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From the Social Charter to the Social Action Program 1995-1997: European Union Employment Law Comes Alive

Donald C. Dowling, Jr.*

I. Employment Costs Play a Key Role in the Success of a Business Operating Within the European Union

As trade becomes increasingly global, and as Western Europe attains an increasingly important position in the world market, businesses based outside of Europe increasingly view the European Union (EU) as a key market. The world's major multinational businesses have, of course, operated in Europe for decades, but many smaller companies based outside Europe only now find themselves attracted to the EU's single market. These companies are exporting goods to Europe and setting up direct operations such as distributorships, branch offices, joint ventures, and manufacturing or service operations within the EU Member States.¹

Traditionally, multinational businesses transferring direct employment operations abroad have moved into "third world" countries to take advantage of cheap labor.² The motive for expanding operations in the European Union, however, is to gain access to the EU's wealthy 380 million "first world" consumers.

The wealth of Europe's consumers comes from Europe's employers. Northern European workers earn higher hourly wages than U.S. and Japanese workers, and they enjoy broader levels of benefits.³ However, the

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1. See, e.g., Lindley H. Clark, Jr., *Europe '92? It's Mostly a Break for Americans*, WALL ST. J., May 31, 1990, at A18.

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

3. While the average U.S. manufacturing wage is \$16.17 per hour, Europe's average is higher, peaking in Germany at \$25.94. 143 Lab. Rel. Rep. (BNA) 126 (May 31, 1993). In addition, employer-provided benefits in Europe are generally more generous than elsewhere, including the United States. In Italy, the rule of thumb is that benefits cost over 100% of an employee's salary; in the United States, benefits average only about 25% of salary. Thus, an Italian's salary makes up less than half his total cost to his employer, while a U.S. worker's salary is about 75% of his cost to his employer. In addition, Euro-29 CORNELL INT'L L.J. 43 (1996)

wealth that makes Europeans ideal consumers renders Europe's employment climate, from the employer's point of view, especially chilly.⁴

Non-European businesses hoping to penetrate the EU market therefore must choose between cheaper labor and market access.⁵ To maximize profitability, anyone doing business in Europe needs to deal with the problem of controlling employment costs in EU operations.⁶ Unfortunately, this goal of minimizing European employment costs runs counter to an increasingly important aspect of the EU's agenda: harmonizing Member States' employment ("social"⁷) laws.

When the European Union originally decided to create its post-1992 single market, it focused largely on the benefits and efficiencies a single market could bestow upon business.⁸ The European labor movement, however, demanded that if business was to benefit from a single market, then workers also deserved some new advantages.⁹ Europe's social mavens (organized labor and Europe's strong socialist parties) demanded a "lowest common denominator" of employee rights, which would apply throughout

pean workers clock substantially fewer hours per year than their U.S. counterparts. As a result, European businesses need to employ more people to get the same output. See Amity Shlaes, "Re-Employment" That Kills Jobs, WALL ST. J., Apr. 26, 1994, at A18. See also *infra* note 120.

4. Cf. Donald C. Dowling, Jr., *How the EC Could Be An Employment Services Market*, EUR. L. & STRAT., Nov. 1992, at 1; Donald C. Dowling, Jr., "L'Europa Sociale": Il Punto di Vista delle Imprese Multinazionali USA, INDUSTRIA E SINDACATO, June 28-July 5, 1991, at 16.

5. The political dynamic is essentially identical to the employment policy debate that raged in the United States prior to the ratification of the North American Free Trade Agreement when U.S. business, Mexican business, and the presidents of the United States and Mexico all argued that NAFTA would boost the economics of the signatory countries. At that time, organized labor and influential businessman Ross Perot strongly opposed the treaty, arguing that it would take away American jobs. As a compromise embodied in a side-agreement to NAFTA, the treaty parties set up a formal structure for policing one another's enforcement of employment laws. The U.S. labor movement was unable to argue for a strengthening of substantive employee protections within the signatory countries' labor laws, because the United States, with the least worker-friendly labor law system of the three NAFTA signatories, had little ground to stand on.

6. See generally CEPS MACROECONOMIC POLICY GROUP, EUROPEAN LABOUR MARKETS: A LONG-RUN VIEW (1990).

7. The word "social" in Eurospeak is virtually synonymous with "employment" in American usage.

8. Cf. DESMOND DINAN, EVER CLOSER UNION? AN INTRODUCTION TO THE EUROPEAN COMMUNITY 368 (1994) ("by giving European industry a political program on which it could finally base concrete action plans for restructuring operations, for increasing economies of scale, and for improving the efficient use of vital resources, completion of the [European] single market became an integral part of the Community's industrial strategy") (internal punctuation and footnote omitted).

9. EC employers' counter-argument to this point was that the single market does not benefit European business. The breakdown of national trade barriers increases competition, which hurts previously-protected industries. See, e.g., *European Employer Group Cites Business Perils of Single Market*, Daily Lab. Rep. (BNA) No. 94, at A-4 (May 15, 1990) (Zygmunt Tyszkiewicz, Secretary-General of UNICE, the Union des Confederations de l'Industrie et des Employeurs d'Europe, arguing 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'").

the European Union, from Germany and Denmark to Portugal and Greece.¹⁰ Such a plan would provide a minimal level of employee protection and leave Member States free to bestow even more generous rights. The social mavens' arguments have proven especially persuasive in the worker-friendly atmosphere of the Brussels "Eurocracy."

All major business deals with Europe will involve, either directly or indirectly, significant employment costs. Europe's high employment costs are not only due to the laws of economics; they also result from Europe's intrusive employment laws, which amount to "unfunded mandates" (borrowing from U.S. political jargon) on everyone who employs Europeans.

Transactional lawyers representing clients doing business in the European Union must be especially vigilant to spot in advance the key European employment law issues. Missing these issues can cost clients dearly. Even large, well-known multinationals have made expensive mistakes by failing to investigate European employment laws prior to closing a transaction.¹¹

Merely structuring a deal in a manner that places all the employment burdens onto a native European party through a licensing, agency, or distributor arrangement, or through certain joint ventures, will never completely skirt the effects of European employment laws. Europe's high employment costs and restrictive employment laws impose indirect (sometimes even hidden) costs and concerns which affect transactions structured this way.¹² Companies based outside Europe which want a presence in the European Union simply cannot escape the high price of admission.

II. The Three Tiers of Employment Law Issues in European Deals

Europe's high employment costs and restrictive employment laws mean that businesses based off the continent need to know up front the employment-law ramifications of their European deals. Unfortunately, researching employment law in this context is a triple undertaking. Three tiers of employment law cover a non-European-based employer's obligations in the European Union: (1) the extraterritorial effect of home-country employment law, (2) the specific European Member State's employment laws, and (3) the EU's growing body of Brussels-level "social" law.

10. Europe's social mavens generally seek to have the European Union enact legislation which sets a minimum baseline of employee protection, leaving Member States free to regulate employers more stringently. The social mavens seek to avoid a "race to the bottom," by which Member States would relax existing employee-protective laws to comply with, but not exceed, the harmonizing European instrument.

11. See, e.g., Donald C. Dowling, Jr., *Preparing for the Internationalization of U.S. Employment Law Practice*, 43 *LAB. L.J.* 350, 352, 355 (1992); Nancy Honig & Donald C. Dowling, Jr., *How to Handle Employment Issues in European Deals*, 13 *PREVENTIVE L. REP.* 3, 6-7 (Spring 1994); *Lab. L. Rep. Insight (CCH) No. 398*, Issue 91 (Apr. 1994) (interview with Donald C. Dowling, Jr.).

12. See sources cited *supra* note 11.

A. Tier 1: Extraterritorial Application of Domestic Employment Laws

A non-European business completing a deal in the European Union first needs to account for the extraterritorial reach of its home-country employment laws. This is especially critical for U.S. businesses, because the United States extends the reach of its domestic employment laws especially far by world-wide standards.

The chief U.S. anti-discrimination laws apply to foreign workplaces "controlled" by U.S. companies.¹³ However, these employment laws only protect those overseas workers who carry U.S. passports. For example, if the McDonald's on the Champs-Elysees fired all its employees over age forty, only affected U.S. citizens could sue under U.S. law.¹⁴

B. Tier 2: Member State Law

Even as the European Union increasingly regulates employment issues at the Brussels level, internal Member State law remains the starting point for determining which employment rules control a given European workplace. These employment laws vary greatly within the EU Member States. Basic employment rules—including minimum wage, firing restrictions, severance pay requirements, and union organization laws—remain purely a function of Member State law.¹⁵

Differences among the Member States hamper multinational employers hoping to streamline trans-European employment operations. A well-known U.S. CEO, Victor Kiam, has stressed that these differences inhibit the viability of the single European market itself:

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.¹⁶

Kiam's lament is well founded. According to one cynic, "if all Europe's labor laws were laid end to end there would be no end."¹⁷ Any multinational doing a deal in Europe must therefore anticipate the effects of each Member State's national employment laws.

13. Age Discrimination in Employment Act, 29 U.S.C. §§ 623(h), 630(f) (1994); Title VII, 42 U.S.C. § 2000e-1 (1988); Americans With Disabilities Act, 42 U.S.C. § 1211(4) (1988).

14. U.S. businesses involved in European deals often assign at least some U.S. employees abroad as expatriates. Often these are highly-compensated management and technical workers.

15. See EUROPEAN LABOR COURTS: CURRENT ISSUES 47-82 (Werner Blank ed., 1989) (comparative overview of seven European countries' systems regulating "disputes concerning termination of employment").

16. Victor Kiam, *Fortress Europe 1992? Don't Hold Your Breath*, WALL ST. J., Sept. 11, 1989, at A18.

17. JACK PEEL, *THE REAL POWER GAME: A GUIDE TO EUROPEAN INDUSTRIAL RELATIONS* 168 (1974).

The various Member State employment laws come into play as early in a deal as the site-selection stage. For example, Mediterranean countries typically have lower wage rates than their Northern European counterparts. However, Mediterranean countries, such as Spain and Italy, also impose some of Europe's highest severance pay obligations and have especially restrictive rules prohibiting firings. On the other hand, northern States, such as Germany and the Netherlands, have far-reaching laws requiring employers to allow workers to participate in management decision-making. Non-European companies planning to merge, open an office, or structure a joint venture on the Continent must account for these differences in employment laws before selecting the Member State for a new facility.

Once a company chooses a European site, Member State employment laws remain an issue when choosing the form of business. For example, a key difference between the German *Aktengesellschaft* [AG] and *Gesellschaft mit beschränkter Haftung* [GmbH] is the type of worker participation obligations which these corporate forms impose.¹⁸

Even as Brussels develops a new body of EU-level employment law, the European Union's unique legal structure requires lawyers to keep their focus on the Member States' internal employment laws. Almost all EU social instruments are "directives," which come into force only when each Member State individually implements them according to its own "choice of form and methods."¹⁹

For example, the EU employment law directive which covers maternity leave merely sets out a "lowest common denominator" which each Member State's internal laws must meet; each Member State is free to offer greater protection to pregnant women.²⁰ If, therefore, a U.S. company plans to acquire offices in Greece and Austria and wants to know what maternity leave regulations apply within each State, reading the EU maternity leave directive will not answer the question. The directive is merely a framework statement addressed to Greece, Austria, and all the other Member State governments. The Greek and Austrian maternity laws, even if both countries have legally implemented the EU maternity directive, may well differ from each other substantially.

C. Tier 3: European Union Law

The Member States are therefore the primary source for employment law applicable in Europe. According to the Commission, "[t]otal harmonisation [sic] of social policies is . . . not an objective of the Commission or the Union."²¹ Nevertheless, over time Brussels will more comprehensively reg-

18. Cf. Donald C. Dowling, Jr., *How Does Europe Regulate Power Within Its Corporations? What Might the Answer Mean for the U.S.?*, 12 *Nw. J. INT'L L. & BUS.* 601, 614 (1992) (book review).

19. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EC TREATY] art. 189, amended by TREATY ON EUROPEAN UNION, 31 *I.L.M.* 247 (1992).

20. See *infra* notes 165-76 and accompanying text.

21. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Medium Term

ulate employment issues at the EU level. Indeed, proposed and current EU employment law instruments already have had far-reaching effects on European business. For example, the recently-enacted Works Council directive on "worker participation" forces even non-unionized companies to grant employee representatives a voice in corporate management.²² But this directive covers only employers "with at least 1,000 employees within the Member States," including 150 or more employees in each of at least two Member States.²³ The representative of a U.S. corporation that plans to establish a European presence which might one day employ 1,000 Europeans needs to account for this directive. If legal counsel for such a corporation ignores this law and its "150 employee" clause, the company unwillingly could enter into a restrictive worker participation obligation.²⁴

III. An Overview of EU Employment Law

In its attempt to harmonize Member State laws, the European Union seeks to establish at least a base level of protection for employees. For example, in the future a worker from Finland should be able to take a job in Portugal and keep the same package of employment law protections, including similar rights to pay and benefits, that he had back home.²⁵ However, movement toward this goal has begun in earnest only recently.²⁶

A. The "European Model" of Employment Relations

The civil (code-based) legal systems, which govern continental EU countries, contain employment law traditions markedly different from those in

Social Action Programme 1995-1997, COM(95)134 final at 2 [hereinafter Social Action Program 1995-1997].

22. See *infra* notes 193-202 and accompanying text.

23. See *infra* note 198.

24. For an overview of EU-level social law with an emphasis on its emerging relevance, see BEVERLY SPRINGER, *THE SOCIAL DIMENSION OF 1992: EUROPE FACES A NEW EC* (1992). See generally Roger Goebel, *Employee Rights in the EC: A Panorama from the 1974 Social Action Program to the Social Charter of 1989*, 17 *HASTINGS INT'L & COMP. L. REV.* 1 (1993).

25. The European Union has stressed recently that in the employment arena, as in other areas, it will respect the doctrine of "subsidiarity," i.e., Member States should regulate all areas, including matters of employment policy, which are more appropriately addressed at the local (Member State or regional) level. Cf. George Bermann, *Taking Subsidiarity Seriously: Federalism in the EC and the U.S.*, 94 *COLUM. L. REV.* 332 (1992); Terence Stewart & Delphine Abellard, *Labor Laws and Social Policies in the EC After 1992*, 23 *LAW & POL'Y INT'L BUS.* 507, 577-78 (1992); W. Gary Vause, *The Subsidiarity Principle in European Union Law—American Federalism Compared*, 27 *CASE W. RES. J. INT'L L.* 61 (1995). The problem of interpretation concerns the concept of "appropriateness." Brussels has most often determined that specific employment issues are most appropriately regulated at the EU level.

26. A small but important set of employment doctrines has long been part of European law. For example, the right to equal pay for men and women has been part of the EC Treaty since its inception in 1957. EC Treaty, *supra* note 19, art. 119. Another important employment issue, worker participation in management, has been debated by scholars and practitioners for decades, but has only recently obtained the force of law. See *infra* notes 185-208 and accompanying text.

the United States.²⁷ European employment laws, even in Britain, are largely a product of legislated rights affirmatively assuring long-term job security and dignified work conditions.²⁸ Unlike the common law employment-at-will concept (still the starting point for non-union employment relationships in the United States), European employment of undefined duration effectively includes an implicit assurance of unlimited job tenure.²⁹

This assurance goes well beyond that found in U.S. anti-discrimination legislation. In Europe, even non-union workers are typically parties to written employment contracts. These agreements raise to the level of law many important aspects of the employment relationship, including management's right to assign overtime and its right to fire people.³⁰ As opposed to the current U.S. practice, workers employed under the "European model" of employment relations often expect either to keep their jobs as long as they want or be bought out at a high price.³¹ While the U.S. anti-discrimination model protects only certain classes of workers (based on their age, sex, race, religion, and disability), Europe's employment laws are more democratic in that they protect everybody.

B. "Social Europe" Through the Social Charter

Conceptually, a "common" or "single" trade market includes both a unified market for goods and a unified market for services, including the services needed to produce goods.³² Accordingly, since the very beginnings of the European Community (EC), the EC Treaty and the early instruments under it have regulated a few notable areas of employment law—including equal

27. See, e.g., *EUROPEAN LABOUR COURTS: CURRENT ISSUES*, *supra* note 15; *THE MAKING OF LABOUR LAW IN EUROPE: A COMPARATIVE STUDY OF NINE COUNTRIES UP TO 1945* (B. Hepple ed., 1986); *PEEL*, *supra* note 17.

28. See, e.g., *COMPARATIVE LABOUR LAW* 115-76 (W. Butler et al. eds., 1987); Pilar Caverio, *Labour Law and Social Security*, in *BUSINESS LAW GUIDE TO SPAIN* 399-430 (Bufete Cuatrecasas ed., 2d ed. 1994).

29. *Internal and External Adaptation of Firms in Relation to Employment*, COM(87)229 final at § VII (May 13, 1987) [hereinafter *Internal and External Adaption*] (discussing the "traditional [EU] unlimited employment contract") (emphasis added). See also *EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, NEW FORMS OF WORK* 36-91 (1988) (analysis of trends in European employment contracts); Ramm, *Model of a European Individual Employment Contract*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS* 378, 381 (R. Blanpain ed., 1982) (model of typical European employment contract explicitly states that "duration" of employment is "indefinite"); Drovín, *Germany's Job Straitjacket*, *WALL ST. J.*, June 12, 1990, at A16 (in Germany "[h]igh levels of job protection . . . restrict dismissals").

30. See sources cited *supra* note 29.

31. See sources cited *supra* note 29. For a Member State by Member State summary of Europe's national employment laws, see *LABOUR LAW COMMITTEE OF THE SECTION ON BUSINESS LAW OF THE INTERNATIONAL BAR ASSOCIATION, INTERNATIONAL HANDBOOK ON CONTRACTS OF EMPLOYMENT* (1988 & Supp. 1994).

32. This is especially true under U.S. jurisprudence, whereby the Constitution's "interstate commerce clause," which gives the federal government jurisdiction to regulate free trade among the states, has been held to encompass authority to regulate employment law. Accordingly, all important U.S. employment legislation is at the federal, not state, level.

pay for men and women, prohibition of sex discrimination, harmonization of workplace safety standards, and basic coordination of social security rules.³³ Simultaneously, Brussels has long worked to ensure the free movement of Member State workers and the cross-border recognition of European certifications and diplomas.³⁴ However, beyond these areas, Brussels for decades stayed out of the business of regulating employment. Even after 1974, when the Community issued a widely-heralded policy document called the 1974 Social Action Program, Brussels failed to implement any sweeping agenda of Community-wide employment regulation.³⁵ There was no coherent body of EC social law up through the 1980s.

The Single Market Program, born with the Commission's June 14, 1985 "White Paper" to the Council, set forth a concrete agenda for a single European market.³⁶ The White Paper's Single Market envisioned eliminating three categories of "barriers" dividing the Member States: physical barriers, technical barriers, and fiscal barriers. While the White Paper fleetingly addressed a need to achieve a social as well as economic union,³⁷ the document conspicuously omitted a category for social barriers.³⁸

The 1986 Single European Act implemented the White Paper by amending the Treaty, thereby raising the Single Market Program to the functional equivalent of European constitutional law.³⁹ However, the Single European Act, like the White Paper, largely ignored the Single Market Program's social side. Accordingly, while the Single European Act spurred the rapid development of a single European market, little happened at first to create any single employment market. In fact, the Single European Act's greatest innovation—the "qualified majority" Council voting system—expressly excluded social matters.⁴⁰ The Single European Act retained the cumbersome unanimous voting rule for all employment issues except those involving worker health and safety.⁴¹ Thus, while the texts of both the White Paper and the Single European Act pay homage to the importance of "social Europe,"⁴² these documents effectively put trade matters ahead of

33. See generally Goebel, *supra* note 24, at 73-81.

34. Cf. Janice Bellace, *Employment Protection in the EEC*, 20 STAN. J. INT'L L. 413 (1984).

35. See Goebel, *supra* note 24, at 16-55. Council Resolution of 21 January 1974 Concerning a Social Action Program, 1974 O.J. (C 13) 1 [hereinafter 1974 Social Action Program].

36. Completing the Internal Market, White Paper from the Commission to the European Council, COM(85)310 final [hereinafter White Paper].

37. *Id.* ¶ 20 (emphasizing how single market will strengthen EC "social . . . policy").

38. See *The European Community's Program for a Single Market in 1992*, 89 DEP'T ST. BULL. 23, 26 ("[s]ignificant by its absence from the EC's 1985 White Paper was any mention of social issues, such as workers' rights").

39. Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1 (effective July 1, 1987) (amending EC Treaty).

40. *Id.* arts. 14, 16-18. See *infra* notes 41, 142, 169.

41. Single European Act, *supra* note 39, art. 18 (unanimity applies to measures "relating to the rights and interests of employed persons"). *Id.* art. 118a, ¶ 2 (qualified majority vote and Parliament "cooperation procedure" apply to instruments involving "health and safety of workers").

42. White Paper, *supra* note 36, ¶ 20; Single European Act, *supra* note 39, arts. 21-23.

social issues.

The representatives at Brussels carefully considered this organization of priorities. From the beginning of the Single Market Program, two sectors, Europe's business community⁴³ and Britain,⁴⁴ consistently opposed a cohesive "social Europe." Instead, they advocated a single market limited to trade in goods, which would leave the Member States free to regulate employment on their own. In the mid-1980s, social Europe was too volatile a concept for Brussels to promote openly, because the single market's future was not yet secure.⁴⁵ As Brussels undoubtedly suspected from the beginning, had the European business community and Britain initially pressed their strong opposition to a social Europe, the entire Single Market Program might never have materialized, suffering the same fate as the EC Treaty's push for a common single employment market and the 1974 Social Action Program's attempt to rejuvenate social Europe.⁴⁶

Although it kept any plans for a social Europe quiet during the Single Market Program's early, formative years, Brussels devoted its energy toward making those plans a reality. Social Europe mavens spent the latter part of the 1980s issuing obscure but visionary papers demanding a social Europe to parallel the single market for goods, aimed at protecting the jobs of Northern European workers and preventing the exploitation of Mediterraneans.⁴⁷

43. Although European business tends to oppose a comprehensive social Europe, this generalization cannot be taken too far. Leaders of important European businesses are often far more socialistic than their U.S. counterparts. For example, Didier Pineau-Valencienne, CEO of Paris-based electronics conglomerate Groupe Schneider, worries about international disparities in distribution of wealth, the harmful effects of competition, and the dangers of "the Adam Smith philosophy." Charles Day, Jr., *The Ecstasy Is Worth the Agony*, *INDUSTRY WK.*, Nov. 15, 1993, at 20, 21.

44. As to Britain's historical aloofness from all matters of Europe's social agenda, see Lord Wedderburn of Charlton, *Companies and Employees: Common Law or Social Dimension?*, 109 *LAW Q. REV.* 220, 262 (1993) ("policies which might do a little to amend the common law philosophies, such as Community proposals for employee participation . . . necessarily find themselves embroiled in Britain in a battle with . . . common law principles and their dominant ideology, the common law tradition of authority [in the] work[place]").

45. See, e.g., Philip Revzin, *The Road to European Unity—1992: Unity Drive Feeds EC Bureaucrats' Power*, *WALL ST. J.*, July 27, 1989, at A8 (by mid-1989, widespread commitment to the Single Market Program at last allowed "the EC's bureaucrats [to] branc[h] . . . fast into previously forbidden areas" including "writing a European Charter of Fundamental Social Rights") (emphasis added).

46. 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, at 2 [hereinafter 1990 Report] ("[i]rreversibility and anticipation have characterized [the EU's] work [toward a single market] in recent months").

47. See Donald C. Dowling, Jr., *Worker Rights in the Post-1992 European Communities: What "Social Europe" Means to United States-Based Multinational Employers*, 11 *Nw. J. INT'L L. & BUS.* 564, 585-89 (1992) (discussing social documents after Single Market Program and before Social Charter). Much of the talk in this era aimed at averting "social dumping," Eurospeak for the fear that free EC trade would cause industry simultaneously to abandon higher-wage northern Europe and to exploit Mediterranean workers by denying them workplace protections and benefits. See also P. TEAGUE, *THE EUROPEAN COMMUNITY: THE SOCIAL DIMENSION* 77-80 (1989). The EU social dumping

In 1989, the social Europe movement emerged triumphantly from the Single Market Program's closet when then-Commission President Jacques Delors formally called for a cohesive social Europe agenda.⁴⁸ Late in 1989 the Commission issued a "Social Charter" and an implementing document now known as the 1989 Social Action Program.⁴⁹ Together these documents outline a "grand design for regulating workers' pay, conditions, and rights."⁵⁰ The 1989 Social Action Program calls for forty-seven specific instruments which the European Union would have to adopt to create social Europe. Comprising one of Brussels' first major single market agendas unconnected to the White Paper's three-barrier structure, the Social Charter and 1989 Social Action Program together articulated a comprehensive EU platform on European worker rights which was surprisingly employer-restrictive, especially by non-European and British standards.⁵¹

Although the Charter and 1989 Social Action Program had no legal force—the Charter was labelled a mere "Solemn Declaration," and Britain had voted against it, apparently vetoing it by blocking unanimous passage⁵²—these two documents quickly took on a life of their own. By the

concept goes back to League of Nations debates in the 1920s. 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 65-66 (1988) [hereinafter *SOCIAL EUROPE SP. ED.*].

48. Letter from Jacques Delors to Chairman of the Economic and Social Committee (Nov. 9, 1988), reprinted in COMMISSION OF THE EUROPEAN COMMUNITIES, 1/90 *SOCIAL EUROPE* 80 (1990) [hereinafter *SOCIAL EUROPE 1/90*]. The Economic and Social Committee (a Treaty-created EU institution) responded by issuing its Opinion of the Economic and Social Committee on Basic Community Social Rights, 1989 O.J. (C.126) 32. History, however, has ignored this uninspiring Opinion and has recognized the Social Charter as Europe's first key post-single market social document. Notwithstanding its substantive competence in social matters, its large and diverse membership, and its Institution-level status, the Economic and Social Committee has not played a significant role in molding social Europe.

49. *Community Charter of Fundamental Social Rights of Workers*, reprinted in COMMISSION OF THE EUROPEAN COMMUNITIES, 1/90 *SOCIAL EUROPE* 48 [hereinafter *Social Charter*] (issued by Commission on November 29, 1989, and approved by eleven of twelve 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 1989 Social Action Program]. For contemporary textual analyses of these documents, see Brian Bercusson, *The European Community's Charter of Fundamental Social Rights of Workers*, 53 *MOD. L. REV.* 624 (1990); Dowling, *supra* note 47, at 590-96; Bob Hepple, *The Implementation of the Community Charter of Fundamental Social Rights*, 53 *MOD. L. REV.* 643 (1990); Kraw, *The Community Charter of Fundamental Social Rights of Workers*, 13 *HASTINGS INT'L & COMP. L. REV.* 467 (1990). See generally Mary Dominick, *Toward a Community Bill of Rights: The European Community Charter of Fundamental Social Rights*, 14 *FORDHAM INT'L L. J.* 639 (1991) (Charter as "human rights" agenda). For a more recent analysis of the Charter, see Goebel, *supra* note 24, at 56-73. For an explanation of the Charter's peculiar publication history, see *id.* at 59 n.258.

50. *The Federal Devil*, *THE TIMES* (London), June 25, 1991, at 18.

51. "Americans are becoming increasingly nervous about the introduction of social legislation in Europe, [because it] is counter to American practice, according to an official of the American Pharmaceutical Association." *Financially Sound, Socially Insecure*, *THE ECONOMIST*, Dec. 14, 1991, at 70, 72.

52. For commentary on the uncertain legal status of the Charter, see Dowling, *supra* note 47, at 590-94.

1990s the Charter and the 1989 Social Action Program had catapulted the previously obscure EU worker rights question to the level of a hot topic throughout Europe.⁵³ By then, Brussels could at last openly acknowledge that its drive toward EU "social cohesion" could "[n]ot be dissociated from" the White Paper program itself.⁵⁴ In a matter of just a few years, social Europe had evolved from a whispered rumor to one of Brussels most important priorities.⁵⁵

While Europe's employers and Britain insisted that the Charter and 1989 Social Action Program had no legal effect, the social mavens (now including the Commission, the Parliament, Europe's socialists, and the European Trade Union Confederation) busied themselves drafting the forty-seven instruments called for by the 1989 Program. The social mavens quickly figured out that even if the Charter and 1989 Social Action Program were legally toothless, the opponents of a social Europe could not stop the Commission from proposing a series of social instruments which matched the laws outlined by the 1989 Program.

C. The Maastricht Social Protocol

Meanwhile, during 1990 and 1991, the European Commission completely rewrote the Treaty of Rome. The Commission wanted to take the next step beyond the Single Market Program, creating an even more cohesive Europe, a more democratic and "transparent" Union which would move Europe into the next logical stage: political integration, full economic integration (including a common currency), and coordinated integration of foreign relations and citizenship.⁵⁶ In November 1991, the Council on the European Communities (Council) held an intergovernmental conference ("constitutional convention" in U.S. terminology) at Maastricht, the Netherlands, where the heads of state congregated to conclude discussions and sign the Commission's radically revised treaty.⁵⁷

53. See, e.g., *id.*; *More Rights for the Workers*, THE ECONOMIST, July 28, 1990, at 60 (Commission's commitment to "social Europe" is "irrepressib[le]"); *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").

54. 1990 Report, *supra* note 46, at 1; see *id.* at 7, 10 ("[t]he social dimension is fundamental to the internal market").

55. On the "front burner" status of the EC social agenda in 1990, see, for example, M. HOLMSTEDT, EMPLOYMENT POLICY (1991); Dowling, *supra* note 47; Barry Fitzpatrick, *Community Social Law After Maastricht*, 21 INDUS. L.J. 199 (1992); Emil T. Kirchner, *The Social Framework of the European Communities*, in THE EUROPEAN COMMUNITIES ENCYCLOPEDIA AND DIRECTORY 1992, at 109 (1991). Yet in the words of one commentator, "[t]he social dimension of community policies is currently a sickly infant . . ." Lord Wedderburn of Charlton, *supra* note 44, at 262.

56. This newly enhanced European Community was dubbed the "European Union." TREATY ON EUROPEAN UNION, Feb. 7, 1992, art. A, 31 I.L.M. 247 (ratified Nov. 1, 1993) [hereinafter Maastricht]. *But cf. id.* art. G(A) (replacing term "European Economic Community" throughout Treaty with "European Community," not "European Union").

57. See generally Sari Laitinen-Rawana, *Creating a Unified Europe: Maastricht and Beyond*, 28 INT'L LAW. 973 (1994). On British employment law after Maastricht, see Georgina Keane, UK Labor Law and the Impact of the EC 4-25 (Aug. 10, 1993) (unpublished American Bar Association manuscript). For a comprehensive discussion of the

One key aspect of the Treaty on European Union was a more cohesive social Europe, called the Maastricht "Social Chapter."⁵⁸ Surprisingly, the proposed Social Chapter proved to be the greatest obstacle at the European Council's actual two-day Maastricht summit meeting.⁵⁹ The controversy over the Social Chapter, in fact, had the effect of pushing the EU's social agenda into the forefront of public consciousness as never before.

The Council went to the Maastricht meeting intending to approve the Commission's new draft treaty in two days.⁶⁰ Britain's Prime Minister John Major, however, was wholly unwilling to accept an earlier version of the proposed Social Chapter, and the other heads of state refused to amend the Commission-recommended draft.⁶¹ After some heated late-night political maneuvering, the Council arrived at an unprecedented—and almost unworkable—Social Chapter compromise. While Britain opted out of the new Social Chapter entirely, leaving the other Member States to legislate much European employment policy among themselves,⁶² the Council retained its previously existing authority to regulate in the social field.⁶³ After Maastricht, the Council could still propose and implement new social instruments under the old treaty authority, and instruments passed this way would, as always, cover Britain. However, Maastricht allowed new employment laws alternatively to be passed under the Britain-less Maastricht Social Chapter, renamed the "Social Protocol" because the reconfigured agreement was appended to the end of the treaty rather than incorporated as a chapter within it.⁶⁴ The Maastricht Treaty's Social Protocol in turn incorporates an Agreement on Social Policy Concluded between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland.⁶⁵ Together these two social appendices constitute only six of the Maastricht Treaty's 256 pages.⁶⁶

Besides carving Britain out of the new social Europe process, the Social Protocol sets forth three key innovations. First, it expands the number of social law subjects on which a qualified majority can pass instruments. Where the pre-Maastricht Treaty had restricted the qualified

Maastricht Treaty, see DINAN, *supra* note 8, at 168-93; RALPH H. FOLSOM & MICHEL P. CLOES, *EUROPEAN UNION BUSINESS LAW: A GUIDE TO LAW AND PRACTICE HANDBOOK* 21-23 (1995).

58. Actually, the Treaty had always contained a "Social Chapter." EC TREATY, *supra* note 19, arts. 117-28.

59. See DINAN, *supra* note 8, at 182-83.

60. *Id.* For an insider's report on the hectic two-day Maastricht Social Chapter negotiations, see Zygmunt Tyszkiewicz, *European Social Policy After Maastricht* (June 23, 1992) (unpublished manuscript by Secretary-General of employers' lobby UNICE).

61. See DINAN, *supra* note 8, at 182-83.

62. Protocol on Social Policy, Feb. 7, 1992, 31 I.L.M. 357 [hereinafter Social Protocol]. A protocol has the same effect as a provision written into the Treaty itself. See EC TREATY, *supra* note 19, art. 239.

63. EC TREATY, *supra* note 19, arts. 117-28.

64. Social Protocol, *supra* note 62. See Donald C. Dowling, Jr., *EC Employment Law After Maastricht: Continental Social Europe?*, 27 INT'L LAW. 7-12 (1993).

65. Social Protocol, *supra* note 62.

66. *Id.*

majority voting mechanism to health and safety topics, the Social Protocol allows qualified majority voting (specially reconfigured to account for the absence of Britain) over any issue involving health and safety, working conditions, worker information and consultation, sexual equality, or "the integration of persons excluded from the labour market."⁶⁷ However, unanimous voting among the participating Member States remains necessary to pass instruments regarding social security and social protection, employment contract terminations, collective bargaining, immigration from countries outside the European Union, and "financial contributions for promotion of employment and job-creation."⁶⁸

Second, the Social Protocol, for the first time in EU history, grants a legislative role to the so-called "social partners," the pan-European lobbying associations representing employers (chiefly UNICE, the Union des Confédérations de l'Industrie et des Employeurs d'Europe) and unions (chiefly ETUC, the European Trade Union Confederation).⁶⁹ In a unique provision, the Social Protocol requires the Commission to submit all draft social instruments to the social partners for nine months of consultation and collective bargaining.⁷⁰ During these nine months, the social partners can either jointly recommend changes to pending proposals or enter collective agreements on the topic of a proposal, thereby effectively pre-empting the proposal and rendering it obsolete.⁷¹ Also under the Social Protocol, a Member State can delegate implementation of social instruments to the social partners within that State, "at their joint request."⁷²

The Protocol's third substantive change to EU social law introduces affirmative action regarding sexual equality. The text of the original 1957 Treaty of Rome had laid out the basic goal of sexual equality as a straightforward ban on discrimination.⁷³ The Social Protocol goes farther by expressly allowing Member States to "[m]aintai[n] or adop[t] measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers."⁷⁴

Announcing this new Social Protocol in a press conference on December 11, 1991, then-Commission President Jacques Delors explained that the "two-tier" approach (all Member States versus all States less Britain) was the only way Europe could avoid reducing the Charter and 1989 Social

67. *Id.* art. 2(1).

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

69. *Id.*

70. *Id.* arts. 3-4. The nine-month period is rumored to have been inspired by the EU's instrument on pregnancy rights, which had occupied the attention of the EU Commission's social policy Directorate-General V just before the December 1991 Maastricht meeting. See *infra* notes 166-76 and accompanying text.

71. Social Protocol, *supra* note 62.

72. *Id.* art. 2(4).

73. EC TREATY, *supra* note 19, art. 119.

74. Social Protocol, *supra* note 62, art. 6(3). Ironically, the European Union introduced the affirmative action concept only shortly before the United States experienced a strong social backlash against it.

Action Program ideals to a level too weak for the other States to accept.⁷⁵ Nevertheless, Delors assured that post-Maastricht social developments would not be too "avant garde." The participating Member States would balance two goals: the need to legislate conservatively enough to insulate the EU's less economically-developed areas with the need to avoid "social dumping."⁷⁶

D. Progress Toward the "Social Action Program 1995-1997"

Maastricht bears the unfortunate distinction of being the Community treaty rewrite with the longest gestation period. Two years elapsed from the signing of the treaty by the European Council in November 1991 until its November 1993 effective date after full ratification. During these two years, the Commission's Directorate-General V drafted many of the forty-seven proposals called for in the 1989 Social Action Program. Otherwise, little occurred during this period on the social Europe front.⁷⁷

These two years of relative inactivity resulted in an increased demand for social change. By late 1993, the 1989 Social Action Program's once-revolutionary forty-seven proposals seemed within reach, even if only under the Maastricht Social Chapter's Britain-less social regime. The social Europe mavens therefore started to demand even more.

By this time the social Europe advocates had captured Europe's attention. London's *The Economist* diagnosed "employment and labour-market policy" as "the most immediate problem facing most EC members."⁷⁸ Madrid's *El Pais* declared: "The need substantively to modify the European labor market is the primary factor giving rise to disharmony among the Member States."⁷⁹ The Commission joined in, warning: "[t]here can be no doubt that the causes and consequences of the high and rising unemployment in Europe represent the single most serious challenge facing the Member States today."⁸⁰ Attempting to remedy this emerging social crisis, the Commission issued a Community-Wide Framework for Employment, calling for a new employment agenda by the end of 1994.⁸¹

75. See *European Community Exempts Britain from Complying with EC Labor Legislation*, Daily Lab. Rep. (BNA) No. 239, at A-1 (Dec. 12, 1991).

76. *Id.* For a more detailed analysis of Maastricht by this author, see Dowling, *supra* note 64, at 7-11. For a detailed analysis of the legal effect of the Social Protocol, see Elaine Whiteford, *Social Policy After Maastricht*, 18 EUR. L. REV. 202 (1993). Regarding "social dumping," see Dowling, *supra* note 47, at 581 n.93.

77. During this period, the Council addressed the issue of social Europe with broad policy statements. Cf. Council Conclusions of 21 December 1992 on the Effective Implementation and Enforcement of Community Legislation in the Area of Social Affairs, 1993 O.J. (C 49) 6.

78. *The Maastricht Recipe*, ECONOMIST, Oct. 23, 1993, at 15-16.

79. *Nace la Unión Europea en medio de un debate sobre la forma de crear empleo*, EL PAIS (Madrid), Nov. 8, 1993, at 1.

80. Green Paper: European Social Policy, Options for the Union, COM(93)551 final at 40 [hereinafter Green Paper].

81. Community-Wide Framework for Employment, COM(93)238 final (decrying "unacceptable levels of unemployment," considering idea of "reducing labor costs," and calling for "a rolling programme of work, to the end of 1994").

Amidst this unprecedented attention to social Europe, the political winds shifted in favor of the employers. Brussels' previous social initiatives, even in times of economic recession, had tended to restrict employers' flexibility and increase non-wage employment costs. The typical European response to tough economic times and rising unemployment traditionally had been to spread around existing work by forcing Europe's employers to cap hours and retain idle workers. However, by the mid-1990s, when Europe was again suffering through a serious recession with high unemployment,⁸² the prevailing economic thinking changed. Unemployment became such a serious problem that it shocked even some of Europe's socialists into believing that European employers needed more workplace freedoms in order to alleviate unemployment by removing disincentives to hiring.

During this time, the Commission's personnel underwent a shuffle. Ireland's Padraig Flynn, an old-school socialist, took his country's seat on the Commission and received responsibility for the Commission's social affairs portfolio. Flynn immediately decided to craft a new social affairs agenda, and, after a public comment period, he issued a Green Paper detailing his thoughts.⁸³ In July 1994, he supplemented this release with a Social White Paper.⁸⁴

Somehow Flynn had failed to appreciate the importance of the free-market turn in Europe's prevailing social thought. Although his writings emphasize competitiveness, Flynn's Green Paper and Social White Paper regurgitate the same tired socialist ideals which Brussels had been offering up for years. Flynn's Green Paper's four objectives are: (1) pass new employment laws to combat unrestricted competition in the market, (2) spend on social expenditures in a manner consistent with social goals, (3) expand overall regulation of the welfare state, and (4) pass social protection laws providing a minimum, decent level of income to those in distress.⁸⁵ Flynn's Green Paper and Social White Paper seek to alleviate unemployment by expanding worker rights and saddling employers with even more inflexible workplace restrictions.

In stark contrast to Flynn's Green Paper and Social White Paper, Commission President Jacques Delors—in one of his last important pronouncements in office—required the Commission to issue a Social White Paper on "Growth, Competitiveness [and] Unemployment" (Competitiveness White

82. The mid-1990s European recession was indeed severe. See Community-Wide Framework for Employment, *supra* note 81, § 2.1. By late 1993 Spain suffered an economic "paralysis" when unemployment officially hit 22.4%. See *La Paralisis de España*, EL PAIS, Nov. 8, 1993, at 24. See also Judith Valentine & Carita Vitzthum, *With Boom Gone Bust, Spain's Social Agenda Still Haunts Economy*, WALL ST. J., June 13, 1994, at A1. Regarding Germany's troubles in the mid-90's recession, see *The Politics of Work*, ECONOMIST, May 7, 1994, at 53 (Germany). On employment in Europe generally, see EMPLOYMENT IN EUROPE, 1993, COM(93)314 (206-page survey).

83. Green Paper, *supra* note 80.

84. European Social Policy, A Way Forward For the Union, A White Paper, COM(94)333 final [hereinafter Social White Paper]. The European Parliament voted to give qualified backing to this Social White Paper on January 19, 1995.

85. See Green Paper, *supra* note 80, at §§ I, IV.

Paper).⁸⁶ Delors's 184-page opus is radically more innovative than Flynn's Green Paper and Social White Paper; the Competitiveness White Paper implicitly rejects the traditional "worker rights" approach to social Europe in favor of a design to create a more competitive and stronger European economy.⁸⁷ While Delors's Competitiveness White Paper stops short of advocating a reversal in existing restrictions on employers' freedoms, the Paper all but ignores Flynn's "worker rights" language in favor of an "all-boats-rise-with-the-tide" theory championing efforts to redress unemployment by boosting Europe's economy. The Competitiveness White Paper, in fact, so ardently advocates macroeconomic reforms that entire sections of the document are silent on employment policy. Much of the paper reads like an economics, not a social, text. Delors's Competitiveness White Paper opens by asking: "Why this White Paper? The one and only reason is unemployment."⁸⁸ It then advocates a three-point economic plan including reduction in public deficits, stable monetary policies, and a guaranteed adequate rate of return on financial investments.⁸⁹

By shifting the social Europe focus from workers' rights to economic success, the Competitiveness White Paper breaks fresh ground. However, the paper does not trigger a complete U-turn in European social policy. The Competitiveness White Paper fails to advocate a relaxing of Europe's already-existing restrictions on employers, and it lacks the support of a Commissioner who could implement its goals: Delors's term in office expired shortly after the document was released.⁹⁰

Advocating employment reforms even more drastic than those of the Competitiveness White Paper, UNICE, the European employers' lobbying organization, issued a detailed position paper in June 1994, declaring: "[a]bove all, Europe needs firms that are profitable."⁹¹ The views expressed in the UNICE paper went beyond the macroeconomic focus of the Competitiveness White Paper and concentrated sharply on reforming Europe's employment laws. UNICE championed European competitiveness by advocating a "reduction in] labour costs (particularly non-wage costs), [an increase in] the flexibility of the labour markets and [an

86. Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century, White Paper, COM(93)700 final [hereinafter Competitiveness White Paper].

87. For example, the Competitiveness White Paper notes that Europe traditionally dealt with employment by paying out "public expenditure[s] . . . on assistance A complete reversal of attitude is required . . ." *Id.* at 15.

88. *Id.* at 1.

89. *Id.* at 6.

90. Additionally, despite the new direction offered by the Competitiveness White Paper, the core sections of the document rely on the old European approach of imposing responsibility on employers for social harmonization. For example, the Competitiveness White Paper does not reject the antiquated concept of alleviating unemployment by capping maximum hours in order to spread around existing work. The result is that employers must pay more of Europe's hefty benefits to a larger payroll. *Id.* at 149-50. See generally *Sharing the Burden*, *ECONOMIST*, Nov. 13, 1993, at 18 (on European propensity to cap hours to reduce unemployment).

91. UNICE, MAKING EUROPE MORE COMPETITIVE: TOWARDS WORLD CLASS PERFORMANCE iii, 11 (1994).

upgrade of] the skills and abilities of employees and the unemployed.”⁹² Specifically, UNICE recommended more subcontracting, increased competition and the introduction of market-type mechanisms, decentralization of authority from central to lower levels of government, and reducing the cost of labor.⁹³

At the time of the UNICE release, Bernhard Molitor assembled a task force called the Independent Expert Group on Legal and Administrative Simplification, with the goal of “turn[ing] back the regulatory tide in Europe at large [and] recommend[ing] where to slash away the red tape superimposed by EU laws in recent years.”⁹⁴

The pro-employer mood in Europe eventually influenced Social Affairs Commissioner Flynn. In 1994, Flynn announced that he would now focus on the quality, rather than the quantity, of employment legislation. He said: “We are looking for new ways to reconcile the twin objectives of economic growth and social progress—a new European model.”⁹⁵ On April 12, 1995, Flynn issued a new social action program, the Social Action Program 1995-1997, laying out a three-year social plan which clearly shows the stamp of Europe’s pro-employer mood in the mid-’90s.⁹⁶ Flynn’s plan, however, retains the influence of its author’s socialist sympathies. The result is an ambivalent, non-committal document which critics accuse of “lacking . . . teeth.”⁹⁷

Rather than demand economic reforms which would stimulate Europe’s economy and induce employment (as Delors’s Competitiveness White Paper would have done), Flynn’s Social Action Program 1995-1997 simply dilutes or eliminates many of his earlier calls for far-reaching socialistic reforms.⁹⁸ The Social Action Program 1995-1997 largely limits itself to toothless suggestions of policy “framework initiatives,” “priorities,” and “reflections.”⁹⁹

Specifically, the Social Action Program 1995-1997 creates a loose three year agenda (a “rolling program”) calling for progress in the social

92. *Id.* at viii.

93. *Id.* at 18, 24.

94. Martin du Bois, *Changing Climate: Dutch Begin Assault on Unemployment with Deregulation*, WALL ST. J. EUR., Apr. 12, 1995, available in WESTLAW, Allnews Library, WSJ-EURO File.

95. David Gardner, *Brussels to Reformulate Social Policy*, FIN. TIMES (London), May 30, 1994, at 2.

96. Social Action Program 1995-1997, *supra* note 21. Parrotting the Competitiveness White Paper’s opening focus on unemployment, the Social Action Program 1995-1997 starts with a section on “Jobs—The Top Priority.” For a comparison with the *Competitiveness White Paper*, see *supra* text accompanying note 88.

97. *Critics: Flynn’s Program Targeting Jobs, Workers’ Rights Lacks Teeth*, EUROWATCH, May 5, 1995, at 1.

98. Compare Green Paper, *supra* note 80 and Social White Paper, *supra* note 84 with Social Action Program 1995-1997, *supra* note 21.

99. Social Action Program 1995-1997, *supra* note 21. Britain’s Employment Secretary accused Flynn in the Social Action Program 1995-1997 of “not having abandoned the old way of thinking—based on regulation and restriction.” Julie Wolf, *A Special Background Report on European Union Business and Politics*, WALL ST. J. EUR., Apr. 13, 1995, available in WESTLAW, Allnews Database, WSJ-EURO File.

area, but with the understanding that “[t]otal harmonization of social policies . . . is not an objective”¹⁰⁰ The Social Action Program 1995-1997 is roughly divided into five main areas: employment, consolidation and development of legislation, equality of opportunities between men and women, an active society for all, and medium term reflection and analysis.¹⁰¹ Adopting a view similar to that espoused in the Competitiveness White Paper, the drafters of the Social Action Program declare that “the creation of jobs remains the top priority” and emphasize that “the economic and social dimension are in fact interdependent and must . . . advance hand in hand.”¹⁰² The document even promises to “enable companies to make suggestions about the creation of jobs and the attack on unemployment.”¹⁰³

IV. The EU Charter’s Twelve Employment Law Rights and the Status of their Implementation

The Competitiveness White Paper introduced a new free-market philosophy to social Europe regulation, which Flynn’s Social Action Program 1995-1997 continued to a lesser extent. These documents, however, did nothing to reverse thirty-seven years of employer-restrictive regulation. Consequently, the European Commission and European Parliament met in May 1995 to discuss the continued viability of the Social Charter and 1989 Social Action Program. Flynn’s Social Action Program 1995-1997 calls for a European Social Policy Forum to meet annually to report on the continued progress of the Social Charter and its twelve worker rights.¹⁰⁴ Social Europe in the traditional sense remains alive and well.

The twelve rights set forth in the Social Charter coincide almost exactly with the areas of employment law which Brussels has regulated to date. A study of each of these twelve substantive topics follows.

A. Right to Free Movement

The first of the Charter’s twelve rights, and therefore the first part of the social Europe framework, is the right to free movement. As an employment issue, this concept is non-controversial because, in principle, both workers and employers support the concept of free immigration within the European Union. The right to free movement is meant to “enabl[e] 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,

100. Social Action Program 1995-1997, *supra* note 21, at 2.

101. Actually the Social Action Program 1995-1997 is divided into 11 topics. *Id.* at i. Commissioner Flynn, in a speech, identified five of these topics as the paper’s themes. Speech by Padriag Flynn at the IBEC Social Awareness Campaign Social Policy Seminar, Dublin (Apr. 28, 1995), *reprinted in* EUROPEAN UNION PRESS RELEASE, Speech/95/81.

102. Compare Social Action Program 1995-1997, *supra* note 21, at 2, with Competitiveness White Paper, *supra* note 86, at 1.

103. Social Action Program 1995-1997, *supra* note 21, at 8, § 1.2.6.

104. *Id.* at 18, § 4.4.2.

working conditions and social protection in the host country."¹⁰⁵ The cornerstones of the free movement right are cross-border recognition of diplomas and licenses (so that, for example, a doctor educated and licensed in Greece can practice in Germany), and cross-border residency rights (so that, for example, an unemployed Irishman can move to Luxembourg to accept a job).¹⁰⁶

Even the 1985 Single Market Program White Paper had set out ambitious goals for attaining the free movement right, but Brussels was nevertheless slow to implement them. As late as 1991, the Commission complained: "[T]he completion of work aimed at facilitating mobility still depends on the extension of recognition of qualifications to all regulated professions and on the reform of the arrangements under which workers and their families obtain the right of residence."¹⁰⁷ In fact, Brussels' proposals on cross-border recognition of diplomas and licenses and its proposals on residence rights for workers were the only projects in the entire White Paper program not in place at the close of 1992.¹⁰⁸

The Commission proposed just one free movement directive expressly under the Social Charter itself—the 1991 Proposal for a Council Directive Concerning the Posting of Workers in the Framework of the Provision of Services.¹⁰⁹ This proposal attempts to deal effectively with competition problems among service businesses operating across Member State lines, *i.e.*, the problems that arise when an employer from a low wage Member State assigns a worker to a temporary posting in a high wage State.¹¹⁰ The proposal requires that a worker employed in one Member State assigned to

105. Social Charter, *supra* note 49, ¶ 2. Curiously, while freedom of movement is the Social Charter's first right, the 1989 Social Action Program, *supra* note 49, misplaces it as the fourth right. The 1989 Social Action Program also reshuffles some of the other rights. This article follows the ordering of rights in the Social Charter. For a thorough treatment of the right to free movement in the social context, see LUCIE A. CARSWELL & XAVIER DE SARRAU, *LAW & BUSINESS IN THE EUROPEAN SINGLE MARKET* 10/3-10/39 (1993). For discussions of the specific free movement issue of law practice mobility in Europe as it affects lawyers, see Jonathan Barsade, *The Effect of EC Regulations upon the Ability of U.S. Lawyers to Establish a Pan-European Practice*, 28 *INT'L LAW.* 313 (1994). See also Gregory Siskind, *Freedom of Movement for Lawyers in the New Europe*, 26 *INT'L LAW.* 899 (1992).

106. See, e.g., Directive 89/48/EEC, 1989 O.J. (L 19) 16; Recommendation 89/49/EEC, 1989 O.J. (L 19) 24; Directive 92/51/EEC, 1992 O.J. (L 209) 25.

107. Sixth Report of the Commission to the Council and the European Parliament Concerning the Implementation of the White Paper on the Completion of the Internal Market, COM(91)237 final at 1.

108. According to a 1992 Commission Report, [t]he only proposals in the White Paper programme which have not been adopted and will probably not be by the end of [1992] are those relating to the free movement and residence of workers and the members of their families These proposals have been with the Council since 11 January 1989 without it having been possible to find a qualified majority in favour of them. Seventh 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(92)383 final at 28.

109. Proposal for a Council Directive Concerning the Posting of Workers in the Framework of the Provision of Services, COM(91)230 final SYN 346.

110. *Id.* at 4.

another State for more than three months in a year receive the protection of the host State's laws regarding work hours, holiday time, minimum wages, subcontracting, health and safety, pregnancy and child care, and anti-discrimination protections.¹¹¹ The goal here is to prevent, for example, a Portuguese company from being able to win the low bid on a Danish construction project, and then staff the job with Portuguese construction workers earning 1.5 to 3 ecu per hour—when their now out-of-work Danish counterparts would have earned 13.32 to 18.39 ecu.¹¹²

The Maastricht Treaty itself contains a chapter outlining a new "Citizenship of the Union."¹¹³ In addition, Commissioner Flynn's Social Action Program 1995-1997 calls for a 1996 White Paper on free movement,¹¹⁴ and also provides three pages of proposals to encourage free worker movement via transfers of pension rights, cross-border recognition of diplomas, and social security for migrant workers.¹¹⁵

B. 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."¹¹⁶ In the European Union, the method of determining a minimum wage is often more complex than the U.S. model of a lowest legal rate per hour. Some Member States set minimum wages by collective bargaining agreement consensus (either Member State-wide or industry-wide); other States delegate minimum rates to Wage Councils or Joint Labor Committees.¹¹⁷ With a move towards harmonizing at least a minimum rate per hour, the Commission, in May 1991, issued a modest draft opinion asking each Member State to adopt its own statutory minimum wage.¹¹⁸ However, apart from a 1975 recommendation "on the principle of the 40-hour week and the principle of four weeks' annual paid holiday,"¹¹⁹ the Council has passed few instruments directly regulating pay. The inactivity is surely a result of the wide disparities in wages among the Member States: While Germans earn on average \$25.94 per hour, the Portuguese earn only \$5.01 hourly.¹²⁰

111. *Id.* at 21-27.

112. *Id.* at 5 (showing lowest and highest collective bargaining agreement hourly wages in the construction industry).

113. Maastricht, *supra* note 56, title II, art. G, part 2. On March 26, 1995, the Schengen Group of EU states (the Benelux and Iberian countries plus France and Germany) opened their borders, thereby allowing virtually free movement among those States. *See, e.g., 7 Members of EU Launch Passport-Free Zone*, N.Y. TIMES, Mar. 27, 1995, at A6. *See also* Tony Horwitz, *Europe's Borders Fade, and People and Goods Can Move Freely*, WALL ST. J., May 18, 1993, at A1.

114. Social Action Program 1995-1997, *supra* note 21, at 13, § 3.3.1.

115. *Id.* at 12-15, §§ 3.01-3.4.2.

116. Social Charter, *supra* note 49, ¶ 5.

117. *See generally* Social Charter, *supra* note 49.

118. Opinion on the Introduction of an Equitable Wage by the Member States, (SEC 91) 2116 (1991).

119. Recommendation 74/457/EEC, 1975 O.J. (L 199) 32.

120. 143 Lab. Rel. Rep. (BNA) 126 (May 31, 1993). According to a 1991 study, total average hourly compensation cost employers \$24.39 in Germany, \$16.10 in France, and \$15.40 in the United States. *See, e.g.,* Bruce Nelan, *As Europe's Ethnic Mix Begins to*

When the laws of economics create disparities this great, the laws of governments are virtually powerless to legislate change.

C. Right to Improved Working Conditions

The Charter's third right seeks to control working conditions, including "forms of employment other than open-ended contracts, such as fixed-term contracts, part-time working, temporary work, and seasonal work."¹²¹ In an attempt to implement this policy, on August 13, 1990, the Commission issued a proposal for a three-part directive on working conditions. The proposal was *not* called for under the 1989 Social Action Program. The three parts are titled the Proposal for a Council Directive on Certain Employment Relationships with Regard to Working Conditions,¹²² the Proposal for a Council Directive on Certain Employment Relationships with Regard to Distortions of Competition,¹²³ and the Proposal for a Council Directive Supplementing the Measures to Encourage Improvements in the Safety and Health of Temporary Workers.¹²⁴ In 1991, the Council approved the final proposal on temporary workers,¹²⁵ but the first two proposals remain pending.

The first proposal, on employment relationships, involves part-time and temporary (seasonal and fixed duration) employment. This instrument would require EU employers to treat their part-time and temporary staff "on the same footing as . . . other employees" as regards access to vocational training, worker representation, benefits, social services, and internal promotions to full-time or indefinite-duration positions.¹²⁶

The second work conditions proposal, defining employment relationships with regard to distortions of competition, involves limited-term contracts.¹²⁷ In Europe, even non-union job holders typically are parties to written employment contracts of indefinite duration which elevate many

Change, Some Countries Discover They Are Not as Tolerant of Foreign Cultures as They Once Thought They Were, TIME, Aug. 12, 1991, at 36. But cf. Proposal for a Council Decision Establishing a Medium-Term Community Action Programme to Foster the Economic and Social Integration of the Least Privileged Groups, 1989 O.J. (C 60) 15. In Italy, total hourly compensation cost employers \$19.51, but total hourly wages were only \$9.52. See Shlaes, *supra* note 3, at A18.

121. Charter, *supra* note 49, at 7-8.

122. Proposal for a Council Directive on Certain Employment Relationships with Regard to Working Conditions, 1990 O.J. (C 224) 4 [hereinafter Relationships Proposal].

123. Proposal for a Council Directive on Certain Employment Relationships with Regard to Distortions of Competition, 1990 O.J. (C 224) 6 [hereinafter Distortions Proposal].

124. Proposal for a Council Directive Supplementing the Measures to Encourage Improvements in the Safety and Health of Temporary Workers, 1990 O.J. (C 224) 8 [hereinafter Temporary Workers Directive].

125. Directive 91/383, 1991 O.J. (L 206) 19.

126. Relationships Proposal, *supra* note 122, art. 2. For a summary of laws regulating part-time work within the member states, see EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, PART-TIME WORK IN THE EU: LAWS AND REGULATIONS (1991). See generally Council Directive 93/104 Concerning Certain Aspects of the Organization of Working Time, 1994 O.J. (L 307) 18.

127. Distortions Proposal, *supra* note 123, art. 1.

important aspects of employment relationships—including the terms of discharge—to the level of law. EU workers employed under these contracts either keep their jobs as long as they want or else are bought out at a high price. Not surprisingly, given the oppressive effects of such contracts on employers, European employers occasionally offer their workers definite length contracts with specific termination dates (usually one year from the date of contracting). These employers typically renew the contracts annually until the employer decides upon discharge. In an attempt to rectify this practice, the “distortions of competition” proposal would prohibit EU employers from using fixed-term contracts for periods greater than thirty-six months.¹²⁸

Complementing this work contracts proposal, in November 1990 the Commission issued another, entirely separate draft directive which would require employers to put all employment contracts in writing, defining the applicable working conditions and the duration of the contract.¹²⁹ In October 1991, the Council adopted a revised version of this directive, making this requirement one of the first pre-Maastricht directives adopted under the Social Action Program and effective in all Member States.¹³⁰ This revised directive, effective since June 30, 1993, requires that virtually all employers of Europeans provide each full-time employee, within two months of employment, with a writing that states: the employers’ identity, the time and hours of work, the employee’s job duties and classification, the duration of employment if temporary, the applicable vacation policy, pre-termination notice policy, compensation and pay schedule, and, where appropriate, citations to applicable collective bargaining agreements.¹³¹ If the employee is to be assigned abroad as an expatriate, the writing must also address the duration of the foreign posting, the currency to be used for payment, the “benefits in cash or kind attendant on the employment abroad,” and the conditions of repatriation.¹³²

The third part of the Commission’s tripartite working conditions proposal is the directive on improving the health and safety of temporary workers.¹³³ This directive, which covers both part-time and temporary

128. *Id.* art. 4a. Surprisingly, while the Member States closely regulate individual dismissals, EU-level social law has historically avoided this topic. The Social Action Program 1995-1997, *supra* note 21, at 15, § 4.1.2, however, calls for a study of “national rules and practices on individual dismissals.”

129. Council Directive 91/533 on an Employer’s Obligation to Inform Employees of the Conditions Applicable to the Contract or Employment Relationship, 1991 O.J. (L 288) 32. See Council Directive 91/383 Supplementing the Measures to Encourage Improvements in the Safety and Health at Work of Workers with a Fixed-Duration Employment Relationship or a Temporary Employment Relationship, 1991 O.J. (L 206) 19.

130. Council Directive 91/533, *supra* note 129.

131. *Id.* art. II, § 2.

132. *Id.* art. IV, § 1. In 1993, the United Kingdom implemented this directive by strengthening a 1978 U.K. law which requires employers to provide workers with writings containing detailed information. Compare U.K. Trade Union Reform and Employment Rights Act 1993 with U.K. Employment Protection (Consolidation) Act 1978.

133. Temporary Workers Directive, *supra* note 124.

employment, requires employers to articulate in their assignment contracts detailed job descriptions setting out the hours of work and indicating "whether the job falls within the category of major risks as defined in national legislation."¹³⁴ The directive also requires employers to warn workers about the risks involved in "any activity requiring special occupational qualifications or skills."¹³⁵ "If necessary," employers have to provide temporary workers with "appropriate training."¹³⁶

An entirely separate instrument on working conditions—which the Commission proposed in November 1991, the EU Parliament supported on March 11, 1992 by a non-binding vote, and the Council approved on June 24, 1992—amends and expands a 1975 directive which required employers of twenty or more employees to give advance notice to their workers of plant closings and mass layoffs, and to bargain with workers over these changes.¹³⁷ The 1992 directive, plugging what the Commission termed a legal loophole, applies the 1975 directive to conglomerates headquartered either in one Member State or outside the European Union, but laying off workers in another.¹³⁸ According to the EU social mavens, the loophole was that the 1975 instrument did not apply to a multinational corporation which decided at its headquarters to dismiss a large contingency of workers in a different state, and keep local management in the other state ignorant about the impending reduction in force.

Under the new directive, home offices must supply to local management, for transmittal to workers or their representatives:

(i) [T]he reasons for the projected redundancies, (ii) the number [and] categories of workers to be made redundant, (iii) the number and categories of workers normally employed, (iv) the period over which the projected redundancies are to be effected, (v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefor upon the employer, [and] (vi) the method for calculating any redundancy payments other than those arising out of a national legislation and/or practice.¹³⁹

The motive for the new plant closing proposal was the Commission's fear of a trend toward the acceleration of corporate restructuring: "[A]n increasing number of employees will be affected by key corporate decisions taken at a level higher than their immediate employer, i.e., by the undertak-

134. *Id.* art. 2.

135. *Id.* art. 5.

136. *Id.*

137. The 1975 directive, Directive 75/129, 1975 O.J. (L 48) 29, was the model for similar but less forceful legislation that the United States adopted in 1988. Worker Adjustment and Retraining Notification [WARN] Act, 29 U.S.C. §§ 2101-2109 (1996). This 1991 amending proposal—the Proposal for a Council Directive Amending Directive 75/129/EEU on the Approximation of the Laws of the Member States Relating to Collective Redundancies, COM(91)292 final [hereinafter Collective Redundancies Proposal]—became a Council-approved directive, Directive 92/56, 1992 O.J. (L 245) 3 [hereinafter Collective Redundancies Directive].

138. Collective Redundancies Proposal, *supra* note 137, at 15.

139. Collective Redundancies Directive, *supra* note 137, art. 2, § 3.

ing's head office, if located in a different country."¹⁴⁰

Another directive on work conditions regulates work time. This law establishes rules regarding total hours, Sunday work, vacation, time off, and overtime, and imposes a cap of forty-eight hours on the weekly amount of time someone can work.¹⁴¹ Originally Britain strongly opposed this instrument and filed a challenge in the European Court of Justice, arguing that the health and safety characterization was improper.¹⁴² The Council ultimately did pass this directive in late 1993, creating a European right to an annual four-week paid vacation.¹⁴³

Commissioner Flynn's Social Action Program 1995-1997 keeps alive the prospect of legislating other work condition issues which are still being debated among the Member States. Potentially the farthest-reaching development in the Program 1995-1997 is its call for a detailed study of a possible EU instrument on individual dismissals.¹⁴⁴ For many years, the individual Member States have had highly protective regimes limiting an employer's right to fire workers and requiring severance pay, but this instrument would be the first European-level initiative in this area.

D. Right to Social Protection

The Charter's fourth right of social protection guarantees "an adequate level of social security" for all Europeans and "sufficient resources and social assistance" for the unemployed.¹⁴⁵ By U.S. standards, Europe has a generous level of social welfare protection, but the special benefits vary greatly among the Member States:

Unemployed, disabled, sick, a single parent? Best then to be a Belgian, Dane, or German, and worst to be British. If you are 18 and out of work, try to be in Portugal, not Greece. If you are a widow with two children, try to be in Spain rather than Italy. True, all . . . members of the European Union provide financial cushions for citizens in need—indeed, spending on social protection ranges from around 20% of GDP in Greece to over 30% in Holland—but some cushions are more comfortable than others.¹⁴⁶

140. Collective Redundancies Proposal, *supra* note 137, at 4.

141. Proposal for a Council Directive Concerning Certain Aspects of the Organization of Working Time, 1991 O.J. (L 24) 4. Certain classes of workers are excepted from the time restrictions, including hospital workers, transportation workers, firefighters, and journalists. For a discussion of work time laws in the Member States, see LEGAL AND CONTRACTUAL LIMITATIONS TO WORKING-TIME IN THE EUROPEAN COMMUNITY MEMBER STATES (R. Blanpain & E. Koher eds., 1988).

142. Under the Treaty, proposals involving "the rights and interests of employed persons" can be approved only by a unanimous Council vote, except that proposals involving health and safety may be passed by a mere qualified majority vote. EC TREATY, *supra* note 19, arts. 100, 100a, 118a. See *supra* notes 40-41. This inevitably leads to characterization disputes. See Dowling, *supra* note 47, at 593-94. See, e.g., *infra* note 169 and accompanying text.

143. Council Directive Concerning Certain Aspects of the Organization of Working Time, 1993 O.J. (L 307) 18.

144. Social Action Program 1995-1997, *supra* note 21, at 15, § 4.1.2.

145. Social Charter, *supra* note 49, ¶ 10.

146. *The Enlightened Welfare-Seeker's Guide to Europe*, ECONOMIST, Mar. 12, 1994, at 57.

Brussels has long supported the European Social Fund, which now has an annual budget of about 5 billion ecu allocated to programs supporting workers' geographic and social mobility.¹⁴⁷ EU legislation under the right to social protection would add more benefits, going beyond those provided by the Social Fund and extending, for example, to pension regulation. The social protection right would also coordinate the existing EU welfare systems and guarantee Europeans a minimum sustenance-level benefit. Another goal is to harmonize pensions, allowing pension funds to invest freely across Member State lines, and facilitating the beneficiaries' ability to collect benefits across Member State lines.

As part of the social protection agenda, Commissioner Flynn's Social Action Program 1995-1997 struggles to add the philosophically distinct goal of fighting "racism, xenophobia and anti-semitism."¹⁴⁸ However, in the reserved fashion which characterizes the Program 1995-1997, Flynn suggests nothing more specific than designating 1997 as the "European Year Against Racism."¹⁴⁹

E. Right to Collective Bargaining

The fifth section of the Charter calls for a right to collective bargaining.¹⁵⁰ Since 1977, an important EU directive has regulated certain collective-bargaining rights applicable within the Member States.¹⁵¹ However, no EU legislation has yet elevated collective bargaining to the EU level. The Single European Act, the Charter, and the 1989 Social Action Program all openly encourage bargaining at the European level,¹⁵² but these earlier documents fail to explain precisely what European level bargaining means.

During 1991, the European employers' group UNICE¹⁵³ reinvigorated the EU-wide collective bargaining concept by indicating that UNICE itself might initiate European-level collective bargaining to forestall intrusive EU-wide employment regulation.¹⁵⁴ Building upon UNICE's willingness to come to the bargaining table, the Maastricht Treaty's Social Protocol gives the social partners a formal role in creating EU social law through collective bargaining on legislation.¹⁵⁵

The Social Action Program 1995-1997 addresses this linkage between EU-wide collective bargaining and EU social regulation. The document

147. EC TREATY, *supra* note 19, art. 123.

148. Social Action Program 1995-1997, *supra* note 21, at 24-25, § 6.5.

149. *Id.*

150. Social Charter, *supra* note 49, ¶¶ 11-14.

151. The Acquired Rights Directive (also referred to as the Transfer of Undertakings Directive) effectively renders a buyer of a business liable for all the seller's employment contracts and prohibits the buyer from instituting layoffs except where "economic, technical or organizational reasons [exist] entailing changes in the work force." Council Directive 77/187, 1977 O.J. (L 61) 26.

152. Single European Act, *supra* note 39, art. 22; Social Charter, *supra* 49, ¶ 12; 1989 Social Action Program, *supra* note 49, at 30.

153. Union des Confédérations de l'Industrie et des Employeurs d'Europe.

154. See *European Employers' Group Considering Trans-European Collective Bargaining*, Daily Lab. Rep. (BNA) No. 75, at A-5 (Apr. 18, 1991).

155. See discussion *supra* part III.C.

promises "a Communication addressing the entire area of implementation of Community directives by collective agreements,"¹⁵⁶ and also promises that a "clause concerning implementation by collective agreements will be inserted in all future directives . . ."¹⁵⁷

F. Right to Vocational Training

Brussels envisions a skilled work force staffing its post-1992 EU workplace. Accordingly, the sixth section of the Charter attempts to improve worker skills by creating a right to lifetime vocational training.¹⁵⁸ At a June 1, 1993 meeting of the EU Council of Ministers, the Social Affairs Ministers reaffirmed their strong commitment to vocational training. Indeed, vocational training has long been a Brussels priority. Europe supports an important and long-established program, the European Social Fund, charged with training workers.¹⁵⁹

The text of the Charter seems to call for privately-financed vocational training programs, but Brussels apparently could not resist expanding its Community-financed vocational training schemes. In December 1990, the Community devised "Euroform," which establishes a "Community initiative concerning the new qualifications, new skills and new employment opportunities induced by the completion of the internal market and technological change."¹⁶⁰ Euroform, which unapologetically reinforces six other similar programs, imposed a 300 million ecu cost on the Union's structural funds for the period between 1990 and 1993. The Member States are responsible for co-financing the program by contributing additional money.¹⁶¹

With the same goal in mind, in June 1994 the Council members arrived at a common position on the "Leonardo da Vinci" vocational training program, effective through the end of 1999.¹⁶² This ambitious plan supports a two-year initial vocational training period followed by lifelong training.¹⁶³

The Social Action Program 1995-1997 contains many non-controversial—but undoubtedly expensive—ideas to increase Europe's already-substantial level of vocational training. In typical fashion, the Program announced that the Commission would issue in 1995 a White Paper enti-

156. Social Action Program 1995-1997, *supra* note 21, at 32, § 11.1.9 (emphasis added).

157. *Id.* at 32, § 11.1.10.

158. Social Charter, *supra* note 49, ¶ 15.

159. EC TREATY, *supra* note 19, arts. 123-27.

160. Notice to the Member States Laying Down Guidelines for Operational Programmes/Global Grants Which Member States Are Invited to Establish, in the Framework of a Community Initiative Concerning New Qualifications, New Skills, and New Employment Opportunities—Euroform Initiative, 1990 O.J. (L 32) 3.

161. *Id.*

162. *Press Release on Labour and Social Affairs*, Council of the EU General Secretariat, 1775th mtg., Doc. No. 7975/94 (Presse 134), at 14 (June 22, 1994) (Luxembourg) [hereinafter *Press Release*]. The Leonardo da Vinci program took effect in December 1994.

163. *Id.*

itled "Education and Training, The Levers of the Year 2000."¹⁶⁴

G. Right to Equal Treatment Between Men and Women

As its seventh right, the Charter seeks to outlaw sex discrimination in employment. This prohibition has existed for years within the internal laws of Member States and also under Community law.¹⁶⁵ To further this right, on October 17, 1990, the Commission issued a Proposal for a Council Directive Concerning the Protection at Work of Pregnant Women or Women Who Have Recently Given Birth.¹⁶⁶ Although this proposal encountered strong initial resistance, the Council of Ministers approved a less radical version of this instrument, making this the first noteworthy piece of 1989 Social Action Program legislation to receive Council approval.¹⁶⁷

The maternity directive addresses two disparate maternity issues: safety (exposure to agents causing potential fetal harm) and leave (time off for childbirth and breastfeeding). The instrument first requires Member States to protect pregnant and breast-feeding women by forcing employers to eliminate all dangerous physical, chemical, and biological agents on their jobs;¹⁶⁸ the document specifies precisely which agents Member States must outlaw.¹⁶⁹ The instrument also requires Member States to ensure that some alternative to night work is available to pregnant women for the sixteen weeks before their expected delivery date.¹⁷⁰

Secondly, the directive acknowledges that the average legally-mandated maternity paid leave within the twelve Member States was fifteen weeks, with minimum and maximum periods of twelve and forty weeks respectively.¹⁷¹ Notwithstanding the Member States' existing protection levels, the first draft of the maternity proposal had required those pregnant women who inform employers of their pregnancy in advance to receive "an uninterrupted period of at least fourteen weeks' leave from work on full pay and/or a corresponding allowance, commencing before and ending after

164. Social Action Program 1995-1997, *supra* note 21, at 11, § 2.2.1.

165. Social Charter, *supra* note 49, ¶ 17. The original version of the EC Treaty mandated "equal [pay] for equal work." EC TREATY, *supra* note 19, art. 119. Since 1975, Brussels has been harmonizing laws on equal pay and equal treatment. See, e.g., Council Directive 75/117 on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, 1975 O.J. (L 45) 19; Council Directive 76/207 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion and Working Conditions, 1976 O.J. (L 39) 39.

166. Proposal for a Council Directive Concerning the Protection at Work of Pregnant Women or Women Who Have Recently Given Birth, 1990 O.J. (C 281) 1.

167. Directive 92/85 of 19 Oct. 1992, 1992 O.J. (L 348) 1.

168. *Id.* art 4.

169. *Id.* Annex I. The drafters of the instrument included a health and safety component with the hope of attaining a qualified majority, not unanimous, Council vote. See *supra* text accompanying notes 40-41, 142.

170. *Id.* art. 3, ¶ 3.

171. *Id.* For a discussion of maternity leave in the Member States, see *Health Care, A Look at all the Systems in EC Countries*, EUR., Apr. 1993, at 14.

delivery."¹⁷² However, the Council then withdrew the requirement setting leave pay at full salary. In a classic example of Brussels' pattern of watering down social instruments to win broader support, the approved directive dictates that leave pay need only equal the rate of sick pay, which in Europe generally is seventy-five percent of full pay. Still, any actual sickness leave a woman takes during her pregnancy is in addition to her guaranteed maternity leave. Member States remain free to mandate more than fourteen weeks leave "not on full pay, as long as an equivalent standard of protection is assured."¹⁷³

The maternity instrument also prohibits employers from discriminating against pregnant women.¹⁷⁴ The directive places the burden of proof on employers to disprove that any adverse employment action they took was on account of an employee's pregnancy.¹⁷⁵ This system is actually more flexible than the doctrine in certain Member States, including Italy, which flatly prohibits discharging pregnant women regardless of the reason or quality of proof.¹⁷⁶

During 1991, the Commission also issued a proposed recommendation on child care—ultimately approved by the Council in 1992—which strongly urged the Member States to create comprehensive child care programs for working parents.¹⁷⁷ Also during 1991, the Commission issued and the Council approved a recommendation for an anti-harassment measure designed to protect the dignity of men and women at work.¹⁷⁸

The Maastricht Treaty provides another development in the equal treatment of men and women under the law. Article 119 of the EC Treaty established the right to equal pay for equal work, and a substantial body of case law and commentary has arisen under it.¹⁷⁹ One controversial 1990 European Court of Justice decision, the *Barber* case, extended the equal pay concept to cover benefits under occupational social security

172. Proposal for a Council Directive Concerning the Protection at Work of Pregnant Women or Women Who Have Recently Given Birth, COM(90)406 final SYN 303, § III, art. 5, ¶ 1.

173. Council Directive 92/85, *supra* note 167, art. 3, ¶ 2.

174. *Id.* art. 10(2).

175. *Id.* See also Case 177/88, *Dekker v. VJV-Centrum*, [1991] IRLR 27 (1991); Case 179/88, *Hertz v. Aldi Marked K/S*, [1991] IRLR 31 (1991).

176. Italy also allows paternity leave. See *Paternity Leave*, EUR., June 1993, at 43.

177. Council Recommendation 92/241 on Child Care, 1992 O.J. (L 123) 16.

178. Commission Recommendation on the Protection of the Dignity of Men and Women at Work, 1991 O.J. (C 27) 4, (incorporating Code of Practice on Measures to Combat Sexual Harassment); Council Declaration on the Implementation of the Commission Recommendation on the Protection of the Dignity of Women and Men at Work, 1991 O.J. (C 27) 1. See also COM(91)232 final; Council Recommendation 92/131, 1992 O.J. (L 49) 1; Council Resolution 390 Y 0627 (05), 1996 O.J. (C 157) 3 (on "protection of the dignity of women and men at work"); Victoria A. Carter, *Working on Dignity: EU Initiatives on Sexual Harassment in the Workplace*, 12 NW. J. INT'L L. & BUS. 431 (1992).

179. EC TREATY, *supra* note 19, art. 119. See, e.g., Rosa Greaves, *Article 119 and Its Interpretation by the European Court of Justice*, 33 N. IRELAND L.Q. 199 (1982).

schemes.¹⁸⁰ This case had a negative effect on longstanding EU benefit plans, imposing substantial new costs. In an attempt to appease both sides, the Maastricht Treaty includes a special Protocol Concerning Article 119 of the Treaty Establishing the European Community, mandating that in most cases *Barber* will apply prospectively only and therefore not disturbing pension rights before the date of that decision.¹⁸¹

Commissioner Flynn's Social Action Program 1995-1997 contains an independent section addressing equal opportunity for men and women, but it proposes no radical action.¹⁸² Most significantly, the Flynn document suggests shifting the burden of proof in sex discrimination and equal pay cases to require employers to prove affirmatively that they had not violated the law.¹⁸³ As a separate development, in June 1994 the Council approved a Resolution on the Promotion of Equal Opportunities for Men and Women through Action by the European Structural Funds.¹⁸⁴

H. Right to Worker Consultation and Participation in Management

The Charter's most controversial proposal is its eighth guarantee of worker access to management information and worker participation in corporate affairs affecting employment.¹⁸⁵ Certain Northern European Member States' national labor law systems—most notably Germany's—have long ceded generous management participation rights to labor. The Northern European worker consultation and participation concept encompasses worker rights to information, consultation, and true participation in management decisions. Under these systems, labor representatives get advance notice of management's plans that would affect the workplace; labor then has a chance to consult and participate in management affairs that affect employment, including corporate mergers, technological changes, restructurings of operations, and transfrontier employment issues.¹⁸⁶

As originally envisioned under the EU's Vredeling Proposal and proposed Fifth Company Law Directive, EU-wide worker participation was to

180. Case C-262/88, *Barber v. Guardian Royal Exch. Assurance Group*, 1 E.C.R. 1889 (1990). On September 28, 1994, the Court of Justice fleshed out the *Barber* doctrine by issuing six more decisions on this topic. See Case C-200/91, *Colorall Pension Trustees Ltd. v. Russell*, 1995 All E.R. (EC) 23; Case C-408/92, *Smith v. Avdel Systems Ltd.*, 1995 All E.R. (EC) 132; Case C-7/93, *Bestuur van het Algemeen Burgerlijk Pensioenfonds v. Beune*, 1995 All E.R. (EC) 97; Case C-28/93, *Van Den Akker v. Stichting Shell Pensioenfonds*, 1995 All E.R. (EC) 156; Case C-57/93, *Fisscher v. Voorhuis Hengelo BV*, 1995 All E.R. (EC) 193; Case C-128/93, *Fisscher v. Voorhuis Hengelo BV*, 1993 O.J. (C 131) 5.

181. Protocol Concerning Article 119 of the Treaty Establishing the European Community, Feb. 7, 1992, 31 I.L.M. 331.

182. Social Action Program 1995-1997, *supra* note 21, at 19-21, § 5.

183. *Id.* at 20, § 5.1.4. See *supra* notes 174-76 and accompanying text (regarding the employer's burden of proof in pregnancy discrimination cases).

184. *Press Release*, *supra* note 162, Annex.

185. Social Charter, *supra* note 49, ¶¶ 17-18 (the approved text of the Charter contains two separate paragraphs numbered 17).

186. See, e.g., COLIN GILL ET AL., *WORKPLACE INVOLVEMENT IN TECHNOLOGICAL INNOVATION IN THE EC* (1993); Michael Paolucci, *Worker Participation; Its History and Its Future* (May 1, 1990) (unpublished manuscript).

be a "rider" directive accompanying a procedure for EU-wide corporate status.¹⁸⁷ The theory behind the proposal was that a single European corporate status would affirmatively benefit businesses. To charge companies for this benefit, Brussels tried to add worker participation to the EU-wide incorporation mechanism. Mixing labor and corporation law, this rider model would have tied worker participation to EU-wide corporate status, forcing those companies that wanted a single European corporate presence to adopt the EU's worker participation provisions into their articles of incorporation.¹⁸⁸

The Charter and 1989 Social Action Program, however, ignored the long-proposed link between EU worker participation and company law. Instead, the Charter called for an unrestricted right of worker consultation and participation for employees of large corporations operating in more than one Member State.¹⁸⁹ To effectuate this right, the 1989 Social Action Program proposed an instrument which would establish "equivalent systems of worker participation in all European-scale enterprises."¹⁹⁰ Employers would be forced to provide their workers with general and periodic information regarding those aspects of company development affecting employment.¹⁹¹ Trans-European employers would 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."¹⁹²

On January 25, 1991, acting under this section of the 1989 Social Action Program, the Commission proposed a directive entitled The Establishment of a European Works Council in Community-Scale Undertakings or Groups of Undertakings for the Purposes of Informing and Consulting Employees.¹⁹³ On September 16, 1991, the Commission updated this with an Amended Proposal.¹⁹⁴ After substantial political wrangling, this proposal was incorporated into the Works Council Directive, which was passed

187. Commission Proposal for a Council Directive on Procedures for Informing and Consulting the Employees of Undertakings with Complex Structures in Particular Transnational Undertakings, 1980 O.J. (C 297) 33; Commission Proposal for a Fifth Company Law Directive, 1983 O.J. (C 240) 2. See also Commission Proposal for a Council Regulation on the Statute for a European Company, 1989 O.J. (C 263) 41. See generally R. BLANPAIN ET AL., THE VREDELING PROPOSAL, INFORMATION AND CONSULTATION OF EMPLOYEES IN MULTINATIONAL ENTERPRISES (1983); Michael Nelson, *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 (1988).

188. See, e.g., COMMISSION OF THE EUROPEAN COMMUNITIES, DIRECTORATE-GENERAL FOR EMPLOYMENT, SOCIAL AFFAIRS AND EDUCATION, SOCIAL EUROPE: THE SOCIAL DIMENSION OF THE INTERNAL MARKET, SPECIAL EDITION 51-52, § 2.2.1.3 (1988).

189. Social Charter, *supra* note 49, ¶ 17.

190. 1989 Social Action Program, *supra* note 49, at 32-33.

191. *Id.*

192. *Id.*

193. 1991 O.J. (C 39) 1. The Parliament approved this draft on July 9, 1991.

194. 1991 O.J. (C 336) 1.

by the Council in September 1994.¹⁹⁵

The Works Council Directive was passed under the Maastricht Social Protocol and therefore does not apply in the United Kingdom.¹⁹⁶ The directive is the single most controversial social instrument to pass under the 1989 Social Charter, yet European trade unionists are uncomfortable with it, because it was substantially altered after the initial draft.

The directive, slated for adoption in the Member States by September 22, 1996,¹⁹⁷ covers only those EU employers "with at least 1000 employees within the Member States," including at least 150 employees in each of at least two Member States.¹⁹⁸ The many smaller European employers not meeting this high threshold remain subject to whatever applicable worker participation law might apply in the Member States.¹⁹⁹

The Works Council Directive requires the representatives of covered employers to sit on an in-house labor/management committee, the European Works Council. This group meets regularly with management as a special negotiating body, discussing issues affecting employment.²⁰⁰ Management must inform the Works Council "of the progress of the [undertaking's] . . . business . . . and its prospects."²⁰¹ This information must:

relate in particular to the [employer's] structure, economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment and investments, and substantial changes concerning organization, introduction of new working methods of production, processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies [lay-offs].²⁰²

In his Social Action Program 1995-1997, Commissioner Flynn hints that he will "initiate consultations with the social partners on the advisability and possible direction of Community action in the field of information and consultation of employees in national undertakings."²⁰³ Thus, Flynn contemplates extending the Works Council concept to the Member State level.

195. Council Directive 94/45 on the Establishment of a European Works Council or a Procedure in Community-Scale Undertakings and Community-Scale Groups of Undertakings for the Purposes of Informing and Consulting Employees, 1994 O.J. (L 254) 64 [hereinafter Works Council Directive].

196. *Id.* pmb. To date this is the only instrument to pass under the Social Protocol. See *supra* part III.C.

197. *Id.* art. 14.2.

198. *Id.* art. 2.1(c). This directive is estimated to cover as many as 1500 multinational companies, including 200 U.S.-based businesses. BNA CORP. COUNS. WKLY, June 29, 1994, at 7.

199. Germany and the Netherlands are the Member States with the farthest-reaching national worker participation regimes. See, e.g., Gerhard Roder, *Labor Law Implications of the Restructuring of Enterprises in the Federal Republic of Germany*, 28 INT'L LAW. 331, 332-37 (1994).

200. Works Council Directive, *supra* note 195, art. 5(2).

201. *Id.* Annex, § 2.

202. *Id.*

203. Social Action Program 1995-1997, *supra* note 21, at 16, § 4.2.4.

Apart from the Works Council Directive, in July 1991 the Commission also issued a proposal on employee profit participation.²⁰⁴ This legislation was based upon Commission's Proposal for a Council Recommendation Concerning the Promotion of Employee Participation in Profits and Enterprise Results (including Equity Participation)²⁰⁵ and was ultimately adopted by the Council in 1992.²⁰⁶ This recommendation requests the Member States to structure their legal systems in a way that encourages the social partners to negotiate diverse types of voluntary employee profit participation schemes, such as profit sharing, employee share ownership, and stock option programs.²⁰⁷ Implicitly conceding that these schemes are properly a product of free enterprise and not governmental regulation, this instrument avoids any overt mandates. Instead, it seeks only to encourage employer profit participation schemes by enhancing the social partners' awareness of them.²⁰⁸

I. Right to Health and Safety Protection in the Workplace

Another area in which European worker representatives have pressed for comprehensive EU-level regulation is workplace health and safety, the topic of the Charter's ninth right. This right is the least controversial aspect of Europe's social agenda. Even UNICE identifies health and safety regulation as an area in which employers believe European-level employment regulation is appropriate. Not surprisingly, substantial progress has occurred in this area over the years. Twelve of the 1989 Social Action Program's forty-seven proposals involved workplace health and safety, more than under any other single Charter right.²⁰⁹ The Commission began issuing these twelve specific proposals in 1990, when it put forth a draft directive on safety at mobile work sites.²¹⁰ Other proposed directives involved safety on ships, industrial diseases, workplace exposure to asbestos, and a "safety, hygiene and health agency."²¹¹ By their very specificity, these new topics for safety legislation indicate that existing EU safety regulations cover a substantially broad range of subjects. The Social Action Program 1995-1997 proffers different but equally specific proposals on certain hazards, including pollution-related diseases, rare diseases, and AIDS.²¹² In June 1994, the Council agreed on a regulation establishing a European

204. 1989 Social Action Program, *supra* note 49, at 34; Proposal for a Council Recommendation Concerning the Promotion of Employee Participation in Profits and Enterprise Results (Including Equity Participation), 1991 O.J. (C 245) 12.

205. *Id.*

206. Council Recommendation 92/443, 1992 O.J. (L 245) 1.

207. *Id.*

208. *Id.*

209. See 1989 Social Action Program, *supra* note 49, at 45-49, 50-53. For citations to the leading EU instruments on health and safety through 1990, see COMPENDIUM OF EC EMPLOYMENT AND SOCIAL SECURITY LAW 295-597 (1990).

210. Council Directive on the Proposal for the Implementation of Minimum Safety and Health Requirements at Temporary or Mobile Work Sites, COM(90)257 final.

211. One source collecting many of these health and safety instruments is CARSWELL & DE SARRAU, *supra* note 105, at 10/62-10/65.

212. Social Action Program 1995-1997, *supra* note 21, at 25-26, §§ 7.1.2, 7.1.4, 7.2.1.

Agency for Safety and Health at Work, a European counterpart to the United States Occupational Safety and Health Administration, to be based in Bilbao, Spain.²¹³

J. Protection of Children and Adolescents

The Charter's final three rights grant affirmative⁴ protections to three groups: the young, the old, and the handicapped.²¹⁴ The Charter's tenth guarantee of protection for the young primarily addresses wage rates, vocational training, and limits on child labor.²¹⁵ Over the years, Brussels has been vigilant in ensuring young peoples' access to vocational training.²¹⁶ In January 1992, the Commission issued its first social document after the Maastricht Treaty summit, the proposal for a Directive on the Protection of Young People at Work, which the full Council passed in June 1994.²¹⁷ This instrument protects youth by eliminating most child labor and restricting teenagers' work hours. Drafters of the Social Action Program 1995-1997 promise to issue in 1996 a policy to promote lifelong learning.²¹⁸

K. Protection of the Aged

As its eleventh right, the Charter grants affirmative rights to the aged, but these rights focus on basic state-provided sustenance, not on employment restrictions.²¹⁹ Apart from pension regulation, social security coordination, and a few other areas,²²⁰ ultimately Brussels' chief role regarding protection of older workers may be merely to coordinate propaganda stressing the aged's concerns. To this end, the 1989 Social Action Program labeled 1993 "a year for the elderly."²²¹ However, since then, the Social Action Program 1995-1997 has added few, if any, new proposals granting rights

213. *Press Release*, *supra* note 162, at 11. In 1990 the Commission put forth a Proposal for a Council Regulation Establishing a European Agency for Safety and Health at Work, COM(90)564 final.

214. Social Charter, *supra* note 49, ¶¶ 20-26.

215. *Id.* ¶¶ 20-23.

216. *See e.g.*, Decision 63/266/EEC, 1964 O.J. (063) 1138; Decision 87/569/EEC, 1976 O.J. (L 346) 31; Council Resolution 476 Y 1230(01), 1976 O.J. (C 308) 1.

217. *Press Release*, *supra* note 162, at 3-5.

218. Social Action Program 1995-1997, *supra* note 21, at 11, §§ 2.2.1, 2.2.3.

219. Social Charter, *supra* note 49, ¶¶ 24-25. The fact that the Charter's social protections for the aged appear to focus on state-run benefit programs is good news for employers of Europeans, because this emphasis deflects the concerns which give rise to the employer-restrictive U.S. model of affirmative anti-discrimination rights for the aged. EU and Member State law is almost entirely devoid of prohibitions against age discrimination. Job advertisements in the European Union often openly list upper age limits. *See, e.g.*, David Guest, *Are You Too Old to Be a Whiz Kid?*, THE TIMES (London), July 23, 1993, at 28; *Age Discrimination in Employment, Benefits, Remain Common in Europe*, 20 PENS. & BEN. REP. (BNA) 1489 (July 12, 1993). *See generally* Dowling, *supra* note 47, at 612 n.300; Dowling, *supra* note 64, at 24, n.139 (providing specific examples of job advertisements at major European companies, including U.S.-based multinationals in Europe, which include age limits).

220. *See, e.g.*, Recommendation 82/857, 1992 O.J. (L 357) 27 (on retirement age).

221. 1989 Social Action Program, *supra* note 49, at 52.

to older workers.²²²

L. Protection of the Handicapped

Like its protections for the aged, the Charter's twelfth and final guarantee of rights for the handicapped acts more as a statement of affirmative social policy than as a body of anti-discrimination prohibitions directly affecting employment.²²³ The Charter and the 1989 Social Action Program's protections for the handicapped are essentially toothless and would not change anything material about EU employment relationships. For example, in 1986 the Council adopted a mere recommendation supporting employment of the handicapped.²²⁴

Brussels has taken great strides in the handicap area unrelated to employment. In 1988, the Council adopted a community action program intended to help integrate the handicapped socially. This program is entitled "HELIOS," Handicapped People in the European Community Living Independently in an Open Society.²²⁵ In 1991 the Commission proposed expanding the HELIOS program, and by 1993 the Council adopted a Decision Establishing a Third Community Action Program to Assist Disabled People, HELIOS II (1992-96).²²⁶ HELIOS II improves computer databases and other aids, and makes new information sources available to the handicapped. Additionally, the Council adopted two recommendations regarding the improvement of assistance to handicapped children.²²⁷ The Social Action Program 1995-1997 seeks to continue HELIOS II beyond 1996 and to pass instruments dealing with transportation (and even parking) for disabled workers.²²⁸

V. The Future of EU Employment Regulation

From the employer's perspective, the future of EU employment regulation—*i.e.*, the blueprint set out in the Charter, the 1989 Social Action Program, the Commission's 1990-1991 package of draft instruments, the Maastricht Social Protocol, and the Social Action Program 1995-1997—looks expen-

222. Cf. Social Action Program 1995-1997, *supra* note 21, at 24, §§ 6.4.1-6.4.2. The Social Action Program 1995-1997 does support a pending Proposal for a Council Decision on Community Support for Actions in Favour of Older People, COM(95)53.

223. Social Charter, *supra* note 49, ¶ 26.

224. Council Recommendation on the Employment of Disabled People in the Community, 1986 O.J. (L 225) 43.

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

226. Council Directive 93/136, 1993 O.J. (L 56) 30.

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

228. Social Action Program 1995-1997, *supra* note 21, at 23-24, §§ 6.3.1, 6.3.3. The Program 1995-1997 also calls for a "code of good practice on the employment of disabled people *within the Commission*." *Id.* at 24, § 6.3.2 (emphasis added).

sive. European employers already pay some of the highest pay and benefit levels in the world. Many European Member States' wages exceed rates in the United States, and benefit costs are so high in Europe that in some Member States they exceed one hundred percent of wage costs.²²⁹ Once the Social Action Program 1995-1997 is fully implemented (throughout the entire Union or in the Member States other than Britain), European workers' wages and benefits may well rise even higher.

Nevertheless, the social Europe program sends employers some positive signals through what it omits. The Social Charter and the social documents it spawned are virtually silent on the employment doctrine which worries U.S. employers most: anti-discrimination law.²³⁰ With the conspicuous exception of sex discrimination, the social Europe agenda omits anti-discrimination protections for racial minorities, religions, and, notwithstanding the Charter rights to protection for the aged and the handicapped, these groups as well.²³¹

Whether Brussels will realize its goal of using social legislation to create a fairer, more cohesive European Union—a "people's Europe"—or whether, conversely, Brussels will decide that a competitive economy precludes broad European-level labor law, remains an open question. The trend, however, is clear. Since 1989, Brussels' social agenda has grown from a guarded secret into the next big frontier of EU regulation.

229. See *supra* notes 3, 120.

230. See 1989 Social Action Program, *supra* note 49, at 5 ("the Commission is not making a proposal in respect of discrimination on the grounds of race, color, or religion").

231. Brussels' omission of race discrimination prohibitions from its social agenda is particularly noteworthy, given the extreme racial tensions which have arisen in Germany, France, and Italy. The United Kingdom is virtually the only member state with any national laws against race discrimination. Cynics, especially in the United Kingdom, believe that migrant-related race problems on the continent are so severe that anti-race-discrimination legislation would be politically intolerable. Perhaps signaling change, the Social Action Program 1995-1997, for the first time in any major Brussels social document, does raise the issue of a race discrimination agenda. Social Action Program 1995-1997, *supra* note 21, at 24, § 6.5.1-6.5.3. It does so, however, only in a tentative way, without calling for any prohibition on race discrimination in employment.

