly play a significant role. However, as shown above, Common Market legislation in this decade will not materially affect Dutch legislation which is still "ahead" of pending Commission proposals.

The Act does present some practical problems—such as timing and interpretation problems and problems regarding the furnishing of information previously considered by management to be "confidential." However, these problems and areas of criticism appear to be directed primarily towards operational details of the statute rather than towards its conceptual underpinnings. At the very least, the Dutch statutory model warrants review and consideration in the continuing debate in the United States over the issue of labor participation in corporate management.