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ARTICLES

DONALD C. DOWLING, JR.*

EC Employment Law After Maastricht: “Continental Social Europe”?**

I. Background Briefing on “Social Europe”

A. THE “SOCIAL EUROPE” CONCEPT

In the United States almost all the important employment laws—from labor union protection statutes to antidiscrimination doctrines to wage and hour protections—are federal laws. In the 1930s, the United States Congress concluded that the United States Constitution’s interstate commerce clause gave the federal government carte blanche to regulate employment.¹ The legal fiction necessary for this conclusion is that virtually any employment relationship in any one state must somehow necessarily affect commerce in at least one other state. Under this reasoning, employment is per se a federal issue.

Political scientists in the European Community (EC) think the same way—although the Europeans have been able to work through this reasoning much faster than the 150 years it took the United States Congress. In 1985 the EC Commission

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**The Editorial Reviewer for this article was William J. Kohler.

1. National Labor Relations (Wagner) Act, 29 U.S.C. §§ 151–157 (1988). This statute, passed in 1935, contains a lengthy justification linking employment to interstate commerce. *Id.* § 151.

issued a White Paper,² made law by the Council-ratified 1986 Single European Act treaty,³ which created a "single market program" to take effect after 1992. This program is converting the EC from what was essentially a customs union into a quasi-federal body. But the EC shuns "federal" terminology;⁴ instead, the slogan for the new EC order is the creation of a post-1992 "single market for goods and services."

Under the same logic by which employment in any one U.S. state necessarily affects interstate commerce in the United States, employment in any one EC Member State necessarily affects the EC's single market for goods and services. After all, no such single market could exist without employees, and because employees create goods and provide services, this new market will necessarily affect employment within the EC.

The 1957 Treaty of Rome,⁵ as amended by the 1986 Single European Act,⁶ empowers the EC institutions to regulate employment issues (or social issues, as employment concerns are called in Eurospeak). The amended Treaty of Rome contains several provisions explicitly calling for social regulation.⁷

In the single market program's early years of the mid-1980s, the Brussels-based EC concealed that it would ultimately pursue a social agenda.⁸ To ensure the success of the 1992 single market program, Brussels first set out to win a broad commitment to its plan by emphasizing the single market's least controversial angles: efficient trade, economies of scale, and a 320-million consumer block.⁹ With the spotlight trained on commercial advantages, the European business community, for one, fell in as an avid supporter of the 1992 movement—as did even Britain, the Community's most skeptical member.¹⁰ By the close of the 1980s the Commission was able to acknowledge an "irreversible" commitment to the single market, among business leaders and among Europeans generally.¹¹

2. Completing the Internal Market, White Paper from the Commission to the European Council, COM(85)310 final.

3. Single European Act, 1987 O.J. (L 169) 1.

4. See Donald C. Dowling, Jr., *Worker Rights in the Post-1992 EC: What Social Europe Means to U.S.-Based Multinational Employers*, 11 Nw. J. INT'L L. & BUS. 564, 575 n.46 (1991), reprinted as chapter 16 in *EUROPEAN ECONOMIC COMMUNITY LAW* (1992).

5. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

6. Single European Act, 1987 O.J. (L 169) 1.

7. See EEC Treaty, *supra* note 5, arts. 117–28. Rarely, but occasionally, social issues in the EC involve nonemployment-related issues. See, e.g., Dowling, *supra* note 4, at 588 n.147 (citations therein).

8. See Dowling, *supra* note 4, at 581–82.

9. *Id.*

10. *Id.* at 582.

11. Fifth Report of the Commission to the Council and the European Parliament Concerning the Implementation of the White Paper on the Completion of the Internal Market, COM(90)90 final ¶ 7 ("[i]rreversibility and anticipation have characterized [the EC's] work [toward a single market] in recent months").

Workers' rights became a hot topic throughout Europe¹² in the 1990s because Brussels was by then able to acknowledge openly that the drive toward "social cohesion" in the EC "cannot be dissociated from" the single market program itself.¹³ Thus, in a matter of just a few years "social Europe" had evolved from a whispered rumor to one of Brussels' most important priorities.¹⁴ Yet not surprisingly, the social Europe agenda proves relatively employer-restrictive by U.S. standards.¹⁵

B. THE IMPORTANCE OF "SOCIAL EUROPE" TO U.S. BUSINESS

In the United States (more so than elsewhere, including Europe) a vast gulf exists between employment relations law and transactional business law.¹⁶ Yet, of course, those who run U.S. businesses remain acutely aware of the critical role that employment costs play in their enterprises' overall profitability. Total employment costs, including benefits, rival costs of materials as a manufacturing business's chief expense and usually far outstrip taxes. (In a service industry, payroll and benefits account for an even greater proportion of total costs.) Yet,

12. See, e.g., *More Rights for the Workers*, THE ECONOMIST, July 28, 1990, at 60 (Commission's commitment to social Europe is "irrepressibl[e]"); *Brother, We Just Missed the 1992 Balloon*, THE ECONOMIST, June 23, 1990, at 61 ("[u]nion leaders are particularly keen on the [EC] social charter").

13. Fifth Report of the Commission to the Council and the European Parliament Concerning the Implementation of the White Paper on the Completion of the Internal Market, COM(90)90 final ¶ 6. See *id.* ¶¶ 28, 34 ("[t]he Social Dimension is Fundamental to the Internal Market").

14.

The [EC] internal market programme has led to an increasing volume of regulation being initiated at the community level, and this tendency looks set to continue as integration proceeds. This has provoked fierce resistance in some quarters, with opponents arguing that 'competition between rules' is a better principle than the imposition of monolithic rules at the supranational level.

CENTRE FOR EUROPEAN POLICY STUDIES MACROECONOMIC POLICY GROUP, EUROPEAN LABOUR MARKETS: A LONG-RUN VIEW 3 (1990). On the "front burner" status of the EC social agenda in 1990, see, e.g., M. HOLMSTEDT, EMPLOYMENT POLICY (1991); Dowling, *supra* note 4, at 580-84, 590-94; Emil J. Kirchner, *The Social Framework of the European Communities*, in THE EUROPEAN COMMUNITIES ENCYCLOPEDIA AND DIRECTORY 1992, at 109 (1991). Brussels now views social policy and economic and social cohesion as two of the six objectives of the Single European Act, *supra* note 3. Sixth Report of the Commission to the Council and the European Parliament Concerning the Implementation of the White Paper on the Completion of the Internal Market, COM(91)237 final [hereinafter Sixth Report], at 1. The other four objectives are the single market, the environment, research policy, and the strengthening of economic and monetary cooperation. *Id.*

15. "Americans are becoming increasingly nervous about the introduction of social legislation in Europe, [because it] is counter to American practice, according to an official of the American Pharmaceutical Association." *Financially Sound, Socially Insecure*, THE ECONOMIST, Dec. 14, 1991, at 70, 72. For a comparison of EC employment law and its U.S. counterparts, see Mazurak, *Lessons to Be Studied from the European Community*, in A FORWARD LOOK AT EMPLOYMENT POLICIES: A CENTENNIAL PROGRAM 111 (1991) (Univ. of Nebraska College of Law, eds.).

16. This author has written elsewhere on how a dangerous crack runs through the law practice area of comparative employment law: International lawyers often do not focus on employment issues, and employment lawyers are usually either ignorant of comparative law, or else do not work on the international matters in which comparative employment law questions arise. See Donald C. Dowling, Jr., *Preparing for the Internationalization of U.S. Employment Law Practice*, 43 LAB. L.J. 350 (1992).

notwithstanding this fact of economic life, U.S. transactional business lawyers rarely, if ever, concern themselves with employment issues.¹⁷ Too often, U.S. lawyers negotiating a foreign deal relegate employment issues to the local lawyers to straighten out after closing.¹⁸

Not surprisingly, therefore, many foreign ventures of U.S. companies develop serious labor problems that were foreseeable but were not confronted at the deal stage.¹⁹ In the most extreme cases these labor problems can render a foreign operation unprofitable.²⁰ To avoid such a fate, any U.S.-based business interested in starting or expanding a presence in the EC to take advantage of the post-1992 single market must account for—in advance and as a primary consideration—the employment costs that EC employment laws and customs impose.²¹

U.S. businesses shifting direct operations abroad have traditionally targeted Third World countries in order to take advantage of cheap labor.²² In contrast, U.S. businesses' motive for opening European operations is to gain access to the wealthy 320 million-consumer European market. The wealth of Europe's consumers, though, comes from Europe's employers. Northern European workers earn higher per hour rates than their United States and Japanese counterparts,

17. Correspondingly, U.S. employment lawyers rarely if ever concern themselves with transactional issues.

18. See Dowling, *supra* note 16.

19. See, e.g., *id.* and text accompanying notes 31, 45, 54 *infra*. Under one proposed directive, see text accompanying notes 122–28 *infra*, the EC plans to apply worker consultation and participation requirements to those companies employing 1,000 or more employees in more than one Member State, with at least 100 employees in a second Member State. Any large U.S. corporation that ignored this instrument at the deal stage could end up unknowingly assuming wide-ranging worker participation and consultation obligations.

20. Probably every U.S.-based multinational company with extensive overseas operations has horror stories about foreign labor law problems that it could have averted had it spotted the issues up front. See, e.g., Dowling, *supra* note 16, at 355 (major U.S. entertainment conglomerate that establishes large European operation makes compensation promises to hundreds of U.S. expatriate employees and hundreds of local nationals, which company ultimately breaks when it learns details of local benefits laws); *id.* at 360 (U.S. corporation discovers too late that Canadian subsidiary is unionized; corporation had not even known union campaign was underfoot, due to corporation's ignorance that Canadian law does not require elections).

Foreign subsidiaries of U.S. companies can become unprofitable because of European labor costs. In northern European Member States, hourly wage rates are usually higher than in the United States. Benefit levels, too, are usually more beneficial for employees. See *id.* at 356 n.36, 357 n.46. Further, white collar employees in Europe enjoy employer-provided benefits unheard of stateside, including country club memberships. See *id.* at 360–61. Additionally, in Europe, laws governing terminations are strict. European operations cannot hire assuming that the "employment-at-will" doctrine, which still prevails in the United States, will be available to them. See *id.* at 356–57. As a result, a business that turns a profit in the United States might not be able to make it in Europe under otherwise-similar circumstances.

21. See generally *id.* at 356–58.

22. U.S. businesses' suspected goal of saving labor costs by moving employment operations to a lower wage country is the chief U.S. controversy surrounding the North American Free Trade Agreement. See, e.g., Jackie Calmes, *Mexican Free-Trade Issue Is Putting Unusual Cross-Pressures on Lawmakers of Both Parties*, WALL ST. J., May 22, 1991, at A16.

and they enjoy even more lavish benefits.²³ Indeed, European companies are now looking to produce overseas to reduce production costs.²⁴ For U.S. business Europe therefore poses a conflict between two opposite motives for operating abroad—cheaper labor versus market access.²⁵ This conflict raises a key issue that U.S.-based businesses operating in Europe must consider: How to control employment, or social, costs when operating in the EC.

C. EC SOCIAL LAW BEFORE MAASTRICHT

The EC's social Europe agenda was originally one of the slow-moving components of the EC single market program. However, the focus changed radically in December 1991 at the Council meeting at Maastricht, the Netherlands, where the Council jump-started the social Europe agenda with a surprisingly powerful jolt. Regardless of the ultimate fate of the Maastricht treaty itself, the proposal is a milestone in the history of social Europe.

To understand the Maastricht meeting's significance, a rundown on social Europe history is in order.²⁶ The code-based legal systems of continental Europe have employment law traditions markedly more employer-restrictive than those of the frontier-spirited, employment-at-will United States.²⁷ Even common law Britain, whose strong Labour Party has flirted with socialism for decades, imposes

23. See *Foreign Labor Costs Grow Closer to U.S. Figures*, 137 Lab. Rel. Rep. (BNA) 280 (July 1, 1991).

24. See, e.g., Terence Roth, *German Firms Bemoan Production Costs*, WALL ST. J., Jan. 29, 1992, at A6. Consider BMW's highly publicized 1992 decision to open an auto plant in South Carolina. Is the United States becoming to northern Europe what Mexico is to the United States?

25. The most hotly debated aspect of the Free Trade Agreement Treaty negotiated by the United States, Canada, and Mexico is the employment issues. United States labor strongly opposes the treaty on the ground that it will steal American jobs. See, e.g., Dowling, *supra* note 16, at 355-56. Curiously, however, employment is one of the least frequently discussed issues when a U.S. corporation rushes to take advantage of the EC single market. Yet employment costs are as important to a U.S. company considering starting or expanding European operations as they are to a U.S. corporation eyeing Mexico, only for the opposite reason.

26. A thorough explication of the history of the social Europe agenda is beyond the scope of this article, but elsewhere this author has discussed this history in detail. See Dowling, *supra* note 4, at 571-96; see also Donald C. Dowling, Jr., *The Debate Over Social Europe*, A.B.A. EUR. L. BULL., 12/90, at 1; Donald C. Dowling, Jr., *The EC's Movement Toward Worker "Consultation and Participation"*, A.B.A. EUR. L. BULL. 17 (Winter 1991); Donald C. Dowling, Jr., *Employment Matters and the Social Charter*, in *LAWYERING IN THE EUROPEAN COMMUNITY* (Folsom et al. eds., 1992); Donald C. Dowling, Jr., *The First Year-and-a-Half Under the EC Social Charter*, A.B.A. EUR. L. BULL. (Summer 1991); Donald C. Dowling, Jr., *Labor Issues Muddy Steps Toward 1992*, CINCINNATI ENQUIRER, Sept. 3, 1990, at D2; Donald C. Dowling, Jr., "L'Europa Sociale": Il Punto di Vista delle Imprese Multinazionali USA, INDUSTRIA E SINDACATO (Italy), June 23-July 5, 1991, at 16; Donald C. Dowling, Jr., *Social Continental Europe*, A.B.A. EUR. L. BULL. 14 (Spring 1992). Another comprehensive survey of social Europe is Terence P. Stewart & Delphine A. Abellard, *Labor Laws and Social Policies in the European Community After 1992*, 23 LAW & POL'Y INT'L BUS. 507 (1992).

27. See Dowling, *supra* note 4, at 572-73.

labor laws more like those on the continent than like those in the United States.²⁸

In short, from a U.S. perspective the internal employment laws within all the EC Member States are decidedly proworker. Yet while this generalization holds true throughout the Community, the specific employment principles internal to the various Member States have, for centuries, differed widely. The vast substantive differences in employment laws among the Member States can (and do) cause real headaches for corporations that employ workers in more than one Member State, and for corporations that move employees among Member States.²⁹

In mapping out its single market program, Brussels realized that in order to create a true EC single market, it would have to iron out the chief differences in the Member States' employment laws and traditions.³⁰ But centuries of laws and traditions die hard, especially when their guardians are major corporations or trade unions.

The documents that created the single EC market, the White Paper and the Single European Act, were conspicuously quiet, but not silent, on social matters.³¹ Social Europe was simply too big a problem for Brussels to tackle along with the threshold trade issues on which these documents focused. So at first Brussels put social issues in the back seat, leaving harmonization of trade concerns up front.³²

Throughout the single market program's early years, a small group of EC-connected trade unionists issued a series of documents championing their dream of a worker-protective social Europe.³³ Eventually EC Commission President Jacques Delors sensed a wide enough commitment to the single market program among European business to justify a Social Charter, which would lay out the basic rights the EC would guarantee all its workers, regardless of Member State affiliation.³⁴

In 1989, at Delors's invitation, the Commission issued a twelve-point Social Charter,³⁵ to be implemented by the Commission's Social Action Program,³⁶ a

28. See J. PEEL, *THE REAL POWER GAME: A GUIDE TO EUROPEAN INDUSTRIAL RELATIONS* 168-73 (1979).

29. See, e.g., Victor K. Kiam, *Fortress Europe 1992? Don't Hold Your Breath*, WALL ST. J., Sept. 11, 1989, at A18 (Remington Products CEO Victor K. Kiam complains that differences among EC Member States' employment laws hamper U.S. operations in Europe, and argues that these differences will prevent any true EC single market).

30. Besides harmonization of employment laws, Brussels' other chief reason for creating a social Europe was to alleviate unemployment by spreading around existing work. See, e.g., Dowling, *supra* note 4, at 585-89.

31. See Dowling, *supra* note 4, at 578-80 & 580-81 n.90, and citations therein.

32. See *id.* at 580-84.

33. See *id.* at 585-89 and citations therein.

34. Letter from Jacques Delors and Manuel Marin to Chairman of the Economic and Social Committee (Nov. 8, 1988), *reprinted in* COMMISSION OF THE EUROPEAN COMMUNITIES, DIRECTORATE-GENERAL FOR EMPLOYMENT, INDUSTRIAL RELATIONS AND SOCIAL AFFAIRS, *SOCIAL EUROPE* 1/90, at 80 (1990) [hereinafter *SOCIAL EUROPE*].

35. Community Charter of Fundamental Social Rights [hereinafter *Charter*].

36. Communication from the Commission Concerning Its Action Programme Relating to the Implementation of the Community Charter of Basic Social Rights for Workers, COM(89)568 final [hereinafter *Social Action Program*].

White paper of sorts that called for forty-seven specific social instruments under the twelve Charter rights. Brussels debated and revised various drafts of the Charter between May and November 1989, ultimately putting the document to a Council vote at the meeting in Strasbourg in December 1989.³⁷ Because a provision in the amended Treaty of Rome requires unanimous votes on most employment issues, the employer lobby argued that in order for the Charter to pass, it had to win the vote of all twelve Member States. To no one's surprise, Britain's Margaret Thatcher, long an outspoken critic of the social Europe concept, cast a lone blackball. As a result, Britain and the employers proclaimed that the Charter had lost, even though it enjoyed the support of a nonunanimous 11-to-1 majority.³⁸

While the Charter's failure was a setback for the social Europe movement, the Commission essentially ignored Thatcher's blackball. During the next two years (1990 and 1991), the Commission went on to propose many of the forty-seven instruments that the Social Action Program called for, just as if the Charter had passed in the first place. Yet Britain (first through Thatcher and then through her successor John Major) vetoed most of these social measures. Only at Maastricht did the balance of power change.

D. THE DECEMBER 1991 MAASTRICHT DECISION TO EXCLUDE BRITAIN FROM THE EC SOCIAL AGENDA

Britain ultimately proved a victim of its own success. Frustrated by the stalemated veto years, the other Member States began applying tremendous pressure to forge some kind of workable program on employment issues. These Member States pressured the Council into including social issues as one of the topics at the EC's intergovernmental conference on economic and political union (the equivalent of a constitutional convention), which culminated in the December 1991 Council meeting at Maastricht.

At Maastricht the Council considered the first substantive changes to the EC treaty since the Single European Act—changes not only in social policy, but in monetary and political policy, as well. While the Maastricht proposals did not purport finally to resolve every outstanding concern regarding economic and political union, they did result in an important Council-level consensus regarding some key substantive amendments to the treaty itself.³⁹ The Maastricht meeting also yielded a surprising, late-in-the-day breakup of the social Europe logjam.

37. See Dowling, *supra* note 4, at 590–94, and citations therein.

38. See *id.*

39. For example, at Maastricht the Council agreed on a 1999 deadline for economic union, gave Parliament a new veto power, and reached important agreements on defense policy and immigration matters. See COUNCIL OF THE EUROPEAN COMMUNITIES AND COMMISSION OF THE EUROPEAN COMMUNITIES, [PROPOSED] TREATY ON EUROPEAN UNION 62–64 (1992) [hereinafter MAASTRICHT] (signed Feb. 7, 1992 after agreement in principle reached on Dec. 10, 1992).

In the months leading up to the Maastricht meeting, both sides of the social Europe debate had entrenched themselves into their prior positions: Britain and Europe's employers tried to water down the Social Action Program to as weak a level as possible,⁴⁰ while the social Europe mavens, now led by France, demanded that the Council comprehensively regulate the EC workplace. A major argument involved whether the EC should change the amended Treaty of Rome's article 100, to apply nonunanimous, qualified majority voting to all social matters, not just to health and safety issues. Britain and the employers, of course, forcefully resisted this proposal. But France, Germany, and Italy threatened to reject all the Maastricht economic and political union treaty changes unless the package contained a new social chapter for the treaty, one that included broad qualified majority voting.

At Maastricht, at the final hour, an unanticipated compromise emerged, one unparalleled in the history of the single market program. The Council ministers decided to carve Britain out of the EC's entire social agenda, leaving the eleven continental Member States⁴¹ to legislate the Charter and Social Action Program's broad social Europe program.⁴² Britain would not participate in creating or passing social instruments, and social instruments, once passed, would not apply in Britain.⁴³ The eleven continental Member States would form an entirely new body, which would exist as a sort of parallel universe to the EC, cloning the EC's institutions, procedures, and even prior instrument proposals. Europe would forge ahead on social issues without Britain.

While the popular press focused on those aspects of the Maastricht treaty dealing with economic and political union, a six-page protocol and agreement within the 256-page proposed Maastricht treaty⁴⁴ sets out a blueprint for a wide-ranging social union. The Maastricht treaty's Protocol on Social Policy,⁴⁵ which

40. For Britain's position on social issues leading up to the Maastricht treaty, see *Union Come-back*, THE ECONOMIST, Nov. 23, 1991, at 81. For a general discussion of Britain's intransigence on social matters, see P. TEAGUE, *THE EUROPEAN COMMUNITY: THE SOCIAL DIMENSION* 64-81 (1989). For EC employers' position on social issues leading up to the Maastricht treaty, see UNICE Submission to the Intergovernmental Conference (IGC) on Political Union: Special Considerations as Regards Social Policy (Mar. 18, 1991).

41. Actually, "continental Europe" in this context is the ten continental Member States, plus Ireland. For brevity, this article refers to these eleven Member States as the continental Member States.

42. Technically, the continental Member States carved themselves out, forming a sui generis body that would create a social union to be implemented apart from the EC treaty structure. Britain remained free to opt in. (The social compromise was therefore the opposite of the Maastricht economic union compromise, which simply carved out Britain.)

43. For contemporaneous overviews of the two-tier Maastricht social compromise, see *The Deal Is Done*, THE ECONOMIST, Dec. 14, 1991, at 51-54; *EC Exempts Britain from Complying with EC Labor Legislation*, 239 Daily Lab. Rep. (BNA), at A1 (Dec. 12, 1991); *EC Exempts Great Britain from Complying with Labor Laws*, 138 Lab. Rel. Rep. (BNA) 535 (1991); *U.K. Will Be Exempt from Complying with Labor Policy*, CORP. COUNS. WEEKLY (BNA) 5 (Dec. 18, 1991).

44. MAASTRICHT, *supra* note 39.

45. *Id.* at 196 [hereinafter Social Protocol].

incorporates the Agreement on Social Policy Concluded between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland,⁴⁶ formally proposes carving Britain out of the EC social lawmaking structure and establishes a new qualified majority voting scheme by which forty-eight votes—instead of the fifty-four votes needed for a qualified majority when Britain participates—could pass social legislation.⁴⁷

Besides carving Britain out of the social Europe process, the Agreement sets forth three other key innovations. First, the Agreement would expand the number of social law subjects by which a qualified majority can pass instruments, from merely health and safety issues to all issues involving health and safety, working conditions, worker information and consultation, sexual equality, and “the integration of persons excluded from the labour market.”⁴⁸ However, unanimous voting would remain necessary to pass instruments on social security and social protection, employment contract terminations, collective bargaining, immigration from countries outside the EC, and “financial contributions for promotion of employment and job-creation.”⁴⁹

Second, the Agreement for the first time formally recognizes the involvement of the so-called “social partners,” the pan-European lobbying associations representing employers (chiefly UNICE, the Union des Confédérations de l’Industrie et des Employeurs d’Europe) and unions (chiefly ETUC, the European Trade Union Confederation).⁵⁰ Under the Agreement, a Member State could delegate

46. *Id.* at 197 [hereinafter Agreement on Social Policy].

47. Compare Social Protocol, *supra* note 45, ¶ 2 with EEC Treaty, *supra* note 5, art. 148(2). Announcing this new two-tier approach in a press conference on December 11, 1991, EC Commission President Jacques Delors explained that agreeing to the plan was the only way continental Europe could avoid further watering down the Charter, *supra* note 35, and Social Action Program, *supra* note 36. *EC Exempts Great Britain from Complying with Labor Laws*, *supra* note 43, at 536. Delors promised that post-Maastricht social developments would not be too *avant garde*. The continental Member States would balance two goals: the need to legislate conservatively enough to insulate the EC’s less economically developed areas, versus the need to avoid social dumping. *Id.*

The reaction to the Maastricht two-tier approach was predictable. British Prime Minister John Major emerged “very happy,” and European union leaders, speaking through the European Trade Union Congress, lauded the compromise as a “major success.” *Id.* at 537. However, Europe’s employers, speaking through their umbrella UNICE (The Union des Confédérations de l’Industrie et des Employeurs d’Europe), decried the two-tier approach “as an extremely negative step.” *Id.* at 536. UNICE lambasted the compromise for unfairly setting up Britain as “a foreign investors’ paradise” at the expense of the continental Member States, complaining that it is “bizarre to have . . . corporations in 11 Member States hav[ing] to respect much stricter and more expensive social legislation than corporations in one Member State.” *Id.* at 536. UNICE also charged that, under the re-weighted qualified majority voting system that would apply without Britain, a mere handful of large and rich Member States would be able to railroad through restrictive social legislation, crippling industry in a majority of smaller dissenting Member States. UNICE added that the scheme would make Britain the “Hong Kong of Europe.” *Financially Sound, Socially Insecure*, THE ECONOMIST, Dec. 14, 1991, at 70.

48. Agreement on Social Policy, *supra* note 46, art. 2(1).

49. *Id.* art. 2(3).

50. That the traditional adversaries of management and labor are together called “partners” points up the ironies of Eurospeak.

implementation of social instruments to the social partners "at their joint request."⁵¹ Much more importantly, in a provision unique to EC law, the Agreement requires the Commission to submit all draft social instruments to the social partners for nine months of consultation and collective bargaining, during which the social partners can either jointly recommend changes to proposals or enter collective agreements on the topic of a proposal, rendering the proposal itself obsolete.⁵²

The Agreement's third substantive amendment to EC social law is its introduction of the affirmative action concept regarding sexual equality. The text of the Treaty of Rome lays out the goal of sexual equality as a straightforward ban on discrimination.⁵³ However, the Agreement expressly allows Member States to "[m]aintain or adopt measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers."⁵⁴

If adopted, the Protocol and Agreement would break up Britain's historic blockade of the passage of a social Europe. They would also seem to change the way Brussels itself will legislate a social Europe. Even if the Protocol and Agreement were fully implemented, however, a key political reality undermines their actual application: these documents do not repeal anything in the Treaty of Rome. They merely exist as an *optional* parallel universe, to be used only if Britain tries to block a specific piece of social legislation.

Because there is within the EC a great pressure to pass laws as part of the *acquis communautaire* (the body of law applicable EC-wide), all Member States favoring any proposed EC instrument would prefer to see that instrument apply EC-wide.⁵⁵ The plan behind Continental Europe's support for the Maastricht treaty's Social Protocol is the theory that the very threat of invoking the Social Protocol procedure for any given proposed instrument would probably be enough to win Britain's reluctant acquiescence. Otherwise, Britain could be accused of diminishing the *acquis communautaire* and further isolating itself as an EC-law outsider. Hence, while the Social Protocol reads as an innovation unique to EC law, even if ratified, it may prove to be little more than the clever political ploy that forced Britain to

51. Agreement on Social Policy, *supra* note 46, art. 2(4).

52. *Id.* arts. 3-4. The nine-month period is rumored to have been inspired by the EC's draft instrument on pregnancy rights, which the Commission's social affairs Directorate-General had been considering shortly before it turned its attention to the Maastricht treaty.

53. EEC Treaty, *supra* note 5, art. 119.

54. Agreement on Social Policy, *supra* note 46, art. 6(3).

55. One reason for the EC's fixation with the *acquis communautaire* is the growing strength of the EC's relationship with the EFTA (European Free Trade Agreement) countries after the Council's tentative approval of the European Economic Area Agreement on February 14, 1992. As EC/EFTA ties became stronger, and as EC law becomes stronger within the EFTA countries, the EC would like as much of its law (the *acquis communautaire*) as possible to be eligible to apply to EFTA countries.

relax its veto of the social Europe agenda proposed under the original Treaty of Rome.⁵⁶

E. THE MAASTRICHT TREATY AFTER THE DANISH VETO

In the months after the EC heads of state signed the Maastricht treaty in principle, all concerned set about studying the lengthy treaty and preparing for life after its ratification. While the internal laws of a few of the Member States technically required that a popular referendum ratify the treaty, from January to May of 1992 almost everyone involved in EC affairs seemed to assume that the Maastricht treaty would shortly become law, bringing to a close the 1992 single market chapter of the EC's history.⁵⁷

Then, on June 2, 1992, Denmark shocked the world by vetoing the Maastricht treaty, sinking it by less than 50,000 votes and a 50.7 percent to 49.3 percent margin.⁵⁸ Denmark's veto turned the tide of EC popular opinion. On September 20, 1992, even France, the traditionally pro-EC homeland of the Commission President Jacques Delors, voted to ratify the Maastricht treaty only by a 2 percent margin.⁵⁹ Delors himself, the architect of the single European market, scrambled to convince the EC's voters that the treaty, if ratified, would not turn the EC into a superstate. Delors, humbled more than he had been since before the White Paper was issued in 1985, admitted that the EC bureaucracy in Brussels had to become more transparent and accountable to the EC citizenry.⁶⁰ In a ground-breaking speech in Strasbourg on June 10, 1992, Delors announced that the Commission would "redouble its efforts" to get the Maastricht treaty ratified, starting with an "examination of its collective conscience."⁶¹

Thus, in late 1992 the fate of the Maastricht treaty, and with it its Social Protocol and Agreement on Social Policy, remained uncertain. However, the Social Protocol and the Agreement's substantive innovations, which had been hastily drawn up the prior December, seemed to have acquired enough gravitational force to

56. For analyses of the Maastricht Social Protocol and Agreement discussing these issues, see UNICE Position Paper, *The Social Chapter of the Maastricht Treaty* (Apr. 28, 1992, unpublished); Confederation of British Industry, *Social Europe After Maastricht* (Mar. 1992, unpublished); Zygmunt Tyszkiewicz, *Social Policy After Maastricht* (July 1992) (unpublished paper by Secretary-General of UNICE).

57. See, e.g., *Unfinished Business*, THE ECONOMIST, Jan. 4, 1992, at 43. By the end of this period, however, some nascent anti-EC feelings were growing among the Member States' citizenry. See, e.g., Peter Gumbel, *Europe's Spirits Over Unity Begin to Sink*, WALL ST. J., Mar. 24, 1992, at A10.

58. A comprehensive, contemporary analysis of the Danish vote appears in Peter Gumbel, *EC Shocker: European Unity Plan Receives Big Setback in Danes' Referendum*, WALL ST. J., June 3, 1992, at A1.

59. Ireland, the only other Member State that had a referendum on Maastricht under its internal law, voted to approve the treaty, on June 18, 1992, sixteen days after the Danish veto.

60. Radigales, *Delors No Quiere Convertir la CEE en un Superestado*, EL PERIÓDICO (Barcelona), June 11, 1992, at A12.

61. *Id.* (translations by this author).

enable them to survive, in one form or another, regardless of the ultimate fate of the Maastricht treaty itself.

In any event, because even the Maastricht Protocol's social scheme did not eradicate the previously existing regime for social regulation under the Treaty of Rome, regardless of the fate of the Maastricht Social Protocol, the two years' worth of proposed social instruments that the Commission had offered up during 1990 and 1991 remained, at the close of 1992, a viable blueprint for the future of social Europe. Posturally, these proposals remained ready to be acted upon and implemented, regardless of the ultimate fate of the Maastricht treaty. To examine these pending social proposals issued under the Charter and Social Action Program's twelve rights, therefore, is to divine the Commission's own view of the future of social Europe.

II. The EC Charter's Twelve Employment Law Rights and the Status of Their Implementation

In 1992, even after the Danish veto of the Maastricht treaty, that a true social Europe (albeit possibly a continental social Europe) would some day appear was, for the first time, virtually assured. In 1992, the single market program's final year, the continental EC appeared close to finally considering seriously whether to adopt the Commission's 1990-91 package of social Europe proposals within each of the twelve Charter rights—be these ultimately adopted under the Treaty of Rome or under the proposed Maastricht procedures.

A. RIGHT TO FREE MOVEMENT

The first of the Charter's twelve rights, and therefore the first part of the social Europe framework, is the right to free movement. This right is meant to ensure free emigration among all EC Member States, "enabl[ing] any worker to engage in any occupation or profession in the Community in accordance with the principles of equal treatment as regards access to employment, working conditions and social protection in the host country."⁶²

While even the 1985 White Paper had set out ambitious goals for the free movement right, Brussels has been slow to implement them. As late as 1991 the Commission complained: "[T]he completion of work aimed at facilitating mobility still depends on the extension of recognition of qualifications to all regulated professions and on the reform of the arrangements under which workers and their families obtain the right of residence."⁶³ Accordingly, Brussels' propos-

62. Charter, *supra* note 35, ¶ 2. Curiously, although freedom of movement is the Charter's first right, the Social Action Program, *supra* note 36, misplaces it as the fourth right. The Social Action Program also reshuffles some of the other rights. This article follows the ordering of rights in the Charter.

63. Sixth Report, *supra* note 14, at 1.

als of residence rights for workers and on cross-border recognition of diplomas and professional qualifications were effectively stalemated through the close of 1992.⁶⁴

The Commission had proposed just one free movement directive expressly under the Charter itself (as opposed to proposals under the White Paper): the 1991 Proposal for a Council Directive Concerning the Posting of Workers in the Framework of the Provision of Services.⁶⁵ This proposal attempts to iron out competition problems among service businesses operating across Member State lines, that is, the problems that arise when an employer from a low-wage Member State assigns a worker to a temporary posting in a high-wage state.⁶⁶

The proposal would require that a worker employed in one Member State who is assigned to another state for more than three months per year receive the protection of the host Member State's laws regarding work hours, holiday time, minimum wage, subcontracting, health and safety, pregnancy and child care, and antidiscrimination protections.⁶⁷ The goal is to prevent, for example, a Portuguese company from winning the low bid on a Danish construction project, and then staffing the job with Portuguese construction workers earning 1.5 to 3 ECU per hour, when their now out-of-work Danish counterparts would have received 13.32 to 18.39 ECU.⁶⁸

B. RIGHT TO FAIR PLAY

The Charter's second right addresses minimum pay, assuring that employment "shall be fairly remunerated" at a "decent standard of living."⁶⁹ In the EC, the minimum wage structure is more complex than the United States model of a lowest legal dollar rate per hour. While certain Member States do use the United States model, others set minimum wages by collective bargaining agreement consensus (either Member-Statewide or industrywide). Still other Member States set minimum wages by Wage Councils or Joint Labour Committees.⁷⁰ In a move towards harmonizing along the lines of the United States model, in May 1991 the Commis-

64. See *id.* at 18-19. Nevertheless, Brussels is making headway in quite a few free movement-related areas outside of the employment arena, including asylum, external frontiers, cooperation among police forces, drug control, immigration policy, and customs matters pertaining to individuals. See *id.* at 14-15.

65. Proposal for a Council Directive Concerning the Posting of Workers in the Framework of the Provision of Services, COM(91)230 final SYN 346 (Aug. 1, 1991) [hereinafter Proposal].

66. *Id.* at 4:

A particular problem arises . . . where a Member State places obligations, notably with regard to pay, on firms based in and working on its territory, and these firms are faced with competition—for a specific task carried out within that same Member State—from a firm based elsewhere and not subject to the same obligations. Legitimate competition between firms is then overlaid by potentially distortive effects between national requirements.

67. *Id.* at 21-22, art. 3, §§ 1-2.

68. Figures are from table, *id.* at 5, showing lowest and highest collective bargaining agreement "Hourly Wages in ECU in the Construction Industry."

69. Charter, *supra* note 35, ¶ 5.

70. Proposal, *supra* note 65, at 6.

sion issued a modest draft recommendation asking each Member State to take a first step by implementing its own statutory minimum wage.

C. RIGHT TO IMPROVED WORKING CONDITIONS

In addition to regulating wages, the Charter, as its third right, seeks to control working "conditions," including "forms of employment other than open-ended contracts, such as fixed-term contracts, part-time working, temporary work and seasonal work."⁷¹ In an attempt to implement this, on August 13, 1990, the Commission issued a three-part multiple draft directive on working conditions, titled the Proposal for a Council Directive on Certain Employment Relationships with Regard to Working Conditions, the Proposal for a Council Directive on Certain Employment Relationships with Regard to Distortions of Competition, and the Proposal for a Council Directive Supplementing the Measures to Encourage Improvements in the Safety and Health of Temporary Workers.⁷²

The first of these three parts, the proposal on employment relationships, involves part-time and temporary (seasonal and fixed duration) employment. This instrument would require EC employers to treat their part-time and temporary staffs "on the same footing as . . . other employees" in access to vocational training, worker representation, benefits, social services, and internal promotions to full-time or indefinite-duration positions.⁷³

The second part of the August 1990 working conditions proposal, that on employment relationships "with regard to distortions of competition," involves limited-term contracts.⁷⁴ In Europe even nonunion job holders typically are parties to written employment contracts of indefinite duration. These contracts raise many important aspects of employment relationships, including the terms of discharge, to the level of law.⁷⁵ EC workers employed under these contracts either keep their jobs as long as they want or are bought out at a high price. Not surprisingly, given the oppressive effects of such indefinite-length contracts on employers, employers in Europe occasionally offer their workers definite length contracts with a specific termination date (usually one year from the date of contracting). These employers typically renew these contracts annually until the

71. Charter, *supra* note 35, ¶¶ 7-8. For a collection of the EC instruments on protection of workers through 1990, and for citations to the interpretive case law, see EUROPEAN INFORMATION SERVICES COMPENDIUM OF EC EMPLOYMENT AND SOCIAL SECURITY LAW 114-32, 1,006-09 (1990) [hereinafter EUROPEAN INFORMATION SERVICES]. For further citations to EC working conditions law, see A. BYRE, LEADING CASES AND MATERIALS ON THE SOCIAL POLICY OF THE EEC 315-402 (1989).

72. Proposal for a Council Directive on Certain Employment Relationships with Regard to Distortions of Competition, COM(90)228 final SYN 280 [hereinafter Distortions]; Proposal for a Council Directive Supplementing the Measures to Encourage Improvements in the Safety and Health of Temporary Workers, COM(90)228 final SYN 281 [hereinafter Temporary Workers].

73. Proposal for a Council Directive on Certain Employment Relationships with Regard to Working Conditions, COM(90)228 final.

74. Distortions, *supra* note 72.

75. See Dowling, *supra* note 4, at 572-73.

year the employer decides upon discharge. In an attempt to rectify this practice, the proposal on distortions of competition would prohibit EC employers from using fixed-term contracts for longer than thirty-six months.

Complementing this second proposal on work contracts, in November 1990 the Commission issued another, entirely separate draft directive⁷⁶ that would require employers to put all employment contracts in writing—spelling out the applicable working conditions and the duration of the contract. On October 14, 1991, the Council actually adopted a revised version of this directive, making this one of the very few pre-Maastricht directives adopted under the Social Action Program and effective in all Member States.⁷⁷ This revised directive (to be effective June 30, 1993) requires that virtually all employers of Europeans provide each full-time employee, within two months of employment, with a writing that states the employer's identity, the time and hours of work, the employee's job duties and classification, the duration of employment if temporary, the applicable vacation policy, pretermination notice policy, compensation and pay schedule, and citations to any applicable collective bargaining agreements.⁷⁸ If the employee is to be assigned abroad as an expatriate, the writing must also address the duration of the foreign posting, the currency to be used for payment, the "benefits in cash or kind attendant on the employment abroad," and the conditions of repatriation.⁷⁹

The third part of the Commission's tripartite working conditions proposal is a draft directive ostensibly on improving safety and health for temporary workers.⁸⁰ This proposed instrument, which involves both part-time and temporary employment, would require employers to articulate in their assignment contracts a detailed job description setting out the hours of work and saying whether the job falls within the category of major risks as defined in national legislation. The proposal would also require employers to warn workers about the risks involved in "any activity requiring special occupational qualifications or skills."⁸¹ If necessary, employers would have to provide their temporary workers with appropriate training.

An entirely separate draft instrument on working conditions, issued in November 1991 (and approved by the EC Parliament on March 11, 1992, in a nonbinding vote), would amend and expand a 1975 directive that requires employers of twenty

76. Commission Proposal for a Council Directive on the Provision of a Written Declaration Concerning Employment Relationships, COM(90)563 (Nov. 28, 1990).

77. Council Directive 91/533 of 14 October 1991 on an Employer's Obligation to Inform Employees of the Conditions Applicable to the Contract or Employment Relationship, 1991 O.J. (L 288) 32.

78. *Id.*, art. II, § 2.

79. *Id.*, art. IV, § 1.

80. Temporary Workers, *supra* note 72. As this document appeared before the Maastricht treaty, its drafters had an incentive to pitch it as a health and safety directive: Article 100a of the EEC Treaty, *supra* note 5, recognizes qualified majority council voting for safety issues, but requires unanimous voting for other employment-related issues. On article 100a, see Dowling, *supra* note 4, at 592-94.

81. Temporary Workers, *supra* note 72.

or more employees to give advance notice to their workers of plant closings and mass layoffs (collective redundancies), and to bargain or consult with workers over these changes.⁸² The 1991 proposal,⁸³ plugging what the Commission openly calls a "legal loophole,"⁸⁴ would apply the 1975 directive to conglomerates headquartered in one EC Member State, but laying off workers in another.⁸⁵

The new proposal would require home offices to pass down to local management, for transmittal to workers or their representatives:

[T]he reasons for the projected redundancies, the number of workers normally employed, the employer's proposals with regard to the number and categories of workers to be made redundant, the criteria proposed for the selection of the workers to be made redundant, the proposed basis for any redundancy payments, and the period over which the projected redundancies are to be effected.⁸⁶

The motive for the new plant-closing proposal is the Commission's fear that a trend toward "accelerating corporate restructuring"⁸⁷ exists: "An increasing number of employees will be affected by key corporate decisions taken at a level higher than their immediate employer, i.e., by the undertaking's head office, if located in a different country."⁸⁸ The Commission worries that the existing 1975 plant-closing legislation gives corporations' headquarters an incentive to withhold from local management information necessary for meaningful plant-closing negotiations.⁸⁹

Still another 1991 draft directive on work conditions involves work time. It proposes regulating total hours, Sunday work, vacation, time off, and overtime. The EC labor ministers, at a Council meeting on December 3, 1991, tentatively showed strong support for this measure.

D. RIGHT TO SOCIAL PROTECTION

The Charter's fourth right guarantees "social protection," which means "an adequate level of social security," and, for the unemployed, "sufficient resources

82. The 1975 directive, Directive 75/129/EEC, was the model for similar legislation that the United States adopted over a decade later, in 1988. *Compare* Worker Adjustment and Retraining Notification [WARN] Act, 29 U.S.C. §§ 2101-2109 (1992) [hereinafter WARN Act]. *See generally* Michele Floyd, Note, *The Scope of Assistance for Dislocated Workers in the United States and the European Community: WARN and Directive 75/129 Compared*, 15 FORDHAM INT'L L.J. 436 (1992).

83. Proposal for a Council Directive Amending Directive 75/129/EEC on the Approximation of the Laws of the Member States Relating to Collective Redundancies, COM(91)292 final (Nov. 13, 1991) [hereinafter Amending Directive].

84. *Id.* at 3.

85. Interestingly, parent/subsidiary issues also create unique problems under the U.S. WARN Act, *supra* note 82. *See, e.g.*, *Electronic Workers Local 397 v. Midwest Fasteners, Inc.*, 7 I.E.R. Cases 65 (D.C.N.J. 1992).

86. Amending Directive, *supra* note 83, at 15.

87. *Id.* at 5.

88. *Id.* at 4.

89. *See id.* at 5.

and social assistance.”⁹⁰ EC legislation under this right would also extend to pension regulation. In October 1991 the Commission issued a Proposal for a Council Directive on the Coordination of Laws, Regulations, and Administrative Provisions Relating to the Freedom of Management and Investment of Funds by Institutions for Retirement Provision. This was a wide-ranging proposal that would forbid Member States from requiring that local pension funds invest only in their home state and that would also facilitate workers’ freedom to transfer pension benefits across Member State lines. It would also allow trans-European employers to create a single pension fund for workers in all Member States.

E. RIGHT TO COLLECTIVE BARGAINING

The fifth section of the Charter would guarantee an EC right of collective bargaining.⁹¹ In 1992, collective bargaining in Europe remained independent within each Member State. But the Single European Act, the Charter, and the Social Action Program all actively encourage bargaining at the “European-level.”⁹² During 1991, the European employers’ group UNICE (the Union des Confédérations de l’Industrie et des Employeurs d’Europe) took the surprising position that it might initiate European-level collective bargaining itself to forestall intrusive EC-wide employment regulation.⁹³ This position proved prophetic, to the extent that the proposed Maastricht treaty attempts to give the social partners a formal role in forming EC social law through collective-style bargaining on legislation.⁹⁴

90. Charter, *supra* note 35, ¶ 10. The leading EC instruments on social security are the 1971 Council Regulation on the Application of Social Security Schemes to Employed Persons and Their Families Moving Within the Community, Council Regulation (EEC) 1408/71, 1971 O.J. (L 149), and the Council Regulation Fixing the Procedure for Implementing Council Regulation (EEC) 574/72, 1972 O.J. (L 74). For the texts of these two regulations, and for citations to the voluminous Court of Justice case law interpreting them, see EUROPEAN INFORMATION SERVICES, *supra* note 71, at 580-945, 1012-79 (1990). For analyses of the decades of existing EC social security law, see A. ARNULL, THE GENERAL PRINCIPLES OF EEC LAW AND THE INDIVIDUAL 129-211 (1990); EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS 115-37 (1988); H. SMIT & P. HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY 3-751.11-.13 (1991). See also citations in Dowling, *supra* note 4, at 601 n.226.

91. Charter, *supra* note 35, ¶¶ 11-14.

92. The Single European Act amends the treaty to encourage EC-level collective bargaining. Single European Act, *supra* note 3, art. 22, amending EEC Treaty, *supra* note 5, art. 118 (“The Commission shall endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement”). See also Charter, *supra* note 35, ¶ 12. The sole new initiative that the Social Action Program offers under the collective bargaining right is a proposed communication on the “role of social partners in collective bargaining” intended to promote “the development of collective bargaining including collective agreements at European level with special reference to the settlement of disputes.” Social Action Program, *supra* note 36, at 30.

93. *European Employers Group Considering Trans-European Collective Bargaining*, 75 Daily Lab. Rep. (BNA) at A5 (Apr. 18, 1991).

94. See *supra* notes 50-52 and accompanying text.

F. RIGHT TO VOCATIONAL TRAINING

Brussels envisions a skilled work force staffing its post-1992 EC workplace. Accordingly, the sixth section of the Charter attempts to improve skills by creating a right to lifetime vocational training.⁹⁵ Indeed, vocational training has long been an EC priority. The EC has an important and long-established program, the European Social Fund, which is charged with training workers.⁹⁶

Even though the Charter and Social Action Program seem to call for privately financed vocational training programs, Brussels apparently could not resist expanding its Community-financed vocational training schemes. In December 1990 the Community introduced the "Euroform" program, establishing a "Community initiative concerning the new qualifications, new skills and new employment opportunities induced by the completion of the internal market and technological change."⁹⁷ Euroform, which unapologetically reinforces six other similar programs,⁹⁸ will impose a 300 million ECU cost on the EC's structural funds for 1990-93 alone, and the Member States will have to cofinance the program by contributing even more money.⁹⁹

G. RIGHT TO EQUAL TREATMENT BETWEEN MEN AND WOMEN

As its seventh right the Charter seeks to outlaw sex discrimination in employment,¹⁰⁰ a prohibition that for some years has existed within the EC Member States and also under Community law.¹⁰¹ To further this right, on October 17, 1990, the Commission issued a Proposal for a Council Directive Concerning the Protection at Work of Pregnant Women, or Women Who Have Recently Given Birth.¹⁰² After failing to reach an agreement on this proposal at the June 1991

95. Charter, *supra* note 35, ¶ 15.

96. SMIT & HERZOG, *supra* note 90, at 3-773 to -843; TEAGUE, *supra* note 40, at 42-56, 124-28. See citations in Dowling, *supra* note 4, at 603 n.237. Also, in 1990, the Commission launched a program to promote transnational networks for vocational training. See Sixth Report, *supra* note 14, at 8.

97. Notice to the Member States Laying Down Guidelines for Operational Programmes/Global Grants Which Member States Are Invited to Establish, in the Framework of a Community Initiative Concerning New Qualifications, New Skills, and New Employment Opportunities—Euroform Initiative, 1990 O.J. (C 327) 3.

98. *Id.*

99. *Id.* at 5.

100. Charter, *supra* note 35, ¶ 17. EEC Treaty, *supra* note 5, art. 119 mandates "equal [pay] for equal work."

101. Since 1975, the EC has been harmonizing laws on equal pay and equal treatment. See, e.g., Council Directive on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, Council Directive (EEC) 75/117, 1975 O.J. (L 45) 19; Council Directive on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion and Working Conditions, Council Directive (EEC) 76/207. For a collection of the EC instruments on equal pay and equal treatment through 1990, and for citations to the lead cases on this topic, see BYRE, *supra* note 71, at 7-310; and EUROPEAN INFORMATION SERVICES, *supra* note 71, at 73-108, 998-1,005.

102. COM(90)406 final SYN 303.

Council Meeting, on November 6, 1991, the Council's social ministers actually did unanimously approve a slightly watered-down version of this directive, making this the first noteworthy piece of Social Action Program legislation to get past the Council, at least provisionally. However, when the social affairs Council next met in early December 1991, Spain and Portugal withdrew their support for this instrument, citing its cost.

This proposed directive addresses two disparate maternity issues: safety (exposure to agents causing potential fetal harm) and leave (time off for childbirth and breast-feeding). The directive would first require that Member States protect pregnant and breast-feeding women by forcing employers to eliminate all dangerous physical, chemical, and biological agents on their jobs.¹⁰³ The document specifies precisely which agents Member States would outlaw.¹⁰⁴ The instrument would further require Member States to ensure that some "alternative to night work" be available to pregnant women for sixteen weeks surrounding their expected delivery date.¹⁰⁵

Separately, regarding maternity leave, the instrument notes that the average legally mandated EC maternity leave within the twelve Member States is already fifteen weeks, with a minimum of twelve weeks and a maximum of forty.¹⁰⁶ Notwithstanding the Member States' already generous protection levels, the first draft of the proposal required that those pregnant women who inform employers of their pregnancy in advance get "an uninterrupted period of at least 14 weeks' leave from work on full pay and/or a corresponding allowance, commencing before and ending after delivery."¹⁰⁷ However, the Council removed the requirement that leave pay be at full salary; the next draft said the pay need only be at the rate of sick pay (which in Europe, generally, is 75 percent of full pay). Still, any sickness leave during pregnancy would be in addition to this leave.¹⁰⁸ Member States could choose to mandate more than fourteen weeks' leave "not on full pay, as long as an equivalent standard of protection is assured."¹⁰⁹

Additionally, the instrument would prohibit employers from discriminating against pregnant women.¹¹⁰ Surprising as it may be to U.S.-based employers accustomed to a presumption of innocence, the proposal would put a burden of proof on employers to disprove that any adverse employment action they took

103. *Id.* art. 4.

104. *Id.* Annex I.

105. *Id.* art. 3, ¶ 3. While this instrument's protections may seem logical, the proposal, interestingly, runs contrary to the spirit of a recent U.S. Supreme Court decision, which prohibits U.S. employers from enacting fetal protection policies that exclude women of "childbearing age" even from demonstrably-hazardous jobs. *Auto Workers v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991).

106. This is in sharp contrast to U.S. law, which does not mandate any maternity leave at all.

107. Draft directive, *supra* note 102, art. 5(1), ¶ 1.

108. *Id.* ¶ 2.

109. *Id.*

110. *Id.* art. 6(2).

was on account of an employee's pregnancy.¹¹¹ This system could actually relax a doctrine in certain Member States, including Italy, which flatly prohibits discharging pregnant women, regardless of the reason or quality of proof.

During 1991 the Commission also issued a proposed recommendation on child care, provisionally approved by the Council on December 3, which strongly urged the Member States to create comprehensive child care programs aimed at facilitating working parents.¹¹² Also during 1991, the Commission issued a recommendation for a code of conduct on the dignity of men and women at work (an antiharassment measure).¹¹³ In December, the EC Council of labor ministers issued a declaration supporting this recommendation.¹¹⁴

H. RIGHT TO WORKER CONSULTATION AND PARTICIPATION IN MANAGEMENT

The Charter's most controversial proposal is its eighth guarantee of worker access to management information and worker participation in corporate affairs affecting employment.¹¹⁵ While the worker consultation and participation concept is familiar to U.S. labor academics, until recently it was wholly foreign to U.S. employers. Even U.S. union leaders saw management participation as outside their scope of expertise.¹¹⁶ Only very recently has worker consultation and participation (known in the United States as worker cooperation) become a factor in U.S. industrial relations. The reason it has emerged in the United States is because of the success of employers who use it abroad, such as in Germany and, in a different format, in Japan.¹¹⁷

111. In 1991 the EC Court of Justice issued a pair of decisions extending maternity rights by clarifying that employers have a high burden of proof regarding absence of discriminatory intent. Case 177/88, *Dekker v. Stichting Vormingscentrum Voor Jonge Volwassen Plus*, I.R.L.R. 27; Case 179/88, *Handels-Og Kontorfunktionaerernes Forbund I Danmark v. Dansk Arbejdsgiverforening*, 1 C.M.L.R. 8 (1991), 1991 I.R.L.R. 31.

112. Proposal for a Council Recommendation on Child Care, COM(91)233 final (Aug. 28, 1991).

113. COM(91)232 final (Aug. 27, 1991).

114. Just as the Clarence Thomas hearings brought sexual harassment to public attention in the United States in 1991, Europe also focused on the issue that year. France and Spain actually imposed criminal penalties (up to one year in prison) for workplace harassment.

115. Charter, *supra* note 35, ¶¶ 17-18 (approved draft of Charter contains two consecutive paragraphs numbered "17").

116. A surprising number of U.S. scholarly studies of the worker participation concept exist, speculating on what role worker participation might play in U.S. labor relations. See citations in Dowling, *supra* note 4, at 606 n.258. Cf. Martin M. Perline & David J. Poynter, *The Effects of Worker Participation Plans on Union Views of Managerial Prerogatives*, 40 LAB. L.J. 37, 38-39 (1989) (survey finds most U.S. union leaders believe many aspects of management are most properly left outside scope of collective bargaining).

117. Cf. Kathleen K. Brickley, *Labor Management Cooperation: Summary of the Electromation Case*, 43 LAB. L.J. 395 (1992); Harold J. Datz, *Employee Participation Programs: Are They Lawful Under the National Labor Relations Act?*, 8 LAB. LAW. 81, 82 (1992); Owen E. Herrnstadt, *Why Some Unions Hesitate to Participate in Labor-Management Cooperation Programs*, 8 LAB. LAW. 71, 71 (1992); Joy K. Reynolds, *A Perspective on the Electromation Case from the U.S. Department of Labor*, 43 LAB. L.J. 397 (1992). Ironically, while in Europe employers resist worker participation

Certain northern European Member States' national labor law systems—most notably Germany's—have long ceded generous management participation rights to labor. The northern European worker consultation and participation concept encompasses worker rights to information, consultation, and true participation in management decisions. Under these systems, labor representatives get advance notice of management's plans that would affect the workplace. Labor then gets a chance to consult and participate in those management affairs that affect employment, including corporate mergers, technological changes, restructurings of operations, and transfrontier employment issues.

The Charter and Social Action Program effectively reject the historic link between EC worker participation and company law that had turned up in various proposals for a European company statute, leaving the future of any such connection in the hands of those drafting the EC's company law instruments.¹¹⁸ Instead, the Charter and Social Action Program call for an unrestricted right of worker consultation and participation for employees of corporations operating in more than one Member State.¹¹⁹ To effect this, the Social Action Program proposes an instrument that would establish "equivalent systems of worker participation in all European-scale enterprises."¹²⁰ Employer "enterprises" would have to provide their workers with "general and periodic information" regarding those aspects of company development affecting employment.¹²¹ Trans-European employers would therefore have to consult with worker representatives "before taking any decision liable to have serious consequences for the interests of employees, in particular, closures, transfers, curtailment of activities, substantial changes with regard to organization, working practices, production methods, long-term cooperation and other undertakings."¹²²

On January 25, 1991, under this section of the Social Action Program, the Commission issued a Proposal for a Council Directive on the Establishment of a European Works Council in Community-Scale Undertakings or Groups of

and labor lobbies for it (see discussion *infra*), as these articles show, in the U.S. employers push for worker cooperation while unions resist it. Pointing out just how backward the United States is on this issue, in 1992 worker cooperation was considered to be illegal pending en banc review in the eagerly-awaited National Labor Relations Board decision *Electromation, Inc.*, NLRB Case No. 25-CA-19818.

118. For a discussion of the historic link between EC company law proposals and worker consultation and participation, see *SOCIAL EUROPE*, *supra* note 34, § 2.2.1.3; Dowling, *supra* note 4, at 606-09. This author has, elsewhere, examined how worker participation fits into the EC's movement toward a single corporate form. Donald C. Dowling, Jr., *How Does Europe Regulate Power Within Its Corporations? What Might the Answer Mean for the U.S.?*, 12 Nw. J. INT'L L. & BUS. 601 (1992).

119. See Charter, *supra* note 35, ¶ 17 (worker consultation and participation requirement "shall apply especially in companies or groups of companies having establishments or companies in two or more Member States of the European Community"). The Social Action Program leaves to the Member States the question of what worker consultation and participation obligations purely domestic employers should have. Social Action program, *supra* note 36, at 31-34.

120. Social Action Program, *supra* note 36, at 32-33.

121. *Id.*

122. *Id.* at 33.

Undertakings for the Purposes of Informing and Consulting Employees.¹²³ On September 16, 1991, the Commission updated this with an Amended Proposal.¹²⁴ This Works Council proposal would cover only those EC employers (or groups of employers) "with at least 1,000 employees within the Community including 100 employees in at least each of two Member States."¹²⁵ Employers not meeting this threshold would simply remain subject to whatever applicable worker participation law might apply in the Member States in which they operate.

The proposed Works Councils directive would require that covered employers' existing labor representatives (or else employees whom the work force elected) sit on an in-house labor/management committee, the European Works Council, meeting regularly with management as a special negotiating body, and discussing issues affecting employment.¹²⁶ Management would have to inform the Works Council "of the progress of the undertaking's . . . business and of its prospects. This information [would have to] relate in particular to [the employer's] structure, economic and financial situation, the probable development of the business and of production and sales, the employment situation and probable trends, and investment prospects."¹²⁷

Just as the worker consultation and participation concept has always been the most volatile aspect of the EC's proposed social agenda, this Works Council draft directive is the most controversial component of the Commission's 1990-91 package of draft Social Action Program proposals. The Works Council proposal is a compromise that, to hard-core union activists, is too watered down. It does not apply to enough employers, and it focuses too much on information and consultation to the exclusion of active participation. However, to large employers, especially to those based in the United States, this proposal reads as a major encroachment on management's right to run a business. Unfortunately for these employers, if the Maastricht proposal's two-tier approach is ever ratified, it would open the doors to broad social legislation in the continental EC,¹²⁸ and this Works Council directive—or some instrument quite like it—would likely receive Council approval.

Apart from the Works Council directive, in July 1991 the Commission also issued a proposal under the only remaining topic on this right under which the Social Action Program calls for legislation:¹²⁹ employee profit participation.¹³⁰ On

123. COM(90)581 final. The Parliament approved this draft on July 9, 1991.

124. COM(91)345 final.

125. *Id.* § 1, art. 2(a). With this language, the instrument would cover more employers than had the analogous January draft. That draft had covered only employers "with at least 1,000 employees within the Community and with at least two establishments in different Member States each employing at least 100 employees." COM(90)581 final, § 1, art. 2(a).

126. COM(91) 345 final, § 2, art. 5(2).

127. *Id.* Annex § 1(c).

128. See *supra* text accompanying notes 66-75.

129. Cf. Social Action Program, *supra* note 36, at 34. Brussels' initiatives in the area of consultation regarding collective redundancies, or layoffs, are categorized as working conditions proposals. See *supra* text accompany note 83.

130. Proposal for a Council Recommendation Concerning the Promotion of Employee Participation in Profits and Enterprise Results (Including Equity Participation), COM(91)259 final (July 29, 1991).

July 16, 1991, the Commission issued a Proposal for a Council Recommendation Concerning the Promotion of Employee Participation in Profits and Enterprise Results (including Equity Participation).¹³¹ This proposal simply requests the Member States to free up their legal systems to encourage the social partners (management and unions) to negotiate diverse types of voluntary employee profit participation schemes (profit-sharing, employee-share-ownership, and stock-options programs).¹³² Implicitly conceding that, even under European jurisprudence, these programs are most properly a product of free enterprise and not governmental regulation, this proposal avoids any overt mandates and instead seeks only to encourage employer profit participation schemes chiefly by "enhanc[ing] social partners' awareness" of them.¹³³

I. RIGHT TO HEALTH AND SAFETY PROTECTION IN THE WORKPLACE

Another area in which European worker representatives have long called for comprehensive EC-level regulation is workplace health and safety, the topic of the Charter's ninth right. Substantial progress has occurred in this area over the years,¹³⁴ and the Social Action Program aims at even more substantial progress. Twelve of the Social Action Program's forty-seven proposals involve workplace health and safety, more proposals than under any other single Charter right.¹³⁵ The Commission began issuing these specific proposals in 1990, when it put forth a draft directive on safety at mobile work sites.¹³⁶ By their very specificity, these new topics for safety legislation indicate that existing EC safety regulations cover substantial ground. Subsequent regulation will only fill in gaps.

J. PROTECTION OF CHILDREN AND ADOLESCENTS

The Charter's final three rights grant affirmative protections to three groups: the young, the old, and the handicapped.¹³⁷ The Charter's tenth guarantee, of protection for the young, largely addresses wage rates and vocational training.¹³⁸ Enforcing this, in January 1992 the Commission issued its first post-Maastricht social document, a long-awaited proposal to regulate the work hours of youth by

131. *Id.*

132. *Id.* ¶ 10.

133. *Id.* ¶ 9.

134. The Council has been actively harmonizing EC health and safety laws since 1974. *See, e.g.*, Council Decision on the Setting Up of an Advisory Committee on Safety, Hygiene and Health Protection at Work, Council Decision 74/325, 1974 O.J. (L 185) 15, 16. For citations to the leading EC instruments of health and safety through 1990, see BYRE, *supra* note 71, at 405-532; EUROPEAN INFORMATION SERVICES, *supra* note 71, at 295-579.

135. Compare Social Action Program, *supra* note 36, at 45-49 with *id.* at 9-42, 50-53.

136. Council Directive on the Proposal for the Implementation of Minimum Safety and Health Requirements at Temporary or Mobile Work Sites, COM(90)257 final SYN 279. *See generally* R.F. Eberlie, *The New Health and Safety Legislation of the European Community*, 19 INDUS. L.J. 81 (1990).

137. Charter, *supra* note 35, ¶¶ 20-26.

138. *Id.* ¶¶ 20-23.

banning night work for those under eighteen, banning those under fifteen from all but light work, and banning those under thirteen from all work except entertainment. The proposal also called for a limit on students' work hours.

K. PROTECTION OF THE AGED

The Charter next, as its eleventh right, grants affirmative rights to the aged, but these rights focus on basic state-provided sustenance, not on employment restrictions.¹³⁹ That the Charter's social protections for the aged appear to focus on state-run benefit programs is good news for employers of Europeans because this deflects the concerns that give rise to the employer-restrictive U.S. model of affirmative antidiscrimination rights for the aged.¹⁴⁰ Apart from pension regulation, ultimately Brussels' chief role regarding protection of older workers may only be to coordinate propaganda stressing the aged's concerns. To this end the Social Action Program suggests that 1993 be labeled "a year for the elderly."¹⁴¹

L. PROTECTION OF THE HANDICAPPED

Like its protections for the aged, the Charter's twelfth and final guarantee, of rights for the handicapped,¹⁴² amounts more to a statement of affirmative social policy than to a body of antidiscrimination prohibitions directly affecting employment.¹⁴³ However, while the Charter and Social Action Program's protections for the handicapped are essentially toothless from the employment law viewpoint

139. *Id.* ¶¶ 24–25. European employers—including North American employers operating in Europe—openly advertise age biases in a way that would be grossly illegal in the United States. *E.g.*, THE TIMES (London), May 7, 1992, Life & Times, at 15 (advertisement by Citibank claims bank is "an equal opportunities employer" but opens "FX sales and trading" positions only to those who "will graduate this year"); *id.* (Microsoft seeks Account Manager aged "mid-twenties to thirties"); *id.* at 26 (Sun Life of Canada seeks representatives "between 24 and 49"); SUNDAY TIMES (London), Nov. 4, 1990, § 6, at 2 (Coopers & Lybrand Deloitte Executive Recruiting seeks "Sales and Marketing Director . . . [p]robably aged around 35"); *id.* at 3 (advertisement seeking "Internal Sales Manager . . . [a]ged between 23–40"); *id.* at 10 (advertisement seeking "Director of Legal Services" for MSL International, aged "early-mid 30's"). Compare Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1988) (prohibiting discrimination in employment against anyone over age forty). Someday, a U.S. age discrimination plaintiff suing one of the U.S. companies that openly discriminate abroad on the basis of age (such as Microsoft or Coopers & Lybrand Deloitte) will show a jury the smoking gun of an openly-age-biased overseas advertisement and argue "institutional bias." After the jury renders an enormous plaintiffs' verdict, the U.S. company will instruct its foreign subsidiaries to pull these ads, if only to reduce U.S. liability. In the meantime, creative plaintiffs' lawyers may realize the utility of reading foreign help-wanted ads. See generally Dowling, *supra* note 16, at 353, 353 n.21.

140. See, e.g., Charter, *supra* note 35, ¶ 25.

141. Social Action Program, *supra* note 36, at 52. However, age bias in employment is a widespread social problem in Europe. See, e.g., citations in Dowling, *supra* note 4, at 613 n.307.

142. Charter, *supra* note 35, ¶ 26.

143. By comparison, U.S. law, especially under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (1990), actively prohibits discriminating in employment against the "disabled"—and "disabled" can include alcoholics, former drug addicts, and victims of long-term diseases, including AIDS.

(they would not change anything material about EC employment relationships), Brussels has taken great strides in the handicap area unrelated to employment.¹⁴⁴ In 1988 the Council adopted a community action program intended to help integrate the handicapped socially—the HELIOS program—Handicapped People in the European Community Living Independently in an Open Society.¹⁴⁵ In 1991 the Commission proposed expanding the HELIOS program, issuing a Proposal for a Council Directive Establishing a Third Community Action Program to Assist Disabled People, HELIOS II (1992–96).¹⁴⁶ HELIOS II would improve the computer data bases and other information sources and aids available to the handicapped. Additionally, the Council has adopted two recommendations regarding improving assistance to handicapped children.¹⁴⁷

III. The Future of EC Employment Regulation

From the perspective of the U.S.-based corporation, the future of EC employment, or social, regulation—that is, the blueprint set out in the Charter, the Social Action Program, the proposed Maastricht Social Protocol, and the Commission's 1990–91 package of draft instruments—looks expensive. European workers already receive from their employers some of the highest pay and benefit levels in the world. Once the Social Action Program's forty-seven called-for instruments are in place, European workers' pay and benefits, at least on the continent, will rise even higher.

Nevertheless, the social Europe program sends some positive signals to U.S.-based employers through what it omits. The Charter and the Social Action Program are virtually silent on the employment doctrine that worries U.S. employers most: antidiscrimination law.¹⁴⁸ With the conspicuous exception of sex discrimination, the EC's social Europe agenda omits antidiscrimination protections for racial minorities, religions, and—withstanding the Charter rights to protection for the aged and the handicapped—even the aged and the disabled. Nothing in the social Europe agenda raises the specter of liability analogous to U.S. law under

144. In 1986 the Council did adopt a *recommendation* concerning the employment of the handicapped. Council Recommendation on the Employment of Disabled People in the Community, 1986 O.J. (L 225) 43, 44.

145. Council Decision 88/231 Establishing a Second Community Action Programme for Disabled People, 1988 O.J. (L 104) 38.

146. COM(91)350 final.

147. Conclusions of the Council and the Ministers of Education Meeting Within the Council Concerning a Programme of European Collaboration on the Integration of Handicapped Children into Ordinary Schools, 1987 O.J. (C 211) 1; Resolution of the Council and the Ministers of Council Meeting Within the Council Concerning Integration of Children and Young People with Disabilities into Ordinary Systems of Education, 1990 O.J. (C 162) 2.

148. See generally Social Action Program, *supra* note 36, at 5 ("the Commission is not making a proposal in respect of discrimination on the grounds of race, colour, or religion"). Generally, the social Europe agenda aims at providing positive benefits to workers, while U.S. employment law imposes negative prohibitions on employers.

the Age Discrimination in Employment Act,¹⁴⁹ the Rehabilitation Act of 1973,¹⁵⁰ the Americans with Disabilities Act,¹⁵¹ and analogous state laws, or under the Employment Retirement Income Security Act.¹⁵²

As long as the fate of the Maastricht treaty remains uncertain, whether Brussels will realize its overall goal of using social legislation to create a fairer, more cohesive EC—or whether, conversely, comprehensive social regulation will unreasonably cripple European business—remains an open question. However, the snowballing effect of a Brussels-regulated EC social agenda since 1989¹⁵³ makes all but inescapable the conclusion that someday the post-1992 EC single market will have a cohesive set of employment regulations applicable throughout the Community. However, whether Britain will be exempt from EC social legislation and will therefore become the “Hong Kong of Europe,”¹⁵⁴ or whether EC pro-worker legislation, even if limited to the continent, will prove unconnected to macroeconomic success, remains unknown. In the early 1990s Germany had the strongest economy in Europe, stronger even than that of the deregulated post-Thatcher Britain.¹⁵⁵ Yet to U.S. employers, Germany, the breeding ground of worker participation, is notorious as having the most restrictive employment laws in Europe. Perhaps, to the surprise of U.S. businesses, the EC might just be able simultaneously to make a success of both its broad employment-law goals and its free single market.

149. 29 U.S.C. §§ 621–634 (1988).

150. 29 U.S.C. §§ 701–796 (1988).

151. 42 U.S.C. §§ 12,101–12,213 (1990).

152. 29 U.S.C. §§ 1001–1461 (1988). Further, with the conspicuous exception of sex discrimination, nothing in the social Europe agenda approaches the severity of U.S. protections on the basis of race, nationality, and religion. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (1988).

153. Throughout this period, the EC's commitment to forming a social Europe remained strong all the way up to the chairmanship of the Council itself. *See, e.g.*, Mr. Jacques Santer, Prime Minister of the Grand-Duchy of Luxembourg, Chairman of the European Council, Address Before the A.B.A. Committee on International Labor Law (May 2, 1991) (unpublished, available from A.B.A. Committee on International Labor Relations Law, Labor Law Section) (“For the single market to be completed and lead one day to the results desired and hoped for, the flanking social policy to such a common market must achieve *genuine* progress!”) (emphasis in original).

154. *See supra* note 47.

155. The Council, at Maastricht in December 1991, appointed Germany's Bundesbank to shepherd the other Member States' central banks toward EC economic and monetary union by 1999.