Northwestern Journal of International Law & Business

Volume 11
Issue 3 *Winter*

Winter 1990

Worker Rights in the Post-1992 European Communities: What "Social Europe" Means to United States-Based Multinational Employers

Donald C. Jr. Dowling

Worker Rights in the Post-1992 European Communities: What "Social Europe" Means to United States-Based Multinational Employers.

*Donald C. Dowling, Jr.**

I. INTRODUCTION: LABOR AND SOCIAL ISSUES WILL PLAY A VITAL ROLE IN THE EC SINGLE MARKET 565
II. HOW LABOR AND SOCIAL RIGHTS PRINCIPLES FIT INTO THE SINGLE MARKET PROGRAM 571
A. The "European Model" of Employment Relations 572
B. EC Law and Institutions 574
C. The White Paper and the Single European Act 577
D. The EC's Progress toward a Single Labor and Social Policy 580
III. EC-LEVEL LABOR AND SOCIAL RIGHTS: THE STATE OF THE LAW 584
A. EC Statements on Labor and Social Rights before the Charter 585
B. The Charter, the Social Action Program, and Their Legal Status 590
C. The Twelve Worker Rights the Charter and Social Action Program Guarantee to EC Workers 594

* Associate, Graydon, Head & Ritchey, Cincinnati, Ohio. A.B., University of Chicago (1982); J.D., University of Florida (1985). The author summarized some of the conclusions in this article at a presentation in Strasbourg, France, at the midyear meeting of the ABA Committee on International Labor Law, April 29, 1990 (reported in Daily Lab. Rep. (BNA) No. 94, at A-4, 5-6 (May 15, 1990)). The author thanks the Graydon, Head & Ritchey International Law Group and Robert W. Gilbert, Esq. (ABA Committee on International Labor Law) for direction in EC social law. The author is especially grateful to Nancy Hill Dowling, Esq. (corporate counsel, Cincinnati). All opinions are the author's. This article was completed in November 1990.

1. Right to free movement 596
2. Right to fair pay 598
3. Right to improved working conditions 599
4. Right to social protection 601
5. Right to collective bargaining 602
6. Right to vocational training 603
7. Right to equal treatment between men and women .. 604
8. Right to worker consultation and participation in management 606
9. Right to health and safety protection in the workplace 610
10. Protection of children and adolescents 611
11. Protection of the aged 612
12. Protection of the handicapped 613
IV. HOW POST-1992 EC SOCIAL LAW MIGHT AFFECT UNITED STATES-BASED EMPLOYERS OF EUROPEANS 614
A. Charter Rights Raising the Cost of Doing Business 614
B. Charter Rights Affecting the Marginal Cost of EC Employment 615
C. Charter Rights Affecting Legal Liability and the Structure of EC Labor Law 616
D. Benefits the Charter Would Confer on EC Employers.. 617
V. CONCLUSION: THE COMING BATTLE BETWEEN BRUSSELS AND THE MEMBER STATES, AND THE OUTLOOK FOR EC LABOR AND SOCIAL REGULATION 619

I. INTRODUCTION: LABOR AND SOCIAL ISSUES WILL PLAY A VITAL ROLE IN THE EC SINGLE MARKET

The United States media have extensively covered the trade angle of the European Communities [EC][1] program to create a "single market" by the end of 1992.[2] The media coverage has spotlighted the benefits the

[1] The European Communities, or EC, is the collective term for the twelve European countries, or member states, which ratified three 1950's treaties creating a union of economic and energy resource policies. For a discussion of the EC's membership, see *infra* notes 44, 47 and accompanying text; for citations to and discussions of the three EC treaties, see *infra* notes 44-45 and accompanying text.

[2] *See, e.g.*, Brimelow, *The Dark Side of 1992*, Forbes, Jan. 22, 1990, at 85; Stout, *In a Major Turnaround, U.S. Is Posting Surplus in Trade with Europe*, Wall St. J., July 10, 1990, at A1, col. 6; Revzin, *Economists See Europe Carrying the U.S.*, Wall St. J., May 17, 1990, at A2, col. 2; Forman, *Europe's Banks Grapple with Sea Change*, Wall St. J., May 17, 1990, at A11, col. 1; *World Business: Euro-Man* (Special Report), Wall St. J., Sept. 22, 1989, § R; Greenhouse, *Europeans Unite to Compete with Japan and U.S.*, N.Y. Times, Aug. 21, 1989, at 1, col. 4. On how EC business views U.S. companies' movement to Europe, see Batchelor, *Why Americans Are Setting up over There*, The

EC market will offer multinational corporations, such as the market's "economies of scale" and its 320 million consumer block.[3] By now this 1992 news has sunk in, and many United States corporations are assessing how they might exploit the soon-to-be unified EC market.[4]

Financial Times (London), Oct. 30, 1990, at 18, col. 1 ("[e]very small and medium sized U.S. company which does come to Europe represents a challenge to the local business community"). *See generally* CLIFFORD CHANCE, THE CCH GUIDE TO 1993: CHANGES IN EEC LAW 1 (1989) (objective of single market program is "to create one market comprising 323 million people in which Community industry can compete on equal terms"); *The European Community's Program for a Single Market in 1992*, 89 DEP'T ST. BULL. 23, 23 (Jan. 1989) [hereinafter European Community Dep't of State Bull. Article] (U.S. position on U.S. effect of EC Single Market Program); Meessen, *Europe en Route to 1992: The Completion of the Internal Market and its Impact on Non-Europeans*, 23 INT'L LAW 359, 370 (1989) (single market will create "opportunities of scale" and "flexible business strategies" paralleling "those of Europe's American and Japanese competitors"). For discussions of the changes which the single market program could bring to the U.S. and EC legal communities, see LAGUETTE & LATHAM, LAWYERS IN THE EUROPEAN COMMUNITY 237-67 (1987); *Europe 1992* (Special Report), Nat'l L.J., Oct. 1, 1990, at 15; Thieffry, *New Legal Landscape in Europe*, Nat'l L.J., Oct. 16, 1989, at 15, col. 4; Sontag, *Planning for 1992*, Nat'l L.J., May 15, 1989, at 1, col. 1.

[3] *See, e.g.*, Revzin, *Europeans Foresee Era of Prosperity, Unity and Growing Power*; Wall St. J., July 5, 1990, at A1, col. 6; Clark, *Europe '92? It's Mostly a Break for the Americans*, Wall St. J., May 31, 1990, at A18, col. 3. *See generally* Completing the Internal Market: An Area without Internal Frontiers, the Progress Report Required by Article 8B of the Treaty, COM (88) 650 final [hereinafter EC Progress Report 1988], at ¶ 2 (November 17, 1988) (acknowledging the oft-cited prediction in P. CECCHINI, THE EUROPEAN CHALLENGE 1992: THE BENEFITS OF A SINGLE MARKET (1988) that single market will create 5% growth in EC's gross community product, 6% average reduction in prices, and 2,000,000 new jobs).

The EC's single market seems to have inspired the sincerest form of flattery: the three continental North American countries are planning an EC-inspired single market. *See* Baer, *Mexico's Race against the Clock*, Wall St. J., Sept. 29, 1989, at A13, col. 3 (Canada, Mexico, and U.S. are planning a "partnership . . . propelled by the emerging global trading blocs in Europe and the Pacific Basin"). Similarly, Argentina, Brazil, Chile, Uruguay and Paraguay are planning to create their own single economic market by "the start of 1994." *Free Trade Moves South*, THE ECONOMIST, July 14, 1990, at ("a genuine Brazil-Argentina common market [to be formed] by the start of 1994 [eventually may include] Chile, Uruguay, and Paraguay. . ."); *cf.* Kamm, *Latin America Edges toward Free Trade*, Wall St. J., Nov. 30, 1990, at A11, col. 1 ("[b]y the end of 1994, Brazil, Argentina, Paraguay and Uruguay are planning a tarrif-free common market"). The North and South American markets may even combine, creating a "free trade zone spreading from Alaska to Tierra del Fuego." *Id.* This potential market is often "compare[d] . . . to the European Community's" single market program. *Id.*

[4] By the early 1990's, U.S. businesses of all sizes understood that the EC's single market program offers a unique potential for profit. *See, e.g.*, Magee, *1992: Moves Americans Must Make*, HARV. BUS. REV., May-June 1989, at 78, 79-80; Stein, *European Foreign Affairs System and the Single European Act of 1986*, 23 INT'L LAW 977, 979 (1989); Note, *Toward a Single European Capital Market: The European Economic Community's Directive to Liberalize Capital Flows*, 20 LAW & POL'Y INT'L BUS. 139 (1988).

While major U.S.-based corporations have had a European presence for years, to buttress market positions in post-1992 Europe, smaller U.S. businesses are increasingly moving beyond exports and forming European distributorships, joint ventures, and branch operations. *See generally Holding Pep Rallies for 1992*, NEWSWEEK, Nov. 6, 1989, at 60; *Confusion Marks Smaller Firms' Views on a Unified European Market*, Wall St. J., Sept. 24, 1990, at B2, col. 3; Boyer, *Firms Ready for Europe*, Cincinnati Enquirer, July 22, 1990, at I1, col. 2; Kingon, *The Next Step toward One Europe*, Wall St.

Originally, United States corporations focused on whether the breakdown in inter-European trade barriers would affect outsiders' access to the EC; many corporations feared a "Fortress Europe" might exclude easy access to the new single market.[5] Yet while United States corporations' concern over the "Fortress Europe" issue may remain important,[6] it does not go far enough. The initial question many United

---

J., Dec. 19, 1989, at A15, col. 4. The EC's planned breakdown in nationalistic protections and customs formalities alone promises real savings for business operating in the EC. In one oft-cited example, the EC truck driver hauling a load across a few member states could, after 1992, see his paperwork reduced from 35 documents to one. *E.g.*, Stone, *The Globalization of Europe: An Interview with Wisse Dekker*, HARV. BUS. REV., May-June 1989, at 90, 91. On United States trade with the EC generally, see Rawlinson, *An Overview of EEC Trade with Non-Community Countries and the Law Governing these External Agreements*, 13 FORDHAM INT'L L.J. 205 (1990).

[5] As late as 1988, very little publicity in either the United States *or* Europe had covered the EC single market program. *See* Fine, *Countdown to 1992: Introduction to the Single Market*, 5 CORP. COUNS. Q. 52, 52 n.1, 58 (1989) (in early 1988, few *European* managers even "knew about" the single market program). But by 1989, United States media coverage on the single EC market had led United States companies to believe that they would have either to establish viable direct operations in an EC member state before the end of 1992 or else forever be excluded from operating in the EC. *E.g.*, Redman, *Charging Ahead: Watch out, Washington and Moscow; Flush with Money and Increasingly Unified, Western Europe Is Marching to Its Own Drummer*, TIME, Sept. 18, 1989, at 40; *U.S. Managers Still Focus on Home Front*, Wall St. J., July 12, 1989, at B1, col. 2; Revzin, *Europe Will Become Economic Superpower as Barriers Crumble*, Wall St. J., Jan. 29, 1989, at A1, col. 6.

The next stage of business opinion in the United States held out the EC as scheming to keep foreign businesses out, thereby creating a "Fortress Europe" which United States industry would be able to penetrate only by effective lobbying in Brussels. *See* 134 CONG. REC. S16825 (daily ed. Oct. 19, 1988) (statement of Sen. Rockefeller) (U.S. government and business must mobilize a coordinated lobbying effort in Brussels to fight "Fortress Europe"); Browning, *Hills Hopes Talks Will Prevent a Protectionist "Fortress Europe,"* Wall St. J., Sept. 12, 1989, at A19, col. 4 (U.S. Trade Representative Carla Hills "is worried . . . that the European Community is heading toward a protectionist 'Fortress Europe' "); Lublin, *U.S. Food Firms Find Europe's Huge Market Hardly a Piece of Cake*, Wall St. J., May 15, 1990 at A1, col. 6 (EC protectionism in food industry); Meessen, *supra* note 2, at 359-60 (EC's single market program as originally articulated might indeed lead to "Fortress Europe"); Mossberg, *As EC Markets Unite, U.S. Exporters Face New Trade Barriers*, Wall St. J., Jan. 19, 1989, at A1, col. 6 (United States resistance to EC import policies rises); Vernon, *Can the U.S. Negotiate for Trade Equality?* HARV. BUS. REV., May-June 1989, at 96, 100 (given trends in international trade, the EC has power to create a "Fortress Europe" which would "leave the United States out of the loop"). European publicity, however, consistently argued that the EC market will never become an exclusionary "fortress." *See* Bangemann, *Fortress Europe: The Myth*, 9 NW. J. INT'L L. & BUS. 480 (1989) (Vice President of EC Commission argues no "Fortress Europe" will ever exist); Meessen, *supra* note 2, at 359-60 (EC prefers image and label of "Europe World Partner"). By 1990, even prominent United States politicians and businessmen began to concede that "Fortress Europe" may not be too realistic a possibility. *See, e.g.*, *Interview: Paul Volcker*, EUROPE, July-Aug. 1990, at 32, 32 (former Chairman of Board of Governors of U.S. Federal Reserve Board had, but no longer, "shared the fears of many people that there would be very strong temptations [within the EC] to turn inward as part of [the] process of perfecting the common market").

[6] Brussels openly recognizes that foreigners' concerns regarding "Fortress Europe," when juxtaposed against internal EC concerns, create difficulties:

> [O]n the one hand, fears have been expressed in some quarters within the Community that the main benefits of the completed Internal Market. . . will flow to powerful and well-prepared third country enterprises better equipped now than their Community competitors. . . . At the other

States businesses looking toward the EC should ask is whether operating in even an accessible Europe will be worth it.

As part of its single market program, the EC is standardizing "social policy" throughout its twelve member states — and in the EC, "social policy" essentially means worker protections.[7] The newly-standardized EC labor and social doctrines will create a "single market for labor" encompassing every entity employing European workers after 1992.[8] Yet according to the *Harvard Business Review*, "the 'social dimensions' of doing business in Europe" are "more ambiguous than ever," and are only becoming increasingly "divisive."[9] Because labor costs have a critical effect on profitability,[10] United States-based corporations directly operat-

---

extreme, certain of the Community's trading partners, without having any concrete evidence to support their fears, have voiced uneasiness that the completed Internal Market is bound to be accompanied by measures designed to exclude or at least disadvantage third country interests.

EC Progress Report 1988, *supra* note 2, at ¶ 20.

7 *E.g., A Unified Europe Poses Labor Problems and Prospects for U.S. Firms*, Wall St. J., Oct. 17, 1989, at A1, col. 5 [hereinafter *Unified Europe*] (equating EC single market plan's "social dimension" with "worker concerns"); Bartley, *The Battle of 1992*, Wall St. J., March 16, 1989, at A-14, col. 3 ("the European Community's 'Social Dimension' [includes] such items as the right of every worker to be covered by a collective bargaining agreement and the creation of European incorporation statutes providing for worker participation on company boards").

8 Like the United States constitutional "supremacy" doctrine, law at the EC level takes precedence (or "primacy") over any potentially-conflicting doctrine of the European member states. For a discussion of this key principle underlying all EC law, see Churchill and Foster, *European Community Law and Prior Treaty Obligations of Member States: The Spanish Fishermen's Cases*, 36 INT'L & COMP. L.Q. 504, 504-07, 509-10, 520-24 (1987); *see also* European Community Dep't of State Bull. Article, *supra* note 4, at 24 (single market "will involve a. . . significant transfer of authority from member state governments to the EC"); Laug, *European Community Constitutional Law: The Division of Powers between the Community and the Member States*, 39 N. IRELAND LEGAL Q. 209, 210-22 (1988) (analyzing division of powers between EC and member states); Thieffry, Van Doore, & Lowe, *The Single European Market: A Practitioner's Guide to 1992*, 12 B.C. INT'L & COMP. L. REV. 357, 359 (1989), *reprinted in* CORP. COUNS. Q., Oct. 1990, at 54, 56 ("[t]he first principle [of EC law] is the primacy of Community law over national law within, of course, its field of applicability").

The proposed EC labor and social doctrines do not distinguish among employers' bases of operations. In fact, Brussels' few official discussions of employers based outside the EC merely note that these employers will be subject to the same employment rules as domestic EC employers. *See, e.g., infra* text accompanying notes 125 and 150.

9 Friberg, 1992: *Moves Europeans are Making*, HARV. BUS. REV., May-June 1989, at 85, 85.

10 As this author has said:

> Often businesses open foreign operations in order to save productions costs, taking advantage of Third World labor rates. By contrast, U.S. businesses' motive for opening European facilities is to gain access to a wealthy end market. The conflict between these two opposite reasons for going international raises a key issue which U.S. businesses must consider — the labor, or social, costs of doing business in Europe.

Dowling, *Labor Issues Muddy Steps Toward 1992*, Cincinnati Enquirer, Sept. 3, 1990, at D2, col. 3. On the cost advantages of "third world" labor as compared to EC labor, see *Third World Offers Cheap Expert Staff*, The Times (London), Nov. 1, 1990, at 19, col. 6. Because labor costs have a direct effect on a business's profitability, corporations doing business in Europe recognize that they must account for their labor costs just as they plan for other costs, such as raw materials and taxes.

ing in the EC[11] must consider the possibility that the EC's nascent employment policy could grow into the greatest *drawback* to operating in the European single market after 1992.

Because employment-related social policy has traditionally been much more worker-protective in Europe than in the United States,[12] European employment doctrines have always been a concern for United States-based multinational corporations. In the United States, employment policy in the non-union sector has long been favorable to employers;[13] by contrast, the "European model" of employment relations guarantees substantial worker benefits and job tenure protections even for non-union workers.[14] Only in recent years have United States employers encountered a domestic trend toward similar worker protections[15] — and this trend is movement in the direction of the long-

---

E.g., A Brushoff in Brussels, Wall St. J., Sept. 5, 1990, at A10, col. 1 ("British entrepreneurs" claim proposed EC labor legislation "would mean sharply higher operating costs and drive many out of business"). *But cf.* Clark, *U.S. Unions Did Too Well for Themselves*, Wall St. J., June 13, 1990, at A14, col. 3 (costs of union representation are higher in United States than in Europe, and Japan); *Workers of the World Disunite*, THE ECONOMIST, Aug. 18, 1990, at 57 (comparing high cost of unionized United States labor with that of Europe).

11 By "directly operating in the EC," this article means "employing Europeans in Europe." For an analysis of the various business forms under which a United States business might operate in the EC, see Magee, *supra* note 4, at 79. Under Magee's hypothetical, United States-based company *A* has manufacturing and distribution operations in several EC member states; *B* has operations in one member state; *C* exports product to the EC, and *D* has no European business. Companies *A* and *B* would be "directly operating in the EC;" while *C* and *D* would not.

Many smaller United States businesses with modest EC operations effectively defer European employment responsibilities to others, via business organizations such as distributorships, licenses, and joint ventures. Of course, EC employment doctrines effect even these companies *indirectly*, through costs on European partner-employers. *Cf.* Buckley & Artisien, *Policy Issues of Intra-EC Direct Investment: British, French, and German Multinationals in Greece, Portugal and Spain, with Special Reference to Employment Effects*, in MULTINATIONALS IN THE EUROPEAN COMMUNITY 105, 123-28 (1988) (J. Dunning & P. Robson, eds.).

12 *See* Laroque, *Towards a New Employment Policy*, 128 INT'L LAB. REV. 1 (1989) (Europeans see employment as providing social protection). *See generally* Weiss, *Individual Employment Rights: Focusing on Job Security in the Federal Republic of Germany*, 67 NEB. L. REV. 82, 82-84 (1988) (German government requires employers to provide workers with substantially more affirmative benefits and protections than United States government).

13 *See generally infra* § II(A).

14 Generally, in continental Europe workers enjoy code-based job protections, and protections through detailed individual employment contracts which grant employment of "indefinite" duration. *See, e.g.* Spanish Foreign Trade Institute, A Guide to Business in Spain, Leaflet No. 8, Labor Legislation 6-16 (1988) (analysis of law of "Individual Labor Relations" in Spain, focusing on individual labor contracts; discussion at page 7 cites Spanish code requirement that individual "labor contracts are considered to be entered into for indefinite periods of time"). For further background on the "European model" of national employment laws in EC member states, see, e.g., *supra* note 12, and *infra* note 38. *See generally* Drovin, *Germany's Job Straitjacket*, Wall St. J., June 12, 1990 at A16, col. 3 ("[m]uch rests on Germany's ability to introduce flexibility in work rules, dismissals and wages").

15 *See generally infra* § IV.

established "European model."

While the "European model" of employment law, especially on the Continent, is a generally cohesive body of worker-protective principles, the post-1992 "single labor market" will create a more comprehensive trans-European labor law than has ever existed before.[16] What the new rules of the employment game will be, though, remains a question on which leaders within the EC still differ widely. Predictably, the European business sector hopes the EC's political restructuring will allow member states to rid themselves of the entrenched worker protections which now keep the relative costs of European production high. According to a German industrialist considering impending changes in the post-1992 single labor market:

> If you compare Europe with the other two big blocks of countries—the United States and Canada on the one hand, Japan, Korea, Taiwan, Hong Kong, Singapore, and even China on the other—it is very clear that Europe has the most costly social structure of the three. As a percentage of wages and salary, our social charges are about two times those of our competitors. . . . *So we have to find ways and means to make European industry competitive, both as individual managers and through political changes.*[17]

Yet social-minded EC politicians see the emerging single labor market not as an opportunity to increase European competitiveness, but as a chance to expand worker protections at the expense of free market policy. According to an early and uncharacteristically candid EC committee report[18] expressing aspirations for the social side of the single market program:

> The *unfair distribution of wealth* between those [in the EC] who are involuntarily jobless, and those who defend their jobs at all costs, is paving the way for *a system which may soon only be governable by authoritarian means*. The major changes under way have led to a situation where labour has become a key factor for *equilibrium in our society and in its political components*.
>
> The identification and allocation of new jobs and a *new distribution of labour* are thus more than just components of economic and social policy; they are a prerequisite for safeguarding today's democratic society.[19]

This committee's outlook for strong social protections directly contra-

---

16 *See infra* § II(D). *See generally Symposium: The European Economic Community and 1992*, 11 COMP. LAB. L.J. 403 (1990) (articles focusing on effects of EC social policy in Germany, Britain, Italy, Holland, Spain, Denmark, and Ireland).

17 Stone, *supra* note 4, at 90, 92 (statement of German industrialist Wisse Dekker) (emphasis added).

18 Information Report of the Section for Social, Family, Educational and Cultural Affairs on the Social Aspects of the Internal Market, CES (87) 225 (1987) [hereinafter Section for Social, Family, Educational, and Cultural Affairs 1987 Report], at § 2.3.2 (September 17, 1987) (emphasis added).

19 *Id.*

dicts the German industrialist's hope for a "competitive" post-1992 EC labor environment. Both cannot prove true. The purpose of this article is to decide which of these two conflicting visions is the more accurate prediction of future EC social policy. This article will attempt to chart the direction in which the EC's post-1992 workers' rights policy is heading, and to explain how this policy direction will affect United States-based employers operating in the EC.[20]

To establish context, this article begins by examining how EC workers' rights issues fit into the 1992 single market scheme.[21] Next, to chart the labor and social positions Brussels has taken to date, the article analyzes the framework of future EC labor and social law by focusing on the Council's "Community Charter of Fundamental Social Rights" and its detailed implementing document, the Commission's "Social Action Program."[22] Finally, to explicate its thesis that United States multinationals must actively plan to minimize the new social costs which Brussels is establishing for the post-1992 EC, this article speculates on where Europe's still-evolving labor and social rights agenda is heading: Unfortunately for United States employers hoping the EC single market will be a streamlined producer's paradise, the structure of Europe's emerging "single labor market" mixes competition principles with strong worker rights protections.[23]

II. How Labor and Social Rights Principles Fit Into the Single Market Program

When the EC instituted its single market program agenda in 1985,[24] Brussels relegated labor and social rights to an obscured corner, while it spotlighted a long, specific list of trade problems to be resolved before the end of 1992.[25] Yet this list conspicuously omitted[26] issues critical to

20 This article is written from the perspective of a United States-based corporation already familiar with practice under United States federal and state employment law. While EC labor and social doctrines are, of course, conceptually unrelated to domestic United States law, in order to address the United States-based employer, this article focuses on *differences* between proposed EC legal doctrines and their closest U.S. counterparts.

21 *See infra* § II.

22 *See infra* § III.

23 *See infra* § IV. European unions' chief goal for the single market is to create stronger EC worker rights protections. *See infra* notes 182-183 and accompanying text. However, United States unions' perspective on the post-1992 EC is entirely different: United States unions fear the single EC market raises a real potential to take away "American jobs." *See, e.g., Unification Blues*, Pennsylvania Conf. Rep. of Teamsters, Fall 1989, at 1.

24 *See infra* § II(C).

25 *See id.* This "list" is the annex to the EC White Paper, discussed *infra*.

26 European Community Dep't of State Bull. Article, *supra* note 2, at 26 ("[s]ignificant by its absence from the EC's 1985 White Paper was any mention of social issues, such as workers' rights").

forming a "single labor market."[27] In spite of this omission, Brussels, from the start of its single market program, openly but quietly signaled that a "single labor market" one day would blossom into a critical part of the 1992 agenda.[28] Accordingly, a series of formal but obscure EC statements going back almost to the beginnings of the single market program discloses the structure of the EC's "social Europe" plan, and the principles which will affect the employment of Europeans after 1992.[29] An understanding of this structure, though, requires a background in the legal context underlying the EC's concept of a "single labor market."

A. The "European Model" of Employment Relations

The civil or code-based legal systems which govern continental EC countries present employment law traditions markedly different from those in the United States[30] European employment law, even in Britain,[31] is largely a product of legislated rights guaranteeing workers not only protections against certain types of discrimination, but also protections affirmatively assuring job security.[32] Unlike the common law employment-at-will concept of "indefinite" employment — which is still the starting point for non-union United States employment relationships,[33]

---

27 Social Dimension of the Internal Market — Commission Working Paper, SEC (88) 1148 final [hereinafter Social Dimension Working Paper], at § 5 (September 14, 1988) ("[w]ith respect to the creation of the internal market, social policy must, above all, contribute to the setting up of a *'single labour market'* by doing away with the barriers which still restrict the effective exercise of two basic freedoms: the freedom of movement of persons and freedom of establishment") (emphasis added).

28 *See* EC Progress Report 1988, *supra* note 3, at ¶¶ 3, 9, 13, 15 (progress toward "social Europe" is a critical EC goal necessary for completing the internal market, yet as of 1988 progress toward "social Europe" had been slow).

29 *See infra* § III(A).

30 On the contrast between European civil law and the common law, see, e.g., J.H. MERRYMAN & D.S. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS, 73, 77-78, 824-43 (1978); Elliott, *Tackling Legal Services in 1992*, 132 SOLIC. J. 1576, 1578 (1988); Mackay, *Remarks to Notre Dame Law School — London Law Centre*, 64 NOTRE DAME L. REV. 461 (1989); Morris, *The Road to Brussels — Two Routes Compared*, STATUTE L. REV., Spring 1988, at 33; Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 369, 372-85 (1989); *see also infra* note 342 and accompanying text. This author has elsewhere discussed certain of the common law's limits, in the context of property rights. Dowling, *General Propositions and Concrete Cases: The Search for a Standard in the Conflict between Individual Property Rights and the Social Interest*, 1 J. LAND USE & ENVT'L L. 353 (1985).

31 As in the United States, in Britain prohibitions against employment discrimination are chiefly statutory. *See* J. PEEL, THE REAL POWER GAME: A GUIDE TO EUROPEAN INDUSTRIAL RELATIONS 168-73 (1979). *See generally infra* note 342.

32 *See supra* note 14.

33 The common law employment relationship was originally a binding and enforceable contract which was terminable at the will of either party, and employment-at-will is still the starting point of U.S. employment relationships. Elsewhere, this author has analyzed some of the early case law explicating the employment-at-will concept. Dowling, *A Contract Theory for a Complex Tort: Limiting Interference with Contract beyond the Unlawful Means Test*, 40 U. MIAMI L. REV. 487, 495-96

European employment of undefined duration effectively includes an implicit assurance of "unlimited" job tenure.[34]

This assurance goes well beyond the worker-protective legislation now becoming common in the United States[35] In Europe, even non-union job holders are typically parties to written employment contracts, which raise many important aspects of employment relationships — including the terms of discharge — to the level of law.[36] As distinct from United States practice, workers employed under the "European model" of employment relations often expect to be able to keep their jobs as long as they want, or else be bought out at a high price.[37]

Yet while the "European model" applies broadly throughout the EC, the specific labor law systems and rules for discharge in each member state remain distinct. Until recently, Brussels had stayed out of most areas of employment relations, including the critical area of how employers could terminate indefinite-length employment contracts.[38] And differences among EC countries' labor laws continue to cause problems for employers with trans-European operations. As late as 1989, the C.E.O.

(1986) *reprinted in* 35 DEF. L.J. 503, 512-14 (1986). Increasingly, U.S. employers face litigation in which former workers allege special promises of long-term employment altered the employment-at-will relationship. *See, e.g.*, Geyelin, *Fired Managers Winning More Lawsuits*, Wall St. J., Sept. 7, 1989, at B1, col. 4.

34 Internal and External Adaptation of Firms in Relation to Employment, COM (87) 229 final [hereinafter Internal and External Adaptation], at § VII (May 13, 1987) (discussing "the traditional [EC] *unlimited* employment contract") (emphasis added); *see* Ramm, *Model of a European Individual Employment Contract*, in COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 378 (Blanpain, ed. 1982) [hereinafter COMPARATIVE LABOUR LAW] at 381 (model of typical European employment contract explicitly stating that "duration" of employment is indefinite); Drovin, *supra* note 14 (in Germany, "[h]igh levels of job protection . . . restrict dismissals").

35 *Compare supra* notes 14 and 34 *with supra* note 33.

36 *See supra* note 14.

37 *See supra* note 34. On unionized labor relations in the EC generally, see BALFOUR, INDUSTRIAL RELATIONS IN THE COMMON MARKET 90-102 (1972); FITZGERALD, THE COMMON MARKET'S LABOR PROGRAMS 199-224 (1966); PEEL, *supra* note 31, at 55-75; 95-102; 168-73; Commission of the European Communities, Social Policy Series No. 40, Problems and Prospects in the EEC Member States 82-103; 157-81 (1980); Note, *The Vredeling Directive: The EEC's Failed Attempt to Regulate Multinational Enterprises and Organize Collective Bargaining*, 20 N.Y.U. J. INT'L L. & POL. 967, 985-87 (1988).

38 Even the Charter and the Social Action Program, discussed *infra* at § III(C), do not directly address the key issue of employee firings under indefinite-term contracts. In an April 1990 discussion in Strasbourg, France, a French management labor lawyer predicted to this author that "it would be 20 years" before the EC imposed any comprehensive community-wide system regulating discharges under indefinite-length employment contracts. Given the speed with which Brussels is fashioning a "social Europe" agenda, EC regulations controlling firings of individual employees may well come more quickly. Certainly, though, no comprehensive set of regulations will exist on this topic before the end of 1992. Regarding EC employees' redundancy (lay-off) rights in the business closing or transfer context, EC regulations already do exist. *Cf.* Note, *Employment Protection Rights on the Transfer of a Business*, 52 MOD. L. REV. 691 (1989).

of a United States multinational corporation with broad European sales operations predicted that the still-existing differences among the member states' labor laws would inhibit any true EC single market.[39] As examples, the executive pointed out:

> In Britain, sales representatives can be terminated with 90 days' notice. In Italy, the law doesn't let us dispose of reps so easily. They, in effect, own their territory. To fire a rep requires paying a penalty based on the rep's anticipated earnings over a long period of time. In France, anyone who gets fired must receive severance pay, an amount borne solely by the company. In Britain, when a worker is made "redundant" the government picks up part of the check.[40]

The lament of this C.E.O. is well founded; according to one cynic, "if all Europe's labor laws were laid end to end, there would be no end."[41] Inconsistencies among the member states' social laws do indeed hinder a true single market. But it is precisely for this reason that the EC has intended, all along, to elevate "social Europe" to a key role in the single market program.[42]

B. EC Law and Institutions

Employment laws differ so widely among the member states because, before the advent of the single market program, the EC had regulated so little employment policy. Probably because the EC began as a trade group,[43] Brussels traditionally focused more on the exchange of finished products and services than on their creation. The roots of today's EC go back to April 1951, when West Germany, Belgium, France, Holland, Italy, Luxembourg, and the Netherlands entered a limited international trade affiliation, the "Treaty Establishing the European Coal and Steel Community."[44] Six years later these countries expanded their relationship, ratifying the "Treaty Establishing the European Economic

---

39 Kiam, *Fortress Europe 1992? Don't Hold Your Breath*, Wall St. J., Sept. 11, 1989, at A18, col. 3 (written by CEO of Remington Products Victor K. Kiam).

40 *Id.* Another U.S. business leader later voiced a similar sentiment:

> The feeling [among U.S. businesses operating in Europe] is you need [to employ] a local resident who understands the mores, the labor laws — the things that are different from country to country. I would think the way to do it would be to have a local partner in each country. There are a number of companies that have approached licensers and suggested they [can represent] the entire Common Market. Personally, I think that's a mistake.

Selz, *Europe Offers Expanding Opportunities to Franchisers*, Wall St. J., July 20, 1990, at B2, col. 3 (statement of Chairman of International Franchise Association Chairman Arthur Karp).

41 *Peel, supra* note 31 at 168 (citing a "cynic" as the originator of this quip).

42 *See infra* § III(A).

43 *See infra* notes 44-47 and accompanying text.

44 Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140.

Community."[45] As amended, this treaty — commonly referred to simply as "the Treaty" — is the operative "constitutional" document[46] underlying all EC law. The Treaty regulates the common market relationships among the original six signatory countries, plus those six which ratified the document later: Denmark, Greece, Ireland, Portugal, Spain, and Britain.[47]

Just as the United States Constitution establishes the United States federal government and delineates the roles of its branches, the EC

---

[45] Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter "Treaty"]. Simultaneously, these countries also ratified the Treaty Establishing the European Atomic Energy Community, March 25, 1957, 298 U.N.T.S. 3.

[46] The Treaty quite self-consciously sets up its own independent European government — the Community — with a distinct "legal personality" (Treaty, *supra* note 45, at art. 210) living on "for an unlimited period" (*id.* at art. 240). Yet to preserve the member states' individual identities, the EC avoids slogans such as "federalism," "country," or "United States of Europe," and Brussels refuses to refer to the Treaty as a "constitution." *See* Laug, *supra* note 8, at 209 (while the EC is a "federal concept," the "Community is not a State"); Meessen, *supra* note 2, at 370-71 (EC is less a nation than a conglomerate of twelve philosophically different governments). Sources outside Brussels are quicker to compare the EC to a federation. *E.g.*, European Community Dep't of State Bull. Article, *supra* note 2, at 23 ("[t]he proposed EC single market would have many features in common with the fifty American States, which benefit from the efficiencies generated by the free flow of economic and human resources"). *See generally* Laug, *supra* note 8 (analysis of EC Treaty as "constitutional law").

[47] Denmark, Ireland, and Britain joined the EC in 1973; Greece joined in 1981; Portugal and Spain joined in 1986. West Germany's 1990 incorporation of East Germany, to form "Germany," is not perceived as adding a member state. *E.g.*, *The Makings of a New Constellation*, THE ECONOMIST, Aug. 4, 1990, at 41 (discussing the "special case" of EC growth when "East Germany . . . disappears into a united Germany"). *See generally East Whaddyamacallit*, THE ECONOMIST, Oct. 20, 1990, at 60 (Europeans avoid designating the former "East Germany" by any discrete name).

For discussions of the background and lore behind how the EC came to be, *see* CLIFFORD CHANCE, *supra* note 2, at 1-2; NATIONAL ECONOMIC AND SOCIAL COUNCIL, IRELAND IN THE EUROPEAN COMMUNITY: PERFORMANCE, PROSPECTS, AND STRATEGY 3-11 (1989); European Community Dep't of State Bull. Article, *supra* note 4, at 27-28; Fine, *supra* note 5, at 52-53; Kirkpatrick, *The New Europe*, 21 CASE W. RES. J. INT'L L. 109, 109-11 (1989); Murphy, *The European Community, the United States and Ireland: An Intermesh of Statutory Provisions*, 17 VAND. J. TRANSNAT'L L. 665 (1984); Stein, *supra* note 4, at 978-80; Shildhaus, *1992 and the Single European Act*, 23 INT'L LAW. 549, 549-50 (1989); *Europe 92: The Reality*, EUROACCESS, Sept.-Oct. 1990, at 24; Revzin, *Europe's "Mr. 1992" Is a Tireless Crusader*, Wall St. J., June 14, 1989, at A10, col. 1 (on EC Commission President Jacques Delors); Revzin, *Europeans' Nationalist Doubts Creep in as They Get down to 1992 Nitty-Gritty*, Wall St. J., Mar. 3, 1989, at A11, col. 2.

The macropolitical structure of Europe has greatly evolved since the end of World War II, when most European governments were decimated. In Germany just after the war "[t]here was not even an identifiable legal system." Weyrauch, *Gestapo Informants: Facts and Theory of Undercover Operations*, 24 COLUM. J. TRANSNAT'L L. 553, 558 (1986). In the 1990's, the reunited Germany had the strongest economic and political position in the EC. *See generally* Drovin, *supra* note 14.

Because of the EC's recent successes, other European countries are seeking admission, and the Community may grow. *See* Kennedy & Specht, *Austrian Membership in the European Communities*, 31 HARV. INT'L L.J. 407 (1990); THE MAKINGS OF A NEW CONSTELLATION, *supra*; Revzin, *Fast-Changing House of Europe Defies Single Blueprint*, Wall St. J., Feb. 22, 1990, at A10, col. 3.

Treaty creates and empowers the EC's decision-making bodies.[48] The Treaty establishes the EC "Council of Ministers," or "Council," granting it ultimate authority to implement EC law.[49] This EC law may take several forms, collectively known as "instruments": a "directive" requires each member state to integrate a point of EC policy into its national law;[50] a "regulation" binds member states directly, even without member state legislation;[51] a "decision" addresses fact-specific situations;[52] and a "recommendation" or an "opinion" states a precatory point of EC policy.[53] Under the Treaty's scheme, the Council implements these instruments only by acting upon legislative proposals from the EC "Commission";[54] these proposals usually are commented upon and sometimes approved by the EC "Parliament."[55] The Treaty also creates the EC "Court of Justice," empowering it to settle disputes arising under

---

48 Treaty, *supra* note 45, at Part Five, Title I (arts. 137-198).

49 Treaty, *supra* note 45, at arts. 145-54 (delineating powers of Council). The Council is made up of the heads of state of the twelve member countries, or — when the Council considers matters requiring special expertise — the heads of states' designees.

50 Treaty, *supra* note 45, at art. 189 ("[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods"). *See id.* art. 100.

51 *Id.* at art. 189 ("[a] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States").

52 *Id.* ("[a] decision shall be binding in its entirety upon those to whom it is addressed").

53 *Id.* ("[r]ecommendations and opinions shall have no binding force"). For more detailed explications of the differences among directives, regulations, decisions, recommendations, and opinions, see CLIFFORD CHANCE, *supra* note 2, at 17-22, 108; MCMAHON & MURPHY, EUROPEAN COMMUNITY LAW IN IRELAND 235-60 (1989); Thieffry, Van Doorn & Lowe, *supra* note 8, at 359-61; Brimelow, *supra* note 2, at 85; *Europe 92: The Reality*, *supra* note 47, at 26.

54 Treaty, *supra* note 45, at arts. 155-63 (delineating powers of Commission). The Treaty specifically empowers the Commission with responsibility over "employment," "social" concerns, "labour law and working conditions," and related areas. *Id.* at art. 118.

55 Treaty, *supra* note 45, at arts. 137-44 (delineating powers of Parliament). Therefore, "Parliament's actual influence on policymaking is quite restricted." Note, *A Community within the Community: Prospects for Foreign Policy Integration in the European Community*, 103 HARV. L. REV. 1066, 1079 (1990). The Parliament's Treaty-authorized role — which is essentially limited to mere "consultation" — is a controversial topic among EC leaders and parliamentarians. Parliament, not surprisingly, complains of being the world's only directly-elected would-be legislative body with no real lawmaking power. During 1990 and beyond, the Council scheduled summit meetings on EC "political union," with a goal of re-writing the Treaty itself. Parliament openly advocated such a union, largely with the goal of increasing its own power. *See What's Cooking in Brussels*, THE ECONOMIST, Feb. 24, 1990, at 45; Riding, *Defining the New Europe; EC Summit to Grapple with "Union,"* Int'l Herald Trib., Apr. 28-29, 1990, at 1, col. 1; Nelson, *Kohl Champions Early EC Political-Unity Talks*, Wall St. J., Mar. 30, 1990, at A8, col. 3. Parliament's power is critical to the state of EC social affairs, because Parliament is the EC's most openly-socialist body — and it is the one EC branch which has historically championed labor and social rights. *See infra* note 167. For a complete explication of Parliament's procedures and the number of seats of each member state, see Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage, O.J. EUR. COMM. (No. L 278) (October 8, 1976).

Treaty-created law.[56]

The steps in the EC law-making process, then, begin when the Commission issues a "proposal" for a directive or other legislation, sometimes upon the advice of an EC committee.[57] Next, Parliament comments upon the proposal, sometimes requesting changes, which the Commission may decide to adopt by amending the proposal, often resubmitting it to Parliament.[58] Finally, if the Council ratifies the proposal, it becomes EC legislation.[59] The Court of Justice interprets the legislation and any challenges to its legal status.[60]

C. The White Paper and the Single European Act

Besides establishing the EC institutions and law-making procedure, the 1957 version of the Treaty of Rome envisioned an integrated economic entity much like the single market only now being fashioned in Brussels.[61] Therefore, for a while after the 1957 Treaty ratification, Europeans expected to become part of a truly unified single market.[62] But for various reasons, the EC put off its single market goal;[63] the con-

---

56 Treaty, *supra* note 45, at arts. 164-88 (delineating powers of Court of Justice). For a complete explication of Court of Justice procedures, see Protocol on the Statute of the Court of Justice of the European Economic Community (April 17, 1957). On the jurisdictional conflict over the power to adjudicate individuals' EC law rights between the EC Court of Justice and the European Court of Human Rights in Strasbourg, see Guilford & Gibb, *Move to Open EC Laws to Private Court Challenge*, The Times (London), Nov. 1, 1990, at 9, col. 6. For a discussion of the respective roles of the Commission, Parliament, Council, and Court of Justice as branches of EC government, see CLIFFORD CHANCE, *supra* note 2, at 101-08; Kennedy & Specht, *supra* note 47, at 441-49.

57 Treaty, *supra* note 45, at Part Five, Title I (arts. 137-98). For an analysis of these and other provisions in the context of the steps in the EC lawmaking procedure, see CLIFFORD CHANCE, *supra* note 2, at 17-22.

58 Treaty, *supra* note 45, at Part Five, Title I (arts. 137-98).

59 *Id.*

60 *Id.* On the Court of Justice's role in the labor and social area, see Harris, *A Brief Review of the Court's Present Role*, 139 NEW L.J. 443 (1989). For more detailed explications of the respective roles of the Council, Commission, Parliament, and the Court of Justice, see *supra* note 53. On the steps in the EC directive-making process specific to social law, see Note, *The Final Directive: Equal Social Security Benefits for Men and Women in the European Economic Community*, 12 B.C. INT'L & COMP. L. REV. 437, 439 n.21 (1989).

61 Treaty, *supra* note 45, at arts. 210-40; *see* MacLachlan and Mackesy, *Acquisitions of Companies in Europe — Practicability, Disclosure, and Regulation: An Overview*, 23 INT'L LAW. 373, 399 (1989) ("[i]n effect, the 1992 program is a crash program designed to complete the structure devised [in 1957 Treaty]"); Meessen, *supra* note 2, at 360 (original 1957 Treaty had set out timetable, which ultimately was never met, for completion of a single market).

62 *See supra* note 61.

63 *See* CLIFFORD CHANCE, *supra* note 2, at 12-16 (analyzing why the "internal market first envisaged some 30 years ago" initially "failed," but ultimately re-emerged in the 1980's and 1990's). The first wave of "Europhoria" died out in the early 1960's, when the EC entered a period of "Eurosclerosis" lasting until the mid-1980's. During the "Eurosclerosis" period, "when visitors [to Brussels] asked 'How many people work in the European Commission?' the cynical answer was

cept of a united European market with a single identity remained suspended until the mid-1980's, when the Council revived it in a series of formal suggestions.[64]

Responding to these Council suggestions, on June 14, 1985 the Commission issued a "White Paper" to the Council, setting forth a concrete agenda for the EC's single market.[65] The White Paper set the famous deadline by which the new market would be completed: December 31, 1992.[66] In its call for a real union of the EC's 320 million citizens, the White Paper set out a plan for eliminating three categories of "barriers" which divide the twelve member states: physical barriers, technical barriers, and fiscal barriers.[67] Yet while the White Paper fleetingly addressed a need to achieve "social" as well as economic union,[68] the document conspicuously omitted a category for "social" barriers.[69]

The White Paper's three-way division of single market barriers quickly became the organizational structure behind the entire single market program, and into the 1990's, this division still controlled how the EC charted progress toward its single market goal.[70] In an "Annex," the

'About 60%.' " *Waste a Lot, Want a Lot*, THE ECONOMIST, Oct. 6, 1990, at 60. On the EC's initial, 1950's wave of "Europhoria," see SMITH, THE GLOBAL BANKERS 32 (1989); on the "Eurosclerosis" period, see *id.* at 225; on the 1980's rebirth of "Europhoria," see *id.* at 244, 377.

64 *See citations in* Completing the Internal Market, White Paper from the Commission to the European Council, COM (85) 310 final [hereinafter "White Paper"], at ¶¶ 2-4 (June 14, 1985) (although the Treaty had originally proposed a single EC market, only in March 1985 did the Council set the 1992 goal for completion). The Commission is credited with first having come up with the "1992" goal, on March 6, 1985. Fine, *supra* note 5, at 53.

65 White Paper, *supra* note 64. For discussions of the importance of the White Paper as the operative EC declaration which gave birth to and structured the single market program, see CLIFFORD CHANCE, *supra* note 2, at 3; European Community Dep't of State Bull. Article, *supra* note 2, at 24; Meessen, *supra* note 2, at 360; Thieffry, Van Doorn, & Lowe, *supra* note 8, at 357; Note, *supra* note 4, at 139.

66 White Paper, *supra* note 64, at ¶¶ 2-3. Because of the "December 31" date, the buzz-word "1992" is a misnomer: It should be "1993." The single market may not be completed even by this date. *E.g.*, Nelson, *Sticking Points: Is the 1992 Timetable for European Integration Too Optimistic?*, Wall St. J., Sept. 21, 1990, at R31, col. 1 (some aspects of single market program are behind schedule).

67 White Paper, *supra* note 64, at ¶¶ 24-218. For background on the relation between these "barriers" and the "social Europe" concept, see Fine, *supra* note 5, at 54-56.

68 White Paper, *supra* note 64, at ¶ 20 (noting that single market will strengthen EC "social... policy"); CLIFFORD CHANCE, *supra* note 2, at 50 (discussing those aspects of White Paper involving social matters).

69 *See supra* note 26.

70 The EC measures progress toward the single market with annual listings chronicling which of the White Paper's called-for instruments had been drafted, approved, and implemented. The EC retains its grouping of these instruments under the White Paper's three topics of barriers. *See, e.g.*, 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 [hereinafter EC White Paper Implementation Report 1990], at ¶¶ 40-92; Fourth Progress Report of the

White Paper listed almost 300 topics needing "harmonization," on which specific EC legislation would have to be passed and implemented before the end of 1992.[71] The White Paper and its Annex categorized each topic needing harmonization under one of the three barriers.[72] As examples, "technical barriers" included safety of toys,[73] public procurement of services,[74] and rollover protection for agricultural vehicles;[75] "physical barriers" included arms control,[76] "customs formalities,"[77] and veterinary controls of swine fever;[78] and "fiscal barriers" included cigarette taxes,[79] general excise taxes,[80] and value added taxes.[81]

To give the White Paper's single market program the full force of Treaty law, in early 1986 the member states ratified the "Single European Act," amending the Treaty of Rome itself[82] and making the single market program the functional equivalent of constitutional law.[83] Effective July 1, 1987, the Act made the single market program mandatory: "[t]he Community *shall adopt measures* with the aim of progressively establishing the internal market over a period expiring on 31 December 1992 . . . ."[84] To ensure the EC could indeed attain the 1992 deadline, the Act realigned the roles of the EC's political institutions — the Council, Commission and Parliament. To do this, the Act reformed the EC decision-making process by abolishing a former practice of unanimous

---

Commission to the Council and the European Parliament Concerning the Implementation of the Commission's White Paper on the Completion of the Internal Market, COM (89) 311 final [hereinafter EC White Paper Implementation Report 1989], at ¶¶ 40-98.

71 White Paper, *supra* note 64, at Annex. "Harmonization" is the "Eurospeak" word for the process of ensuring that the member states' laws are uniform on a given topic.

72 *Id.*

73 *Id.* at part A.

74 *Id.*

75 *Id.*

76 *Id.* at part B.

77 *Id.*

78 *Id.*

79 *Id.* at part C.

80 *Id.*

81 *Id.*

82 Single European Act, Feb. 17, 1986, 29 O.J. EUR. COMM. (No. L 169) (1987) (effective July 1, 1987). On why the Single European Act is the sine qua non of the EC single market, see Laug, *supra* note 8, at 222-23; Sherlock, *Sovereignty, the Constitution, and the Single European Act*, 9 DUBLIN U. L.J. 101 (1987); Thieffry, Van Doorn, & Lowe, *supra* note 8, at 357; Usher, *The Institutions of the European Communities after the Single European Act*, 19 BRACTON L.J. 64, 64-69 (1987). The Single European Act fostered such extensive growth toward a true single market that by 1990 Brussels proposed rewriting the entire Treaty, forging a new political union. *See supra* note 55.

83 On the "constitutional" character of the Treaty as amended by the Single European Act, see *supra* note 46. On how the Single European Act implements the EC single market program, see CLIFFORD CHANCE, *supra* note 2, at 2; MacLachlan and Makesy, *supra* note 61, at 399; Meessen, *supra* note 2, at 361; Shildhaus, *supra* note 47, at 550-51.

84 Single European Act, *supra* note 82, at art. 13, *amending* Treaty, *supra* note 45, at art. 8(a).

agreement among Council representatives, substituting for it a "qualified majority" Council voting system for most areas — but not, ostensibly, for labor and social topics.[85] Thus, while the changes which the Single European Act made to the Treaty induced rapid development in many parts of the White Paper's three-barrier program,[86] they did not stimulate immediate growth in the EC's nascent single labor market.[87]

D. The EC's Progress toward a Single Labor and Social Policy

Just as the White Paper had restricted the growth of the EC workers' rights program by conspicuously omitting labor and social issues from the three-barrier program,[88] the Single European Act initially restrained the single labor market by openly separating out labor issues. While the Act's new "qualified majority" voting system applied to almost all of the White Paper program, it expressly did *not* apply in much of the worker rights area. Instead, for EC legislation "relating to the rights and interests of employed persons," the Act purported to retain the old unanimous approval mechanism.[89] Thus, while the text of both the White Paper and the Single European Act pay homage to the importance of "social Europe,"[90] both documents effectively relegate labor and social

---

85 Single European Act, *supra* note 82, at arts. 14, 16, 17, 18, *amending* Treaty, *supra* note 45, at arts. 8b, 28, 57(2), 99, 100a. The key question of whether the Treaty requires Council unanimity for labor and social issues is treated *infra* at notes 169-178 and accompanying text. "Qualified majority" means a vote weighted upon the member states' population. Member states' votes range from ten (Germany, France, Italy, United Kingdom) to two (Luxembourg). Treaty, *supra* note 45, at art. 148 § 2.

86 The Commission's annual White Paper progress reports, discussed *supra* at note 70 (which are distinct from the two single market progress reports mandated by the Single European Act, *supra* note 82, at art. 14, *amending* Treaty, *supra* note 45, at art. 8b; *see e.g.*, EC Progress Report 1988, *supra* note 3), carefully track the year-by-year progress of the White Paper program. *See, e.g.*, EC White Paper Implementation Report 1990, *supra* note 70; EC White Paper Implementation Report 1989, *supra* note 70; Third Report from the Commission to the Council and the European Parliament on the Implementation of the Commission's White Paper on the Completion of the Internal Market, COM (88) 134 final [hereinafter EC White Paper Implementation Report 1988]. The 1990 Implementation Report, *supra*, at ¶¶ 20-31, summarizes the respective roles which the four EC institutions played in effecting progress under the White Paper agenda through early 1990.

87 In its 1988 White Paper progress report, the Commission lamented that "[i]t is regrettable that some Member States, despite the terms of the Single European Act, still contest the Community's competence where people as such are concerned." EC White Paper Implementation Report 1988, *supra* note 86, at ¶ 28; *see also* EC Progress Report 1988, *supra* note 3, at ¶¶ 13-15 (complaining that progress toward "Citizens' Europe" has been slow).

88 *See supra* note 27.

89 Single European Act, *supra* note 82, at art. 18 *amending* Treaty, *supra* note 45, at art. 100a; *see infra* notes 169-178.

90 White Paper, *supra* note 64, at ¶ 20; Single European Act, *supra* note 82, at arts. 21-23; *see* EC White Paper Implementation Report, *supra* note 70, at ¶ 5 ("social cohesion" and "social policy" are goals "inextricably linked" to the Treaty and to "the central objective of a single European market"); EC Progress Report 1988, *supra* note 3, at ¶ 24 ("one critical aspect of removing European

issues to the single market program's back seat, leaving trade matters up front.[91]

Brussels's priority of trade before social issues seems to have been carefully considered. Initially, two sectors — Europe's business community and Britain under former Prime Minister Margaret Thatcher — opposed a cohesive "social Europe," urging instead a single market program limited to trade.[92] While the official EC position held that Brussels would not allow a single market which condoned "social dumping" of EC workers,[93] Brussels appears implicitly to have recognized the political reality that during the single market program's infancy, "social Europe" was too volatile a concept to promote openly.[94] As Brussels undoubtedly suspected from the beginning, had the business community and Britain initially made a bigger issue of their opposition to a "social Europe," the whole 1992 program might have gone the way of the 1957 Treaty's initial push for a single market.[95]

To avoid this fate, the EC set out to win a broad commitment to its 1992 program by emphasizing the single market's least controversial an-

---

frontier controls is letting Europeans know that people are as important as goods"). The Treaty has always addressed certain fundamental EC social issues. *See* Treaty, *supra* note 45, at Part Three, Title III (arts. 117-128).

On how the "social Europe" concept and European labor principles have historically fit into the EC and its regulation of trade, see generally CLIFFORD CHANCE, *supra* note 2, at 49-50; FITZGERALD, *supra* note 37; FOGARTY, WORK AND INDUSTRIAL RELATIONS IN THE EUROPEAN COMMUNITY (1975) (Chatham House European Series No. 24); HOLLOWAY, SOCIAL POLICY HARMONISATION IN THE EUROPEAN COMMUNITY (1981); THE SOCIAL POLICY OF THE EUROPEAN COMMUNITIES (Kapteyn ed. 1977); MCMAHON & MURPHY, *supra* note 53, at 490-517; NATIONAL ECONOMIC AND SOCIAL COUNCIL, *supra* note 47, at 497-517; Schnorr, *European Communities*, in COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 65, *supra* note 34.

91 *See infra* notes 92-108 and accompanying text. *See generally infra* text accompanying notes 155-181.

92 On the European business community's opposition to "social Europe," see *infra* notes 170-178, 185, and accompanying text. On Thatcher's opposition to "social Europe," see *infra* notes 102-103, 170-178, 185, and accompanying text, and see Longworth, *European Nations Step Closer toward Unity*, Chicago Trib., Dec. 9, 1989, at 4, col. 2.

93 "Social dumping" is the slogan EC unionists use to convey their fear that free European trade will both cause industry to abandon higher-wage Northern Europe, and exploit Mediterranean workers by denying them needed workplace protections and benefits. The EC "social dumping" concept goes back to League of Nations debates in the 1920's. *See* COMMISSION OF THE EUROPEAN COMMUNITIES, DIRECTORATE-GENERAL FOR EMPLOYMENT, SOCIAL AFFAIRS AND EDUCATION, SOCIAL EUROPE: THE SOCIAL DIMENSION OF THE INTERNAL MARKET, SPECIAL EDITION (1988) [hereinafter SOCIAL EUROPE SP. ED.], at § 3.2.1.1.

94 *See generally* Revzin, *Unity Drive Feeds EC Bureaucrats' Power*, Wall St. J., July 27, 1989, at A8, col. 1 (arguing that by mid-1989 widespread commitment to single market program within EC allowed "the EC's bureaucrats [to] branc[h] . . . fast into previously forbidden areas" including "writing a European Charter of Fundamental Social Rights").

95 On the fate of the 1957 Treaty's initial push for a single market, see *supra* text accompanying notes 61-64.

gle — efficient trade, economies of scale, and a 320 million consumer block.[96] With the spotlight trained on commercial advantages, the European business community, for one, fell in as an avid supporter of the 1992 movement.[97] By 1989, the Commission was able to acknowledge an "irreversible" commitment[98] to the single market program among business leaders, and among Europeans generally.

Emboldened by this commitment, late in 1989 the Commission issued a "Social Charter" and an implementing document called the "Social Action Program," which together specifically outline how the EC plans to implement worker rights.[99] By 1990, the EC worker rights question had become a hot topic,[100] and Brussels openly acknowledged that the drive toward "social cohesion" in the EC "cannot be dissociated from" the White Paper program itself.[101] Thus, in a matter of just a few years, "social Europe" had evolved from a whispered rumor to a veritable fait accompli.

The wave of enthusiasm for a single labor market, though, was slower in reaching Margaret Thatcher's Britain. During the 1992 program's early years, Britain had stood as a hold-out, agreeing only in concept to a breakdown of trade barriers, and refusing to relinquish power to

---

96 *See supra* notes 3-4, 65-67, and accompanying text.

97 Major EC businesses strongly support the move toward a single market. *See supra* note 2. However, insofar as the new EC market will eliminate the member states' historic protections of local businesses — including especially nationalism in the public procurement sector — less competitive EC businesses are almost certain to fail as a result of the 1992 program. *E.g.*, Daily Lab. Rep. (BNA) No. 94, at A-4 (May 15, 1990) (statement of Zygmunt Tyszkiewicz, Secretary-General of UNICE, Union des Confédérations de l'Industrie et des Employeurs d'Europe, that contrary to frequent assertions otherwise, the single market program is a "kick in the backside" for EC businesses because "[i]ncreased competition within the [EC] market will expose 'weak companies for what they are' "); *see infra* note 187.

98 According to the Commission's report on the progress of the White Paper program issued in March 1990, "[i]rreversibility and anticipation have characterized [the EC's] work [toward a single market] in recent months." EC White Paper Implementation Report 1990, *supra* note 70, at ¶ 7.

99 Community Charter of Fundamental Social Rights, COM (89) 568 final [hereinafter Charter] (November 29, 1989) (implemented by eleven heads of state at Strasbourg Council meeting on December 9, 1989); 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] (November 29, 1989). For analyses of these documents, see Bercusson, *The European Community's Charter of Fundamental Social Rights of Workers*, 53 MOD. L. REV. 624 (1990); Hepple, *The Implementation of the Community Charter of Fundamental Social Rights*, 53 MOD. L. REV. 643 (1990).

100 *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").

101 EC White Paper Implementation Report 1990, *supra* note 70, at ¶ 6; *see id.* at ¶¶ 28, 34 ("[t]he social dimension is fundamental to the internal market").

control most other areas of policy on British soil.[102] While by necessity Britain's position ultimately softened somewhat, Britain entered the 1990's still opposing virtually all issues not spelled out in the White Paper program; this obstinacy toward the EC, in fact, ultimatley led to Thatcher's resignation.[103] Britain's opposition to the more sweeping vision of European unity championed on the continent was never clearer than when one of Thatcher's closest cabinet ministers derided the EC unity movement, linking the 1992 program to Nazism.[104]

In spite of Britain's battle against a "social Europe," in May 1989 the Commission was able to issue its first wide-ranging declaration in the labor and social rights area, the "Community Charter of Fundamental Social Rights."[105] After two redrafts, the Council effectively adopted this Charter — over Britain's objection[106] — at its December 1989 meeting in Strasbourg, and the Commission fleshed it out, issuing a detailed "Social Action Program."[107] Comprising one of the Brussels's first major single market pronouncements unconnected to the White Paper's three-barrier structure, the Charter and Social Action Program together spell out a comprehensive EC platform on European worker rights policy. Not surprisingly, by United States standards this policy proves rela-

---

102 *See supra* note 92. On Britain's reluctant attitude toward EC social law, see Hepple & Byre, *EEC Labour Law in the United Kingdom — A New Approach*, 18 INDUS. L.J. 129 (1989).

103 *See supra* note 92. Apart from its opposition to "social Europe," Margaret Thatcher's Britain notably resisted the post-White Paper movement toward EC "economic" and "political" union. On the political struggle underlying EC Economic and Monetary Union (EMU), see generally Note, *The ECU: Prospects for a Monetary Union in the European Economic Community*, 21 LAW & POL'Y INT'L BUS. 273 (1989); *European Monetary Union*, THE ECONOMIST, Aug. 25, 1990, at 65; Bishop, *Honest Money for Europe*, Wall St. J., July 25, 1990, at A12, col. 3; *infra* note 354. On Brussels's "official" view supporting EMU, see White Paper Implementation Report 1990, *supra* note 70, at ¶ 17. On EC "political" union, see *supra* note 55. On the link between Thatcher's intransigence toward EC unity and her November 1990 resignation, see *infra* note 180.

104 In July 1990 Britain suffered a scandal when its trade and industry secretary Nicholas Ridley accused the EC's proposals for Economic and Monetary Union (EMU) of being "all a German racket designed to take over the whole of Europe," claimed the EC Commission was "17 unelected reject politicians with no accountability to anybody, . . . who are pandered to by a supine parliament," and denounced support for the EC's bid for sovereignty as tantamount to "giv[ing in] to Adolf Hitler." Hudson, *U.K. Secretary Ridley Draws Fire for Lambasting EC and West Germany*, Wall St. J., July 13, 1990, at A6, col. 5 (ellipsis in original). Ridley resigned on July 14, 1990. *Nick and His Mouth*, THE ECONOMIST, July 14, 1990, at 61; Horwitz, *British Assaults on Germany's Character May Hurt Relations between the Nations*, Wall St. J., July 16, 1990, at A7, col. 1.

105 COM (89) 248 final (May 30, 1989) (first draft of Charter, *supra* note 99).

106 The second redraft (COM (89) 471 final (October 2, 1989)) is the last redraft before the version which the Council approved in Strasbourg, over Margaret Thatcher's objection (COM (89) 568 final (November 29, 1989)). *See supra* note 99. On the debate over the legal status of the Council's non-unanimous adoption, see *infra* text accompanying notes 155-181. For a discussion of the three drafts of the Charter, see Bercusson, *supra* note 99, at 624.

107 Social Action Program, *supra* note 99.

tively employer-restrictive.[108]

III. EC-Level Labor and Social Rights: The State of the Law

With the Charter and Social Action Program effectively adopted,[109] at the turn of the decade Brussels had begun to coalesce its various employment-related policies, focusing on how businesses would have to employ Europeans after 1992.[110] The Social Action Program calls for 47 specific social-law "instruments" to be implemented by the end of 1992, and the Commission began issuing drafts of these called-for documents in June and July, 1990.[111]

While the 1990's seemed to open a new era of EC social rights, actually Brussels had been quietly laying groundwork for a "single labor market" at least since 1986, when the Single European Act had made the 1992 program legal reality.[112] After the Single European Act, those EC institutions concerned with the new market's social side articulated various visions of a "single market" for EC employment. Through their formal statements, these EC institutions unanimously and consistently called for a unified labor and social program, just like the one the Com-

108 *See, e.g.*, Longworth, *supra* note 92 (employers oppose Charter because of its "clauses that would encourage unionization, give workers access to their companies' records or give them a voice in company management as is common in Germany").

109 On the status of the EC's adoption of the Charter and the Social Action Program, see *supra* note 106 and *infra* text accompanying notes 155-181.

110 The wide-ranging political developments in Eastern Europe of late 1989, however, seemed momentarily to divert Brussels's attention from "social Europe," as Europeans became aware of their own growing political clout. According to a January 1990 Spanish news editorial:

> Europe is entering this new decade with greater confidence in its economy than is the U.S. Those who predict a slow process of transformation [within the EC] ignore that Europe, as united, has a real potential to blaze in Eastern Europe the same economic trail that the U.S. forged in America during the last century, or that Southeast Asia forged in the last few years.

ABC (Madrid), Jan. 8, 1990 at 54, col. 1 (translation by this author).

111 The Commission-proposed directives issued in June and July, 1990 would set forth strict limits on employers' use of overtime and night work, and would regulate rest periods. Proposal for a Council Directive on Certain Employment Relationships with Regard to Working Conditions, COM (90) 228 final [hereinafter Proposed Directive on Working Conditions] (August 13, 1990); Proposal for a Council Directive on Certain Employment Relationships with Regard to Distortious of Competition, COM (90) 228 final SYN 280 [hereinafter Proposed Directive on Limited-Term Contracts] (August 13, 1990); Proposal for a Council Directive Supplementing the Measures to Encourage Improvements in the Safety and Health at Work of Temporary Workers, COM (90) 228 final SYN 281 [hereinafter Proposed Directive on Part-Time and Temporary Employment] (August 13, 1990). For discussions of these proposals, see 134 Lab. Rel. Rep. (BNA) 438 (Aug. 6, 1990); *see also More Rights for Workers*, *supra* note 100; *Europe's Social Insecurity*, The Economist, June 23, 1990, at 13; *Brother We Just Missed the 1992 Balloon*, *supra* note 100; *EC's Working-Hour Proposal*, Wall St. J., July 26, 1990, at A12, col. 2. In September 1990 the Commission issued another draft directive, on maternity leave, which called for a required minimum of 14 weeks leave. *See infra* note 255.

112 *See infra* notes 114-127 and accompanying text.

mission and Council ultimately set forth in 1989, via the Charter and Social Action Program.[113] These institutions' statements, the direct predecessors to the Charter itself, form the context out of which the 1990's concept of "social Europe" arises.

A. EC Statements on Labor and Social Rights before the Charter

The first comprehensive post-Single European Act plan for an EC labor and social rights agenda was a May 1987 communication from the Commission on "Internal and External Adaptation of Firms in Relation to Employment."[114] In this communication, the Commission diagnosed the EC's labor and social problems, isolating unemployment as the major concern facing European labor.[115] In an effort to relieve unemployment by spreading around already-existing jobs, the Commission sought to limit work days and work weeks, and to reform the practice of flexible job scheduling.[116] The Commission also sought to harmonize EC minimum wage regulations and "collective dismissal" systems, and to limit employers' freedom to hire workers under contracts other than for an "unlimited" duration.[117] The communication also supported the venerable European labor concept of "worker consultation and participation"

---

113 *See infra* text accompanying notes 114-181.

114 Internal and External Adaptation, *supra* note 34.

115 Throughout the 1970's and 1980's the chief goal of European labor and social policy had been to reduce Europe's high unemployment. At the dawn of the 1990's, as "Europhoria" for the single market swelled worldwide, EC unemployment began to subside, and Europeans actually predicted a future employment shortage. *See e.g.*, Smith, *supra* note 63, at 245 (during 1980's, political value of "the plight of the unemployed" declined in the EC, "free-market programs were seen to be more effective, and [EC] voters began to back away from their socialist heritage"); *Brother, We Just Missed the 1992 Balloon*, *supra* note 100 (even EC union leaders are "[f]inally convinced that the single market will create more jobs"); *How the Other Half Works*, THE ECONOMIST, June 30, 1990, at 21, 22 ("Europe is running out of new young workers"). Horwitz & Forman, *Immigrants to Europe from the Third World Face Racial Animosity*, Wall St. J., Aug. 14, 1990, at 1, col. 1 ("[w]ith European economies booming and fertility rates plummeting — Italy's is the world's lowest — the need for immigrant labor [in the EC] has soared"). Yet the motive of reducing unemployment lived on as a key policy driving EC social matters. *See, e.g.*, Carrington, *Europe's Left Fears 1992 Will Cost Jobs*, Wall St. J., March 16, 1989, at A12, col. 1 ("unemployment strains coming around 1992 will be a bi[g] problem"). The global recession which began in the last half of 1990 put the European unemployment issue back at the forefront of EC policy. *See, e.g.*, *Unemployment Rises in the EC*, Wall St. J., Oct. 11, 1990, at A10, col. 3 (August 1990 rise in EC "unemployment" led "EC Commission Vice President Henning Christophersen to call for the speeding up of economic and monetary union within the EC"). The recent unification of Germany poses another special EC unemployment problem. *See Germans Voice Unity Fears; Workers Rally while Leaders Plan*, Cincinnati Enquirer, May 2, 1990, at A8, col. 1.

116 Internal and External Adaptation, *supra* note 34, at Part III. Ultimately, when in 1990 the Commission issued its first proposed directives under the Social Action Program, they were in the area of work time restrictions. *See supra* note 111.

117 Internal and External Adaptation, *supra* note 34, at Parts IV, V, VI.

— the requirement that employers inform workers about employment-related issues and grant worker representatives a voice in management.[118]

Shortly after this communication issued, the EC's Section for Social, Family, Educational and Cultural Affairs released an "Information Report on the Social Aspects of the Internal Market."[119] After summarizing the developments in the EC labor and social arena which had then occurred, this report argued that the Treaty authorizes broad regulation of labor and social issues.[120] Decrying an "unfair distribution of wealth" in the EC,[121] the report recommended a single EC social security system,[122] a new division of labor offering "equal job opportunities and . . . shorter working hours,"[123] and a comprehensive system of worker participation.[124] To coordinate these, the report recommended an overall "harmonization of working conditions in the various regions of the Community," with which "multinationals" — such as United States-based employers of Europeans — would have to comply.[125] The report concluded that, in order to protect "fundamental social rights," Brussels would have to "adjust national regulations to the new economic and social dimension which is to be generated by the reshaped Community-wide single market."[126] To create this new "dimension," the report offered a list of specific worker rights meant to form the core of the EC's ultimate social and labor program.[127]

In November 1987, the EC's Economic and Social Committee — a Treaty-created body charged with advising on social issues[128] — released

118 *Id.* at Part II. On worker consultation and participation, see *infra* at text accompanying notes 257-283.

119 Section for Social, Family, Educational, and Cultural Affairs 1987 Report, *supra* note 18.

120 *Id.* On the debate over how the Treaty's "qualified majority" voting might apply to labor and social issues, see *infra* text accompanying notes 155-181.

121 Section for Social, Family, Educational, and Cultural Affairs 1987 Report, *supra* note 18, at § 2.3.2.

122 *Id.* at §§ 2.3.4, 5.2.4.

123 *Id.* at § 2.3.8.

124 *Id.* at § 5.2.4.

125 *Id.* at §§ 2.1.4, 3.2.

126 *Id.* at § 4.6.4.

127 *Id.* at § 5.2.4.

128 Treaty, *supra* note 45, at art. 193 ("[a]n Economic and Social Committee is hereby established"); *see id.* at arts. 194-98 (delineating role of this committee). Its name notwithstanding, the Economic and Social Committee is an employment-related institution with a mission more "social" than "economic." *See generally* COMMISSION OF THE EUROPEAN COMMUNITIES, DIRECTORATE-GENERAL FOR EMPLOYMENT, INDUSTRIAL RELATIONS AND SOCIAL AFFAIRS, SOCIAL EUROPE 1/90 (1990) [hereinafter SOCIAL EUROPE 1/90], at 78 (chart depicting position of Economic and Social Committee among other EC institutions).

an "Opinion on the Social Aspects of the Internal Market."[129] Like its predecessor documents, this opinion called for "guarantee[s of] basic social rights immune to competitive pressures";[130] the opinion even made the openly-socialist recommendation that EC "supply and demand policies" be supplemented by "other measures."[131] Specifically, the opinion recommended shorter work hours, stronger collective bargaining arrangements, tighter workplace health and safety regulations, more comprehensive social security benefits, and stricter controls on employment contracts for other than fixed terms.[132] The opinion, like its predecessors, supported worker consultation and participation.[133]

In a later document, the "Opinion on Social Developments in the Community in 1987,"[134] the Economic and Social Committee proposed a broad "people's Europe" of guaranteed "citizens' rights," at the direct expense of free market policy: "Although more wealth is being produced, traditional forms of poverty are reappearing, flanked by growing inequalities in economic, civil, social and cultural conditions and opportunities."[135] To remedy such "inequalities," and to create its called-for "people's Europe," the opinion proposed a concrete list of suggested social rights.[136]

In early 1988, the Commission re-entered the social arena by again supporting a social side to the 1992 program, this time via a comprehensive "working paper" addressing the "Social Dimension of the Internal Market."[137] In form, this document purported to be a "White Paper" for "social Europe."[138] Elevating the call for labor policy reform to an emotional level, this working paper threatened that, left unregulated, the EC unemployment problem might "ultimately" give rise to "certain forms of violence and criminal behavior, [and] other pathological social behavior."[139] To avert this fate, the working paper offered a single suggestion: "a fair shareout of the advantages deriving from the Single Mar-

129 Opinion on the Social Aspects of the Internal Market (European Social Area), 87/C 356/08 (November 19, 1987).

130 *Id.* at § 1.6.

131 *Id.* at § 2.4.1.

132 *Id.* at §§ 1.5, 2.1, 2.4.1, 2.4.2.

133 *Id.* at § 2.1.

134 Opinion on Social Developments in the Community in 1987; 88/C 208/12 (June 2, 1988).

135 *Id.* at § 1.10; *see* §§ 3 ("people's Europe"), 3.3.3 ("citizen's rights").

136 *Id.* at § 3.4.

137 Social Dimension Working Paper, *supra* note 27.

138 *Compare supra* note 137 *with* White Paper, *supra* note 64. Paralleling the White Paper's structure of physical, technical, and fiscal bariers, the Social Dimension Working Paper, *supra* note 27, at Part 65, calls for free movement, comprehensive labor laws encouraging "mobility," and reduced social costs.

139 Social Dimension Working Paper, *supra* note 27, at Part 12.

ket."[140] According to the working paper, the single market "would be pointless if the standard of living and of social protection attained by the average European were called into question."[141]

Invoking a postulate basic to the single market program as a whole—that "homogeneity is always preferable to diversity"[142]—in an annex paralleling the White Paper's list of 300 trade-related topics, this working paper listed 80 social problems needing legislative resolution.[143] The annex list proposed, for example, a regulatory system for workplace health and safety,[144] a system of information for workers,[145] and controls on "the proliferation of types of work contract."[146] Further tracking the White Paper's three-barrier organization, the working paper divided its proposed agenda into three categories: freedom of movement, encouragement of intra-European labor mobility, and social facilitation of workers into the integrated single market.[147]

Joining the other EC institutions' calls for broad regulation of the post-1992 European workplace, throughout the post-single European Act period the EC Parliament championed social rights. The Parliament issued a series of resolutions on social issues, including a comprehensive "Resolution on Economic and Social Cohesion in the Community" and a "Resolution on the Social Dimension of the Internal Market."[148] Paralleling the other institutions' documents, the "Social Dimension of the Internal Market" resolution proposed a comprehensive social platform via a proposed list of "fundamental social rights," and suggested a set of "minimum rules" to regulate specific labor-related areas.[149] And the "Social Dimension of the Internal Market" stressed that EC social rights

---

140 *Id.* at Foreward.

141 *Id.*

142 *Id.* at Part 45.

143 *Id.* at Annex II. In form, this annex is a precursor to the Social Action Program's list of 47 "new initiatives" for instruments needed to create a "social Europe." *See infra* notes 161-165 and accompanying text.

144 Social Dimension Working Paper, *supra* note 27, at Annex Part IV.

145 *Id.* at Annex Parts I, IV.

146 *Id.* at Annex Part I.

147 *Id.* at Part 65. In addition to this working paper, in 1988 the Commission issued a comprehensive set of proposals in the social sector *outside* of the employment arena. Proposal for a Council Decision Establishing a Medium-Term Community Action Programme to Foster the Economic and Social Integration of the Least Privileged Groups, COM (88) 826 final (December 22, 1988).

148 Doc. A2-307/80 (Economic and Social Cohesion in the Community); Doc. A2-399/88 (Social Dimension of the Internal Market). The Parliament's 18 principal social resolutions are reprinted in part in SOCIAL EUROPE 1/90, *supra* note 128, at 109-120. On September 13, 1990 the Parliament approved a series of 100 legislative measures aimed at broadening the Social Action Program's scope; however, the Commission and the Council were not expected to ratify this ambitious package.

149 Resolution on the Social Dimension of the Internal Market, *supra* note 148, at §§ 20, 55.

must cover "workers from third countries" employed in the EC.[150]

Taken together, the communication, the report, the opinions, the working paper, and the resolutions add up to a cohesive agenda for a single EC labor market. With this agenda extant by November 1988, the Commission's President Jacques Delors acknowledged the need for a labor "bill of rights" backed by the EC's full weight, so Delors asked the EC Economic and Social Committee to draft a "Community Charter of Basic Social Rights."[151] In February 1989 this Committee issued an "Opinion on Basic Community Social Rights";[152] like the Committee's prior opinions, this document listed basic rights considered necessary to ensure a "people's Europe."[153] Nestled among its exhortations for a comprehensive EC-wide social policy, the opinion contained a discussion of a key unresolved conflict basic to the "social Europe" debate, called the "subsidiarity" question: whether, out of respect for national differences in labor policy and the member states' rights to self-government, EC social rights should be enforced at the member state level — or whether, because of the EC's need to adopt community-wide "common rules," the EC should directly administer its own social agenda.[154]

---

150 *Id.* at ¶ 52 (Parliament "[c]alls on the Commission and the Council to formulate a joint policy on the basis of reciprocity in respect of permanently established workers and their families from third countries").

151 Letter from Jacques Delors and Manuel Marin to Chairman of the Economic and Social Committee (November 9, 1988), *reprinted in* SOCIAL EUROPE 1/90, *supra* note 128, at 80.

152 Opinion on Basic Community Social Rights, CES 270 (89) (February 22, 1989). For background on the Committee's debate giving rise to this Opinion, see Record of the Proceedings of the Economic and Social Committee on Basic Community Social Rights, 263rd Plenary Session Held at Committee Headquarters, Brussels, on 22 and 23 February 1989, CES 292/89 Att/vh (March 7, 1989).

153 Opinion on Basic Community Social Rights, *supra* note 152, at Part III. This Opinion's Appendix provides a useful bibliography of EC institutions' prior statements on EC social rights.

154 *Id.* at Part II(8) ("[a]lthough the Committee does not feel that all areas of social policy have to be regulated by Community Legislation, it stresses the need to adopt basic social rights founded on a common heritage of experience, taking due account of national differences"). "Subsidiarity" has been more succinctly defined as the doctrine "that national or even local governments should make policy whenever possible" (*Europe's Social Insecurity*, *supra* note 111); that is, the doctrine "that decisions should be taken at the lowest practical level" (*European Monetary Union*, *supra* note 103). According to the preamble of the Charter itself, "by virtue of the principle of subsidiarity, responsibility for . . . social rights lies with the Member States . . . and, within the limits of its powers, with the European Community." Charter, *supra* note 86, at preamble ¶ 16.

The impact of the "subsidiarity" question within the EC has grown from a jurisdictional technicality into the central issue underlying the "social Europe" debate. *Compare* Schnorr, *supra* note 90, at 69 (notation written in 1982 stating that EC has limited power in social arena, where member states wield chief control) *with* Social Action Program, *supra* note 99, at 4 (key issue in achieving a social Europe is "the principle of subsidiarity, whereby the Community acts [only] when the set objectives can be reached more effectively at its level than at that of the Member States. . ."). The Charter itself endorses the subsidiarity principle, declaring "[i]t is more particularly the responsibility of the Member States, in accordance with national practices . . . to guarantee the fundamental

B. The Charter, the Social Action Program, and Their Legal Status

With the Economic and Social Committee's 1989 opinion in hand, the Council was at last prepared to delimit precisely what rights the EC should guarantee Europe's workers. At the Council's request, in early 1989 the Commission prepared a draft "Community Charter of Fundamental Social Rights,"[155] a bill of twelve guarantees to all EC workers: free movement, fair pay, "improved" working conditions, social security, collective bargaining, vocational training, equal treatment between men and women, worker "consultation and participation" in management, health and safety in the workplace, protection of children and adolescents, protection of the "aged," and protection of the handicapped.[156] The initial version of the Charter contained rather broad grants of these twelve worker rights, similar to the two prior Commission statements on "social Europe," the Commission's 1987 "Communication" and the 1988 working paper.[157]

At its May 1989 meeting in Brussels, the Council sought to approve the Commission's draft Charter, if only as a precatory statement of EC policy. But Margaret Thatcher objected.[158] In an effort to win Thatcher over, the Commission revised the Charter during the following months — substantially watering it down, from EC unionists' perspective, and labelling it a mere "Solemn Declaration."[159] But at a vote during the Council's December 1989 meeting in Strasbourg, even the newly-tempered "Solemn Declaration" could not sway Thatcher. The Council therefore "approved" this version, but by a non-unanimous 11-to-1.[160]

---

social rights guaranteed in this Charter. . . ." Charter, *supra* note 99, at ¶ 27. *See generally* Hepple, *supra* note 99, at 646-47 (overview of "subsidiarity" concept).

155 COM (89) 248 final (May 30, 1989). For a discussion of the Charter's subsequent drafts, see *supra* notes 105-106 and accompanying text.

156 COM (89) 248 final (May 30, 1989). These are the same rights set out in the ultimate version of the Charter, *supra* note 99.

157 *Compare* COM (89) 248 final (May 30, 1989) *with* Internal and External Adaptation, *supra* note 34, *and* Social Dimension Working Paper, *supra* note 27.

158 *See We Europeans*, The Times (London), May 18, 1989, at 11, col. 1 (notwithstanding Thatcher's opposition to the May 1989 Charter draft, Britain should play the " 'good' European" and *accept* the Charter, "concentrat[ing] its fire against excessive harmonization, and on containing the ambitions implied in the 'Social Charter' "). *See generally* McEvoy, *The Social Side of "Europe 1992,"* EUROPE, Sept. 1989, at 26 (reporting on May 1989 Charter proposal and Thatcher's opposition to it).

159 *See supra* notes 105-106 (discussing progressive "watering down" of Charter over its several drafts); *see also* COM (89) 471 final (October 2, 1989) (October 1989 draft of Charter). Some extreme unionists ultimately came to *oppose* the Charter, viewing it as a toothless document which might instill a false sense of security in the EC labor sector. *E.g.*, Vogel-Polsky, *What Future Is There for a Social Europe following the Strasbourg Summit?* 19 INDUS. L.J. 65, 66-67 (1990). On the ambiguity surrounding the "Solemn Declaration" designation, see *id.* at 65-66.

160 *See supra* note 99; *see also* McEvoy, *supra* note 158.

Between the May and December Council meetings, the Commission had not only tempered the Charter, it had also made real progress on a concrete legislative agenda to implement the Charter's twelve rights.[161] Just *before* the December Council meeting, on November 29, 1989, the Commission presented a full-blown social program explicating the Charter's otherwise-vague listing of worker rights. The new program bore the ponderous title "Communication from the Commission Concerning its Action Programme Relating to the Implementation of Basic Social Rights for Workers," known for short as the "Social Action Program."[162] Effectively paralleling the White Paper's annex[163] and similar in form to the Commission's 1988 "working paper" on the EC's social dimension,[164] the landmark 53-page Social Action Program document calls for precise EC social regulation via 47 specifically-designated "instruments,"[165] all grouped under the Charter's 12 social law rights.

Because the Commission had promulgated its Social Action Program just before the Council "passed" the Charter, ever since the December 1989 Strasbourg Council meeting EC worker rights supporters have pointed to the Social Action Program as their blueprint for a "social Europe" under the Charter.[166] These EC social law mavens — including labor unions, socialists, and certain key members of Parliment[167] — take the Strasbourg Council's 11-to-1 vote as a ratification of both the Charter and the Social Action Program. To these "social Europe" supporters, the 11-to-1 vote turned these documents' agenda into a legal fait accom-

---

161 Social Action Program, *supra* note 99. While the Social Action Program is explicit in its proposals for specific instruments, critics complain that the document fails to cite sources of Treaty law under which the proposed instruments are to be passed. *E.g.*, Hepple, *supra* note 99, at 644-46; Vogel-Polsky, *supra* note 159, at 70-72.

162 *Id.* The Social Action Program builds upon an earlier EC "Social Action Program," issued in 1974. *See* Social Action Program, *supra* note 99, at 7.

163 White Paper, *supra* note 64, at Annex.

164 Social Dimension Working Paper, *supra* note 27.

165 Social Action Program, *supra* note 99, at 23.

166 *See* McEvoy, *supra* note 158, at 28 (European Trade Union Confederation [ETUC] "warn[s] that. . . it will withdraw from the consensus upon which the Single European Act is based" unless Brussels commits to implementing Charter and its proposals); *Brother, We Just Missed the 1992 Balloon*, *supra* note 100 (EC unions strongly support Charter and proposals under it).

167 *See* Eberlie, *The New Health and Safety Legislation of the European Community*, 19 INDUS. L.J. 81, 86 (1990) ("[t]he Parliament undoubtedly favours the extension of the 'social dimension' of the internal market, and its socialist majority has [sought to] increase the duties to be placed on employers"); Leonard, *Left Stands to Gain in EC Parliamentary Elections*, Wall St. J., June 14, 1989, at A15, col. 3 (while Parliament had "a right-of-center majority" after 1984 elections, trend in late 1980's was toward socialist majority); *cf. Europe's Social Insecurity*, *supra* note 111 ("[s]ocialists in the European Parliament have been struggling to find some antidote to the rigours of the competitive free-for-all that 1992 promises"). The EC Parliament's leading champion of worker rights, Mme. Martine Buron, has clearly set out the socialists' position on "social Europe." Buron, *Community Charter of Basic Social Rights for Workers*, SOCIAL EUROPE 1/90, *supra* note 128, at 14.

pli which remained only to be implemented.[168]

But because the Charter's "passage" was not unanimous, and because the EC treaties do not even provide for a "charter" as a form of law,[169] ever since Thatcher cast her dissenting vote at the Strasbourg Council meeting, the EC employers' lobby[170] has argued that the social law mavens are jumping to an improper legal conclusion.[171] To these employers, the Charter, as a "Solemn Declaration," is just a legally-meaningless precatory document; if it is not, it can only be a now-dead proposal which Margaret Thatcher singlehandedly vetoed in a proper Council vote.[172]

The EC employers' analysis grows out of the Single European Act's requirement for Council unanimity in labor matters.[173] The employers reason that, because even the post-Single European Act Treaty requires

168 EC labor leaders and socialists aim to strengthen workers' rights at employers' expense. The worker lobby warns that without strong EC-level protections, a unified market will encourage the "social dumping" of higher-paid northern Europeans and the exploitation of Mediterranean workers. *E.g., Unified Europe, supra* note 7 ("[m]any [EC] employers have already begun moving to southern countries such as Spain and Italy, where wages are low and unions are weaker"). The worker lobby, claiming popular support in its bid for tight EC-level regulation in each of the Charter's twelve areas, argues that until now the single market program has unfairly supported big business, at workers' expense. The worker lobby looks toward the Council meetings on EC "political union" and their aftermath (*supra* note 55) as an opportunity to increase the power of the European Parliament — because, as compared to the Council and Commission, Parliament champions the "social Europe" agenda (*supra* note 167 and accompanying text). *See More Rights for Workers, supra* note 100 (discussing EC unions' political goals in a restructured EC).

169 *See supra* notes 50-53 and accompanying text. The Treaty-authorized forms of EC law are regulations, directives, decisions, recommendations, and opinions. Treaty, *supra* note 45, at art. 189. *Cf.* Hepple, *supra* note 99, at 644-51 (discussing non-status of "charter" form); Vogel-Polsky, *supra* note 159, at 67 (EC employer groups stress Treaty's unanimity requirement for social regulation).

170 The employer lobby, speaking through the Brussels-based Union des Confédérations de l'Industrie et de Employeurs d'Europe [UNICE], argues that under the doctrine of "subsidiarity" (*supra* note 154) the member states should retain jurisdiction over most labor law issues; Brussels has enough to do ironing out wrinkles in the EC trade agenda. Employers stress that because the post-1992 single market will increase competition, businesses should not also have to bear an additional layer of restrictive regulation. Further, employers urge that the Charter has no legal effect: Quite simply, the Communities' treaties do not empower any such legal mechanism as a "charter." *Supra* notes 97, 169.

171 Employers accuse the Charter of being "a statement of principles without legal force." Chicago Tribune, Dec. 9, 1989 at 4, col. 2; *cf.* Vogel-Polsky, *supra* note 159, at 67; *supra* notes 97, 169-170.

172 This argument involves qualified versus unanimous Council voting, as discussed *infra* at text accompanying notes 173-181. On the Treaty's underlying authorization for EC social regulation, see Treaty, *supra* note 45, at Part Three, Title III (arts. 117-128); Hepple, *supra* note 99, at 644-51. *See generally* McMahon & Murphy, *supra* note 53, at 490-92 (Treaty's authorization of EC labor regulation); Harris, *"Social Charter": The Legal Basis*, 139 NEW L.J. 764 (1989) (Charter's authorization in Treaty); Harris, *Legal Rights of EEC Citizens*, 138 NEW L.J. 43 (1988) (Treaty's authorization of EC social rights regulation); Vogel-Polsky, *supra* note 159, at 70-72 (unanimity issue and legal basis for Social Action Program).

173 Treaty, *supra* note 45, at art. 100a § 2.

Council unanimity on labor matters,[174] Thatcher's lone objection effectively killed the Charter. In fact, under this analysis every Council member remains free singlehandedly to veto almost any of the 47 instruments which the Commission plans to promulgate under the Social Action Program.[175]

This employers' "unanimity" argument is simply a plain reading of Single European Act article 18, incorporated as amended Treaty of Rome article 100a.[176] This article carves out an exception to the Single European Act's "qualified majority" voting innovation, and requires that a *unanimous* Council approve "provisions. . . relating to the rights and interests of employed persons."[177] But, cryptically, this article allows that a mere *qualified majority* may institute those labor or social "proposals . . . concerning *health [and] safety*."[178]

How to interpret this article's health and safety "exception within an exception" has, not surprisingly, become the threshold question underlying the "social Europe" debate. To employers, virtually all the Social Action Program's 47 points, as well as the Charter itself, involve "the rights and interests of employed persons" generally: Any contrary reading would render the article 100a "employed persons" exception meaningless. Yet to the social lobby, the very concept of "social Europe" necessarily involves worker "health and safety."[179] To the social lobby, apparently, all or virtually all the twelve points in the Charter and Social

---

174 *Id.*

175 *See* Bartley, *supra* note 7 ("Article 100A [sic] . . . would seem to mean unanimous agreement would be needed to mandate worker participation on company boards").

176 Treaty, *supra* note 45, at art. 100a §§ 2-3, *incorporating* Single European Act, *supra* note 82, at art. 18 §§ 2-3.

177 Treaty, *supra* note 45, at art. 100a § 2. Casual readers of the Treaty interpret this exception strictly, assuming that the entire area of EC "labor-management relations" is subject to regulation only by a unanimous Council. *See, e.g.*, Schildhaus, *supra* note 47, at 552 (the Council's power to enact "directives on the basis of decisions taken by a qualified majority" is subject to three topical exceptions, one of which is "labor-management relations").

178 Treaty, *supra* note 45, at art. 100a § 3. Until any single specific proposed instrument comes before the Council for a vote, this debate over Treaty authority remains merely theoretical. When the Commission ultimately proposes an instrument on worker participation under the Social Action Program, a threshold question should be whether that proposal, which deals with "employed persons," *also* involves "health [and] safety," thereby allowing for a mere "qualified majority" vote. *See* citations *supra* at note 172. Although the Social Action Program expounds upon the 47 proposed social instruments in some detail, it does not cite specific Treaty authority for each proposal. Of course, ultimately the debate over Treaty authority might be obviated — if the Council rewrites the entire Treaty, in its move toward "political union." *See supra* notes 55, 168.

179 How the social lobby equates "social Europe" with "health and safety" is unclear. Apparently, the social lobby reasons a fortiori that anything involving workers' general welfare encourages better worker health. *Cf.* Vogel-Polsky, *supra* note 159, at 70-72.

Action Program fit under the health and safety "exception within an exception."

Assuming Thatcher's successor, Prime Minister John Major, upholds Britain's record of intransigence on social issues, how the EC should interpret article 100a will remain a critical question.[180] In fact, given that EC employers are aligned with the traditional British position on this issue, the article 100a question could remain a hotly contested issue until the Court of Justice settles it — unless the Council first rewrites the entire Treaty itself.[181]

C. The Twelve Worker Rights the Charter and Social Action Program Guarantee to EC Workers

Although EC employers argue compellingly that the Charter is legally null, the Charter and the Social Action Program have nevertheless taken on an independent importance within the EC, effectively transcending the threshold debate over what Treaty authority underlies "so-

180 Revzin & Mapes, *Thatcher's Influence Turns into Isolation*, Wall St. J., Feb. 27, 1990, at A20, col. 1. According to Britain's Lord Cockfield, a former EC Commissioner, "Mrs. Thatcher's EC policies . . . are isolating her within her own party . . . .' [Britain] could have had the leadership of Europe. . ., but. . . threw it away. It's no good saying 11-to-1 votes don't matter if you're right. Numbers do matter in a democracy.' " *Id.* Thatcher's isolation from the EC crescendoed in the fall of 1990, just before her November 1990 resignation, when her longest-tenured cabinet minister, Sir Goeffrey Howe, resigned on account of her anti-EC policies. On Thatcher's isolation from the EC leading up to Howe's resignation, see Guilford, *Italy Believes Britain Must Fall in Line or Quit EC*, The Times (London), Oct. 31, 1990, at 4, col. 1; Jones, *Thatcher Ready to Stand and Fight on Europe*, The Daily Telegraph (London), Oct. 31, 1990, at 1, col. 1; Looch, *Thatcher's Xenophobia "A Liability,"* The Daily Telegraph (London), Oct. 31, 1990, at 14, col. 7; Oakley, *Thatcher Rules out Further Surrender to Europe*, The Times (London), Oct. 31, 1990, at 1, col. 4; Weekes, *Britain Spurns EC Back Door Route to "Federal Europe,"* The Daily Telegraph (London), Oct. 31, 1990, at 14, col. 6. On the blow Howe's resignation delivered to Thatcher's isolationist EC policies, leading directly to Thatcher's own resignation, see Hughes, *Out Come the Knives: Margaret Thatcher is Fighting for Her Political Life in the Tory Tumult Unleashed by Sir Geoffrey Howe's Resignation*, The Sunday Times (London), Nov. 4, 1990, § 1, at 11, col. 1 ("4-Page Special" report); *A Crisis for Thatcher*, The Sunday Times (London), Nov. 4, 1990, § 3, at 7, col. 1; Johnston & Jones, *Howe Quits over European Policy*, The Daily Telegraph (London), Nov. 2, 1990, at 1, col. 1; Oakley & Webster, *Howe Resigns in Protest over Europe*, The Times (London), Nov. 2, 1990, at 1, col. 1; Stephens and Smith, *Howe Quits in Row with PM over Europe*, The Financial Times (London), Nov. 2, 1990, at 1, col. 1. On the direct link between Thatcher's intransigent stance toward the EC and her November 1990 resignation, see Toman & Carrington, *How Britain's Thatcher Got In Serious Trouble With Her Own Party*, Wall St. J., Nov. 21, 1990, at 1, col. 6.

181 On how hotly the the Article 100a Charter unanimity issue was debated at the end of 1990, see *EC's Labor Law Problems*, Wall St. J., Nov. 27, 1990, at A19, col. 6 (the "dispute . . . over whether the [Social Action Program] proposals need unanimous backing to become law . . . threaten[s] to unravel the EC's 'social action program' "). On the Council's proposal to rewrite the Treaty, see *supra* notes 55 and 168.

cial Europe."[182] Immediately after the Charter "passed," the Commission began to work on draft directives implementing the Social Action Program. In June and July 1990, the Commission issued its first such proposals, which were in the areas of part-time and overtime labor.[183] Thus, in the months after the Strasbourg Council meeting, the Brussels "Eurocracy" effectively validated the Charter and Social Action Program, treating the documents as an active agenda for post-1992 "social Europe." The documents also seem quickly to have taken root at the local level, inspiring Europeans with notions of new employment-related rights.

Unfortunately for Britain and the EC employers, this trend steamrolled the threshold argument that the Charter has no legal status; the Social Action Program quickly took "on a political importance all its own."[184] Thus, the locus of the debate over "social Europe" shifted from the legal status of the Charter to the still-nascent Commission-proposed instruments under the Social Action Program. Try as Britain and the employers might to stop it, this debate evolved into a fight over the propriety and the content of each specific Social Action Program proposal.[185]

In this fight, the EC social mavens urged the Commission to propose broad instruments guaranteeing sweeping worker rights which would only technically cover "health [and] safety" — and which would therefore enjoy a chance at qualified majority Council approval.[186] The

---

182 *See, e.g., supra* note 111 (on Commission's June and July 1990 Social Action Program proposals on work time).

183 *See supra* note 111 and accompanying text.

184 Vogel-Polsky, *supra* note 159, at 77. On the widespread acceptance of the Charter's rights among Europeans generally, see *id.* at 67, n.4 (study finds 70% of Europeans support concept of EC-level social regulation). *See generally supra* notes 169-179 and accompanying text.

185 The EC employers' leading spokesman, Zygmunt Tyszkiewicz, secretary general of the Union des Confédérations de l'Industrie et des Employeurs d'Europe [UNICE], forcefully denounces those Social Action Program proposals most restrictive of employers. *See, e.g., More Rights for Workers, supra* note 100, at 60 (Tyszkiewicz opposes proposed ban on overtime work beyond eight hours per day); *Brother, We Just Missed the 1992 Balloon, supra* note 100, at 62 (Tyszkiewicz argues against supposed efficacy of EC-wide collective bargaining proposals); Daily Lab. Rep. (BNA) No. 94, at A-4 (Tyszkiewicz argues single market program could hurt employers). British industry also takes a strong stance against the Social Action Program. *See, e.g.*, Gribben, *EC Reforms "Will Cost Firms £3bn,"* The Daily Telegraph (London), Oct. 31, 1990, at 9, col. 1 (Confederation of British Industry complains Social Action Program proposals on part-time and temporary work, overtime, and maternity will be prohibitively expensive to EC employers). On the Thatcher administration's opposition to the Social Action Program, see Bassett, *Howard Gives Strong Warning of EC Jobs Impact*, The Times (London), October 31, 1990, at 6, col. 2 (Britain's Employment Secretary Michael Howard denounces Social Action Program).

186 The Social Action Program conspicuously neglects to cite sources of Treaty authority for each called-for instrument. *See supra* notes 161, 172, 178.

employer lobby, of course, tried to keep alive its argument that the Council could pass most social measures only by a unanimous vote — but to be safe the employers also addressed the 47 Social Action Program-proposed instruments, directly opposing those which could wreak real economic trouble,[187] and invoking the "subsidiarity" doctrine in a bid to temper most of the rest.[188]

Thus, by mid-1990 the "social Europe" argument had come full circle, and returned to the question that EC social bodies debated since the time of the Single European Act: What social rights should protect EC workers in the post-1992 workplace?[189] While the pre-Charter analyses of this question had invoked amorphous lists of rights,[190] this time the debate centered on the Social Action Program's 47 specific proposals, all organized under the Charter's 12 now-settled rights. By 1990, then, both sides of the "social Europe" issue had to address the twelve-point rhetorical framework which would order EC-level labor and social regulation after 1992.

1. 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 — a right which would 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."[191] As the Social Action Program acknowledges, regulations under the White Paper itself, when implemented, will ensure substantial freedom for cross-border employment and cross-border social security rights.[192] The next stage of EC free movement regulation will

187 *See supra* notes 97, 185. While EC unionists argue that "social Europe" is a needed counterweight to the boon to business which the single market will bring, employers urge that, to the contrary, the breakdown in protectionist barriers will hurt established EC business. *See* CLIFFORD CHANCE, *supra* note 2, at 78 ("[t]hat 1992 will be beneficial to business is not a foregone conclusion[,]" insofar as the single market will create a "downward pressure on prices"). According to employers, additional burdens from restrictive social legislation could be crippling. *E.g.*, *supra* note 97.

188 *See supra* note 154.

189 *Compare supra* notes 112-127 and accompanying text *with supra* notes 182-187 and accompanying text.

190 *See supra* § III(A).

191 Charter, *supra* note 100, at ¶ 2. Curiously, although freedom of movement is the Charter's first right, the Social Action Program misplaces it as the fourth right, and the Social Action Program also reshuffles some of the other rights. This section of this article follows the ordering of rights in the Charter, not the Social Action Program.

192 Social Action Program, *supra* note 99, at 21. The Treaty itself calls for free movement of

center on fine points, such as work subcontracting, public procurement contracts, and supplemental social security benefits.[193]

The problem which the right to free movement addresses — restrictions on free movement among the states — is probably the greatest difference between interstate business in Europe and the United States[194] In the United States, of course, the Constitutional "right to travel" and comprehensive federal regulation facilitating interstate commerce so thoroughly guarantee free movement that the "right" to transport labor, goods, and most services among the states goes unquestioned.[195] Yet until recently, Europe's national borders seriously impeded a corresponding mobility in the EC, greatly increasing transaction costs among the member states.[196] As proponents of the single EC market are keenly aware,

---

workers and purports to abolish employment discrimination on nationality grounds. Treaty, *supra* note 45, at art. 48 §§ 1-2. On the free movement right in the EC generally, see Morris, Fredman & Hayes, *Free Movement and the Public Sector*, 19 INDUS. L.J. 20, 21-22 (1990). For citations to the chief pre-Charter instruments concerning freedom of movement for workers and mutual recognition of diplomas and certificates, see SOCIAL EUROPE SP. ED., *supra* note 93, at Annex 1, Annex 2; see generally *id.* at §§ 1.2.1, 1.2.2. On nationality discrimination prohibitions under EC law, see *infra* note 196.

193 Social Action Program, *supra* note 99, at 23-25.

194 The Charter's goal of free movement aims at a "right" long enjoyed in the U.S. As such, the EC concept of free movement is more analogous to U.S. interstate commerce protections than it is to immigration law, which addresses the entrance of citizens of foreign states. The EC, of course, has wholly separate problems and policies regarding immigration into the Community from countries outside the member states. *E.g.*, *Huddled Masses on the Move*, THE ECONOMIST, Oct. 13, 1990, at 51; *see* Melloan, *Can Europe Keep Them down on the Maghreb?*, Wall St. J., Nov. 5, 1990, at A17, col. 3. On the EC's immigration policy vis-a-vis non-member countries, *see* SOCIAL EUROPE SP. ED., *supra* note 93, at § 1.2.5. On the problem of workers from non-member countries in the EC, see *id.* at § 1.1.4.

195 *See* Memorial Hospital v. Maricopa, 415 U.S. 250, 254 (1974) ("[t]he right of interstate travel has repeatedly been recognized as a basic constitutional freedom").

196 For discussions of the various social problems resulting from the difficulties arising out of Europe's internal borders, see, e.g., 2 COLLINS, THE EUROPEAN COMMUNITIES: THE SOCIAL POLICY OF THE FIRST PHASE 99-127 (1975) (mobility problems which Europe's "Working Population" encounters); LAGUETTE & LATHAM, *supra* note 2, at 237-67 (freedom of movement of EC lawyers); SUNDBERG-WHITMAN, DISCRIMINATION ON THE GROUNDS OF NATIONALITY: FREE MOVEMENT OF WORKERS AND FREEDOM OF ESTABLISHMENT UNDER THE EEC TREATY 127, 131-34, 148-68 (1977) (effects of Treaty article 48 on free worker movement); Haxburg, *1992 and Professionals' Freedom of Establishment*, 133 SOLIC. J. 712 (1989) (freedom of movement of English lawyers). Schnorr, *supra* note 90, at 75-77 distinguishes the "free movement issue of employment discrimination against other member states' nationals" from EC anti-discrimination provisions, which generally involve sex discrimination. EC policy, both before and under the Charter, contains no cohesive set of principles banning race discrimination; the closest the Charter comes to protecting race or nationality is the "nationality discrimination" component of the free movement right. *Cf. infra* notes 238, 342. While the U.S. inarguably has a greater historical problem with race discrimination in employment than does Europe, recent immigration into the EC seems to be causing social problems which might one day lead to EC-level protection for racial groups. *See, e.g.*, Horwitz & Waxman, *supra* note 115 (in 1990 "Europe's racial problems were getting ugly"); Waxman, *Anti-Semitic Act Unifies Town*, Chicago Trib., May 14, 1990 at 3, col. 1 (French Jew compares 1990

only truly free movement among the member states could give the EC the degree of internal market mobility long enjoyed in the United States[197]

True mobility among the member states means more than relaxed customs procedures; it means free movement of people. Free movement of people among the member states is so basic to the single market concept that the free movement right is one of the very few labor-related areas which the EC began to develop early.[198] Shortly after issuing the White Paper, Brussels worked on standardizing recognition of occupational skills, professional degrees, and professional certifications, all with the goal of granting both tradesmen and professionals a freedom to emigrate and work in any member state.[199] Given the further advances which the Social Action Program envisions,[200] the EC right to free movement of people may ultimately surpass its United States "counterpart," at least as it regards professionals: if each EC member state readily recognizes education and qualifications earned in the other member states, EC interstate professional cross-certification will be more streamlined than it is in the United States[201]

2. Right to Fair Pay

The Charter's second right addresses minimum pay, assuring that employment "shall be fairly remunerated" at a "decent standard of living."[202] Going beyond a straightforward guarantee of a minimum wage such as that under the United States Fair Labor Standards Act [FLSA] of 1938,[203] this right would guarantee an "equitable reference wage" to

---

vandalism of Jewish cemetery to "the 1930's and Germany"). Member states' internal laws only recently have begun addressing this issue. *See, e.g.*, Graves, *Asian Constable Wins First Race Bias Case against Police Force*, The Daily Telegraph (London), Oct. 31, 1990, at 4, col. 1.

197 Free movement is a high priority in the EC: The Treaty itself contains non-discrimination provisions protecting nationals of one member state in the others. *See* Treaty, *supra* note 45, at art. 221. *See generally* Morris, Fredman & Hayes, *supra* note 192, at 21-22.

198 *See supra* notes 192 and 197.

199 *See* EC White Paper Implementation Report 1990, *supra* note 70, at ¶¶ 55, 68-70.

200 *See supra* notes 192-193 and accompanying text.

201 After 1992, for many purposes "movement" among EC member states should be smoother than corresponding interstate U.S. "movement." For example, while U.S. state bar associations still separately regulate admission to legal practice, in the EC a lawyer licensed in any member state will more freely be able to become licensed in the others. *See e.g.*, LAGUETTE & LATHAM, *supra* note 2, at 237-67; *cf.* Sontag, *supra* note 2, at 29 (U.S. and European lawyers react to proposed post-1992 breakup of barriers to legal practice among EC member states). Similarly, the EC will regulate teaching, insurance, medicine, and other areas which in the U.S. fall under the jurisdiction of the various states.

202 Charter, *supra* note 99, at ¶ 5. On the importance of a minimum "decent" wage in the EC *before* the Charter, see FITZGERALD, *supra* note 37, at 111-125 ("Trends in [EC] Wage Standards").

203 29 U.S.C. § 201 *et seq.*

workers not employed under indefinite length contracts, and for every would-be worker, "public placement services free of charge."[204] The Social Action Program calls for an opinion guiding member states in establishing "a decent reference wage," and it proposes a directive on "employment relationships other than full time open-ended contracts."[205]

United States law, by comparison, contains guarantees of "prevailing wages" only in the context of construction work on state-funded jobs,[206] and the United States has no analog for the Charter's guarantee of free placement services. To this extent, the Charter's right to fair pay exceeds corresponding "rights" under U.S. law. On a broader level, though, the EC's proposal for "a decent reference wage" essentially parallels the United States FLSA, in that its chief aspect is a guarantee of minimum pay to unskilled labor.[207] Any major difference between this EC right and the FLSA would be, simply, the rate at which each sets minimum pay.[208]

3. Right to Improved Working Conditions

In addition to regulating wages, the Charter seeks to control labor "conditions" including "forms of employment other than open-ended contracts, such as fixed-term contracts, part-time working, temporary work and seasonal work."[209] Directives proposed in 1990 would require employers to treat part-time and seasonal workers the same as full-time indefinitely-employed workers in all matters of benefits,[210] and would prohibit employers from using fixed-term contracts for any employee totalling over 36 months.[211] Another proposed right would effectively include a specific limit on weekly hours beyond which an employee could

---

204 Charter, *supra* note 99, at ¶ 5 (reference wage); ¶ 6 (placement services).

205 Social Action Program, *supra* note 99, at 14-16. The first proposed instruments under the Social Action Program, issued in the summer of 1990, involved these issues — specifically, part time and temporary work. *See supra* note 111.

206 For an example of an especially employer-restrictive prevailing wage statute, see, e.g., Ohio Rev. Code Ann. Chap. 4115 (Anderson 1980 & Supp.).

207 *Compare* Social Action Program, *supra* note 99, at 14 *with* 29 U.S.C. § 206.

208 An examination of how the European Currency Unit (ECU) coordinates exchange rates among the member states within the European Monitary System (EMS), thereby ensuring an equivalent reference wage until a common EC currency comes into existence, exceeds the scope of this article. *Cf.* Shildhaus, *supra* note 47, at 553-54. For an in-depth analysis of the ECU, see Note, *supra* note 103, and see *supra* note 103.

209 Charter, *supra* note 99, at ¶¶ 7-8.

210 Proposed Directive on Working Conditions, *supra* note 111, at arts. 2-8; Proposed Directive on Part-Time and Temporary Employment, *supra* note 111, at arts. 2-6.

211 Proposed Directive on Limited-Term Contracts, *supra* note 111, at art. 4, ¶ a. For discussions of the "traditional unlimited [EC] employment contract" — which employers try to circumvent via fixed-term contracts see *supra* note 34; see also *supra* § II(A).

not work, even at an overtime rate.[212] This section of the Charter would also guarantee an "annual paid leave" and a "weekly rest period" to all EC workers, and it would regulate the effects of employer bankruptcies and "collective redundancies," or layoffs.[213] Spelling this out, the first proposed directives issued under the Social Action Program in 1990 called for tight regulation of work time, rest periods, holidays, night and weekend work, and overtime.[214] Additionally, the Social Action Program sets out a highly controversial proposal for a worker identification form to "serve as proof of an employment contract or relationship."[215]

Employers in the United States have long operated under legislation controlling most of the working "conditions" which this Charter right would control. For example, certain United States state laws regulate rest periods and other aspects of workplace conditions,[216] and the federal FLSA controls overtime pay.[217] A controversial recent United States federal statute even requires that employers notify workers before mass layoffs and plant closings.[218]

Yet the EC's regulation of working conditions under the Charter could prove even more employer-restrictive than all this analogous United States law. Given that Brussels sees limiting work time as a method of spreading around existing jobs and thereby alleviating unem-

212 *See supra* note 111. Such provisions are rooted in the EC's goal of reducing employment by spreading around existing work. *See supra* notes 114-118 and accompanying text.

213 Charter, *supra* note 99, at ¶ 7 ("collective redundancies" and "bankruptcies"); ¶ 8 ("paid leave" and "rest periods").

214 *Compare supra* note 111 *with* Social Action Program, *supra* note 99, at 19. Most notably, the 1990 Proposed Directive on Working Conditions, *supra* note 111, would require employers to treat part-time and temporary workers the same as full-time workers employed indefinitely, in matters of vocational training, worker representation, benefits and social security, access to social services, and recruitment into full-time indefinite-length positions. *Id.* at arts. 2-9.

215 Social Action Program, *supra* note 99, at 19. This proposal would require that the identification form "define the nature of employment, stipulate the duration of the contract, indicate the system of protection provided and contain a reference to the relevant law and/or collective agreement." *Id.* Employers oppose this proposal because it uses the back door — a claimed need for a cross-border worker identification document — to require that employers delineate workers' purportedly-collectively-bargained rights, which may not in fact exist at all. Employers complain that the proposal implicitly assumes all workers are subject to collective bargaining agreements, but often many are not: while in some EC member states (such as Denmark and Belgium) 80% to 90% of the work force is unionized, in others, such as France and Holland, fewer than 30% to 40% of workers belong to unions. *See Workers of the World Disunite, supra* note 10 (chart showing union membership as percentage of all non-agricultural employees in each EC member states over three time periods).

216 *See* HUNT, THE LAW OF THE WORKPLACE: RIGHTS OF EMPLOYERS AND EMPLOYEES 24-25 (1984).

217 29 U.S.C. § 201 *et seq.*

218 Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 (effective February 4, 1989). This U.S. plant-closing legislation is similar to, and was inspired by, European law.

ployment,[219] the "right to improved working conditions" could prove to be one of the Charter's most intrusive aspects.[220] The Commission's first proposals under the Social Action Program, issued in June and July 1990, do indeed seem employer-restrictive, rigidly insisting that part-time and temporary workers be treated — for benefits, collective bargaining, and other purposes — as if they were full-time and indefinitely-employed.[221]

4. Right to Social Protection

The Charter's next guarantee is a right to "social protection," meaning "an adequate level of social security," and, for the unemployed, "sufficient resources and social assistance."[222] As explicated in the Social Action Program, this right would grant state-funded minimum sustenance to the jobless, effectively paralleling United States social security and welfare programs.[223] The right might also guarantee minimum unemployment compensation, based, as in the United States, on employer contribution.[224]

The Charter's "social protection" right appears to be an attempt to coordinate existing EC welfare systems in order to guarantee Europeans a minimum sustenance-level benefit.[225] As such, this right could ultimately have wide-ranging administrative effects, but as proposed it would not seem to envision any new direct employer cost.[226] Neverthe-

---

219 *See supra* notes 18-19, 115-116, and accompanying text.

220 The Social Action Program's proposals and the draft directives under the Charter's right to improved working conditions — including especially the proposed worker identification form — are employer-restrictive. *See supra* notes 111 and 215; Social Action Program, *supra* note 99, at 18-20.

221 *See supra* notes 111, 210, 211, and 214.

222 Charter, *supra* note 99, at ¶ 10.

223 Social Action Program, *supra* note 99, at 27-28.

224 *See* Hunt, *supra* note 216, at 43-47.

225 Charter, *supra* note 99, at ¶ 10 (deferring to "arrangements applying in each country"). According to the Social Action Program, to facilitate free movement of people, objectives of member states' social security systems must "converg[e]." Social Action Program, *supra* note 99, at 27. Yet due to radical differences among the member states' social security systems, there can "be no question of harmonizing the systems existing." *Id. See, e.g.*, SPANISH FOREIGN TRADE INSTITUTE, *supra* note 14, at 28-32 (analyzing Spanish laws of "Social Security," including "Basic System," "Disability," "Old Age," "Unemployment," "Death and Survivorship," and "Family Benefits").

226 On how the EC coordinated member states' social security schemes before the single market program, see COLLINS, *supra* note 196, at 129-142; COMPENDIUM OF COMMUNITY PROVISIONS ON SOCIAL SECURITY (2d ed. 1983 & Supp. 1985); FITZGERALD, *supra* note 37, at 127-49; HOLLOWAY, SOCIAL POLICY HARMONISATION IN THE EUROPEAN COMMUNITY (1981); *Joint Economic Committee, 89th Cong. 1st Sess. Joint Committee, Economic Policies and Practices, Paper No. 7, European Social Security Systems* (1965); SHANKS, EUROPEAN SOCIAL POLICY, TODAY AND TOMORROW (1977); WATSON, SOCIAL SECURITY LAW OF THE EUROPEAN COMMUNITIES (1980); Note, *supra* note 60; Boskey, Book Review, 14 VAND. J. TRANSNAT'L L. 935 (1981) (reviewing HOLLOWAY, *supra*).

less, to employers fearing that the creation of a "social Europe" might turn the EC into a giant welfare state, this right raises the specter of minimum benefit levels "harmonized" at a rate so high as to provide a disincentive to cheap labor.

5. *Right to Collective Bargaining*

The fifth section of the Charter would guarantee an EC right of collective bargaining.[227] As has been clear to United States employers since the time of the Wagner Act,[228] the extent to which a government protects organized labor has a heavy impact on employment relationships.[229] United States experience under the National Labor Relations Act and its ancillary federal statutes regulating collective bargaining[230] shows that union status often plays a key role in an enterprise's profitability.[231] While the EC member states have a strong tradition of organized labor representing workers collectively, some evidence shows that European unionization may not be as expensive as its United States counterpart.[232]

Until the single market program, union issues in Europe were chiefly matters independent to each member state.[233] In an attempt to raise collective bargaining to the status of EC law, the Single European Act, the Charter, and the Social Action Program all actively encourage bargaining at the "European level." [234] Yet because so far European collective bargaining has taken place largely at the *local* level, little precedent explicates what, practically, "European level" bargaining will mean.[235]

---

227 Charter, *supra* note 99, at ¶¶ 11-14.

228 *Codified as* 28 U.S.C. § 151 (originally enacted July 5, 1935).

229 On the interplay between EC member states' labor policies and the member states' widely different unionization rates, see *Workers of the World Disunite*, *supra* note 10.

230 29 U.S.C. Ch. 7, §§ 141-187.

231 *See supra* note 229.

232 *See supra* note 229.

233 *See, e.g.*, SPANISH FOREIGN TRADE INSTITUTE, *supra* note 14, at 17-27 (analysis of Spanish law of "Collective Labor Relations"). However, some member states have national laws which attempt to give extra-territorial force to certain collective bargaining agreements. For summaries of and citations to these laws, see SOCIAL EUROPE SP. ED., *supra* note 93, at Annex 11.

The Single European Act amends the Treaty to encourage EC-level collective bargaining. Single European Act, *supra* note 82, at art. 22, *amending* Treaty, *supra* note 45, at art. 118b ("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.").

234 *Supra* note 233; *see* Charter, *supra* note 99, at ¶ 12. The sole "new initiative" which 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 99, at 30.

235 *See* Sciarra, *Regulating European Unions: An Issue for 1992*, 11 COMP. LAB. L.J. 141 (1990)

Initially, industry-wide collective bargaining arrangements under the Charter most likely will appear in those industries which would more directly benefit from cross-border coordination, such as transportation; such arrangements would be reminiscent of Teamster multi-employer agreements, which have been common throughout the United States trucking industry for years.[236] Otherwise, notwithstanding the Charter's call for "European level" bargaining, the localized nature of the standard EC employment situation may hold most collective bargaining relationships to the local level, just as is the case today in so many sectors of United States employment.

6. Right to Vocational Training

Because Brussels envisions a skilled work force staffing its post-1992 EC workplace, one section of the Charter attempts to improve skills by creating a right to lifetime vocational training.[237] In what seems to be an attempt to keep the cost of vocational training off the EC's books, the Charter encourages management and organized labor to establish joint "continuing and permanent training systems," and it urges employers to grant workers "leave for training purposes."[238] The Social Action Program's proposals, similarly, seek to offer workers — including even part-time and temporary workers — comprehensive training programs at what could well prove to be employers' cost.[239] United States law, by contrast, offers no analogous right to lifetime vocational training, perhaps because historically United States policy assumed individuals' self-reliance.[240] However, the Charter's vocational training right loosely cor-

(Italian labor law professor explores some possible paths which future EC regulation of collective bargaining might take).

236 On U.S. multi-employer collective bargaining agreements, see citations at Lande & Zerbe, *Reducing Unions' Monopoly Power: Costs and Benefits*, 29 CORP. PRAC. COMMENTATOR 109, 111 n.7 (1987).

237 Charter, *supra* note 99, at ¶ 15. On the importance of vocational training in the EC before the Charter, see EUROPEAN CENTRE FOR THE DEVELOPMENT OF VOCATIONAL TRAINING [hereinafter CEDEFOP], CONTINUING TRAINING AS A MEANS OF PREVENTING UNEMPLOYMENT (1984); CEDEFOP, VOCATIONAL TRAINING IN THE MEMBER STATES OF THE EUROPEAN COMMUNITY — COMPARATIVE STUDY (1980); CEDEFOP, YOUTH UNEMPLOYMENT AND ALTERNANCE TRAINING IN THE EEC (1980); FITZGERALD, *supra* note 37, at 33-53; VOCATIONAL TRAINING IN THE EUROPEAN ECONOMIC COMMUNITY (P.J.C. Perry ed. 1972).

238 Charter, *supra* note 99, at ¶ 15. Additionally, the Charter prohibits "discrimination" in training programs "on grounds of nationality." *Id.*

239 Social Action Program, *supra* note 99, at 40-42. On part-time and temporary workers' access rights to employers' vocational training programs, see Proposed Directive on Working Conditions, *supra* note 111, at art. 2, ¶ 1.

240 According to the U.S. Supreme Court, the "principles [in the U.S. Constitution Bill of Rights] grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should

responds to certain more recent United States institutions, such as the federal program which provides for retraining workers in declining industries,[241] and the requirement of many state bar associations that lawyers pursue ongoing lifetime education.[242]

Unlike the United States, where the few legally-mandated job training programs are typically government funded,[243] the thrust of the EC's proposed training would put cost burdens on employers, and possibly also on unions.[244] While Brussels's emphasis on worker training may indeed engender a more skilled work force, such a highly skilled labor pool may not necessarily be worth the extra employer cost.[245] Insofar as higher skill levels will raise the cost of labor generally, the proposed EC training right, if implemented, will likely work to the detriment of those who employ menial labor.

7. Right to Equal Treatment Between Men and Women

As its seventh right, the Charter seeks to outlaw sex discrimination in employment,[246] a prohibition already quite familiar to employers in the United States, as well as in the E.C. Federal statutes such as Title VII,[247] the Pregnancy Discrimination Act,[248] and the Equal Pay Act[249] — as well as analogous state laws[250] — completely ban sex discrimination in United States employment. Similarly, sex discrimination is one area of social law in which the EC has long played a role: at least since

---

be entrusted with few controls and only the mildest supervision over men's affairs." Board of Education v. Barnett, 319 U.S. 624, 639-40 (1943).

241 Job Training Partnership Act, 29 U.S.C. §§ 1501 *et seq.*, at §§ 1651-1662c.

242 Increasingly, U.S. state bar associations require minimum annual hours of "continuing legal education." Usually state supreme courts issue these requirements as a precondition of lawyers' maintaining their status as members of the bar. *E.g.*, Supreme Court of Ohio, *Rules for the Government of the Bar*, Rule X (to maintain active status, members of Ohio Bar must complete 24 hours of approved legal education every two years).

243 *See supra* note 241.

244 *See, e.g.*, Proposed Directive on Working Conditions, *supra* note 111, at art. 2, ¶ 1 (employers must give their part-time and temporary workers the same access to *employer-provided* vocational training that full-time indefinitely-employed workers have).

245 Under a pure free market analysis, if this worker training were worth the extra cost, employers would pay for it voluntarily, and the EC would not have to mandate it. Of course, the counter-argument is that because workers change jobs, employer-provided training may well be worth its cost, but it must be legislated into mandatory existence, to prevent individual employers from taking a "free ride."

246 Charter, *supra* note 99, at ¶ 17. Treaty, *supra* note 45, at art. 119 mandates "equal pay for equal work."

247 42 U.S.C. §§ 2000e *et seq.*

248 42 U.S.C. § 2000e(k).

249 29 U.S.C. § 206(d).

250 Generally, laws in the U.S. states prohibit sex discrimination in a manner paralleling federal law. *See* 1 LARSON, EMPLOYMENT DISCRIMINATION 2-292 - 2-321 (1990).

the mid-1970's, Brussels has actively attempted to eradicate sex discrimination not only in hiring and retention decisions, but especially in equal pay and equal benefits.[251] In certain prescribed circumstances, individual EC workers have already taken their employers and their member states to the Court of Justice for direct redress of sex-based discrimination claims.[252] "Equal pay" is one discrimination-law concept far more advanced in the EC and its member states than in the United States[253]

Encouraging even further development in this area, the Charter would guarantee the "principle of equality" in "access to employment, remuneration, working conditions, social protection, education, vocational training, and career development."[254] The Social Action Program expands this, concentrating specifically on pregnancy, child care, and maternity leave.[255] In September 1990, in fact, the Commission issued its third proposal under the Social Action Program, a specific directive requiring a minimum of 14 weeks maternity leave.[256] United States employers operating in the EC will therefore have to be especially vigilant,

---

251 According to the Social Action Program, pre-existing EC directives on "equal treatment represent a considerable step forward." Social Action Program, *supra* note 99, at 35. The Treaty itself guarantees equal pay. Treaty, *supra* note 45, at art. 119. For citations to sources treating EC sex discrimination principles, see Cook, *Bibliography: The International Right to Nondiscrimination on the Basis of Sex*, 14 YALE J. INT'L L. 161 (1989); see also *How the Other Half Works*, *supra* note 115. *See generally* Argiros, *Sex Equality in the Labour Market and the Community Legal Order: An Attempt at an Appraisal*, 12 LIVERPOOL L. REV. 161 (1989); Harvey, *Equal Treatment of Men and Women in the Work Place: The Implementation of the European Community's Equal Treatment Legislation in the Federal Republic of Germany*, 38 AM. J. COMP. L. 31 (1990); Millet, *European Community Law: Sex Equality and Retirement Age*, 36 INT'L & COMP. L.Q. 616 (1987); *Presentation of the Third Comparative Labor Law Roundtable: Unlawful Discrimination in Employment*, 20 GA. J. INT'L & COMP. L. 1, 105-44 (1990); Note, *supra* note 60; Belton, Book Review, 13 VAND. J. TRANSNAT'L L. 901 (1980).

252 *E.g.*, Millet, *supra* note 251, and cases cited therein.

253 While activity under the U.S. Equal Pay Act (29 U.S.C. § 206(d)) is sparse, the EC Treaty's equal pay right (Treaty, *supra* note 45, at art. 119) is quite well-developed. For explications of EC equal pay law, see COLLINS, *supra* note 196, at 84-89; FITZGERALD, *supra* note 37, at 66-68; MCMAHON & MURPHY, *supra* note 53, at 492-509; SAUNDERS & MARSDEN, PAY INEQUALITIES IN THE EUROPEAN COMMUNITIES (1981); Covington, *Equal Pay Acts: A Survey of Experience under the British and American Statutes*, 21 VAND. J. TRANSNAT'L L. 649 (1988); Fitzpatrick, *European Women Entitled to Equal Pay for Work of Equal Value*, 34 FED. B. NEWS & J. 384 (Nov. 1987); Greaves, *Article 119 and Its Interpretation by the European Court of Justice*, 33 NO. IRELAND LEGAL Q. 199 (1982); and see generally Napier, *Equal Value in the House of Lords — Third Time Unlucky?*, 139 NEW L.J. 36 (1989) (British law).

254 Charter, *supra* note 99, at ¶ 17.

255 Social Action Program, *supra* note 99, at 36-38 (proposing directive on workplace health hazards facing pregnant women, recommendation on child care, and recommendation on job rights for pregnant women and mothers). The Commission issued a draft of this directive — which would require a minimum of 14 weeks employer-provided maternity leave — in September 1990. *See Maternity Leave in EC*, Wall St. J., Sept. 14, 1990, at A7, col. 4.

256 *See supra* note 255.

ensuring their employment practices keep up with Brussels's emerging regulations in the family care area.

8. Right to Worker Consultation and Participation in Management

Easily the Charter's most controversial proposal is its guarantee of worker access to management information and worker participation in corporate affairs affecting employment.[257] While the "worker consultation and participation" concept is familiar to United States labor academics,[258] it is foreign to United States employers — in fact, even United States union leaders perceive management "participation" as outside their scope of expertise.[259] In the EC, on the other hand, certain member states' national labor law systems have long ceded generous management participation rights to labor.[260]

The European worker consultation and participation concept in these member states encompasses rights to worker information, consultation, and true "participation" in management decisions. Under the member states' systems, labor representatives get advance notice of management's plans which would affect the workplace, then labor gets a chance to consult and participate in those management affairs which effect employment — including corporate mergers, technological changes, restructurings of operations, and "transfrontier" employment issues.[261] For some time, Brussels has sought to harmonize these rights under member states' laws, and extend them to workers in all member states.[262]

---

257 Charter, *supra* note 99, at ¶¶ 17-18 (approved draft of Charter contains two consecutive paragraphs numbered "17").

258 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, e.g.*, Gould, *Reflections on Workers' Participation, Influence, and Powersharing: The Future of Industrial Relations*, 58 U. CIN. L. REV. 381 (1989); Harper, *Reconciling Collective Bargaining with Employee Supervision of Management*, 137 U. PA. L. REV. 1 (1988); Perline & Poynter, *The Effects of Worker Participation Plans on Union Views of Managerial Prerogatives*, 40 LAB. L.J. 37 (1989).

259 *See* Perline & Poynter, *supra* note 258, at 38-39 (poll finds most U.S. union leaders believe that many aspects of management are most properly left *outside* scope of collective bargaining). *But cf.* White & Grenier-Guiles, *GM's Plan for Saturn to Beat Small Imports Trails Original Goals*, Wall St. J., July 9, 1990, at 1, col. 6 (under labor relations practices at new U.S. General Motors "Saturn" plants, workers "participate" somewhat in management).

260 For discussions of the different worker participation schemes existing in various member states, see Schnorr, *supra* note 90, at 72-74; Note, *supra* note 37, at 982-87.

261 *Supra* note 260.

262 For discussions of Brussels's various worker participation proposals since the 1970's, see BLANPAIN, BLANQUET, HERMAN & MOUTY, THE VREDELING PROPOSAL: INFORMATION AND CONSULTATION OF EMPLOYEES IN MULTINATIONAL ENTERPRISES (1983); MCMAHON & MURPHY, *supra* note 53, at 515-17; Bisconti, *Participation of Employees in the European Economic Community*, 1987 Private Investors Abroad (MB) § 11-1 (1988); Hepple & Byre, *supra* note 102, at 138-41; Schnorr, *supra* note 90, at 72-74; Note, *supra* note 37.

Not surprisingly, employers have forcefully challenged the EC's forays into the worker consultation and participation area, first in the context of the "Vredeling Proposal,"[263] and more recently under the proposed "Fifth Directive" for a European company statute.[264]

Labor laws of the various member states structure worker consultation and participation in different ways, so Brussels's notion of worker consultation and participation is theoretically a hybrid of the diverse practices among these member states.[265] However, the proposed EC right of worker consultation and participation seems to be as employer-restrictive as the worker participation right gets in *any* member state.[266] This may be why European employers decry the EC's amalgamated vision of the consultation and participation schemes; management usually argues that worker participation would be most appropriate, if at all, only at the local, plant-by-plant level.[267] Predictably, Europe's international unions lobby the other way, urging a multinational-level participation which includes mandatory labor representation on corporate boards — which, the unions claim, is the only effective way to ensure real "participation."[268]

---

263 Council Directive on Procedures for Informing and Consulting the Employees of Undertakings with Complex Structures, in Particular Transnational Undertakings, 25 O. J. Eur. Comm. (No. C 292) 33 (1982) [hereinafter Vredeling Proposal]. According to one source:

> None of the proposals of the European Commission in the area of labour relations has aroused more heated debate, tension, and continuous heavy lobbying, both in national capitals and at the European Headquarters in Brussels and Strasbourg, as the proposed directive for informing and consulting the employees of undertakings with complex structures, in particular transnational undertakings, commonly known as the 'Vredeling Proposal' after Mr. Vredeling, the Social Commissioner of the EEC at the time the draft was accepted by the Commission in November 1980.

BLANPAIN, BLANQUET, HERMAN & MOUTY, *supra* note 262, at 17.

264 Fifth Company Law Directive, O. J. Eur. Com. (No. C. 240) 2 (1983) [hereinafter Fifth Directive].

265 *See supra* note 262; *see also* Social Action Program, *supra* note 99, at 31 (discussing "diversity [among] Member States in [the worker consultation and participation] area").

266 *Compare* Charter, *supra* note 99, at ¶¶ 17-18 *with* citations *supra* at note 262.

267 "[L]ogic [behind the EC's worker consultation and information or participation proposals does] not appeal to many of Europe's bosses. John Lewis, a British retailer, fears it might have to change its well-established workers' councils. Unilever's [head of industrial relations Herwig] Kressler, who chairs an industrial relations working party for the European Round Table, an industrialists' club, worries that if companies have to introduce a new EC layer of consultation on top of their existing procedures the result would be extra cost and confusion." *More Rights for Workers*, *supra* note 100. United States-based employers oppose worker consultation and participation even more vehemently. Some United States businessmen simply cannot even comprehend the possibility of EC-wide worker consultation. *See, e.g.*, Selz, *supra* note 40 (U.S. chairman of International Franchise Association, Arthur Karp, calls Dutch consultation procedure "a socialistic concept" which Karp reasons, a fortiori, will have to "change with [EC] unification" because "[c]ertainly not all of the [EC] countries will agree to those kinds of restrictions").

268 *See, e.g.*, Daily Lab. Rep. (BNA) No. 94, at A-4 - A-5 (Fritz Rath, Confederal Secretary to European Trade Union Confederation [ETUC] advocates mandatory EC-level worker consultation

As originally envisioned under the EC's Vredeling Proposal and Fifth Directive,[269] EC-wide worker participation was to be a "rider" directive accompanying a procedure for EC-wide corporate status.[270] The theory here was that a single European corporate status is a real "benefit," one which multinational European corporations have sought since at least the late 1960's.[271] Brussels proposed attaching to this benefit a "burden": worker participation.[272] In an ingenious mix of labor and corporation law, this "rider" model ties worker participation to whatever cross-Europe incorporation mechanism Brussels ultimately produces, forcing those companies which opt for trans-European corporate status to adopt the EC's worker participation provisions into their very articles of incorporation.[273]

Yet the Charter and Social Action Program effectively reject the historic link between EC worker participation and company law, leaving the future of any such connection in the hands of those drafting the EC's company law instruments. 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.[274] To effect this, the Social Action Program proposes a single "instrument," of unspecified character, which would establish "equivalent systems of worker participation in all European-scale enterprises."[275]

---

and decries EC employers' "genera[l] hostil[ity]" toward the concept; Rath says that, "in the back rooms," EC employers will admit they would support "some kind of information sharing... not out of enlightenment, but... to avoid conflict").

269 Vredeling Proposal, *supra* note 263; Fifth Directive, *supra* note 264.

270 *See* CLIFFORD CHANCE, *supra* note 2, at 31-33.

271 *See* Note, *supra* note 37, at 31-33. *See generally* Carreau & Lee, *Towards a European Company Law*, 9 NW. J. INT'L L. & BUS. 501 (1989) (EC proposals for a single incorporation mechanism).

272 *See generally supra* note 262. A single trans-European corporate status would be a real benefit to multinational operations, reducing the paperwork and multiple tax liabilities still necessary for maintaining a separate corporate status in each member state. As a step in the direction of an EC-wide corporate status, Brussels now recognizes cross-border affiliations of business entities as "European Economic Interest Groupings" (EEIG's). Certain forms of European businesses, including law firms, are rapidly forming EEIG's to create formal cross-border networks. *Cf.* Murphy, *The European Economic Interest Group (EEIG): A New European Business Entity*, 23 VAND. J. TRANSNAT'L L. 65 (1990).

273 For a discussion of the historic link between EC company law proposals and worker consultation and participation, see SOCIAL EUROPE SP. ED., *supra* note 93, at § 2.2.1.3.

274 *See* Charter, *supra* note 99, at ¶ 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 99, at 31-34.

275 Social Action Program, *supra* note 99, at 32-33. Separately, the Social Action Program proposes another, analytically separate instrument under the worker participation right on "equity shar-

Under this instrument, employer "enterprises" would have to provide their workers with "general and periodic information" regarding those aspects of company development which affect employment.[276] 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."[277]

The Social Action Program would also require that any covered employer's "dominant associated undertakin[g]" — that is, its parent — provide the employer with enough relevant information to comply with Brussels' worker consultation and participation requirements.[278] Because the Social Action Program contains no exception for "dominant associated undertakings" based outside the EC, this proposal would apparently impose an affirmative duty on United States corporations' stateside headquarters to keep their European branches informed of any plans which could possibly affect EC employment — giving European worker representatives a chance to "consult" before United States headquarters could fashion nascent ideas into faits accomplis.[279] To the extent that this aspect of the EC's proposed worker participation right violates the international law doctrine of sovereignty, the United States State Department will challenge it as invalid.[280]

For obvious reasons, worker consultation and participation is a volatile and controversial aspect of "social Europe," especially from United States-based corporations' viewpoint. Accordingly, employers of

---

ing and financial participation by workers," which aims to redistribute to certain workers "a share of the enterprise's results." *Id.* at 34. The Social Action Program does not say whether the EC would seek to enforce this "equity sharing" goal through anything other than non-binding encouragement.

276 *Id.* at 32-33.

277 *Id.* at 33.

278 *Id.*

279 The Labor Counselor to the United States State Department's Mission to the EC takes the position that the United States will invoke the international law doctrine of sovereignty to challenge any EC worker participation proposal which would have an internal effect inside the United States, insofar as it could affect the makeup of a United States board of directors. Speech by Daniel Turnquist, United States State Department Labor Counselor, United States Mission to the EC, ABA Committee on International Labor Law Midyear Meeting in Strasbourg, France (Apr. 27, 1990), *reported in* Daily Lab. Rep. (BNA) No. 94, at A-4, A-6 (May 15, 1990). However, a strong argument exists that an EC instrument echoing the Social Action Program's clause on "dominant associated undertakings" would *not* violate the sovereignty or extraterritoriality principles. Of course, any debate remains premature until the EC issues specific instruments under the worker consultation and participation right.

280 *See supra* note 279.

Europeans continue to track the progress of this Charter right even more closely than that of the other eleven.[281] According to a rumor in mid-1990, the Commission would release *two*[282] proposed "instruments" explicating worker consultation and participation; the Commission was to offer a draft *directive* on worker consultation, but — apparently in a bow to employer interests — only a draft *regulation* on worker participation.[283]

9. *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. Substantial progress has occurred in this area over the years.[284] In a way paralleling United States administrative law under the Occupational Safety & Health Act [OSHA],[285] the Charter appears to impose a "general duty" on employers to maintain a safe workplace,[286] with the goal of codifying the specifics of this duty through comprehensive workplace safety regulations, many of which already exist.[287] Twelve of the Social Action Program's 47 proposals involve workplace health and

---

281 *See supra* note 267.

282 The Social Action Program sets out just one proposed instrument explicating the worker participation and consultation right. *See supra* note 275 and accompanying text.

283 Speakers discussed this rumor at the ABA Committee on International Labor Law Midyear Meeting in Paris and Strasbourg, France (Apr. 22-29, 1990), *reported in* Daily Lab. Rep. (BNA) No. 94, at A-4 - A-5 (May 15, 1990) ("the European Commission will propose a directive covering information and consultation and a recommendation covering participation. This would require EC member countries to 'harmonize' their laws to conform to the information and consultation requirement, but it would leave the area of worker participation in management decision-making up to individual countries' determination."). *See More Rights for the Workers*, *supra* note 100 ("a measure due in November [1990] on the right of workers to consultation and information. . . will probably require any EC company with subsidiaries in more than one country to set up a consultative council at group level"). However, ultimately Brussels watered down even this compromise position: Social Affairs Commissioner Vasso Papandreou prepared a proposal for a directive, presented in December 1990, which would require those companies employing more than 1,000 EC workers in two or more member states to establish a "European Works Council" to consult with management at the EC level. *See Don't Forget to Tell the Workers*, THE ECONOMIST, Dec. 1, 1990, at 82. Unionists were unhappy with this proposal, because the "Works Councils" would have no authority beyond mere consultation; employers were unhappy with the proposal because, they argued, worker consultation is most appropriate at the local level. *Id.* at 82, 84.

284 *See* Social Action Program, *supra* note 99, at 43 (noting that before Single European Act, EC had made substantial inroads in certain areas of health and safety regulation); *see also* COLLINS, *supra* note 196, at 90-98 (health and safety is appropriately regulated at EC level); FITZGERALD, *supra* note 37, at 87-110 (EC regulates "industrial health and safety").

285 29 U.S.C. §§ 651 *et seq.*

286 29 U.S.C. § 654 (so-called "OSHA General Duty Clause").

287 *Compare* Charter, *supra* note 99, at § 19 *and* Social Action Program, *supra* note 99, at 45-49 *with* 29 U.S.C. § 654.

safety — more proposals than under any other single Charter right.[288] By their very specificity, these twelve proposals reflect that existing EC safety regulations cover substantial ground. Subsequent regulations need only fill in gaps: among these dozen proposals are calls for precise directives in the fishing, mining, and asbestos industries.[289]

How the proposed safety regulations would affect a specific EC employer's workplace, of course, controls how free the employer will be to structure its operations efficiently. A chief concern for United States employers just starting up employment operations in Europe will be whether the EC regulations translate efficiently from the company's established OSHA-complying procedures. For employers already operating in Europe, the chief concern will be whether the ultimately-adopted EC regulations radically change existing safety law now applicable in the member states. How Brussels resolves these concerns, of course, will be industry-specific.

10. Protection of Children and Adolescents

The Charter's final three rights grant affirmative "protections" to three specific groups: the young, the old, and the handicapped.[290] The Charter's protections of the young,[291] which largely concern wage rates and vocational training, would appear more inclusive than their closest United States equivalents, laws governing minimum work age,[292] child labor regulations,[293] and the sub-minimum "training wage" for youth.[294]

Citing a need to reduce high youth unemployment, the Charter

---

288 *Compare* Social Action Program, *supra* note 99, at 45-49 *with id.* at 9-42, 50-53.

289 *Id.* at 45-47. The Social Action Program's nine remaining health and safety proposals involve maritime safety, safety at temporary work sites, drilling safety, industrial diseases, workplace safety notifications, worker information regarding industrial diseases, exposure to physical hazards, transportation safety, and coordinated regulation of hygiene and health. *Id.* at 45-49. The proposals regarding workplace safety notifications and worker information regarding diseases parallel the recent push under U.S. OSHA law for worker "right to know" protections. 29 C.F.R. § 1910. For a discussion of the advanced EC health and safety regulations at the time of the Charter and Social Action Program, see Eberlie *supra* note 167.

290 Charter, *supra* note 99, at ¶¶ 20-26. By today's standards in the U.S., protection of age and handicap seem an equitable extension of civil rights. Such protection, however, is *not* taken for granted in Europe. As recently as 1977, one European commentator urged:

> [I]f one concentrates one's attention completely on the so-called marginal groups, it may simply be at the expense of adult males who are not normally in need of help. There is no particular sense in that. *Neither socially, economically nor politically is there much merit in boosting employment of youths, women or handicapped if it means proportionally fewer jobs for fully trained fathers of families.*

SHANKS, *supra* note 226, at 22-23 (emphasis added).

291 Charter, *supra* note 99, at ¶¶ 20-23.

292 U.S. federal law effectively prohibits minors under age 16 from working. 29 U.S.C. §§ 203(e)-212.

293 U.S. federal law expressly prohibits "oppressive child labor." 29 U.S.C. § 212.

seeks to set 15 as the EC's minimum employment age.[295] And, for youth lawfully employed, the Charter would require "equitable remuneration."[296] The Social Action Program adds a call for a single directive which would "approximat[e]" the member states' various child protection laws.[297] And the Charter adds a wrinkle on which the Social Action Program is silent, a requirement that "[f]ollowing the end of compulsory education" the young receive "initial vocational training of a sufficient duration to enable them to adapt to the requirements of their future working life."[298] Such training could easily become expensive for employers.

11. Protection of the Aged

The Charter next grants affirmative rights to the aged, but these rights focus on basic state-provided sustenance, not employment restrictions;[299] the EC member states do not have a tradition prohibiting age discrimination.[300] Ensuring that Europe retain the Western tradition granting workers a viable pension, the Charter calls for a right to "sufficient resources and to medical and social assistance" after a certain age, regardless of former employment status.[301] By contrast, the United States actively prohibits discriminating in employment against everyone over age 40,[302] and, as a branch of labor law, closely regulates employers' benefit and pension programs.[303]

That the Charter's social protections for the aged appear to focus on

294 Fair Labor Standards Amendments of 1989, § 6, 103 Stat. 941 (1989) (codified at 29 U.S.C. 206 Note).

295 Charter, *supra* note 99, at ¶ 20. Member states would be able to set their ages higher, based on "the minimum school-leaving age." *Id.*

296 *Id.* at ¶ 21.

297 Social Action Program, *supra* note 99, at 50. In this context, the Social Action Program appears to use "approximate" as a term of art meaning "harmonize at the EC level." To this extent, "approximation" is the antithesis of the "subsidiarity" concept (*see supra* note 154), because "approximation" moves regulation up toward Brussels, rather than keeping it with the member states. On the "supranational structure" of EC law, see Kennedy & Specht, *supra* note 47, at 436-41.

298 Charter, *supra* note 99, at ¶ 23.

299 *Id.* at ¶¶ 24-25. On protections for the aged in the EC before the Charter, see Millet, *supra* note 251, at 616-17.

300 European employers, in fact, openly advertise age biases in a way which would be grossly illegal in the U.S. *E.g.*, Sunday Times (London), Nov. 4, 1990, § 6, at 2, col. 3 (advertisement placed by Coopers & Lybrand Deloitte Executive Recruiting seeking "Sales and Marketing Director . . . [p]robably aged around 35"); *id.* at 3, col. 1 (advertisement seeking "Internal Sales Manager . . . [a]ged between 23-40"); *id.* at 10, col. 1 (advertisement seeking "Director of Legal Services" for MSL International, aged "early-mid 30's").

301 Charter, *supra* note 99, at ¶ 25.

302 29 U.S.C. §§ 621 *et seq.*

303 29 U.S.C. §§ 1001 *et seq.*

state-run benefit programs actually benefits employers, insofar as it deflects the concerns which gave rise to the employer-restrictive United States model of affirmative anti-discrimination rights for older workers. On this point the Social Action Program is even less intrusive than the Charter, because it emphasizes that under the "subsidiarity" doctrine[304] member states should retain primary control over issues concerning the aged.[305] As such, ultimately Brussels's chief role regarding protection of older workers may only be to coordinate propaganda stressing the aged's concerns.[306] To this end, the Social Action Program suggests that 1993 be labeled "a year for the elderly."[307]

Unless Brussels decides to impose a minimum employer-provided pension benefit, the thrust of the Charter's age protections would not likely change the terms of EC employment. Increased state-guaranteed benefits could, however, affect the EC's tax structure, raising the cost of doing business in Europe.

12. Protection of the Handicapped

Like its protections for the aged, the Charter-granted rights for the handicapped[308] amount more to a statement of social policy than to a body of anti-discrimination prohibitions directly affecting employment. United States law, especially under the new Americans with Disabilities Act,[309] differs, actively prohibiting discrimination against the handicapped in employment. And under United States law, "handicapped" often includes alcoholics, drug addicts, and victims of long-term diseases, including AIDS.[310]

The thrust of the Charter's proposals for the "disabled" would be

---

304 *See supra* note 154.

305 Social Action Program, *supra* note 99, at 52.

306 *Id.*

307 *Id.* This is not to minimize the growing belief within the EC that a problem of workplace age discrimination indeed does exist. *See* Lublin, *Graying Europeans Battling Age Bias*, Wall St. J., Aug. 14, 1990, at B1, col. 3 ("Rampant age bias against [employing] older Europeans is just starting to decline. . . . Unlike America, Europe lacks tough laws broadly barring age discrimination."); *cf. The Future of Europe's Elderly*, Wall St. J., Sept. 24, 1990, at A10, col. 2 (according to Italian demographer, "there will be problems if [EC] governments fail to adopt a long-term strategy" regarding employment of the aged).

308 Charter, *supra* note 99, at ¶ 26. On EC protections for the handicapped before the Charter, see COMMISSION OF THE EUROPEAN COMMUNITIES, TEACHING AND TRAINING THE HANDICAPPED THROUGH NEW INFORMATION TECHNOLOGY (1984).

309 Americans with Disabilities Act of 1990, Pub. L. No. 101-336 (1990) [hereinafter ADA]. This U.S. law protects as "handicaps" alcoholism, certain forms of drug addiction, and transmissible diseases. The prior, and still-effective, U.S. federal handicap statute applicable to the U.S. government and its contractors is the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*

310 *See supra* note 309. *See generally Lawson, AIDS, Astrology, and Arline: Towards a Causal Interpretation of Section 504*, 17 HOFSTRA L. REV. 237, 275-298 (1989) (demonstrating application

measures "improving" the disabled's "social and professional integration" through EC-level programs fostering "vocational training, ergonomics, accessibility, mobility, means of transport, and housing."[311] The Social Action Program focuses especially on the goal of improving the handicapped's mobility: "Making it easier for disabled people to travel is an essential prerequisite for vocational training and employment."[312] As with other of the Charter's social platforms, EC programs furthering these goals likely could effect the tax structure, raising the cost of doing business in the EC. Yet these proposals do not seem likely to give rise to any new area of anti-discrimination law.[313]

IV. How Post-1992 EC Social Law Might Affect United States-Based Employers of Europeans

Because the Charter and the Social Action Program spell out Brussels's vision of employee rights after 1992, the documents do not focus on how the proposed social regulations might effect a business's ability to earn a profit while simultaneously employing an EC-regulated work force. Yet the Charter and the Social Action Program do reveal, when analyzed in the context of prior EC statements and regulations in the Charter's twelve areas, how future regulation under the Charter most likely will affect the costs of EC employment.

A. Charter Rights Raising the Cost of Doing Business

Some of the proposed Charter rights would directly affect employment relationships, but others would only affect state-provided social benefits. Insofar as these other rights would give rise to EC-level social programs funded from the tax base, they might increase the cost of doing business in Europe.[314] However, these rights would not likely raise marginal European employment costs much, if only because social program

---

of landmark U.S. Rehabilitation Act of 1973 hepatitis-as-handicap decision, School Board v. Arline, 480 U.S. 273 (1987), to AIDS).

311 Charter, *supra* note 99, at ¶ 26.

312 Social Action Program, *supra* note 99, at 53.

313 In a sense, the EC's policy toward the handicapped — affirmative assistance rather than negative prohibitions of discrimination — parallels U.S. federal policy before the ADA (*supra* note 309): Before the ADA, the chief U.S. federal statute regarding the handicapped in employment was the Rehabilitation Act of 1973 (*supra* note 309). The Rehabilitation Act's text is devoted almost wholly to affirmative handicap "rehabilitation" programs, and not to discrimination provisions. Those few discrimination provisions in the Act apply only to the federal government and certain federal contractors. *See supra* note 309.

314 How the EC raises its budget from the member states is beyond the scope of this article. Of course, taxes paid to member states which ultimately finance EC programs come from EC taxpayers.

funding is already high in most EC member states;[315] theoretically, a true "approximation" of social programs need not raise total costs at all.

Examples of such social benefits not directly affecting marginal employment costs include the Charter's called-for rights to social protections of youth,[316] the aged,[317] and the disabled.[318] Because the EC already oversees aspects of social security and certain national welfare systems,[319] at best these new rights would only "approximate" national social welfare systems into a single broad-based protection covering citizens of all twelve member states. As such, these Charter rights need not change the overall balance between the EC member states' tax base and the programs it supports — although these rights would likely affect this balance in the less paternalistic countries.[320] At best, these rights could spawn more efficient social programs, consolidating and streamlining duplicative national programs. At worst, though, the new EC systems would impose new costs, to be spread among all taxpayers, including employers.

B. Charter Rights Affecting the Marginal Cost of EC Employment

The bulk of the Charter's worker rights would come at the direct expense of EC employers. For example, the Charter's right to "fair remuneration"[321] would regulate employer-paid wages. High wage minimums could prove expensive to those employing unskilled and short-term workers. As another example, the Charter's right to "improved working conditions"[322] could impose substantial new costs on employers — yet in the absence of a complete set of regulations, how onerous this right will be is difficult to assess. As envisioned under the Charter, the right to improved working conditions would include rights to annual vacation leave and weekly rest periods.[323] At least initially, this could prove burdensome to those United States-based employers still unused to the liberal vacation and leave policies standard in much of Europe.[324]

---

315 *See supra* § III(C)(4), and citations therein.

316 *See supra* § III(C)(10).

317 *See supra* § III(C)(11).

318 *See supra* § III(C)(12).

319 *See supra* § III(C)(4).

320 As a general rule, taxes are lower in jurisdictions which fund fewer social programs.

321 *See supra* § III(C)(2).

322 *See supra* § III(C)(3).

323 *See supra* note 213 and accompanying text.

324 As any North American who has traveled through Europe in August is aware, EC member state tradition strongly supports generous annual vacation time. Indeed, the Treaty itself regulates "holiday schemes." Treaty, *supra* note 99, at art. 120.

Similar is the Charter's right to vocational training.[325] Depending on the extent to which the EC requires industry to implement the Charter's called-for training programs, and depending on how liberally Brussels interprets its right of worker "leaves" for training,[326] the right to vocational training could prove expensive for employers. While better-trained workers could certainly be an asset for certain businesses, how expensive — and expansive — the EC's vocational training right will be remains to be seen.

Also, the Charter's protections of health and safety in the workplace[327] could prove costly, at least for a United States-based employer starting up direct operations in Europe. Substantive differences between United States and EC workplace safety regulations could impose on certain United States-based employers, such as those in heavy manufacturing, the burden of translating one set of safe work practices into another.

C. Charter Rights Affecting Legal Liability and the Structure of EC Labor Law

The sections of the Charter and Social Action Program most likely to affect employers of Europeans directly are those worker "rights" which could give rise to new employer liabilities, and those "rights" which would alter the form of labor law in the member states. One such right is the Charter's call to abolish sex discrimination,[328] insofar as employers found to have violated this will be liable for damages.[329] However, because similar anti-discrimination provisions already exist in the EC — and, for that matter, in the United States — this right should not radically affect those employers which already strive for sex-neutral hiring, pay, promotion, benefits, and training programs.[330]

EC social rights more likely to burden employers are those proposals which would contravene the "subsidiarity" concept[331] and impose an EC-structured labor law on the existing order of employment relations within the member states. A basic example is the Charter's grant of collective bargaining rights, under which Brussels would effectively protect unions.[332] By promoting a labor/management dialogue at the "Euro-

325 *See supra* § III(C)(6).
326 *Id.*
327 *See supra* § III(B)(9).
328 *See supra* § III(C)(7).
329 *See supra* note 252.
330 *See supra* text accompanying notes 246-250.
331 *See supra* note 154.
332 *See supra* § III(C)(5).

pean level,"[333] Brussels might actively re-order existing bargaining relationships. Yet how much coordinated EC-wide determination of worker rights really will occur remains to be seen. At least in the single market's early years, the EC collective bargaining right may mean little more than Brussels's promotion of labor representation. Collectively-bargained determinations of workplace conditions for most European workers could well remain local for some time.[334]

Potentially farther-reaching is the call for a worker consultation and participation scheme;[335] indeed, worker consultation and participation is the single market program's most volatile employment-related measure.[336] While many corporations, especially multinationals based off the continent, are attracted to the possibility of an EC-wide corporate status, such corporations are understandably reluctant to accept labor representatives on their boards, or even to share information and decision-making with worker representatives. This is especially true to the extent that the Charter and Social Action Program reject the historic link between EC-wide corporate status and worker participation.[337] United States-based corporations, which have no tradition of worker participation,[338] seem particularly loath to grant foreign labor a say in corporate policy. To some extent, the international law doctrine of sovereignty may support these United States employers.[339] Yet how extensive the ultimately-enacted EC version of worker consultation and participation will be remains an unsettled, hotly debated issue.

D. Benefits the Charter Would Confer on EC Employers

Because the Charter and Social Action Program focus on worker and not employer rights,[340] these documents for the most part read as business-restrictive. Yet the EC's proposed social program would actually confer some *benefits* on those employing Europeans after 1992. Primarily, the Charter's first right, to freedom of movement,[341] would be a

---

333 *See supra* note 234 and accompanying text.

334 One collective bargaining issue which might have more *immediate* impact, however, is the Social Action Program's proposal to require that employers issue documentation to workers proving they have an employment "contract." *See supra* note 215 and accompanying text. Employers fear this proposal could be a back-door attempt to force them to "recognize" collective bargaining relationships where none would otherwise exist.

335 *See supra* note 215; *see also supra* § III(C)(8).

336 *See supra* notes 257-264 and accompanying text.

337 *See supra* notes 269-276 and accompanying text.

338 *See supra* note 259 and accompanying text.

339 *See supra* notes 279-280 and accompanying text.

340 *See supra* § II(D).

341 *See supra* § III(C)(1).

boon to any employer with trans-European operations, because it would allow greater staffing flexibility among the member states.

Additionally, the Charter and Social Action Program send some positive signals to United States employers through what they *omit*. The Charter and the Social Action Program are silent on several areas in which United States employers bear heavy domestic burdens; most notable is the virtual absence of anti-discrimination law.[342] Even the proposed protections for the young, the aged, and the disabled[343] do not seem headed toward the extensive United States regulation of employment decisions arguably involving age or handicap, under the Age Discrimination in Employment Act,[344] the Rehabilitation Act of 1973,[345] the Americans with Disabilities Act,[346] and analogous state laws.[347] Similarly, although much of the Charter and Social Action Program aims at guaranteeing increased benefits for workers, nothing in the documents raises the specter of benefit plan liability analogous to United States law under the Employment Retirement Income Security Act.[348] And nothing in the Charter or Social Action Program approaches the magnitude of United States prohibitions, under Title VII[349] and analogous state laws,[350] against race, nationality, and religious discrimination.[351]

---

342 *Cf. supra* note 196. *See generally* Social Action Program, *supra* note 99, at 5 ("the Commission is not making a proposal in respect of discrimination on the grounds of race, colour, or religion. . ."). Generally, the Charter and Social Action Program aim at providing *positive* benefits to *workers*, while U.S. employment law imposes *negative* prohibitions on *employers*. This philosophical difference may be a result of the difference between civil law and common law jurisprudence: In civil law systems, affirmative rights effectively arise from codes; under common law, citizens' acts are all legal unless specifically prohibited by statute or otherwise. *See generally supra* notes 30-34 and accompanying text. Still, the Charter and Social Action Program would not override more worker-protective anti-discrimination laws internal to any member state. On such laws in Britian, see, e.g., Fitzpatrick, *Legislation: The Sex Discrimination Act of 1986*, 50 MOD. L. REV. 934 (1987); Pannett, *Whom Does the Race Relations Act Cover?*, 133 SOLIC. J. 855 (1989).

343 *See supra* §§ III(C)(10) - III(C)(12).

344 29 U.S.C. §§ 621 *et seq.*

345 29 U.S.C. §§ 701 *et seq.*

346 Pub. L. No. 101-336 (1990).

347 *See supra* note 250. The Charter and Social Action Program actively prohibit sex discrimination, but this EC-law prohibition effectively predates these two documents. *See supra* § III(C)(7).

348 29 U.S.C. §§ 1001 *et seq.*

349 42 U.S.C. §§ 2000e - 2000e-17. *See generally supra* note 247 and accompanying text.

350 *See supra* note 250.

351 The Charter would, however, grant employment rights to EC citizens regardless of their member state affiliations. *See supra* § III(C)(1). On sex discrimination, see *supra* note 347.

V. CONCLUSION: THE COMING BATTLE BETWEEN BRUSSELS AND THE MEMBER STATES, AND THE OUTLOOK FOR EC LABOR AND SOCIAL REGULATION

Perhaps the most important principle to be gleaned from the Charter and Social Action Program comes not from the documents themselves, but from the political battle surrounding them.[352] Because each of the twelve member states which make up the EC has a distinct social and labor relations tradition,[353] legislating a single, harmonious labor and social rights program may be among the most difficult tasks facing Brussels before the end of 1992.[354]

While in the final two years of the single market program an intense battle still raged over the Charter's legal status,[355] the Commission and Council were nevertheless almost sure to draft and approve some comprehensive social legislation for a post-1992 "social Europe." But what the specifics of this legislation would be, and whether the Charter's twelve rights would chiefly be enforced at the EC level or be deferred to the member states under the "subsidiarity" doctrine,[356] still remained open questions in the final years leading up to December 31, 1992.

By the early 1990's, the previous quandary over the meaning of "social Europe" had been clarified to a struggle over how broadly to implement twelve EC-level worker rights. The outcome of this struggle — which may be all but determined by the end of 1992 — will necessarily determine whether Brussels creates new socialized protections for all Europeans, whether it retains for the member states control over key labor and social issues, or whether it forges some different, compromise position.

The socially-expansive mood among the EC decision-makers who approved the Charter and drafted the Social Action Program[357] virtually

---

352 *See supra* § II(D).

353 *See supra* § II(A).

354 *See, e.g., More Rights for Workers, supra* note 100 (detailing political problems Brussels faces in resolving policy disputes between EC employers and EC labor). Perhaps the move toward a single social policy is the most contentious issue facing European unity, apart from the issue of the single EC currency and monetary union. *See* Stephens, *Thatcher Set for Vigorous Defence of Stance on EMU*, The Financial Times (London), Oct. 30, 1990, at 1, col. 6. *See generally* citations *supra* at note 103.

355 *See supra* note 181; *see also supra* § II(D).

356 *See supra* note 154.

357 As a reading of the Charter and the Social Action Program shows, the mood motivating "social Europe" is an expansive one. The November 1990 resignation of Margaret Thatcher could also spur faster growth toward a "social Europe." Yet, the events in Eastern Europe of 1989 and the reunification of Germany in October 1990, plus the Mideast war and threatened recession of 1990-1991, could cause economic conservatism in Brussels. This may, in turn, slow down the "social Europe" movement — at least insofar as the Charter and Social Action Program propose sweeping

assures that the costs of employing EC workers, and of doing business in the EC generally, will remain high after 1992.[358] Yet, however expensive the regulation under the Charter and Social Action Program proves to be, these two documents will likely achieve their purpose, strengthening the labor and social fabric of Europe. Possibly, the EC's hybrid economic system, which combines free market principles with broad state-provided social protections,[359] will produce real benefits for the EC employment market — however difficult such benefits may be for a United States free market capitalist to appreciate in the abstract. To this extent, Brussels's "social Europe" program could actually afford employers based outside the EC a favorable European workplace environment well after 1992.

tax-funded programs. *But cf. supra* note 110 (on connection between EC economy and Eastern Europe).

358 By U.S. standards, employment costs in Europe are already high. *See supra* notes 314-315 and accompany text.

359 As this article attempts to show, the EC's vision of "social Europe" is inconsistent with an unregulated, purely-free-market ideal. Yet the EC's own Treaty requires that directives on labor and social issues "shall avoid imposing administrative, financial, and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings." Treaty, *supra* note 45, at art. 118a, ¶ 2. Businesses in the EC, including those based in the U.S., have a keen interest in seeing Brussels live up to this provision.