Multinational Enterprises Programme

Working Paper No. 37

Access to decision-makers in multinational and multi-plant enterprises: A review of labour law and practice

by Roger Blanpain
Institute for Labour Relations
Catholic University
Leuven, Belgium

International Labour Office Geneva

ISBN 92-2-105120-X

First published 1985

Printed by the International Labour Office, Geneva, Switzerland

INTRODUCTION

1. This study examines the conditions under which representatives of workers have access according to labour law and practice to (i.e. the right to deal with) representatives of management who are authorised to take decisions (i.e. decision-makers). This question is especially relevant in the case of a multi-plant, national or multinational group where there are various levels of managerial decision-making.

2. The study's methodology relies mainly on desk material - especially the International Encyclopaedia for Labour Law and Industrial Relations (IELL)[1] - and on the collaboration of some colleagues who were kind enough to contribute various pieces of information. I am particularly grateful to Professors A. Goldman (United States), T. Hanami (Japan), A. Lyon-Caen (France), T. Treu (Italy) and M. Weiss (Federal Republic of Germany) for their most welcome help.

3. The study is divided into two parts. In the first section the national situation and developments, that is law and where available practice, are discussed. We have limited ourselves to a review of several countries with industrialised market economies - Belgium, France, the Federal Republic of Germany, Italy, Japan, the Netherlands, Sweden, the United Kingdom and the United States - which we believe illustrate well the different approaches, developments and issues to be described.

The second part relates to international developments. Here we examine international instruments and relevant proposals of organisations such as the European Economic Community (EEC), the Organisation for Economic Co-operation and Development (OECD) and the International Labour Organisation (ILO).

4. In both sections the institutions and machinery for communication between management and workers' representatives in the enterprise are initially examined. In the first part (national developments), we deal consecutively with the different levels of communication and decision-making (establishment - enterprise - group) followed by the institutions and/or machinery at each level (works councils, shop-stewards, safety and health committees, supervisory boards, and collective bargaining) which facilitate this communication. Then the modalities of associating employees with the process of decision-making are analysed, i.e. the provision of information, consultations and codecision-making.[2] For each of these modalities a description is presented of the framework, the subject matter, the timing and the conditions under which they take place (confidentiality, etc.). Finally attention is paid to specific provisions relating to access to decision-makers at the various levels, including in Part II an examination of the responsibility of headquarters in this connection.

R.B.
15 August 1984

CHAPTER ONE: NATIONAL DEVELOPMENTS

I. Institutions and machinery for communication between management and workers' representatives

Institutions and machinery for communication between management and workers' representatives exist at various levels:

- the level of the plant (technical production entity);
- the level of the enterprise or company (legal entity, ususally also an economic unit); and
- the level of the group (economic or financial entity).

A. At the level of the plant

There is a wide variety of institutional machinery for the purpose of communication between management and workers' representatives at the level of the establishment (plant). This usually includes works councils or similar bodies, such as safety and health committees and shop steward committees, as well as, collective bargaining which takes place between management and trade unions.

(a) Works councils

Works councils and similar bodies, i.e. elected workers' representatives for the entire workforce, are rather widespread in the countries under review and elsewhere. That is, however, about the only common feature they enjoy. Otherwise they differ quite widely as far as composition is concerned, method of election (or appointment), competences and the like. In many countries councils have been set up by legislation;[3] in other countries either by national collective agreements,[4] by industry, enterprise or plant agreements and even by employers on their own initiative.[5]

In certain countries the councils are composed of workers only (e.g. Federal Republic of Germany, the Netherlands) in others (e.g. Belgium) they are joint workers and management bodies or chaired by an employers' representative (e.g. France). In some countries (e.g. Federal Republic of Germany, the Netherlands) elections for the councils are open. In Belgium and France representative trade unions enjoy a monopoly in nominating candidates, while in France the trade union's influence fades if its nominees do not get majority backing in the first round of the elections. The councils represent in general all employees, with the exception in some countries of senior or middle management who are considered to be groups having interests different from those of the bulk of the workers.

The size of the establishments covered by the works council regulations differs considerably from country to country. A works council has to be established if a minimum number of people are employed as follows:

Austria and the Federal Republic of Germany	:	5
France and Spain	:	50
Belgium	:	100
Luxembourg	:	150

(b) Other personnel representatives

Other forms of personnel representation at the level of the establishment exist in some countries in the place of, or concurrent with, works councils (committees) or similar bodies. Thus in France, besides the works councils (committees) there are three other bodies, which can operate at the level of the establishment: the employee delegates for handling grievances; the trade union sections, representing a representative trade union; and the committee for occupational safety and health and working conditions, which is a subcommittee of the works council (committee). One and the same person is often a trade union representative, a personnel representative and a member of the works council (committee).

In the Federal Republic of Germany in certain branches and especially in large corporations the unions have so-called "confidence men" inside the plant, who may be appointed by the union or elected by the organised employees of the plant. These "confidence men" are intended to perform liaison functions between organised employees, the works council and the trade union.

In Belgium union delegations have existed for many years and operate in addition to the (joint) works council and the occupational safety and health committee. In the Nordic countries trade union representatives also play an important role in communications between management and the workers at the level of the establishment.

In Italy, delegates are elected in each department, shop or office of the enterprise by all the workers. The average ratio of delegates is 1:40-50 workers. The shop delegates of each plant make up a Factory Committee.[6]

In the United Kingdom shop stewards play a very important role, in bargaining and settling grievances. In 1971 their number was estimated at about 200,000, that is an average of one for 50 to 60 union members.[7] In the United Kingdom a recognised trade union can also appoint safety representatives from among employees. If at least two safety representatives request the employer to establish a safety committee he must do so within three months.[8]

The shop stewards in the United States play, in enterprises where majority unions operate, a prominent role in the settlement of grievances at the plant level. The first step in a grievance procedure is likely to be a meeting between the employee, his shop steward and the employee's foreman or immediate supervisor.[9] The concept of the works councils, i.e. the representation of all workers whether unionised or not is practically non-existent in the United States.

(c) Collective bargaining

Collective bargaining through trade unions, or eventually other representatives of employees, remains an important instrument of communication between management and labour especially at the level of the establishment and even in cases where works councils exist. However, in recent years there has been a remarkable and noticeable development towards negotiations at lower levels in many countries.[10]

In the United States, where collective bargaining is - communication par excellence - the notion of "appropriate bargaining unit is of central importance to an understanding of the system. An appropriate bargaining unit refers to a plant, shop, department or other administrative division of a company in which there is sufficient community of interest among the employees

that it is deemed suitable for defining the boundaries of union representation and bargaining".[11] The vast majority of agreements cover just one employer and a small number of workers.[12]

Agreements can also be concluded in other countries at the plant level, e.g. in the United Kingdom through shop stewards. In the Federal Republic of Germany management and the works council are free to conclude "works agreements" on all possible matters relating to labour management relations in the plant but are not allowed, generally speaking, to negotiate wages and labour conditions which are the province of collective agreements between employers and trade unions.

In Japan minor issues particular to the plants are often negotiated between union organisations and local management at the shop floor level.[13]

B. At the level of the enterprise

Workers' representatives have access to decision-makers at the level of the enterprise (the legally incorporated entity) through a variety of institutions. These include representation on management boards, works councils, the economic committee (such as in the Federal Republic of Germany) and, of course through collective bargaining.

(a) Representation on management boards

Workers' representation on boards has been introduced in a number of countries, e.g. Austria, Denmark, the Federal Republic of Germany, France, Luxembourg, Norway, Sweden, the Netherlands and is being discussed in a number of countries, although it seems that the movement toward employees sitting on boards has lost momentum.

For analytical purposes two models can be distinguished: that of the Federal Republic of Germany and that of the Netherlands. In the model of the Federal Republic of Germany employees or trade unionists sit on the board; in the Netherlands independent persons acceptable to the works council and shareholders.[14]

1. The Federal Republic of Germany: Workers or trade unionists

One of the most striking features of the system of co-determination in the Federal Republic of Germany is the appointment of employee representatives to supervisory boards. According to the Works Constitution Act of 1952, employee representatives account for one-third of the total membership of the board[15] in companies of a certain size. The workers' representatives are elected by direct and secret ballot by all the workers and employees of each company; if there are two or more seats to be filled, at least two of the workers' representatives must belong to the company's staff, at least one being a manual worker and one a white-collar worker. The workers' representatives are full members of the board, enjoying all rights and emoluments pertaining to such an office and taking part in all deliberations and decisions.

The law of May 21, 1951, on the participation of employees in supervisory and administrative boards in the mining and iron and steel producing

industries, goes much further. Companies or combines (including holding companies) which employ at least 1,000 employees operate under "parity co-determination". The employees designate the same number of members of the supervisory board as do the shareholders. A board usually consists of eleven members, but the number rises in larger firms. Two members are employees elected by the works council at the plant level, the other three need not be employees of the company; they are appointed by the trade union. One member from each side should be "neutral", but this seems to mean little in practice. The two sides elect the eleventh member, who should be independent. If no agreement can be reached the courts appoint him. Equally important is the appointment of the Labour Director. He is one of the three members of the management board, elected by the supervisory board; but he cannot be appointed without the consent of the majority of the worker members of the supervisory board. The Labour Director is in charge of all labour and personnel matters, and also participates on an equal footing in all policy decisions taken by the management board.

The Co-determination Act of March 18, 1976 foresees a quasi-parity representation for employees on the supervisory board in companies with more than 2,000 employees. For companies with less than 2,000 employees the "one-third formula" of employee participation under the law of 1952 remains in force. Subject to the 1976 Act 50 per cent of the members of the supervisory board depending on its size (12, 16 or 20 members) must be employee representatives. In companies with up to 10,000 employees the board has 12 members; over 10,000, 16 members and in companies with more than 20,000 members it must be composed of 20 members. Where there are 12 and 16 members at least 2 members of the employee representatives have to be representatives of the trade unions, in supervisory boards with 20 members, 3 members must be union representatives. In each case at least one blue collar worker, one white collar and one member of the senior personnel must be represented on the board. The board elects a chairperson and a deputy from among its members by a two-thirds majority. If this majority is not reached then he is elected by the members of the board representing the shareholders, while the employees' representatives elect the deputy chairperson.

The Supervisory Board elects the management Board with a vote of two-thirds. If this majority is not reached, a committee composed of the chairperson of the board, the deputy and one employee representative and one shareholder's representative make a proposal to the supervisory board. The Board then decides with a simple majority; in case of deadlock the chairperson has a casting vote.

2. The Netherlands: Independent persons acceptable to the works council and shareholders

According to the Act of May 6, 1971, on the structural re-organisation of limited liability companies, the employees have through their works council a say in the composition of the Supervisory Board. This Board has, like the Supervisory Board in the Federal Republic of Germany, wide-ranging powers: the board is entitled to appoint management and draw up the plan for the next year's activities. Members of the Board are appointed by the Board itself (i.e. by co-option). The works council (as well as the shareholders and the board of managers) are entitled to nominate candidates when a vacancy in the Board arises. The works council as well as the shareholders may object to an appointment when they are of the opinion that a candidate is not suitable. Such an objection has as a consequence that the Supervisory Board cannot proceed to appoint its candidate unless the Social Economic Council (SEC) overrules the objection. There is no appeal against the decision of the SEC.[16]

(b) Works councils or similar bodies

Works councils or similar bodies as indicated above do not as a general rule operate at the level of the enterprise, but rather at the plant level. There are however important exceptions. One is the Federal Republic of Germany where a works council (and an economic committee) operate at the level of the enterprise in addition to the plant level.

In the Federal Republic of Germany the Works Council system extends to the enterprise level (central works council) and since 1972 even to the level of the corporate group (Konzern). If an enterprise "has several plants where works councils are elected, these also appoint delegates to a central works council. The central works council can follow the same procedure to select a representative body at the corporate group level. The works councils at enterprise level and corporate group level are authorised to deal only with matters which cannot be regulated at plant level".[17] In Austria there is also a central works council when the enterprise comprises several establishments.

In the Federal Republic of Germany the law provides for an economic committee in enterprises, with a minimum of 100 employees. The members of the economic committee are elected by the work council(s). The committee has right to be informed on important financial matters which it then communicates to the works council(s).[18]

In France there is an enterprise (plant) committee, the establishment of which is mandatory in any enterprise, employing at least 50 workers; recently legislation has been adopted providing for an economic committee, which is obligatory in companies having more than 1,000 employees. A central committee (composed of delegates of the plant committees) must be established in multi-plant enterprises. In the Netherlands a central works council has to be established, when the enterprise employs 100 employees or more.

In Belgium it is possibile - on the request of at least half of the members of one works council - to have special meetings of the different plant works councils belonging to the same enterprise, to deal with economic or financial matters and with other matters, which belong to the competence of the council and relate to different plants of the same enterprise.

In Italy the shop delegates of each plant make up "Factory committees" which have been recognised by both the unions and management as the bargaining agent at the plant and at the enterprise level (in multi-plant companies a co-ordinating body exists amont the various factory committees).[19]

In the United Kingdom while contacts between management and shop stewards are usually limited to the plant level there are examples of company-wide committees of shop stewards, e.g. in the automotive industry.[20]

In Japan more than 50 per cent of the 1,700 enterprises surveyed by the Labour Ministry in 1971 had works councils which have the function of facilitating workers' consultation, as opposed to bargaining.[21]

(c) Collective bargaining

In some western European countries there is a trend towards the development of bargaining at the enterprise level.[22]

In France the law of 13 November 1982 established the annual obligation to negotiate the effective wages, organisation and duration of working time in the enterprise concerned.

In Italy, as indicated, multi-plant factory committees engage in collective bargaining at company level; the same is true for shop steward committees in the United Kingdom.

In Sweden collective bargaining at the enterprise level has been enhanced by the 1976 co-determination act: the primary duty to negotiate beforehand is mandatory for the employer when the employer plans to introduce important changes of interest to the workers. This duty to negotiate is to be fulfilled - in the first place - by negotiations with the local trade union.[23] It has been observed in this context that the term "negotiations" in connection with the co-determination act does mean "consultation".[24]

In Japan bargaining is almost exclusively carried out at enterprise level; this is particularly true of most important wage negotiations which are under the co-ordination by the industrial federations or national centres of unions.[25]

Although the typical bargaining situation in the United States involves a relatively small company with one plant or shop, there are important exceptions. "If the company is a large national firm with many plants, its arrangements for collective bargaining become more complicated ... it is standard procedure for the company's top officials to sign a master contract with the national union covering basic items at all plants, and then leave to the plant managements the task of working out local supplements with the various local unions."[26]

Another variation is to be found in the automotive industry, where bargaining takes place between the United Automobile Workers' Union on an employer-by-employer basis with few giant enterprises. The main focus of bargaining is the enterprise, the contract being supplemented in plant-wide agreements. In other sectors, like construction, the local employers will form local employers' associations and negotiate local contracts.[27]

C. At the level of the (national) group

It is not common for the workers to be represented at the level of the group which comprises different legally independent enterprises. However, mention can be made of the Federal Republic of Germany, France and the Netherlands in this respect.

As indicated earlier employee participation in the Federal Republic of Germany is not limited to the plant level, but extends also to the enterprise level and (since 1972) even to the level of the corporate group (Konzern). The works council at that level is selected by the central works councils of the various enterprises. A group (Konzern) works council for all the enterprises belonging to a group can be established provided there is a favourable qualified majority vote of 75 per cent in the different central works councils of the different (legally established) enterprises, which constitute the group.

In France, one of the most important innovations of the October 28, 1982 act is the institution of the "group committee".[28] The group committee is composed of the head of the dominant enterprise or his representative assisted by two persons appointed by the employer on the one hand and of the representatives of the employees of the enterprises, which constitute the group, on the other. The employees' representatives are appointed by the trade unions from the elected members of the works councils of the different

enterprises and on the basis of the results of the last elections. If half or more of the elected members were presented on non-trade union lists, the departmental director of employment of the place where the dominant enterprise has its seat will decide upon the distribution of the available places in the groups committee. The groups works council is presided over by the president of the dominant enterprise (or his representative).

In the Netherlands "central works councils" are mandatory if requested by the majority of concerned works councils. A central works council is competent for matters which relate to all or the majority of the enterprises. If a group (or concern) is composed of divisions, a group works council, competent for a division, can be established in between the central council and the enterprise councils. Collective bargaining at the level of the group seems as a general rule to be non-existent or rather exceptional. (The group is also usually not the "employer" for the worker in respect of individual work contracts.)

II. Modalities of associating employees in the process of decision-making, including scope

Traditionally the modalities of associating employees with the managerial decision-making process are listed in accordance with their respective degree of intensity. The following - in the order of increasing worker involvement - can be distinguished:

- information;
- consultation;
- co-decision.[29]

A. Provision of information

The meaning of the word "information" seems rather simple: it is "the communication of ... knowledge".[30] Disclosure of information to employees means that the employer provides information about which explanation may be sought and questions can be raised; this information will eventually be discussed. Information can be provided in the framework of collective bargaining, works councils or similar bodies and managerial boards.

(a) In the framework of collective bargaining

The provision of information is widely seen as a measure to facilitate the collective bargaining process. It is obviously "in the general interest that negotiation should take place on the basis of full and accurate information".[31] "With this information, the parties are in a better position to negotiate advisedly and to avoid certain arguments about points of fact."[32]

It seems logical that in countries where collective bargaining is the way par excellence to influence managerial decision-making, special requirements exist requesting employers to provide workers with adequate information for collective bargaining purposes.

Thus the duty to bargain in good faith under the United States' National Labor Relations Act involves "the duty, on request, to provide the other side with information that is directly related to the controversy".[33] Consequently an employer must furnish all information necessary and relevant to the performance of the union's collective bargaining responsibilities. This applies to the administration of as well as to the negotiation of the collective agreement.

The British Employment Protection Act of 1975 provides that it shall be the duty of the employer to disclose to the representatives of a recognised trade union, on request, "all such information relating to his undertaking as is in his possession, or that of any associated employer, and is both (a) information without which the trade union representatives would be to a material extent impeded in carrying on such collective bargaining with him, and (b) information which would be in accordance with good purposes of collective bargaining". These statutory provisions were supplemented in 1977 by a Code of Practice prepared by the Advisory Conciliation and Arbitration Service.[34]

Under Sweden's Act concerning joint regulation "an employer shall keep a workers' organisation, in relation to which he is bound by collective agreement, continuously informed of developments in the production and financial aspect of his business and also of the principles on which his personnel policy is based. He shall additionally afford the organisation of workers an opportunity to examine books, accounts, and other documents which concern his activity, to the extent that the union needs (it) in order to take care of its members' common interests in relation to the employer" (paragraph 19). The idea is that the established union should be given the same insight and overview as the employer himself, in the interest of greater equality in negotiations. Information should be such that all individual employees get a good picture of the activity of the enterprise in general, and of how their own contributions fit into the larger patterns.[35]

In Italy, according to T. Treu "the most important national agreements have introduced clauses obliging the employers or employers' associations to inform the territorial unions or the 'delegates' of their programme of investments and long-term business policies influencing employment and working conditions and, on occasion to examine the same matters in conjunction with the unions".[36] The scope of discussion of information and of consultation - on the basis of that information - has been expanding in the last few years: so that whereas in other countries this kind of development has been introduced by law, in Italy it has come about through collective bargaining, particularly in larger firms.

(b) Works councils - managerial boards

Next to promoting collective bargaining, information is given to workers - mostly to works councils, safety committees, sometimes union delegates - with the idea of keeping them informed about their situation in the enterprise and to allow those councils to fulfil their advisory role, sometimes as a basis for co-determination on certain matters.[37]

Information to works councils and similar bodies is given for example in Austria, Belgium, Finland, France, the Federal Republic of Germany (also to the economic committee), Norway and the Netherlands. In the system where information is provided to works councils this is an automatic requirement established by law, contrary in some cases to disclosure for collective bargaining purposes where trade unions have to specifically request the information, such as in the United States and the United Kingdom.

Works councils have as a general rule been set up with the idea of promoting collaboration between employees and employers. This is explicitly stressed in the Works Constitution Act of January 1972 in the Federal Republic of Germany which states that "employer and works council have to work together in a spirit of mutual trust". The underlying idea seems to be that the employees, as integrated and fully-fledged members of the enterprise, have a self-evident right to know - to be informed. This is also clearly the perception in article 3 of the 1973 decree in Belgium on economic and financial information to be given to the works council stressing that "the purpose of this information is to give the employees a clear and correct view of the situation, its evolution and the projects of the unit or group to which it belongs".

Mention in this context must also be made of employees and/or trade unionists, who are members of supervisory boards or management boards of companies, such as is the case in the Federal Republic of Germany, Austria, Denmark, Norway, Sweden and Luxembourg. These members are entitled to the same information as the other share-holder representatives.

(c) Scope and format of the disclosure of information

In order to evaluate the kind of information which is given to employees a number of questions must be asked; the most important concern:

1. the subject matter on which information is to be provided;

2. the entity about which information has to be given;

3. when information has to be given;

4. to whom information has to be given;

5. the format of information and expertise needed to use it; and

6. problems regarding confidentiality.

1. Subject matter

In examining the different points on which information has to be given, it is easy to be baffled by the wide diversity and differences between the various (national) systems and provisions. There is however a clear trend for information to cover not only wages and conditions of work in the strict sense, but also work organisation and economic and financial data and decisions. This trend parallels the widening scope of collective bargaining.[38]

Sweden seems to be one of the most progressive countries in this area: extensive information has to be given which covers almost all aspects of a business.

Far-reaching information must also be given to the works council in the Federal Republic of Germany. The council is entitled "to information which is necessary in order to discharge its duties, including the inspection of the payroll (paragraph 80 II, Works Constitution Act).[39] The employer has to inform the council on any plan concerning the construction, alteration or extension of production, administration and other premises, of technical installations, of working processes and operations or of work places".[40]

Furthermore, the economic committee has to be informed in advance about the economic matters of the undertaking, and he has to hand over the necessary documents to the economic committee. Such economic matters concern especially:

- the economic and financial situation of the enterprise;
- the production and sales situation;
- production and investment programmes;
- rationalisation programmes;
- manufacturing and working methods;
- reduction or closing of factories or parts thereof;
- transfer of factories or parts thereof;
- amalgamation of factories;
- changes in the work organisation;
- all other matters, which materially affect the interests of the employees of the enterprise.

In Belgium legislation also imposes an extensive obligation to inform which concern the following subject-matters.[41]

Economic and financial matters:

Basic information

- company statutes;
- the competitive position of the enterprise in the market;
- production and productivity;
- financial structure of the enterprise;
- budget and calculation of costs;
- personnel costs;
- programme and general prospects for the future of the enterprises;
- scientific research;
- public assistance;
- the organisation chart of the enterprise.

Annual information

- up-dating the basic information;
- balance sheet, profit and loss account, etc.

Periodic information

- sales;
- orders;
- market;
- production;
- costs;
- cost prices;
- stocks;

- productivity;
- employment;
- programme;
- new technologies.

Occasional information

- all important events.

Social matters

- employment policy;
- structural changes;
- closure of enterprises;
- personnel policy.

It is however a fact that many laws are often de facto not lived up to, which underlines the discrepancies between the textbook and reality. Thus a report of the Government of Belgium indicated that quite a great number of works councils do not get all the legally required information. To give one example (1981):

	O.K. %	more or less %	insufficient %	inexistant %
Enterprise with a works council for the first time	6	29	33	32
Enterprises controlled for the first time	8	38	24	30
Enterprises controlled before 1978	21	60	14	5

The United States may be at the other end of the spectrum. Information has to be given about pay, wages, hours and all other terms and conditions of employment which have been listed as "relevant" and "necessary" for collective bargaining. Financial data however need not be disclosed unless the employer makes the financial position an issue in the negotiations by claiming that the company cannot afford to pay.

However, the employer is entitled to withhold in all cases sensitive information. In Sweden, where information is to be given "to the extent that the union needs it ... outside of the duty to given information falls private circumstances, arrangements in connection with dispute situations, certain cases to which a challenge aspect applies, research and development work of a

particularly secret nature, and matters connected with tenders made in competition with other firms...".[42]

In the United Kingdom no employer can be required to disclose, inter alia, any information the disclosure of which would be against the interests of national security, any information which has been communicated to him in confidence, any information relating specifically to an individual or any information "the disclosure of which would cause substantive injury to the employers' undertaking for reasons other than its effect on collective bargaining".[43]

In Belgium, the works council is not entitled to information, when this information would be prejudicial to the enterprise, or when this is justified by "the necessities of the commercial policy of the undertaking and specifically by the competitive position of the undertaking". In some countries, for example in Belgium, the Netherlands, the Federal Republic of Germany and as already mentioned in the United Kingdom, the privacy of employees is specifically protected in connection with information disclosure to workers' representatives. One can thus conclude that the employer's duty to inform can be waived if competing important values come into play, such as the prejudicial effect on the enterprise, national interest and privacy. The question then remains as to who in cases of conflict decides whether information is of a prejudicial nature, of national interest, privacy, etc.? This can be a court or as in Belgium, a governmental institution.

2. The entity involved

In most cases information provided to workers is limited to the local entity. In the United States information is related to the bargaining unit. In the United Kingdom the Employment Protection Act obliges an employer to make disclosure to an independent trade union which is recognised for collective bargaining. The information must be such as is in the possession of the employer or an associated employer. It must both be information without which the union would be impeded in collective bargaining to a "material extent" and which the employer should disclose in accordance with good industrial relations practice. In case of an enterprise, composed of different establishments (multi-plant enterprises), the level of negotiation is relevant in order to determine on which entity information has to be given. However, will the union be able to obtain information from an associated employer, when the first employer does not have the information which the union wants?

The level of bargaining is equally determining in Italy and Sweden where information likewise has to be given in accordance with the level of negotiation. In Italy, for the bigger enterprises with different plants, a central factory committee has to be set up which will deal directly with and get information from the level of the group. In Sweden if negotiation takes place at a higher enterprise level, then the information will be given on that level - also to the central union organisation.

In France, the Federal Republic of Germany and the Netherlands, information to the works council is given in accordance to their level of activity. So the group committee in France will receive information on the activity, the financial situation and the evolution of employment in the group as a whole and its component entities. This may also, exceptionally, be the case in other countries: thus in the United States, the Ford Motor Company in accordance with a collective bargaining agreement concluded in 1982 provides information on certain investment-disinvestment decisions for the enterprise as a whole in the United States. Also in Fiat, Italy, information is limited

to the national group. Generally speaking, in most cases of multinational enterprises information will be limited to activities within national boundaries up to the level of the national group. It would be rather exceptional (and only a matter of practice) for local (or national) workers' representatives to receive information on the multinational group as a whole. A statutory requirement to provide information on the international group exists only in rare cases.

Such is the case in Belgium: the employer must give the works council financial and economic information concerning the plant, at the level at which the works council operates, and if applicable, concerning the legal and/or economic or financial entity to which the enterprises belongs. The purpose of this information is to give the employees a clear and accurate view of the overall situation. The information will thus indicate the position occupied by the enterprise:

(1) in the economic or financial group to which it belongs;

(2) in the local, national or international economy.

Likewise, in the Netherlands the employer is obliged, "for the purpose, inter alia, of discussing the general conduct of the undertaking's business, to provide the works council ... with written or oral information also as regards any investment made in the Netherlands and abroad".

In Japan, de facto information is given to the (enterprise) union on the group as a whole. For example investment decisions need the informal consent of the unions. Thus investment by Nissan in Italy and in the United Kingdom has been greatly delayed because the unions have not consented.[44] Obviously, where workers' representatives are members of a board of managers or a supervisory board in a parent company of a multinational enterprise group, they can receive information on the entire group when, for instance, international investment decisions are at stake. Thus, in the Federal Republic of Germany representatives of employees in a supervisory board of a multinational group are involved by way of information and also consultation in the worldwide operations of the group. At times such information may also be given upon request to a works council (as apparently has happened in connection with foreign investment plans at Volkswagen).

3. When?

A crucial question is of course that of when information has to be given to the workers' representatives. Obviously, if employees are to have an opportunity to influence certain management decisions which will effect them or to prepare for their social implication information only makes sense if it is given in advance. This certainly is the case with collective dismissals, substantive modifications of activities and the like. Different provisions exist in the labour law or collective agreements in the various countries.

In the Federal Republic of Germany the works council must be informed in good time about a planned alteration of the establishment, which is defined as:

- the reduction of operations or the closure of the whole or important departments of the establishment;

- the transfer of the whole or important departments ... (paragraph 111 Works Constitution Act).

In Belgium if an employer has to undertake collective dismissals the works council must be informed immediately and certainly before the actual decision has been taken.

In other countries, like France, the Netherlands, and Sweden information must likewise be provided before decisions are taken. For example, in France a 1982 act strengthened the powers of the enterprise committee by giving it a right to information and prior consultation on management plans to introduce new technologies affecting the general operations of the undertaking, where these are likely to have consequences for employment, job qualifications, pay, training and working conditions. In Belgium, an important inter-industry-wide agreement on new technologies was concluded in late 1983, which applies to enterprises which employ on average 50 employees or more. If the introduction of new technologies has important consequences for the employees regarding employment, work organisation or working conditions, the employer must inform the employees three months before the implementation of the decision.

4. Information to whom?

The term workers' representatives to whom information is provided relates to various bodies determined in line with national legislation, collective agreements or practice. These can be the trade unions (especially in the case of collective bargaining), or the employees of the firm, represented by a union delegation (shop stewards), a works council, a safety and health committee, an economic committee (Federal Republic of Germany) or the worker members on the supervisory and management boards of enterprises. To whom information is given is obviously an important aspect of communication. Its impact and outcome will also be affected by the attitudes of the recipients involved.

5. Format and expertise

In the area of information and consultation a number of problems arise, not only concerning the content of the information, but also concerning the format of the information (the information should be clear and understandable) and also concerning the knowledge of employees' representatives to grasp the essence of the message and its impact upon the workers' interests. The role of experts is sometimes specifically referred to in the labour legislation. Thus the Works Constitution Act of the Federal Republic of Germany mentions in paragraph 80(7) that in agreement with the employer the works council can call in experts for the orderly conduct of its business. The role of experts, who could effectively help employees in evaluating the information provided cannot be overstressed. In some countries there are union centres providing training and expertise to worker representatives in the enterprise. Training of works council members or shop stewards in the handling of information is also a matter which has found particular attention for example in Norway and also in the Federal Republic of Germany. It is being discussed and developed in other countries.

6. Confidentiality

In all systems workers' representatives are in one way or another bound to observe discretion or secrecy with respect to certain types of information provided by the employer. In Sweden, for instance, "in respect of information which the enterprise wishes to keep secret, therefore, we have to distinguish between information which is given under the Act on Board

Representation and information which is given under the Joint Regulations Act. Under the former act the worker representative acquires information in his capacity as a member of the board and is placed under the same duty of confidentiality as the rest of the directors ... In regard to information under the Joint Regulation Act, it is the rule that the employer may impose a duty of confidentiality, but that the information may always be conveyed to the rest of the members of the union branch committee."[45]

B. Consultation

(a) Notion, related concepts

In general one can say that consultation conveys the notion that the employer has to obtain the advice and views of the employees, but retains the right to take the final decision (in the English-speaking countries this is also referred to as joint consultation). Negotiation on the other hand is in general a "method of joint decision-making" involving bargaining between representatives of workers and of employer(s), with the object of establishing mutually acceptable terms and conditions of employment. Negotiation implies an effort to reach agreement by the parties concerned.[46] Let us see how these concepts are translated into the various national systems.

In Japan, too, a distinction is made between consultation and negotiation in theory and to some extent in practice, in the sense that most collective agreements distinguish these processes. But in fact there are two meanings of the term consultation, one is consultation in the general sense; the second, which prevails in practice, is consultation with the aim of finding consent on the side of the workers' representatives for major managerial decisions. This means that certain issues such as dismissal, transfer of employees and the like, quite often must and do take place with the consent of the union. Consultation aiming at this consent takes place in a framework of harmonious and peaceful relations between management and labour.

Quite often, however, consultation is regarded as a step prior to collective bargaining; if the issue is not settled through consultation, that is peacefully, then it may be taken up by collective bargaining. In this case the union may resort to a strike.

Collective bargaining has a rather formal meaning and takes place within a framework of confrontation. In theory and more or less in practice, it is assumed that different persons attend to the consultation and the bargaining processes. Accordingly, members of the executive of the union will attend both consultation and collective bargaining sessions, while bargaining will usually be carried out on the union side by the secretary-general and by the President of the union only if bargaining takes place at the level of the company.

Consultation in the private sector is not mandatory by law in Japan, but constitutes a moral obligation. In the public sector, the law distinguishes between consultation and bargaining, since the issues for bargaining are limited by law and so-called "managerial matters" (prerogatives) are excluded from bargaining but subject to consultation..

In the Federal Republic of Germany the concepts of consultation and negotiation should be looked upon as different steps involving different degrees of participation in decision-making. A sharp distinction is made in labour legislation (for example the Works Constitution Act) between the obligation to inform, the obligation to consult, the right of veto and the right of co-determination.

With respect to information, the employer is entitled to make a decision after having informed the workers. In the case of consultation, the employer must talk to the workers, but may ignore their opinion and take a decision anyway. If the workers have the power of veto, then the employer must provide information, discuss the issues with them; they can block his decision (a settlement might be reached through a labour tribunal, if required). If the workers have a right of co-determination, they can even take the initiative and enforce a decision which the employer initially may not like. Information consultation and co-determination rights are generally associated with the general workers' representatives in the enterprise, i.e. primarily the works councils.

In the Federal Republic of Germany bargaining usually takes place between employers (or their federations) and the trade unions (which are normally industry-wide). It also takes place between management and the works council in respect of agreements on certain work conditions or for the regulation of the social consequences of major management decisions affecting the employment of workers (social plan). Generally speaking, co-determination and bargaining take place at different levels and between different institutions.

While bargaining is the major communication form between employers (or their associations) and industry-wide unions, co-determination is the province of workers' representatives in the enterprise (works councils and workers' representatives on supervisory boards). Such a distinction is not found in other countries such as Japan, the United States or Italy, to mention a few.

In the United States the term consultation is not widely used although one could say that employers may consult with unions regarding matters of managerial prerogative. In the public sector in a number of states there is a procedure for harmonising public employees. However, there is also a well-known process called "meet and confer"; that process is analogous to consultation, meaning that the employer has the obligation to meet and discuss, but that he retains the ultimate right to take a decision.

In true collective bargaining - which applies to all private sector and to half or more of the public sector - once there is a union, then there is an obligation to try to reach an agreement.

Another aspect, which is illustrated by case of the Federal Republic of Germany and Japan, is that in certain cases decisions are invalid if consultations have not taken place, (e.g. in the first country if the works council has not been heard before the employment of a worker is terminated).

In Italy, various forms of consultations exist depending on the means by which they were established (law, agreement or practice); whether consultation is ad hoc or on a regular institutionalised basis; whether or not consultation is mandatory; and lastly whether consultation is binding or voluntary. Consultation, combined with a veto power of the union, is regarded as binding consultation.

It is also important - and this goes for all countries - whether advice from the workers is sought before or after the decision. In Italy there is an additional intermediate step called joint examination.

In the public sector joint consultation tends to be associated in many English-speaking countries with a public sector tripartite institution (e.g. the Whitley Councils in the United Kingdom after the First World War) and usually there is no management discretion to choose whether they will or will not consult.

In summary, it can be said that consultation takes place mostly, but not exclusively, in the framework of works councils and other comparable committees. (It is obvious that trade unions can also have "consultative" status.) The subject matter for consultation is usually not as wide as the subject matter on which information is provided.

As regards the scope of consultation, in Belgium, for example the works council has advisory competence concerning:

Economic and financial matters:

- work organisation and productivity.

Social matters:

- supervision of labour standards;
- vocational training and retraining;
- structural changes;
- criteria regarding dismissals and recruitment;
- job classification;
- social rehabilitation of handicapped workers;
- use of language;
- destination of fines;
- new technologies.

Other examples of wide ranging consultation rights in the Federal Republic of Germany are as follows:

(1) The employer has to notify the works council sufficiently in advance of plans for new constructions, remodelling or extension of buildings for production, administration or other factory purposes, technical installations, working methods or procedures or working areas. The employer has to consult with the works council on these matters and he especially has to discuss their effects on the quality of work and on the employees (paragraph 91 of the Works Constitution Act).

(2) The employer has to inform the works council on matters of personnel planning, present and future personnel requirements and measures resulting therefrom for personnel and vocational training. This includes the obligation to inform the works council before hiring, reclassifying and transferring personnel, because there measures require its approval. (This right of information even exists for the contemplated employment or change in managerial employees.) The works council has to be consulted on the nature and magnitude of the required measures and can make suggestions regarding personnel planning measures (paragraph 92 of the Works Constitution Act).

(3) Adherent to the right of obtaining information is the right to study relevant documents. The employer has to submit to the works council all documents which are necessary for the fulfilment of its task. This includes the right to inspect wage and salary records (paragraph 80 of the Works Constitution Act).

(4) Members of the works council have the right to participate in the inspection by the authorities of safety and accident prevention at the work place (paragraph 89 of the Works Constitution Act).

Similar examples can be given for other countries like the Netherlands, France or Spain. In the United Kingdom a 1981 Confederation of British Industry (CBI) survey indicates that consultation is the most prominent way for workers to participate in decision-making regarding employment levels (47 per cent), while negotiation scored 31 per cent and information 27 per cent.

(b) The involved entity

The entity for which consultations are held corresponds practically to the entity for which information is provided, i.e. the employer who is obliged to consult will most likely be the local employer. In a number of cases consultation will take place at the level of the enterprise and exceptionally at the level of the national group. Rarely, e.g. in Japan, or in the Federal Republic of Germany certain consultations may involve matters relating to the level of the international group. Those latter consultations, however, involve representatives of the workers in the national (home country) context only and not representatives of the employees of the international group as a whole.

(c) When? To whom? Confidentiality

Here also there is really no fundamental difference with what has been said in relation to information and we refer to the relevant chapters above.

C. Co-decision

In some cases, the representatives of the employees, enjoy de jure or de facto the power to take decisions together with the employer concerning certain aspects of the employment relationship. This is obvious in the case of collective bargaining and in situations such as in the Federal Republic of Germany where workers enjoy co-decision rights through parity representation on the supervisory board, or when works councils have co-determination rights.

(a) Subject-matter

1. Works councils

In the Federal Republic of Germany the works council has important co-determination rights. Co-determination means that management cannot make decisions without the consent of the works council. In the absence of an agreement, any move by management could be judged illegal. The co-determination law of 1976 goes even further. It extends to both sides an equal voice in the decision-making process especially where there is parity of representation. Therefore - at least in theory - either side can take the initiative and call for a new rule.[47] If management and the works council do not agree, the problem can be referred to an arbitration committee. If management or the works council is unhappy with the decision of the arbitration committee, either side can take the matter to the labour court. The power of the court is however very limited.[48]

Subjects on which the agreement of the works council must be sought as a result of (legally enforcable) co-decision rights concern the following social matters:

- the internal working order of the factory: this includes general rules on the control of working time, use of telephone for private purposes, work clothing, etc.;
- daily working time, including breaks and allocation of the working hours to the days of the week;
- time, place and method of payment of wages or salaries;
- establishment of rules for vacations and the individual selection of the period for vacations;
- installation of technical equipment which controls the conduct or performance of employees (i.e. time clocks);
- regulations concerning industrial security and professional illnesses and health protection in general;
- administration of social welfare installations within the factory;
- administration and management of housing made available by the company to its employees (including general conditions and termination);
- compensation structure;
- amount of piece-work remuneration, premiums and similar compensations based on performance;
- procedure for the handling of suggestions to improve work as well as working conditions. (paragraph 87 Works Constitution Act).

Co-decision power also exists for the works council in respect of the regulation of the social consequences of management decisions entailing changes in the operations of the enterprise/plant (e.g. plant closures with redundancies) through the negotiation of a "social plan" as well as the modalities in the implementation of the underlying managerial decision (not the decision itself). This latter right (interest equalisation) is, however, not legally enforcable (paragraph 112 Works Constitution Act).

In the Netherlands the employer needs the agreement of the council on decisions concerning:

- work rules;
- pensions, profit sharing or savings plans;
- a compensation - or evaluation scheme,
- rules relating to safety, health or welfare regarding the work;
- rules relating to appointment, dismissal or promotion;
- rules concerning vocational training;
- rules concerning the evaluation of the employees;

- rules concerning welfare in the enterprise;
- rules concerning work concentration;
- rules concerning the treatment of young workers in the enterprise.

If the works council refuses to agree, the employer can submit his case to the joint committee of the sector and eventually to the Minister of Social Affairs.

In Belgium, to give another example, the co-decision making powers of the works council are much more limited. They relate to the following social matters:

- drawing up work rules;
- deciding on the general criteria for dismissal and re-engagement;
- annual vacation;
- public holidays;
- management of the social services;
- indication of the working language.

In case the works council cannot reach agreement, the problem of the work rules is referred to the joint committee of the sector, in which employers association(s) and trade unions are represented and which can take a decision by majority vote. In case of conflict about the dates of the annual vacation or holidays the Labour Court has final decision-making power.

The works council has no co-decision rights in respect of economic and social matters.

2. Collective bargaining

There is in the long run a trend towards the expansion of the content of collective agreements and therefore towards the increase of co-decision rights of the workers through this rule setting procedure.[49]

For Sweden,[50] A. Adlercreutz reports that:

> The primary duty to negotiate, characterised by the employer's duty to take the initiative, is incumbent on the employer - in relation to an established trade union in the following cases, which all have in common that the employer plans to introduce important changes in present conditions or other innovations of interest to the employees:
>
> - the change is expected to affect the enterprise in a general way, such as the expansion, reorganisation, closure or curtailment of operations, or the transfer of or leasing out the enterprise or part of it, or the introduction of new working methods;
> - the employer intends an important alteration of working or employment conditions affecting individual employees who belong to the employee organisation concerned. Such might be a removal which is not merely temporary to another work place or a transfer to another kind of job.

- the employer intends to use a contractor for the performance of a certain task or otherwise to allow non-employed persons to perform work in the enterprise. The enintention here is to gain control over the utilisation of sub-contracting manpower and to prevent the employer from using outsiders for work which falls general outside the usual activity of the enterprise. Thus work which is of a short-term or temporary nature or requires special expert knowledge is generally exempt.

The duty to negotiate on the initiative of an established trade union is imposed on the employer whenever such a union calls fornegotiations in other cases when the employer has in mind a decision which will affect members of the union. This provision aims at providing the opportunity for negotiation in special cases, but it should not, according to the legislative documentation, be used so as to extend the employer's primary duty to negotiate by general requests for negotiations in certain types of questions. For such extentions only a co-determination agreement should be used. The difference compared with the general right of negotiation according to paragraph 10 is that negotiations according to paragraph 12 are combined with the employer's duty of postponement mentioned above.

This duty to negotiate is to be fulfilled - in the first place - by negotiations with the local trade union, if such exists. Emphasis should be laid on the local level. However, if agreement cannot be reached by local negotiations, the employer must, on request, also negotiate with the national trade union. It is in such cases up to the employer to decide, whether he wishes to be represented in the national employers' association. The employer need not give up the right of decision, as when the application of a national collective agreement is at stake. The content of the duty to negotiate according to the provisions mentioned is otherwise the same as that of the general duty according to paragraph 10, namely to be available for a serious exchange of proposals and arguments.

Negotiations preceding the decision-making is the fundamental method provided for in the Co-determination Act for employee participation in managerial matters. The intention is, according to the legislative documentation, that negotiations should be a normal stage, a normal element in the decision-making process. Therefore the duty to postpone a decision, which constitutes the teeth of this duty to negotiate, should not in itself have any obstructive effect on the activity of the enterprise. However, in certain situations rapid decisions and measures are called for. Exemption from the duty of postponement is provided for such situations. The employer is permitted to decide and put the decision into effect before he has fulfilled his duty to negotiate if urgent reasons require this in the case of primary duty to negotiate. The employer is also so permitted when there are special reasons for doing so in the cases mentioned above when the duty to negotiate is dependent on a request by the trade union. The more extensive exception (special reasons) is explained by the fact that the employer, when the initiative lies with the union, does not have the same opportunity to include the negotiation procedure in his planning. The duty of postponement applies also to negotiations at the second stage, with the national union, but the exemption rules may be applied more generously in such cases according to a recommendation made by the Riksdag in the course of its legislative discussions.

The duty to negotiate does not imply that the employer has lost the final right of decision. For such a step a co-determination agreement is required. Neither does failure to comply with this duty mean that the employer's decision is void. The sanction is damaging to the union.

In the United States wages, hours, and other terms of conditions of employment are mandatory subjects of bargaining.

> "Wages" have been held to encompass compensation in almost every conceivable form. Thus, there must be bargaining upon request not only about salaries or hourly earnings but also about pensions, vacation pay, overtime and other premium rates, health and life insurance, stock purchase plans, Christmas bonuses, employee discounts on purchases from the employer, and many other types of remuneration. "Hours" include not only the total number of hours to be worked in a day or a week but also the scheduling of shifts, the allocation of overtime,and the like. Working "conditions" obviously refer to such factors as heat, cold, light, noise, dirt and mental or physical stress and strain. In addition, by itself or in conjunction with "wages" and "hours", the term "conditions" may cover a wide range of miscellaneous matters, including seniority, job classifications, hiring referral systems, promotions and discipline, grievance and arbitration procedures, union security provisions and no-strike clauses.[51]

> In recent years the most controversial issue concerning the duty to bargain has been the extent to which employers must negotiate about managerial decisions that result in a shrinkage of employee job opportunities. The National Labor Relations Board for a long time held that in the absence of antiunion animus, management did not have to bargain over decisions to subcontract, relocate operations, or introduce technological improvements, although it did have to bargain about the effects of such actions on the employees displaced. Layoff schedules, severance pay, and transfer rights were thus bargainable, but the basic decision to discontinue an operation was not. During the Kennedy-Johnston administration of the 1960s, however, the Labor Board reclassified a whole range of managerial decisions as mandatory subjects of bargaining. These included decisions to terminate a department and subcontract its work, to consolidate operations through automated techniques, and to close one plant of a multi-plant enterprise.[52]

> The US Supreme Court has approved some of these developments and disapproved others. For example, it sustained a bargaining order when a manufacturer wished to subcontract out its maintenance work.[53] The Court emphasised this did not alter the company's "basic operation", or require any "capital investment". There was merely a replacement of one group of employees with another group to do the same work in the same place under the same general supervision. Bargaining would not "significantly abridge" the employe's "freedom to manage the business". On the other hand, a maintenance firm did not have to bargain when it decided to terminate an unprofitable contract to provide janitorial services to a nursing home.[54] The Court first stated broadly that an employer has no duty to bargain about a decision "to shut down part of its business purely for economic reasons". But it then pointed out that in this particular case the operation was not being moved elsewhere and the laid-off employees were not going to be replaced, the employer's dispute with the nursing home concerned the size of a management fee over which the union had no control, and the union had just recently been certified and thus there was no disruption of an ongoing relationship. That leaves unanswered many questions regarding the more typical instance of a partial closing or the removal of a plant to a new location.[55]

In 1984 the Board reversed its own previous decision and held that a company is permitted to move its operation from a union to a non-union plant without the consent of the unions during the term of a collective agreement unless the collective agreement itself expressly and specifically prohibits such a move.[56]

In another important decision the US Supreme Court decided that business may unilaterally abrogate collective agreements with trade unions once they have filed for a reorganisation in bankruptcy court. If the company can show that the collective agreement burdens the estate and that after careful scrutiny the equities balance in favour of rejecting the labour contract, there was no need to go so far as to prove that their survival would be placed in question if they were to honour the collective agreements.[57]

These decisions tend to weaken in certain cases the impact of unions in respect of information and consultation rights arrived at through collective bargaining.

In Italy the scope of bargaining, mainly under the impulse of plant bargaining, has been extended to potentially all aspects of labour relations, which can in fact be appropriately dealt with only within the undertaking, namely organisation of work, content of jobs, work loads, sub-contracting, control of overtime and, more recently, information and control of management investment policies.[58]

In Japan matters which are regarded by management as being managerial prerogative are certainly not suitable for collective bargaining, which tends to be in the country more or less a matter of confrontation. In general collective bargaining is used to decide on matters such as working conditions. Consultation takes place in areas within managerial prerogatives, like changes in production, introduction of new technologies, abolition of certain plants or work divisions and so on.[59]

(b) The involved entity

The involved entity, regarding collective bargaining has already been dealt with in Chapter I. The reader is referred to that part of that study.

D. Access to decision-makers

The law contains in only a few countries specific provisions on the question of which kind of management representatives, the employee representatives are entitled to deal with. The law does not therefore specifically address the question as to whether the employees have the right to have access to decision-makers, i.e. to those representatives of management who are authorised to take decisions on the subjects under consultation or negotiation.

In the Federal Republic of Germany the law simply refers to the "employer"; for example article 74 of the Works Constitution Act indicates that the employer and the works council shall meet at least once a month for joint discussion. Regarding the economic committee the act is somewhat more specific: "The employer or his representative shall attend the meetings of the economic committee. He may be accompanied by competent employees of the company including members of the .... executive staff." The latter carry out duties on their own responsibility which are normally assigned to them because of their particular experience and knowledge.

In France the employer or his representative chairs the meeting of the works council. The employer is free as far as the appointment of his representative is concerned, but his choice should not infringe on the possibilities for the employee to exercise their information and consultation rights. The group's committee is presided over by the president of the dominating company or his representative, assisted by two persons of his choice.

Trade union delegates shall be received collectively by the head of the establishment or his representative. If the undertaking is a joint-stock company and the delegates wish to present claims which require discussion by the board of directors before action can be taken on them, the board shall receive them at their request, in the presence of the manager or a representative of the latter who is familiar with the claims submitted.

In Belgium, the law is even more specific. The employers' side of the works council is composed of the head of the undertaking and one or more delegates who are competent to represent him and to commit him on the basis of the managerial functions they perform in the undertaking. This is to say: senior staff who are responsible for the day-to-day running of the enterprise, and as indicated, competent to represent the employer and to bind him legally.

In the Netherlands the Works Councils Act, as amended in 1979, uses specifically the term "manager", which "means the person who, either alone or together with others, directly exercises the highest authority in an undertaking in the management of the work". Regarding discussions with the works council the act stipulates that "discussions shall be held on the employer's behalf by the manager of the undertaking. Where an undertaking has more than one manager, they shall decide together who is to hold discussions with the works council" (section 23). "Section 24 provides for discussions concerning the general conduct of the business of the undertaking, which have to take place twice a year. Where an undertaking is operated by a joint-stock or limited liability company, the board members of the company, if any, or one or more representatives chosen from among their number shall be present at the discussions. Where at least half of the shares in the company are held, either directly or indirectly, by some other company for its own account, the foregoing obligation shall be discharged by the managers of the last mentioned company or by one or more representatives to be designed by them. Where the undertaking is operated by an association or foundation, the meeting shall be attended by the board members of the association or foundation or by one or more representatives chosen from among their number." In case of a central works council or a groups works council one of the employers has to be designated by them for the purpose of dealing with those councils. The employer so designed shall act on behalf of the other employers concerned (section 34 (6), (7)).

Regarding collective bargaining, Professor T. Hanami reported about Japan as follows that under the Japanese law employers have obligation to bargain with the union representing their employees. If an employer were found to have refused to bargain without proper reason he would be liable for committing an unfair labour practice. The Labor Relations Commission has the authority to order the employer to bargain with good faith. Employers may appoint an agent to bargain although in a normal case a manager represents the employer in bargaining sessions. In any case the managers or agents representing the employer must have enough power and authority to make decisions delegated by the employer, at least in the final stage of bargaining. Usually such delegation of power is a point to be examined by the Commission to judge whether the employer has bargained with good faith. There is no special provision concerning multinational enterprises. However, it is an established theory that the bargaining representatives of the foreign companies must have power to make decisions. Otherwise they are liable to refuse to bargain. Since bargaining takes place mostly on the enterprise level the above described law of unfair labour practice is enough. Works councils established by the agreement between the employer and the enterprise union also discuss on the matters of management decision-making. However, in the final analysis the unions are entitled to demand bargaining over such matters which are often discussed in works council meetings including so-called matters of management decision-making. The notion of management prerogatives is not generally accepted here.[60]

For Italy, Professor T. Treu indicated that there was nothing in the law to give precision to the concept of employer representatives taking part in consultation or negotiations with workers. However, attempts were being made regularly to relate union representatives structures to the real power structure of the enterprise. For example in the case of groups of enterprise or of multiplant enterprises a co-ordinating body can be is set up among plant or enterprise union representatives (co-ordinating committees or the like). The Act 300/1970 allows or even promotes such moves. The effectiveness of these co-ordinating committees is uneven. The difficulty of reaching the real locus of power on the employer side is often stressed by trade unions (particularly as regards the top or financial control of enterprise groups). This is particularly true in the case of strategic information and related decision-making. Most national collective agreement and enterprise group agreements provide for a right to inform and sometimes to consult about these matters. This often includes provisions about very detailed information to be given prior to decision-making by the competent authority of the firm (from the financial holding, down to the individual enterprise director and the plant manager).

In a few large companies and groups these rules have worked reasonably well and unions receive information and have consultation with decision-makers in which they try to influence them. In most small or medium enterprises the practice is uneven, and trade unions have difficulties in getting and using real information.

An attempt to specify these rules is being made for the group Institute for Industrial Reconstruction, the largest publicly owned group (500,000 employees). A network of bilateral committees for information and consultation is being established from the top financial holding level down to the plant level. Multinational enterprises seem the most difficult to tackle. While no case of outright refusal to give information is reported, elusive answers seem common according to trade union sources. Decisions such as collective lay-offs or dismissals are always taken by an enterprise authority which commits itself to the unions by agreement and by law. Under Italian labour law no plant or enterprise manager could claim not to be responsible for decisions of this type.

In Belgium, the 1968 act on collective agreements lays down that the delegates of the organisations are presumed to have the competence to conclude an agreement on behalf of their organisation, and that such a presumption is irrefutable. Through this provision, the law is attempting to solve the problem which is constituted by the fact that some negotiators have, in fact, no power to conclude an agreement. The law tries to implement a principle of good industrial relations; that representatives of employees should be able to discuss and negotiate with representatives of management capable of decision-making thus giving them access, as such, to decision-makers. However, nowhere is it clearly stated just who is a delegate of the organisation, or exactly what indicates that he is recognised as such. According to Article 16 of the Act, it is obligatory for the parties to give - in each agreement: (1) the name of the organisations concluding the agreement; (2) the name of the joint body, if the agreement is concluded in such a body; (3) the identity of the persons concluding the agreement and, if the agreement is concluded outside a joint body, the capacity in which such persons act and, where applicable, their functions in their organisation. The agreement is signed by the persons concluding it on behalf of their organisation or in their own name. These signatures may be replaced by:

(1) a statement to the effect that the chairperson and the secretary of the joint body have signed the minutes of the meeting as approved by the members;

(2) the signature of a member of each organisation represented on the joint body in which the agreement was concluded;

(3) the signature of the person who brought about conciliation between the parties in the case of a labour dispute, and who testifies that the parties have indicated their agreement on the written record of conciliation (art. 14).

In the United States, Professor T. St. Antoine indicated that at either the national or local level both employer and union will be represented by negotiating teams. The union's negotiating committee is elected by the membership or appointed by the union president or local business manager, but occasionally by a committee chairperson. The employer's side will generally consist of officials and staff from the personnel department. In small companies the chief executive officer may participate actively. In larger firms the vice president for industrial relations will be the chief negotiator. Especially at the national level both lawyers and economists may be involved at the bargaining table or behind the scenes. In complex negotiations there may also be union-employer subcommittees to work on particular issues. After a tentative agreement has been reached by the negotiators, it often has to be ratified by the union's membership and the corporation's board of directors.[61]

According to the NLRB and the courts, an employer is guilty of bargaining in bad faith if he is found to have "refused to send to bargaining conferences representatives who have power to negotiate and to bind the employer",[62] or as A. Goldman calls "failure to give a negotiating representative responsible authority".[63] The National Labor Relations Act indeed "requires that the management representatives have authority to consummate an agreement".[64] Professor Goldman goes on to say that the parties are free to select their agent for negotiation. The courts and the NLRB, however, have insisted that the employer's bargaining agent must have sufficient authority to carry on meaningful bargaining. The right to ratify the proposed agreement can be retained by management representatives who are not at the bargaining table. However, those who speak for management must have sufficient knowledge of the employer's business and bargaining goals so that the agreement reached at the bargaining table based upon the positions taken by these representatives most probably will be ratified by any officials who retain the ultimate authority to execute the bargaining agreement.

Generally speaking, multinational enterprises, including the subsidiaries of foreign companies, are subjected to the same legal provisions where they exist as regards the question of authorised decision-makers on the employers' side. This is so irrespective of the fact that certain managerial decisions on which consultations or negotiations are held with workers' representatives may be within the final decision-making competence of foreign headquarters. Likewise, co-determination on economic matters (e.g. through workers' representation on company boards) where it is given does not make specific provisions for this fact.

CONCLUSIONS

I. Institutions and machinery for communication between management and workers representatives operate in most cases at the level of the establishment; they are less widely developed at the level of the (legally incorporated) enterprise and exist only rarely at the level of the national group. They are practically non existent at the level of the international group.

At the level of the establishment there is a wide variety of institutions and machinery for such communications between management and employee representatives.

Very prominent are works councils, which however differ greatly from country to country as far as composition, nomination and election of candidates, competence, minimum size of establishments subjected to them and the like are concerned. This means also that - at first sight - similar institutions can and do perform different functions in different countries the more so as the attitudes of the actors involved differ as well. And, as is widely known, functions are more important than institutions.

Other institutions and (or) machinery also have important functions for management/employee communications, like shop stewards, staff delegates, committees of occupational safety and health and shop delegates. Moreover, collective bargaining retains in various countries, through trade unions or other representatives of employees like, for example, shop stewards an important, if not an exclusive place in the relationship between employer and employees. In recent years there has been a remarkable and noticeable development and enlargement of negotiations at lower levels including the establishment.

As indicated above, institutions at the level of the (legal) enterprise are less widely developed. In a number of countries, especially in Western Europe, employees' participation in supervisory or management boards has already been introduced in a number of countries, but the movement toward further expansion of employees on company boards has, probably in the shadow of the crisis, lost momentum.

Two models can be retained: those of the Federal Republic of Germany and the Netherlands. In the Federal Republic of Germany employees (and) or trade unionists sit on the board; in the Netherlands independent people have been introduced who are acceptable to the works council and the shareholders.

Again there is baffling difference between countries as far as the kind of board is concerned (one tier versus two tier systems), the number of employees, who are members of the board (minority or parity), the ways nominations are made; whether the representatives are fully-fledged members of the board or not, etc.

In a few countries works councils or similar bodies operate at the level of the enterprise under the form of central councils, economic committees, factory committees or company-wide committees of shop stewards.

Collective bargaining again plays an important role in a number of countries, with sometimes the main focus of bargaining at the level of the enterprise, the contract being supplemented in plant-wide agreements. Institutional machinery at the level of the national group is rather exceptional. Concern works councils operating at the level of the group are indeed not widespread. Collective bargaining at that level seems as a

general rule to be non-existent or rather exceptional, one reason for this is that the group is legally speaking not an employer. This is even more true as far as the international group as a whole is concerned.

II. As far as the modalities of associating employees in the process of decision-making is concerned, a distinction has to be made between provision of information, consultation and codecision-making while realising at the same time that account has to be taken of the fact that these different forms of involvement in management decision-making may have a different significance or at least testify to various shades of meaning in different national contexts.

In most cases the involvement is limited to the local entity. This parallels along with the level at which the institutions or machinery are operating. In a few countries the association of employees' representatives in decision-making may include the level of the enterprise or exceptionally the national group; almost never the international group (leaving aside rare cases where consultations have occured with works councils regarding international investment or more generally, the involvement of worker representatives on company boards (where existing) in corporate decision-making in parent companies of multinational enterprises).

There are however a number of exceptions to the latter rule, such as in Belgium or Japan, where local employees may have to be informed regularly on the group as a whole, or have regular de facto (Japan) consultation at that level.

A tendency can be observed to provide specific information and have consultation before decisions are made or at least implemented. This tendency is for example confirmed by recent measures concerning the introduction of new technologies and their effect on employees which have been elaborated in a number of countries. In a few countries employees' representatives have the right to call upon experts to help them evaluate the impact of the new technologies and eventually develop alternative strategies.

III. Notwithstanding the fact that in certain countries almost everything is negotiable - which does not mean that agreement can be reached - unilaterial decision-making and managerial prerogative remain prominent as regards decision-making in economic matters at least. This is easily demonstrated.

Managerial prerogative in the United States is a well-entrenched notion, limited by the duty to bargain in good faith on wages and conditions. The latest decisions of the NLRB and the Supreme Court seem to narrow the concept of wages and conditions and consequently to bargaining on the social consequences of managerial decisions regarding (dis)investment, subcontracting, the introduction of new technologies and the like.

"In the Federal Republic of Germany all decisions having to do with investment, prices, marketing, financing, production (what, how much and how) are managerial prerogatives. There is however a tendency to establish for such matters, too, some sort of participation in decision-making, albeit in a very indirect way. Thus the closure of a plant is a matter of managerial prerogative. But the works council has the right to ask for a social plan, which may be very expensive. This constitutes a very effective - though indirect - means of participation. The ideology of managerial prerogatives is adhered to, but there is in fact far-reaching participation."[65]

In Italy everything is negotiable. In practice, strategic decisions are, however, still under managerial control. The cases in which unions have managed to bargain on investment are very few indeed, although there is a trend in that direction.

A possible exception may be Japan: "in the private sector, everything is de facto subject to consultation or in some cases negotiations. Thus investment decisions need the informal consent of the (enterprise) union".[66]

IV. Only in a few countries do explicit provisions exist concerning the question whether the employees' representatives are entitled to deal with representatives of management who are authorised to take decisions, i.e. "decision-makers". Even if there are such provisions, they are not very specific nor comprehensive. Where such provisions exist they stipulate for instance that employees' representatives should be able to meet with managers, "who exercise the highest authority", "the president of the dominating company", the "board of directors", managers, who are responsible for the "day-to-day running of the enterprise". In some countries it would be looked upon as bargaining in bad faith if managers or agents representing the employer would not have "enough power and authority to make decisions delegated by the employer" or has "refused to send to bargaining conferences, representatives, who have the power to negotiate and bind the employer" or "failure to give representative responsible authority".

One may wonder why there are not many precise rules concerning such an important issue. One reason seems at least to be that the outcome of the involvement of employees in decision-making, especially, collective bargaining - where the issue is the most important - has traditionally been more the result of specific attitudes or of a power relationship between the parties concerned than the outcome of a legal obligation, so that the formulation of a (legal) rule would seem to be less relevant. It is remarkable that such a rule has been most firmly elaborated in a system where bargaining in good faith has long been established as a legal obligation, namely the United States.

It is also noteworthy that the rule itself has been neither qualified, nor specified. The idea of "authority" in certainly central, but without further elaboration. It seems at first sight that a further distinction - which is usually retained in international law when establishing treaties - namely between the authority to negotiate an agreement, the authority to conclude an agreement and the authority to ratify an agreement might be a useful concept in the labour law and industrial relations context.

V. A final point to be made concerns multinational enterprises specifically. There are no particular institutions or machinery concerning multinational enterprises with regard to information, consultation or negotiations - nor as regards co-determination in managerial bodies. The existing labour law applies equally to national and multinational enterprises although specific provisions for multi-plant enterprises (e.g. the obligation in Belgium to provide information on the whole group) may add an international aspect to these obligations. Subsidiaries and/or headquarters therefore fall under the same rules as national undertakings, enterprises or groups. Exceptionally local (national) employees' representatives may be involved by way of information or consultation in the international business. Certain multinational enterprises however seem to have developed an overall strategy, laying down general principles for conduct as far as information and consultation is concerned. Thus the outcome of the first part of this study would seem to be that the higher level in the group, the less employees' representatives are involved and the less access there is to (top) management, national or multinational

CHAPTER TWO: INTERNATIONAL DEVELOPMENTS

There are several international instruments relating to multinational enterprises which contain a number of provisions relating to the communication between management and workers' representatives. These instruments include voluntary international codes of conduct in particular the Guidelines for multinational enterprises adopted in 1976 by the OECD Council of Ministers and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy adopted by the Governing Body of the International Labour Office in November 1977. Also in this category fall proposals of the EEC, viz. a draft directive on information and consultation of employees (the Vredeling proposal) and the draft European Company Statute as well as various other directives. References are also made to recent International Labour Conventions and Recommendations adopted in the ILO's International Labour Conference.

I. The OECD

Under the voluntary OECD Guidelines for multinational enterprises as promulgated in 1976, employees' representatives enjoy a number of information, consultation and collective bargaining rights. In this respect the problems of access to decision-makers and of the responsibility of headquarters versus the affiliate have been explicitly dealt with in clarifications undertaken by the OECD's Committee on International Investment and Multinational Enterprises (CIME).

A. Institutions and machinery for communication between management and workers' representatives

(a) Information and consultation provisions

1. Information on the enterprise as a whole

Paragraph 3 of the employment and industrial relation chapter of the OECD Guidelines lays down that multinational enterprises, where this accords with local law and practice, should "... provide to representatives of employees, information which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole". Not much work has been done on how these words are to be understood in detail. The 1984 review report of the OECD indicates, however, that "it is the opinion of the Committee (CIME) that employees and their representatives may need and should have access to more specific information, in a form suitable for their interests and purposes, than that available to the public at large"[67] It continues to note that

> In this connection certain activities of multinational enterprises, for instance restructuring activities, may be understood and put into perspective only if the information on the position of the enterprise as a whole is available. For example, if restructuring or similar decisions result in negotiations where the performance of the enterprise as a whole is a key element, then employee representatives should have information which gives a true and fair view of the enterprise as a whole in these instances where and inasmuch such information is needed for meaningful negotiation on conditions of employment. The Committee is

also aware that considerations of business confidentiality may mean that information on certain points may not be provided, or may not be provided without safeguards. The CIME recognises the importance of these issues, and it stands ready to hold discussions on them.[68]

2. Information and consultation rights in case of important decisions

Paragraph 6 of the employment and industrial relations chapter stipulates that multinational enterprises should:

> in considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective lay-offs or dismissals; provide reasonable notice of such changes to representatives of their employees, and where appropriate to the relevant governmental authorities, and co-operate with the employee representative and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects.

(b) Collective bargaining

The right to collective bargaining is laid down in the paragraphs 1 and 2 of the employment and industrial relations chapter. They provide that enterprises should:

- respect the right of their employees to be represented by trade unions and other bona fide organisations of employees, and engage in constructive negotiations, either individually or through employers' associations, with such employee organisations with a view to reaching agreements on employment conditions, which should include provisions for dealing with disputes arising over the interpretation of such agreements, and for ensuring mutually respected rights and responsibilities;

- provide such facilities to representatives of the employees as may be necessary to assist in the development of effective collective agreements;

- provide to representatives of employees information which is needed for meaningful negotiations on conditions of employment.

The OECD has made it clear that the Guidelines are neutral as far as multinational or international bargaining is concerned, i.e. these questions are not addressed (as in the case of the ILO Declaration).

B. Access to decision-makers

Guideline 9 of the employment and industrial chapter of the OECD Guidelines foresees that enterprises should "... enable authorised representatives of their employees to conduct negotiations on collective bargaining or labour management relations issues with representatives of management who are authorised to take decisions on the matters under negotiation".

In the VIGGO case, involving disinvestment - which is subject to mandatory bargaining in Sweden - for which unions demanded to also negotiate with London headquarters of the firm, the OECD was asked to clarify the meaning of Guideline 9.

The CIME responded as follows:

Paragraph 9 was carefully worded to avoid the need for defining the locus of the negotiations or the proper level of management to be involved in such negotiations which would depend upon the decision-making structure in each MNE. The basic purpose of paragraph 9 is to ensure that negotiations conducted under national practice take place in a meaningful manner with representatives of management in a position to directly influence decisions in investment matters and to negotiate in an effort to reach agreement. Where negotiations are defined by national practice in a way that management, in case of disagreement, remains free to make the final decision, these negotiations should still provide employee representatives the opportunity to discuss with representatives of management having a real impact upon the final decision.

In carrying out their responsibilities as discussed above on issues relating to future production and investment plans, management of the enterprise as a whole would seem to have a range of possibilities among which it would choose or that it could combine, taking into full account the need to respect prevailing labour relation practices in the country where the negotiations have been initiated. Its choice depends on various circumstances, such as the matters under discussion, the decision-making structure within the enterprise, and the importance of the decisions to be taken. A number of possibilities are open to this end without suggesting any order of preference. Examples of such possibilities include:

- to provide the management of the subsidiary with adequate and timely information and to ensure that it has sufficient powers to conduct meaningful negotiations with representatives of employees;

- to nominate one or more representatives of the decision-making centre to the negotiating team of the subsidiary in order to secure the same result as in the preceding example;

- to engage in negotiations.[69]

The Committee considered that general provisions of the Guidelines, such as paragraphs 1 and 8 of the Introduction together with item (i) of the chapter on Disclosures of Information ('structure of the enterprises'), could not be seen to imply a general right of the employees to be informed on the decision-making structure within the enterprise.

It was agreed, however, that as stated on earlier occasions, it was the basic purpose of paragraph 9 of the Employment and Industrial Relations Guidelines to ensure that negotiations take place in a meaningful manner with the relevant representatives of management. For this purpose employee representatives, under the Guidelines, have a legitimate interest to be informed about the decision-making structure within the enterprise but such a right of information is confined to negotiating situations referred to in the Guidelines, and in particular in paragraph 9 of the chapter on Employment and Industrial Relations of the Guidelines.[70]

This problem was further discussed in the OECD context in connection with a case regarding the closure of the Ford Motor Company Amsterdam. The question was raised whether the representatives of the employees were entitled, under paragraph 6 of the Employment and Industrial Relations chapter of the Guidelines[71] in case of closing down to co-operate with representatives of management authorised to take decisions so as to

mitigate to the maximum extent practicable adverse effects. The CIME indicated in this connection, by means of a clarification, its opinion 'that it would be in conformity with the intention of paragraph 6 of the Employment and Industrial Relations Guideline if representatives of management participating in the process of co-operation ... had sufficient authority to co-operate in good faith and ... to take decisions that might be called for as required by the circumstances.[72]

C. Responsibility of headquarters

Regarding information provision, the OECD clarified in connection with paragraph 9 of the Employment and Industrial Relations Guidelines that the parent company should see to it that the affiliate receives the necessary information in due time in order to respect local law, agreements ... and or the Guidelines concerning information and consultation rights of employees if headquarters do in fact detain and control such information.[73]

D. Use of national languages

With respect to a Danish case involving a company which was reproached by the unions to have refused to negotiate in the local language, the OECD dealt with the problem of "use of national languages". The OECD clarified as follows:

> The issue has been raised concerning the use of national language in negotiations, consultations, co-operation and the provision of information referred to in the Guidelines on Employment and Industrial Relations, between multinational enterprises and employees' representatives. In fact, a number of paragraphs of the Guidelines on Employment and Industrial Relations are of direct relevance. Negotiations, consultations, co-operation or provision of information imply effective communication between the parties concerned. As a general rule, it is expected that management and employee representatives will communicate, in the framework of prevailing laws, regulations and practices in a language effectively understood by employers' or employees' representatives. Nevertheless, it must be recognised that there may be cases, such as those which may occur when representatives from the parent company are involved, where it may be unreasonably difficult to do so. In such cases adequate interpreter and translation facilities should be provided.[74]

II. The ILO

ILO instruments contain quite a number of provisions relating to information, consultation and collective bargaining, which are impossible to enumerate and comment upon in extenso in this study.[75] We limit ourselves in particular to some topical issues, especially in relation to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office, in 1977; and to several international labour Conventions and Recommendations adopted by the International Labour Conference keeping in mind that the Tripartite Declaration itself refers to 19 Conventions and 15 Recommendations setting general standards in the areas which it covers.

A. Institution and machinery for communication between management and workers' representatives

(a) Information and consultation rights

1. In general

Paragraph 54 of the Tripartite Declaration indicates that multinational enterprises should provide workers' representatives with information required for meaningful negotiations with the entity involved and, where this accords with local law and practices, should also provide information to enable them to obtain a true and fair view of the performance of the entity or, when appropriate, of the enterprise as a whole.

As regards general ILO standards it may be added that Paragraph 7 of the Promotion of Collective Bargaining Recommendation, 1981 (No. 163), calls for measures to be taken so that the parties can have access to the information required for meaningful negotiations. For this purpose employers should, at the request of the workers' organisations, make available such information on the economic and social situation in the negotiating unit and the undertaking as a whole, as is necessary for meaningful negotiations; where the disclosure of the information could be prejudicial to the undertaking, its communication may be made conditional upon a commitment that it would be regarded as confidential to the extent required.

Paragraph 56 of the Tripartite Declaration indicates that in multinational as well as national enterprises, systems devised by mutual agreement between employers and workers and their representatives should provide, in accordance with national law and practice, for regular consultation of matters of mutual concern. Such consultations should not be a substitute for collective bargaining.

2. In case of important decisions

In considering changes in operations (including those resulting from mergers, take-overs or transfer of production) which would have major employment effects, paragraph 26 of the Tripartite Declaration states that multinational enterprises should provide reasonable notice of such changes to the ... representatives of the workers in their employment and their organisations so that implications may be examined jointly in order to mitigate adverse effects to the greatest possible extent. This is particularly important in the case of the closure of an entity involving collective lay-offs or dismissals.

(b) Collective bargaining

Workers employed by multinational enterprises should, according to paragraph 48 of the Tripartite Declaration have the right, in accordance with national law and practice, to have representative organisations of their own choosing recognised for the purpose of collective bargaining. Enterprises should in line with paragraph 50 of the Declaration provide workers' representatives with such facilities as may be necessary to assist in the development of effective collective agreements.

As regards general ILO standards, the Promotion of Collective Bargaining Convention, 1981 (No. 154), re-emphasises the role of collective bargaining, which should be made possible for all employees and groups of workers ... (Article 5, 1, 2 (a)).

The Promotion of Collective Bargaining Recommendation, 1981 (No. 163), prescribes that measures should be taken, if necessary, so that collective bargaining may be possible at any level whatsoever, including that of the establishment, the undertaking, the branch of activity, the industry, the regional or national levels (Paragraph 4 (1)).

An amendment proposed by the Workers' Delegation during the International Labour Conference to add the "international" level was not retained. The record of ILO proceedings report as follows:

> The Workers' members proposed to add the following: 'Measures to facilitate, where appropriate, the development and co-ordination of collective bargaining within enterprises operating in more than one country should be taken. On collective bargaining and other issues of mutual interest, trade union negotiators should have access to the appropriate level of decision-making within such enterprises, up to and including the highest level of management.' The Workers' members stated that the need for such a point was largely self-evident as it tended to bring collective bargaining with multinational enterprises within the scope of the proposed instrument. When enterprises operated in more than one country, the need to co-ordinate collective bargaining and to have access to the highest levels of decision-making was of the greatest importance. The Employers' members opposed the amendment as it raised issues of intense controversy that were being examined in other ILO bodies. They referred in particular to the fact that the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted after lengthy discussions by the Governing Body in 1977, contained a whole section on collective bargaining. A number of Government members also opposed the Workers' members' amendment because they felt that it was incompatible with their national laws and practices and because they considered it inapplicable. With respect to access to the appropriate level of decision-making, it was suggested that this was already covered by point 18 (2) of the Recommendation.[76]

B. Access to decision-makers

Paragraph 51 of the Tripartite Declaration of the ILO states that "multinational enterprises should enable duly authorised representatives of the workers in their employment in each of the countries in which they operate to conduct negotiations with representatives of management who are authorised to take decisions on the matters under negotiation".

As regards general ILO instruments, Paragraph 6 of Promotion of Collective Bargaining Recommendation, 1981 (No. 163), establishes that parties to collective bargaining should provide their respective negotiators with the necessary mandate to conduct and to conclude negotiations, subject to any provisions for consultation within their respective organisations.[77] It can be seen that text of paragraph 51 is very similar to the wording of paragraph 9 of the employment and industrial relations chapter of the OECD Guidelines.

A possibility exists for interpreting the provisions of the Tripartite Declaration under the procedure for disputes regarding the application of the Declaration. So far there has only been one interpretation. Requests for interpretation under this procedure can be made by governments and under certain conditions by representative organisations of employers and workers. Draft replies to requests for interpretation are prepared by the ILO secretariat for discussion by the Standing Governing Body Committee on Multinational Enterprises prior to consideration by the Governing Body itself.[78]

III. The European Economic Community

A. Institutions and machinery for communication between management and workers' representatives: in general

(a) Information and consultation of employees: the Vredeling proposal

The Vredeling proposal for a directive "on information and consultation of employees in enterprises with a complex structure, in particular transnational enterprises", named after the Social Commissioner of the EEC at the time the first draft was accepted by the Commission (Nov. 1980), is undoubtedly one of the most controversial proposals the EEC has put forward in the area of labour relations.[79]

Vredeling began with the assumption that decisions taken in one unit of a group (e.g. headquarters) may affect the interest of employees of another unit (subsidiary) and that consequently employees should be able to have a view on the activities of the group as a whole, the decisions affecting them, even when taken in another unit of the group, and consult "with a view of reaching agreement" (which is in the present author's opinion very similar to negotiation) with management having the authority to do so.

The Commission amended the original proposal in June 1983 mainly in line with the wishes of the European Parliament. The text applies now to undertakings employing at least 1,000 workers in the Community. Member States may lay down special provisions for undertakings whose direct and main objectives are (a) political, religious ... (b) related to public information or expression of opinion.

1. Information

(i) On the group as a whole

Information would be given annually to the workers' representatives as determined by legislation or practice in the member States and should be "general" and "intelligible" so as to give a clear picture of the activities of the undertaking as a whole and of the sector of production or geographical area in which the subsidiary is active.

This information would in particular relate to:

- structure;
- the economic and financial situation;
- the probable development of the business and of production and sales;
- the employment situation and probable trends;
- investment prospects.

Employees would be able to request oral explanations and obtain answers, if necessary on a confidential basis.

(ii) Important decisions

Information would have to be given by the parent company to the management of each subsidiary concerned for communication in good time to the workers' representatives before the final decision is taken on decisions which relate to:

- the closure or transfer of an establishment or major parts thereof;
- restrictions or substantial modifications to the activities of the undertaking;
- major modifications with regard to organisation, working practices or production methods, including modifications resulting from the introduction of new technologies;
- the introduction of long-term co-operation with other undertakings or the cessation of such co-operation;
- measures relating to workers' health and to industrial safety.

It would also be possible to request oral explanations concerning these decisions.

2. Consultation

The consultation procedure would not concern all employees of an enterprise group in the Community but only those directly affected by a decision. Consultations would be mandatory with workers' representatives of a subsidiary in the Community when the parent company envisaged making a decision liable to have a substantial effect on the interests of those workers.

Local management of a subsidiary would be required to ask for the opinion of the employees' representatives within a period of at least 30 days from the day on which the information was communicated, and then to hold consultations with them with a view to attempting to reach agreement on the measures planned in respect of the employees. The proposed decision could not be implemented before the opinion was received or failing that before the end of the period of 30 days. The intention is however not to impose a right of co-determination. The decision could be implemented as soon as the opinion of the employees' representatives has been received. Failing this, management would be entitled to implement the decision following the expiry of the period accorded for the submission of an opinion (at least 30 days). However there is also a provision in the draft proposal for the employees' representatives to appeal to a tribunal for measures to be taken within a period of 30 days to compel the management of the undertaking to fulfil its obligations.

The amended proposal includes the key consideration that "the management of each subsidiary must be in a position to communicate the requisite information to its employees and must have the necessary powers to conduct the consultations referred to above in good faith".

3. Responsibility

Each subsidiary in the Community would be held responsible in the event of a parent undertaking established outside the Community failing to fulfill its information and consultation obligations.

4. Secrecy

Secret information would not need to be communicated. Information would only be treated as secret which, if disclosed, could substantially damage the undertaking's interests or lead to the failure of its plans.

Disputes concerning the secret or confidential character of information would be settled by a third party, i.e. a tribunal. The fact that information could be withheld on the grounds of secrecy would not release management from the obligation to consult the employees: in case of secrecy consultation would take place at least 30 days before putting into effect any decision directly affecting employment or working conditions of the employees.

5. Penalties

Member States would provide for appropriate penalties for failure to comply with the obligations laid down in the directive.

The amended proposal is still attacked by business and supported by trade unions disappointed about certain changes made to the initial proposal. Business seems to believe that the proposal is one of many Community initiatives involving a further step in the direction of worker participation in decision-making. A decision on the directive by the Council of Ministers of the EEC is still pending.

(b) Workers' participation in public limited companies. The proposed Vth directive

The EEC aspires with the aim of promoting a common market, at the harmonisation of the rules which govern the market and especially those which regulate the activities of the main actors in the market. Quite a number of rules have already been promulgated. One, which has already been more than 10 years in the pipeline, and is also one of the most controversial is the proposed Vth directive concerning the structure of public limited companies. The controversy has mostly to do with the fact that the European proposal contains rules for employee participation in the decision-making of the company.

The proposal was first presented in 1972 and was inspired mainly by the experience of the Federal Republic of Germany and the Netherlands (1/3 worker representation in the Supervisory Board and co-option of people acceptable to the works council and shareholders on the Supervisory Board). In 1975, after the Community had been enlarged in 1973, the Commission issued a "green paper", dealing with the main forms of worker participation.[80] The proposal was discussed widely in the Economic and Social Committee and the European Parliament on different occasions, leading to opinions by the Committee and Parliament in 1982. The main thrust of their observations was to enlarge the different forms of participation to include the works council system in addition to the experience of the Federal Republic of Germany and the Netherlands, while leaving the (social) parties the possibility to collectively lay down procedures analogous to one of these three models. The European Commission has taken these proposals into account. The final word is now with the Council of Ministers.

1. Scope of application: more than 1,000 employees

The European directive will apply to the public company limited by shares, which employs more than 1,000 employees. The directive would apply

in principle to parent companies, although Member States can derogate when the company is a financial holding company or when the sole objective of the parent company of an international group is the co-ordination of the management and financing of subsidiary undertakings (thus not effectively taking part in the management of subsidiaries).

Persons employed by subsidiary undertakings of a company would be considered to be employees of that company.

Member States could also derogate with respect to companies whose sole or principal object was:

(a) political, religious, humanitarian, charitable, educational, scientific or artistic; or

(b) related to public information or expression of opinion.

2. Different models

Unless a majority of the employees expressed its opposition to such participation, employee participation would be mandatory. Considering the different models from which Member States may choose, one has to distinguish between two-tier systems and one-tier systems.

(i) The two-tier system

A two-tier system is characterised by the fact that the company would be run by a management organ under the supervision of a supervisory organ.

The supervisory organ appoints the managers and indicates which member of the management board is more particularly responsible for questions of personnel and employee relations.

Article 4(2) contains the four alternative models as to employee participation from among which the Member States may choose:

1. employee representation on supervisory boards;

2. participation in the appointment of members of supervisory boards through co-optation procedures;

3. employee representative bodies at company level;

4. through collectively agreed procedures analogous to one of the three preceding models.

Employee representatives on supervisory boards

The members of the supervisory organs would be appointed by the general meeting of shareholders as regards a maximum of two-thirds and by the employees of the company as regards a minimum of one-third but subject to a maximum of one half. Specific rules must be prescribed to avoid a blockage in the board's decision-making ability and that it is ensured that decisions may ultimately be taken by the shareholders' representatives. Employee-representatives would not necessarily be employees of the company, but could be outsiders, e.g. trade unionists.

Co-optation

As the members of the supervisory organ are appointed by co-optation, the representatives of the employees may object to the appointment of a proposed candidate if he lacks ability or if the supervisory organ, having regard to the interests of the company, the shareholders and the employees, would eventually be improperly constituted. In such cases, the appointment could not be made unless the objection was declared unfounded by an independent body existing under public law.

A body representing company employees

Such a body would have rights of information and consultation. It would meet at regular intervals, and at least immediately prior to each meeting of the supervisory organ. At its request the chairman of the supervisory board, his deputy or a member of the management board would attend its meetings.

Collectively agreed systems

Participation either within or outside the board could be created by collective agreements. Participation in the board could be realised through appointment or through co-optation procedures (art. 4f). Such systems would have to ensure a sufficient degree of equivalence between the collectively agreed and the legally based systems. In this case, employees need not be represented by a single body.

(ii) The one-tier system

In the one-tier system there is only one administrative organ. In a one-tier system the company is managed by the executive members of the administrative board. These executive members would normally to be appointed by non-executive members of the management board and then supervised by them. They would be a greater number than executive directors.

One executive member would more particularly responsible for questions of personnel and employee relations. Member States could choose between three models of employee participation.

Employee participation in the appointment of the non-executive members of the administrative organ

The same rules apply as in case of employee representatives on supervisory boards.

Through a body representing company employees

Collectively agreed systems

3. Principles as to the appointment of employee representatives

These principles are designed to guarantee the democratic character of all the employee participation systems. They amount to that:

1. the relevant members of the supervisory organ or of the administrative organ and representatives of the employees shall be elected in accordance with systems of proportional representation ensuring that minorities are protected;

2. all employees must be able to participate in the elections;

3. the elections shall be by secret ballot;

4. free expression of opinion shall be guaranteed.

(c) The proposed Statute for European Companies

On 13 May 1975, the Commission of the European Communities presented to the Council an amended Proposal for a Council Regulation on the Statute for European Companies. The proposed Statute would, if adopted, provide for uniform legal rules for companies wishing to adopt them. The proposal also provides for a system of employee participation adapted to the decision-making structures of multinational enterprises.

The proposed system consists of three parts which interlinked:

- the formation of European Works Councils representing all the employees of a European company with establishment in different Member States;

- the capacity given to a European company to conclude with the trade unions represented in its plants uniform collective agreements throughout the EEC; and,

- the representation of employees on the Supervisory Board of the European company which appoints, supervises, and eventually dismisses the Management Board.

1. The proposed European Works Council

A European Works Council would be set up under the proposed Statute in all European companies with establishments in different Member States. It would be competent only in matters affecting the whole company or several establishments which could not be dealt with by bodies representing employees in establishments at the national level within the framework of their competence. Matters governed by collective agreements would be outside the competence of the European Works Council.

The competence of the European Works Council would include the right to be informed on matters relating to the running of the enterprise.

Its members would be under an obligation to maintain secrecy on confidential matters. The proposed European Works Council would have to be consulted prior to important economic decisions and its approval would be required on decisions by the Board of Management which directly affect employees. If the European Works Council withheld its approval, the matter could be submitted to an arbitration board.

The European Works Council would also have to approve a social plan which the Board of Management would draw up to deal with the social problems following, for example, the closure of an establishment. The closure decision itself is would however, be taken by the Management Board with the consent of the Supervisory Board, having consulted the European Works Council.

The members of the European Works Council would be elected in the establishments of the European company by all the employees in accordance with uniform European electoral provisions. Elections would be conducted on the principle of proportional representation; candidates could be nominated by trade unions and groups of employees (10 per cent of 100 employees).

2. The proposed European collective agreements

The possibility that the conditions of employement of employees of a European Company might be governed by a European collective agreement between the company and the trade unions represented in its establishments has been retained in the proposal in cases where the parties concerned wish it to apply. Conditions of employment governed by any such European collective agreement would apply directly in respect of all employees who are members of a trade union which is a party to the collective agreement. The parties concerned would obviously be free, however, to govern conditions of employment by collective agreement in national contexts.

In order to prevent from the outset conflicts between the powers of the European Works Council and the trade unions it is stipulated in the proposal that the competence of the European Works Council would not extend to those matters governed by collective agreement. It is also clearly laid down that the European Works Council may neither conclude agreements on employees' conditions of employment nor conduct negotiations in this area unless empowered to do so by a European collective agreement.

3. The proposed Supervisory Board

A European company would have a Management Board in charge of running the enterprise and a Supervisory Board in charge of appointing, supervising and eventually dismissing the latter.

The Management Board would keep the Supervisory Board informed on the conduct of the business and would submit important acts of business policy for its prior authorisation (closures of plants for example).

All members of the Supervisory Board would have the same rights and duties, namely as regards access to information and discretion with regard to confidential matters.

According to the opinion of the European Parliament the Supervisory Board of a European company should consist of:

- one-third of representatives of the shareholders;
- one-third of representatives of the employees;
- one-third of members co-opted by these two groups, who are to be independent of both shareholders and employees and to represent "general interests".

The number of members of the Supervisory Board shall be uneven and divisible by three.

4. Groups of companies

Where a European company is a controlling group company, a Groups Works Council would be formed in which the employees of all the groups enterprises

would be represented and which would have similar powers to those of the European Works Council in matters affecting the group.

Employees in all group enterprises whose registered offices are situated within the Community and which are dependent on the European company would take part in elections to the Supervisory Board.

Where a European company is a dependent group company, instructions to take measures with which the Supervisory Board of the European company must comply may only be carried out in the absence of the Supervisory Board's consent if the employees in the organs of the controlling enterprise are represented in a manner equivalent to that laid down by the provisions applicable to the European company.

B. Institutions and machinery for communication between management and workers' representatives in specific cases

These cases relate to collective redundancies, transfer of a business and division of public limited companies.

(a) Collective redundancies

The EC directive of 17 February 1975 concerning the approximation of the laws of the Member States relating to Collective Redundancies provides that when an employer is contemplating redundancies, he shall begin consultations with the workers' representatives with a view to reaching an agreement. Those consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and mitigating the consequences. To enable the workers' representatives to make constructive proposals the employer shall supply them with all relevant information and shall in any event give in writing the reasons for the redundancies, the number of employees to be made redundant, the number of workers normally employed and the period over which the redundancies are to be effected.

(b) Transfer of a business

The directive of 14 February 1977 concerning the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts of business provides employees' representatives with information and consultation rights.

In case of a transfer of an enterprise, employees' representatives shall be informed about the reasons of the transfer; the legal, economic and social implications of a transfer for the employees; and, measures envisaged in relation to the employees. Employees of the transferrer should receive such information in good time before his employees are directly affected by the transfer as regards their condition of work and employment. Both, transferrer and transferee have to consult with the representative in good time on such measures with a view to seeking agreement.

If the transferred enterprise preserves its autonomy, the status and functions of the representatives of the employees shall be preserved.

(c) Division of public limited companies

A directive of 17 December 1982 on this subject (the sixth company law directive) provides that in case of division by acquisition that the rights of the employees involved in a division shall be regulated in accordance with the directive of 1977 on acquired rights, discussed above.[81]

IV. Efforts towards international collective bargaining

A number of attempts have been made at international collective bargaining. In general these have been unsuccessful.

In several cases however there have been contacts and consultations, even negotiations between national unions and multinational enterprises (e.g. in the Badger case).[82] Of a more general importance are the efforts undertaken by International Trade Secretariats (ITS). These may take different forms. For example, an ITS may ask a nationally affected union that represents the employees in the home country of the multinational enterprise to inform headquarters about what is happening in a subsidiary in another country and eventually bring some pressure to bear upon headquarters. An ILO study noted in this connection although "it is difficult to estimate the direct outcome or effect of these types of interventions by unions with their own managements on behalf of unions in another country - this is one of the tools or weapons most effectively used by unions when difficulties occur in one or several plants of a multinational and is certain to continue to be an important part of union and management relations in multinational enterprises".[83]

The creation of trade union world councils for individual multinationals or groups of multinationals in the same industry has also to be seen in the same framework. These councils are composed of representatives of workers employed in different subsidiaries around the globe and reflect thus the structure of the multinational, of which they are in a sense a union counterpart. Councils have been established for the world's major automobile producers, as well as for other firms, such as General Electric, Philips, I.C.I. and Michelin. The council promote the sharing of information and knowledge, focussing on possible disparities in wages, conditions and labour relations and may thus envisage to realise a certain harmonisation or uniformity in industrial relations. The councils may request meetings with central management. Exceptionally those requests have been granted and may involve information and sometimes consultation.[84] But generally speaking multinationals consider contacts with international trade unions and more so international collective bargaining as a misconception since they feel that these contradict the desired integration of their subsidiaries into the local industrial relations setting.

CONCLUSIONS

I. Different international instruments, emanating from the OECD, the ILO and the EEC deal with the relations between management and workers' representatives. By their very nature the wording and tone of those international instruments are more general than national provisions and/or practice.

Instruments such as the ILO Collective Bargaining Recommendation, 1981 (No. 163), recognises different levels for communication between both sides of industry: "measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever ..." (Paragraph 4(1), emphasis added). However, the "international level" has not been explicitly recognised for communications at the OECD or the ILO, although certain provisions (e.g. regarding information on the enterprise as a whole) can include that level.

Proposals by the Commission of the European Communities to involve the group (including the multinational group) in global information and consultations with a view to attempting to reach agreement at the group level have been watered down and it is not certain whether they will be adopted by the Council of Ministers. The same is true for other EEC proposals aimed at introducing more worker participation, as put forward in the proposed Vth directive and efforts to elaborate a European Company Statute have come to a standstill.

As noted, the OECD Guidelines and the ILO Tripartite Declaration provide under certain conditions for information on the enterprise as a whole; but these general statements - which are voluntary in nature - have not been made more specific through clarification or interpretation. A relevant further element is that the OECD has indicated, as a general rule, that management and employee representatives are expected to communicate in a language effectively understood by the employees.

II. The international instruments include the areas of information, consultation and collective bargaining. Information and consultation in case of major change has to take place in a stage prior to final decision or at least before implementation. Different expressions are used toward that end, like "in considering changes" (OECD, ILO); "when an employer is contemplating collective redundancies"; "... give ... information in good time before the transfer is carried out"; "in good time before the final decision is taken" (EEC).

The various national instruments respect the general idea of management prerogative. What is to be bargained about is in general specified at the national level. Where international instruments like the EEC directives on collective dismissals and on transfer of enterprises or the OECD Guidelines or ILO Principles provide consultation rights, they concern the social effects of the (economic) decisions and the mitigation of adverse effects but not the decisions as such.

The EEC directives however use the expression "consultation with a view to reaching agreement". It seems to the author of the present paper that this expression goes further than consultation in the strict sense, where the employer asks for the benefit of the ideas of the employees on the matter; here more seems to be required - the parties are also asked to try to reach an agreement. This actually means that one leaves the area of consultation and enters the area of negotiation.[85]

III. The international instruments reviewed contain a number of explicit provisions concerning the access of workers' representatives to decision-makers. The OECD Guidelines and the ILO indicate that employees' representatives should have the right to conduct negotiations with representatives of management who are authorised to take decisions on the matters under negotiation.

Recommendation No. 163 is more specific and indicates that the parties should provide their respective negotiators with the "necessary mandate to conduct and to conclude negotiations, subject to any provisions for consultations with their respective organisations" (paragraph 63, emphasis added).

The OECD has clarified the "access to decision-makers" principle and has stated that "a number of possibilities are open to this end without suggesting any order of preference. Examples of such possibilities include:

- to provide the management of the subsidiary with adequate and timely information and to ensure that it has sufficient powers to conduct meaningful negotiations with representatives of employees;

- to nominate one or more representatives of the decision-making centre to the negotiating team of the subsidiary in order to secure the same result as in the preceding example;

- to engage directly in negotiations.

The OECD also considered that general provisions of the Guidelines, such as paragraphs 1 and 8 of the Introduction together with item (i) of the chapter on Disclosures of Information ("structure of the enterprises"), could not be seen to imply a general right of employees to be informed on the decision-making structure within the enterprise.

It was agreed, however, that as stated on earlier occasions, it was the basic purpose of paragraph 9 of the Employment and Industrial Relations Guidelines to ensure that negotiations take place in a meaningful manner with the relevant representatives of management. For this purpose employee representatives, under the Guidelines, have a legitimate interest to be informed a out the decision-making structure within the enterprise but such a right of information is confined to negotiating situations referred to in the Guidelines, and in particular in paragraph 9 of the chapter on Employment and Industrial Relations of the Guidelines."

IV. In the framework of the experience under the OECD Guidelines the responsibility of the group, including the multinational group, was recognised in the area of information, consultation and negotiation. The OECD clarified that the parent company should see to it that the affiliate receive the essential information in due time in order to respect local law, agreements ... and or the Guidelines concerning information and consultation rights of employees if headquarters do in fact detain and control such information. It follows that multinational enterprises should see to it that where bargaining has to take place decision-makers are at hand to conduct negotiations.

V. In general efforts towards international collective bargaining have not been successful, although there are certain exceptions. The creation of union world councils for individual multinationals, representing workers, employed in different subsidiaries world-wide reflect in a sense the structure of the multinational enterprises. These councils exchange information on wages and conditions and thus may envisage to realise a certain harmonisation. Requests by the councils to meet with central management have rarely been granted.

CHAPTER THREE: FINAL REMARKS

1. Where institutions and machinery for communication between management and employees' representatives exist, they are usually only concerned with the level of the establishment; they are not so frequent at the level of the (legal) enterprise when it consists of different establishments, and they are exceptional at the level of national group while being practically non-existant at the level of the international group. One can state as a general rule that the higher the level in the enterprise, the less employees' representatives are involved and consequently their access to those levels diminishes.

2. Information, consultation, co-decision, the latter mainly under the form of bargaining, is given, held or conducted as a rule at the local level. Only a few countries have provisions concerning the national group. The international level is neither explicitly recognised, nor excluded, but has failed to be specifically recognised as an appropriate level by all parties involved in the negotiation of national and international instruments. The fortunes of the EEC proposals on information and consultation of employees clearly demonstrate this as well as recent attempts by workers in the ILO to explicitly include such a level in instruments.

3. In informing, consulting and negotiating the perspective is mostly at the national (local) level. Only in a few countries are (local) employees' representatives entitled by law to obtain specific information on the (international) group as a whole or on international developments (Belgium is such a case). International instruments such as the OECD Guidelines on Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy contain general references to information on the enterprise as a whole, but these provisions are rather vague and have not been elaborated further by clarification or interpretation.

4. In principle, specific information has to be given and consultation held before decisions are taken or at least before they are implemented. The same goes without saying for codecision-making procedures, like for example collective bargaining.

5. Notwithstanding the fact that in certain countries almost all aspects of the management-labour relations are negotiable, unilateral decision-making and managerial prerogatives remain prominent. In most cases involvement of workers concerns information and consultation and possibly bargaining on the social consequences of managerial decisions regarding (dis)investment, subcontracting, introduction of new technologies and the like.

6. In a few countries explicit provisions exist concerning the question of whether employees' representatives are entitled to deal with representatives of management who are authorised to take decisions, i.e. decision-makers. The OECD Guidelines and the ILO Tripartite Declaration provide that employees' representatives should be able to conduct negotiations with representatives of management, who are authorised to take decision on the matters under negotiation. The OECD has clarified the related Guideline. It seems however that there is room for further elaboration in the direction shown by the United States' experience and ILO Recommendation No. 163 (1981). A distinction might be usefully made between the authority to:

- conduct negotiations;
- conclude an agreement;
- ratify an agreement.

Also the expression "authority to take decisions" may need further elaboration.

7. The OECD has recognised certain possibilities for the (international) group. The OECD clarified that the parent company should see to it that the affiliate receive the necessary information in due time in order to respect local law, agreements ... and or the Guidelines concerning information and consultation rights of employees if headquarters do in fact detain and control such information. It follows that multinational enterprises should see to it that in case of bargaining, employees' representatives are enabled to conduct negotiations with representatives of management, who are authorised to take decisions.

8. A final point to be made concerns multinational enterprises. Generally speaking there are no specific rules nor machinery concerning multinational enterprises. Affiliates and headquarters are subject to the same national rules as domestic enterprises. The international rules (the OECD Guidelines and the principles of the ILO Tripartite Declaration), although specifically addressed and recommended to multinational enterprises, constitute, wherever they are relevant, good practice for all. As a general rule there are no (institutionalised) contacts involving (local) employees' representatives and (international) headquarters with regard to multinational enterprises. As a consequence there is little or no access by workers at that level to top management.

NOTES

[1] R. Blanpain (ed.): International Encyclopaedia for Labour Law and Industrial Relations (IELL) (Deventer, 1984).

[2] For the notion of consultation and related concepts see Chapter One, II.B.(a)

[3] That is the case e.g. in Austria, Belgium, France, the Federal Republic of Germany and the Netherlands.

[4] For example in Denmark and Norway.

[5] Arrangements of this kind are, for example, found in Japan and the United Kingdom. See further ILO: Workers' participation in decision-making (Geneva, 1983), p. 135.

[6] T. Treu: "Italy", in T. Hanami and R. Blanpain (eds.): Industrial conflict resolution in market economies (Deventer, 1984), p. 140.

[7] ILO: Workers' participation in decision-making, op. cit., p. 172

[8] B. Hepple: "United Kingdom", in Blanpain, IELL, op. cit., no. 438. For a general treatment of new information on occupational safety and health as communicated within multinationals see, ILO: Safety and health practices of multinational enterprises (Geneva, 1984).

[9] St. Antoine: "United States", in Hanami and Blanpain, Industrial conflict resolution ..., op. cit., p. 266.

[10] ILO: Workers' participation in decision-making, op. cit., p. 169; see also: E. Cordova: "Collective bargaining" in R. Blanpain (ed.): Comparative labour law and industrial relations (Deventer, 1982), p. 227.

[11] St. Antoine: "United States", in Hanami and Blanpain, Industrial conflict resolution ..., op. cit., p. 255.

[12] idem; see also: A. Goldman: "United States", in Blanpain, IELL, op. cit., no. 530 ss.

[13] Hanami and Blanpain, Industrial conflict resolution ..., op. cit., p. 203.

[14] For more details see: T. Ramm: "The Federal Republic of Germany" and B. Bakels: "The Netherlands" in Blanpain, IELL, op. cit.

[15] Contrary to the works councils system, participation in managerial boards does not apply at the level of the 'Betrieb' (technical production unit) but at that of the 'Unternehmen', i.e. the economic unit (the "company" of an industrial combine). Joint stock and similar companies of the Federal Republic of Germany are characterised by their two-tier management structure. General policy guidance is vested in a supervisory board elected by the shareholders' assembly; the supervisory board in turn designates the management board, which usually comprises three full-time directors, who form a collective top management organ of the company and are responsible for all current business matters.

[16] The Dutch Social Economic Council is composed of representatives of trade unions and employers associations, as well as appointees of the Crown.

17 Weiss, Simitis, and Rydzy: "The settlement of labour disputes in the Federal Republic of Germany" in Hanami and Blanpain, Industrial conflict resolution ..., op. cit., pp. 82-83.

18 idem, p. 86.

19 Treu, in Industrial conflict resolution ..., op. cit., p. 140.

20 R. Blanpain, T. Etty, A. Gladstone, and H. Günter: Relations between management of transnational enterprises and employee representatives in certain countries of the European Communities, International Institute for Labour Studies, Research Series, no. 51 (Geneva, 1979), p. 30.

21 Although in Japan the distinction between consultation and bargaining is unclear (Hanami, Industrial conflict resolution ..., op. cit., p. 202).

22 ILO: Workers' participation in decisions within undertakings, op. cit., p. 171.

23 A. Adlercreutz: "Sweden", in Blanpain, IELL, nos. 466-469.

24 ILO: Information and consultation by multinational enterprises on their manpower plans (Geneva, 1985), Chapter VI.

25 Hanami and Blanpain: Industrial conflict resolution ..., op. cit., p. 203

26 St. Antoine, idem, p. 254.

27 Goldman, "United States" in Blanpain, IELL, op. cit., nos. 530-535

28 An enterprise can only belong to one group for the purpose of the 1982 act.

29 For example in the framework of collective bargaining, parity on supervisory boards or when works councils have comparable powers.

30 Webster's Dictionary, 1965, p. 433.

31 R.O. Clarke: Workers' participation in management in the United Kingdom, International Institute for Labour Studies, Research Series, no. 58 (Geneva, 1980) p. 11.

32 ILO: Promotion of collective bargaining, ILO Report V (1) (Geneva, 1980), p. 29.

33 Goldman,"United States" in Blanpain, IELL op. cit., no. 496. See also H.W. Arthurs: "Canada", ibid.

34 ACAS: Disclosure of information to trade unions for collective bargaining purposes (London, HMSO, 1977). See Hepple," United Kingdom": in Blanpain, IELL, op. cit., nos. 451-453; Clarke, Workers' participation in management in the United Kingdom, op. cit., p. 11; ILO, Workers participation in decision-making, op. cit., p. 30.

35 F. Schmidt: Law and industrial relations in Sweden (Stockholm, 1977), p. 116.

36 "Italy" in Blanpain, IELL, 1981, para. 439.

37 ILO, op. cit., p. 31

38 The preoccupation with security of employment has thus furnished the occasion for the expansion of the scope of collective bargaining to include even aspects of the investment policy of undertakings in some cases (ILO, op. cit., p. 48).

39 The same is true for the Netherlands, see H. Bakels and L. Opheikens, op. cit., p. 199.

40 Para. 112 of the Works Constitution Act.

41 For more details see: R. Blanpain: "Belgium", in Blanpain, IELL, no. 248 f1.

42 Schmidt, op. cit., p. 117.

43 ILO, op. cit., p. 30. ACAS is empowered to make determinations on this question in respect of the Employment Protection Act (1975). See: Blanpain, et al., Relations between management of transnational enterprises and employee representatives in certain countries of the European Communities, op. cit., p. 32.

44 Hanami and Blanpain, Industrial conflict resolution ..., op. cit., p. 12.

45 Schmidt, op. cit., p. 118.

46 Blanpain, Comparative labour law and industrial relations, Chapter 12, op. cit., p. 209.

47 M. Weiss et al.: Industrial conflict resolution ..., p. 85.

48 ibid.

49 Cordova: "Collective Bargaining", in Blanpain, Comparative labour law and industrial relations, op. cit., p. 233.

50 Adlercreutz, "Sweden", in Blanpain, IELL, op. cit

51 St. Antoine, "United States", in Hanami and Blanpain, Industrial conflict resolution ..., op. cit., p. 258.

52 ibid.

53 Fireboard Paper Products Corp. v. NLRB, 379 US 203 (1964).

54 First National Maintenance Corp. v. NLRB, 452 US 666 (1981).

55 St. Antoine, "United States", in Hanami and Blanpain, Industrial conflict resolution ..., op. cit., p. 258.

56 Milwaukee Spring II, 268 NLRB no. 87, Jan. 23, 1984.

57 Petitioner v. Bildisco and Bildisco. Debtor in posession, et.al., Local 408, International Brotherhood of Teamsters, etc. Petitioner v. NLRB et al. Nos. 82-818 and 82-852, Washington, D.C., 22 February 1984, 44 pp.

58 Treu, "Italy", in Blanpain, IELL, op. cit., no. 384.

59 Hanami, Industrial conflict resolution..., op. cit., p. 202.

60 Report of Professor Hanami communicated to the author for this study (roneo).

61 Hanami, Industrial conflict resolution ..., op. cit., p. 261.

62 Seyfarth et al.: Labour relations and the law in Belgium and the United States (Michigan, 1969), p. 83.

63 Goldman, United States, in Blanpain, IELL, no. 497.

64 J. Getman and J. Blackburn: Labour relations: Law, practice and policy (New York, 1983), p. 262.

65 Weiss, Industrial conflict resolution ..., op. cit., p. 12.

66 Hanami, idem, p. 12.

67 OECD: The 1984 review of the 1976 Declaration and Decisions (Paris, 1984), para. 71.

68 ibid., para. 72.

69 OECD: Mid-term report on the Declaration and Decisions of 1976 (Paris, 1982), Annex IV, paras. 20-22.

70 R. Blanpain: The OECD Guidelines and multinational enterprises and labour relations, experience and mid-term report 1979-1982 (Kluwer, 1983), p. 24.

71 Paragraph 6 reads as follows: "in considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective lay-offs or dismissals; provide reasonable notice of such changes to representatives of their employees, and where appropriate to the relevant governmental authorities, and co-operate with the employee representative and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects".

72 OECD: The 1984 review of the 1976 Declaration and Decisions op. cit., para. 52.

73 See, for instance: OECD, Mid-term report ..., op. cit., Annex IV, para. 20.

74 OECD, The 1984 review of the 1976 Declaration and Decisions, op. cit., para. 69.

75 For a full description see: N. Valticos: "International Labour Law" in Blanpain, IELL, op. cit.

76 A further subamendment by the workers was also rejected. In expressing their disapointment they pointed out that many workers' organisations and governments in developing countries had great difficulty in dealing with multinational enterprises. They hoped that progress could be made when the application of the Declaration came up for discussion in the Governing Body again. The Employers' members indicated that the role of multinational enterprises could not be evaluated until more facts were known. They recalled that their opposition to the amendment was based on their view that the present Committee was not the appropriate forum to discuss matters relating to multinational enterprises, and that, in their opinion, collective bargaining was impossible at the international level.

As there was not a majority of Government members in support and the Employers' members were opposed, the Workers' members withdrew their amendment to insert the words "or international" between the words "national" and "level". The purpose of this proposed change had been to open the way to collective bargaining between multinational enterprises and trade unions organised at the international level. They expressed their profound concern over the problems created by the operation of multinational enterprises, especially in developing countries. In their view, multinational enterprises were in a position to flout the will of individual governments and to undermine the effectiveness of traditional collective bargaining arrangements. Multinationals challenged the authority of governments and were able to exploit workers. New international methods of regulation were needed, including the development of collective bargaining beyond national boundaries. For collective bargaining to be truly effective with such enterprises, it had to be carried out at the international level. Promotion of collective bargaining, Geneva, pp. 11 and 27-28.

77 Whereas paragraph 51 of the ILO Tripartite Declaration and paragraph 9 of the employment chapter of the OECD Guidelines only mention "conduct" of negotiations, paragraph 6 of the recommendation states: (a) conduct negotiations; (b) conclude negotiations; and (c) subject to any provisions for consultations within their respective organisations. The final text of the recommendation was the result of an amendment of the Employers' group, subamended by the Workers' group, as the following extract from the ILO proceedings indicates: "An amendment submitted by the Employers' members proposed to replace paragraph (2) with the following: '(2) Parties to negotiations should provide their negotiators with the necessary authority to conduct negotiations.' The authors of the amendment explained that the word 'mandate' in the Office text was not completely appropriate as it had the connotation of individuals operating under specific instructions and being obliged to adhere to them. Such arrangements were not conducive to the process of collective bargaining. Hence, the Employers' members proposed that the text should refer to the necessary 'authority' to conduct negotiations. the Workers' members indicated that they could accept the amendment if three changes were made: first, to avoid any possible ambiguity, they proposed that the word 'respective' be added before 'negotiators'; second, to deal with the possibility of a narrow interpretation of the word 'mandate', they suggested the phrase 'the necessary mandate to conduct and conclude negotiations'; and, third, in order that the text should correspond with normal bargaining practices, they proposed to add at the end of the amendment the words 'subject to any provision for consultations within their respective organisations'." International Labour Conference, 67th Session 1981, Report IV(1), Promotion of collective bargaining, Geneva, p. 24.

78 The first interpretation of the Tripartite Declaration concerned paragraph 26 and was submitted with respect to the behaviour of a subsidiary of a foreign multinational bank in the United Kingdom. The Governing Body of the ILO endorsed the following interpretation of the Declaration in March 1985: "Paragraph 26 of the Declaration requires that reasonable notice of intended changes in operations which would have major employment effects be given to representatives of the workers in their employment and their organisations. This means that for the purpose of paragraph 26 notice should be given to the workers' representatives concerned (as defined in Convention No. 158) and their organisations, where such representatives and organisations can be identified under national law and practice. Where such representatives or organisations exist, it is not sufficient for the purpose of paragraph 26 to information the workers affected on an individual basis of the intended redundancies." (GB.229/13/13). The procedure concerned is described in GB.214/6/3, para. 85.IV (1980).

79 For more details see: R. Blanpain et al.: The Vredeling proposal. Information and consultation of employees in multinational enterprises (Kluwer, 1983).

80 Commission of the European Communities: Employee participation and company structure, Bulletin of the European Communities, Supplement 8/75 (Luxembourgh, 1975).

81 Official Journal of the European Communities: Sixth Council Directive No. L378/47, 31.12.82.

82 R. Blanpain: The Badger Case (Dewenter, 1977).

83 ILO: Multinationals in Western Europe (Geneva, 1976), p. 62.

84 See further: J. Windmuller: " The international trade union movement", in Blanpain, IELL, op. cit., nos. 444-453; T. Kennedy: European labor relations (Harvard, 1980), pp. 329-355.

85 This is, I believe, illustrated by the text of article 6, 5 which states: "... and, where appropriate, to reaching agreement".