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Employee Rights in the European Community: A Panorama from the 1974 Social Action Program to the Social Charter of 1989*

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** Professor of Law and Director of the Center on European Community Law, Fordham Law School. This Article attempts to describe the state of European Community social policy as of Spring 1993. My thanks to Karen Banks and Julian Currall of the Commission Legal Service for their enrichment of my knowledge and their assistance in obtaining recent documents. The EC Information Service office in New York has also been very helpful in supplying social policy materials.
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I. INTRODUCTION

Social policy represents one of the most important facets of the European Community (EC). Indeed, the Preamble to the European Economic Community Treaty (EEC Treaty) makes express references to social goals in its initial recitals:

Determined to lay the foundations of an even closer union among the peoples of Europe, Resolved to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe, Affirming as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples.¹

In addition, article 2 of the EEC Treaty, which states the goals of the common market, includes among them “an accelerated raising of the standard of living,” which clearly has social as well as economic connotations.

Certainly, in the eyes of the drafters of the EEC Treaty, social progress was inseparably linked with economic progress, and both were intimately related to the goal of a “union among the peoples of Europe.” The Court of Justice has also recognized the importance of social policy, stating that “the Community ... is not merely an economic union,” but rather has a “double aim, which is at once economic and social ...”²

In view of the capital importance thus accorded to the social aspect of the European Community, it is surprising that the Commu-

nity’s achievements in the social sphere, both through legislation and through Court of Justice case law, have been relatively neglected in academic literature. It is the purpose of this Article to provide an overview of Community social policy, concentrating on its employee rights protection measures. The Article will give particular attention to the recent stimulus to Community social action provided by the Social Charter of 1989, a stimulus that has already yielded fruit in the form of significant recent legislation and proposals for further action.

Part II of this Article deals with Community social policy prior to the Social Charter. At the outset, the Article situates social policy within the framework of the EEC Treaty. Next, the Article discusses the major employee economic rights protection legislation produced by the 1974 Social Action Program. In view of the importance and success of Community action to achieve equal economic rights for women as workers, this topic is treated separately and at greater length. This initial part of the Article concludes with coverage of worker health and safety legislation.

The third part of this Article begins with a description of the background and nature of the Social Charter of 1989. Each of the major Social Charter substantive sections are then presented and briefly analyzed. The final section reviews the Commission’s 1989 Communication on the Social Action Program, linking it to the Social

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3. Although there exist a number of excellent English-language texts on the structure and operations of the European Community, most give only a passing reference to social policy. P.J.G. Kapteyn & P. Verloren van Themaat, Introduction to the Law of the European Communities: After the Coming into Force of the Single European Act (Laurence W. Gormley ed., 2d ed. 1989) treats social policy in 13 out of 849 pages. Josephine Steiner, Textbook on EEC Law (3d ed. 1992), and Derrick Wyatt & Alan Dashwood, The Substantive Law of the EEC (2d ed. 1987), each briefly covers equal economic rights for men and women, but does not discuss other social policy legislation and case law. The most current coverage of social policy, with case excerpts, is to be found in George A. Bermann, Roger J. Goebel, William J. Davey & Eleanor M. Fox, Cases and Materials on European Community Law (1993). The author of this Article was responsible for the two casebook chapters dealing with social policy. There have also been relatively few law review articles and student notes treating aspects of Community social policy, except for those describing directives and case law on equal economic rights of men and women, despite the large volume of literature in recent years on other aspects of the European Community. The more important articles will be cited later when relevant.

Charter. This section also analyzes recent legislation, notably the 1992 directive on the protection of pregnant women and mothers of newborn infants, and ends by describing more summarily other significant pending proposals.

An article treating such an important topic as Community social policy unfortunately cannot be totally comprehensive—that would require a book. Still, an attempt will be made to sketch the key features. Some provocative questions will be raised and at least partially answered, such as: How has the Community managed to adopt social action measures despite the lack of a clear EEC Treaty authorization for such legislation? To what extent can useful comparisons be drawn between employee rights protection in the United States and in the Community? Why has the Court of Justice laid special stress on the attainment of equal economic rights for women? Why has Community social policy at times lagged behind economic achievements? Is social policy a valid component of the Community’s program designed to achieve an integrated internal market? Is the Social Charter of 1989 apt to constitute a real incentive for the adoption of a practical legislative program or only to remain an eloquent statement of ideals? What is the prognosis for a more energetic Community social policy based on the measures proposed in the Commission’s 1989 Social Action Program? What impact will the principle of “subsidiarity” as described in the Maastricht Treaty, or Treaty on European Union as it is properly denominated, have on Community social policy?

II. SOCIAL POLICY PRIOR TO THE SOCIAL CHARTER

A. The Limited Extent of Authorization for Social Action Contained in the EEC Treaty

American observers of the European Community often do not understand why students of Community law place so much stress on the Treaty authorization for action to adopt particular legislative programs — in the present instance, to adopt social legislation. The reason is, as the Court of Justice has declared, that “the EEC Treaty ...

5. See infra Part IIIC.

constitutes the constitutional charter of [the] Community. . . ."7 Just as any fundamental analysis of a federal legislative field in the United States begins with study of its constitutional basis, so too in the European Community a legislative program must be examined in light of its basis in the EEC Treaty.

An examination of Community social legislation accordingly begins with study of two questions: To what extent does the legislation fall within a proper sphere of Community action? And by what procedural mechanism can the legislation be adopted?

To begin with the first question, it is a fundamental characteristic of the Community that its legislative powers are attributive in nature, that is to say, that the Community can only legislate in a sphere within which the EEC Treaty has established the Community's express or implied legislative competence. Although the Court of Justice has often broadly construed a Treaty grant of legislative authority, or even implied one by extrapolation from other express Treaty powers,8 nonetheless there must always be a jurisdictional basis within the Treaty. If none exists, then the field remains one entirely within the competence of the Member States.9

There is, of course, an analogy to be drawn with U.S. constitutional law, precisely in the field of social legislation or, as we are more apt to call it, labor or employee rights legislation. During most of the early half of this century, the Supreme Court wrestled with the question whether federal legislation protecting private sector employees could be justified under the Interstate Commerce Clause or whether it

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8. The most famous instance in which the Court of Justice recognized implied Treaty powers is with regard to the Community's external relations competence to enter into international agreements in areas other than where the EEC Treaty expressly granted such competence. Case 2270, Commission v. Council (ERTA), 1971 E.C.R. 263, [1971] C.M.L.R. 335. Other prominent instances include the Court's recognition of implied power to legislate for environmental protection in Case 9279, Commission v. Italy, 1989 E.C.R. 1115, 1 C.M.L.R. 331 (1981), and the recognition of legislative power to promote research and exchange studies in higher education, Case 242/87, Commission v. Council (Erasmus), 1989 E.C.R. 1425, 1 C.M.L.R. 478 (1991).

9. Prominent examples presently include security and defense policy, criminal law, and immigration and visa policy. The Community's lack of competence in immigration law was established in Joined Cases 281, 283-85 & 287/85, Germany v. Commission, 1987 E.C.R. 3203, 1 C.M.L.R. 11 (1988). Under the Maastricht Treaty, the Community will receive at least partial authority to act in these spheres. See TEU arts. G 100(c) (visa policy), J (common foreign and security policy), K (cooperation in justice and home affairs).
represented an unconstitutional claim of federal power. The Supreme Court initially concluded that Congress could not use its powers under the Interstate Commerce Clause to enact legislation to benefit employees in *Hammer v. Dagenhart* (The Child Labor Case), in which Justice Day said notably:

There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition . . . . [O]ne state [may have], by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions.\(^\text{10}\) In response, Justice Holmes issued one of his famous dissents.\(^\text{11}\) In accord with *Hammer v. Dagenhart* were important precedents such as The Employers’ Liability Cases,\(^\text{12}\) invalidating imposition of liability on employers for employee injuries, and *Railroad Retirement Board v. Alton R.R. Co.*,\(^\text{13}\) invalidating the regulation of private pension systems for railroad employees as intended only to benefit “the social welfare of the worker, and therefore remote from any regulation of commerce.”\(^\text{14}\)

The modern Supreme Court reading of the Interstate Commerce Clause as justifying federal regulation of labor matters began with *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,\(^\text{15}\) upholding provisions of the National Labor Relations Act, and *United States v. Darby*,\(^\text{16}\) upholding federal minimum hourly wage legislation and expressly overruling *Hammer v. Dagenhart*. Today we take for granted federal authority to legislate in the field of labor relations and the protection of employees, but that is the case only after a long period of evolution in constitutional law.\(^\text{17}\)

In the European Community, despite the references to social goals in the preamble and article 2, the basis for a legislative power to adopt most types of social legislation is not clear-cut. In the structure of the EEC Treaty, article 3 sets out its principal spheres of action: the creation of a customs union; the removal of barriers to free move-

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11. *Id.* at 277.
14. *Id.* at 368.
15. 301 U.S. 1 (1937).
16. 312 U.S. 100 (1941).
ment of goods, persons, services, and capital; the adoption of common policies in the fields of agriculture and transport; the institution of a system to promote competition, and other goals.\textsuperscript{18}

It is noteworthy that article 3 does not include social policy as such as a sphere of Community action. Although article 3(i) provides for “the creation of a European Social Fund\textsuperscript{19} in order to improve employment opportunities for workers and to contribute to the raising of the standard of living,\textsuperscript{20} authorization of a European Social Fund definitely does not constitute authorization of social legislation generally.

In a later part of the EEC Treaty dealing with Community policies, Title III covers social policy. Somewhat surprisingly, Title III does not provide for an express grant of legislative authority to attain social policy goals, in contrast to the approach in other parts of the EEC Treaty where such legislative grants are common.\textsuperscript{21} When the Single European Act (SEA) amended the EEC Treaty on July 1, 1987,\textsuperscript{22} it added article 118a, granting legislative power to adopt

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18. For a discussion of the role of articles 2 and 3 of the EEC Treaty as the core of a \textit{Traité-cadre} or framework within which almost all Community legislation is developed, see \textsc{Kapteyn & Verloren van Themaat, supra} note 3, at 67-69.

19. EEC Treaty articles 123-28 outline the goal, structure, and basic operations of the European Social Fund. For a discussion of its present role, see \textsc{Kapteyn & Verloren van Themaat, supra} note 3, at 637-39. The Commission's Annual General Reports to Parliament and its Annual Social Reports summarize the European Social Fund's activities each year. Coverage of the operations of the European Social Fund is beyond the scope of this Article, but one can certainly note that the Fund has long made a valuable contribution to vocational training, resettlement allowances, and similar forms of economic assistance to the labor force.

20. EEC \textsc{Treaty} art. 3(i). Note that the TEU would amend article 3(i) to add “a policy in the social sphere” as one of the Community's spheres of action. TEU art. G 3(i).

21. For example, specific grants of legislative power are made in articles 43 (agriculture), 49 (free movement of workers), 54 (right of establishment), 63 (right to provide services), 69 (free movement of capital), and 87 (competition rules).

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worker health and safety measures, but the SEA did not otherwise create legislative authority in the social sphere.

Title III's key provision is article 117, which begins: "Member States agree upon the need to promote improved working conditions and an improved standard of living for workers." Instead of continuing with an express grant of legislative power to the Community, article 117 then states that these two goals will be achieved "from the functioning of the common market," as well as by the harmonization of law provisions set out elsewhere in the Treaty.

Apparently the drafters of the Treaty could not agree upon the mode of attaining the goals of article 117. Some Member States clearly felt that economic progress in attaining the common market would provide inevitable accessory benefits to workers, so that specific social legislation would be superfluous. Others felt that social legislation to achieve these goals would be necessary, which accounts for the cross-reference to harmonization of laws. This difference of opinion among Member States has, of course, persisted to the present day.

The other general social policy provision is article 118, which assigns the Commission the "task of promoting close cooperation between Member States in the social field" through studies and consultations with regard, for example, to employment, labor law and working conditions, social security, the right of association, and collective bargaining. Article 118 does not, however, grant the Commission any legislative power. In a 1987 case interpreting article 118, the Court of Justice held that the Commission could require the Member States to cooperate in studies and consultations, but that article 118 did not give the Commission any power to adopt legislative measures as such.

The famous article 119 of the Treaty, mandating equal pay for equal work as between men and women, has had tremendous impact on the social life of the Community, due in large measure, as we shall

23. Worker health and safety legislation before and after article 118a is discussed infra in Part II.F.
24. EEC Treaty art. 117.
25. It is generally believed that France felt that Community legislative action to achieve social goals would be necessary, while Germany was inclined to doubt this. See generally HANS SMIT & PETER HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY 3-715 to 3-740 (Dennis Campbell ed., 1993) (annotation to article 117).
26. EEC Treaty art. 118.
see, to the article's expansive interpretation by the Court of Justice. 23 However, once again, article 119 does not grant any legislative authority.

As a result, Community competence to adopt social legislation comes essentially through the generic grant of power to harmonize laws in order to achieve the common market stated in article 100. Article 100 was initially used in the 1960s to harmonize technical, health and safety, and product quality rules in the Member States in order to promote free movement of goods. 29 In the 1970s, article 100 began to be employed to adopt legislation more tangentially related to the common market, including social legislation, consumer rights protection, and environmental protection. 30

The use of article 100 to adopt social legislation has the important consequence that the legislation must be linked to attaining the common market. As a result, in the recitals, or "whereas" clauses, which precede and justify the operative articles of any social measure, references are made to the measure's impact on the common market. Because legislation that protects or benefits employees invariably produces economic consequences for employers, the "whereas" clauses frequently refer to the need to harmonize Member State rules in order to achieve equal competitive conditions among enterprises in different states, that is, the need to achieve a level playing field. 31 Even though everyone understands that the principal purpose of Community social legislation is to promote the interests of employees or society generally, the particular measures must be given the appearance of being necessary to attain competitive equality among Member State enterprises, an economic rather than a social goal, in order to justify the legislation as an appropriate use of article 100. Thus, Community legislation to promote social goals is adopted through the legislative power to achieve a common market, an interesting parallel to the adoption of labor relations and employee protection measures in the United States through use of the Interstate Commerce Clause.

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28. Case law based on article 119 is discussed infra Part IIIE(1).
30. See infra Part IIIC, particularly notes 49, 50, 53-56.
31. For illustrations, see the recitals discussed in the coverage of the social legislation infra Part IID.
B. The Present Procedure for the Adoption of Social Legislation

Having determined that article 100 constitutes the Treaty basis through which the Community can assert its competence to adopt social legislation (except for worker health and safety legislation, for which article 118a can be used since 1987), we turn to the procedural mechanism by which such legislation can be adopted.

The legislative process described in article 100 requires the Commission to propose the legislation and the Council to adopt it.\textsuperscript{32} The European Parliament need only be "consulted," which means that it can provide an advisory opinion but has no power to amend proposed legislation. Moreover, article 100 is one of the Treaty articles permitting the Council to act only by unanimous vote. Finally, the only type of harmonization legislation authorized by article 100 is a directive—a legislative act setting a framework for legislative or regulatory action by the Member States within a period of time (usually two years) stated in the directive.\textsuperscript{33}

Even though harmonization of Member State laws by use of article 100 proved highly successful in many fields in the 1960s and 1970s,\textsuperscript{34} the legislative process has two manifest defects. First, the Council must act unanimously, which means that every Member State has a veto, thus effectively blocking harmonization efforts in certain fields of particular political sensitivity. Second, the omission of Parliament from any effective power in the legislative process not only reduces the extent to which its potentially helpful suggestions are accepted by the Commission and the Council, but it also deprives adopted legislation of a certain degree of democratic legitimacy.

It is beyond the scope of this Article to discuss the feeling of "Europessimism" that pervaded the European Community in the early 1980s due, among other things, to dissatisfaction with slow pro-


\textsuperscript{33} EEC Treaty article 189 distinguishes between regulations, which are immediately binding in all Member States, and directives, which are only "binding, as to the result to be achieved" and which allow the Member States to choose the mode of implementation. In U.S. legal nomenclature, a regulation would be a statute. The Community uses regulations principally in the fields of agriculture, transport, competition, and trade law. The U.S. analogy to a directive would be an act of Congress that requires states to adopt legislation or regulations within certain parameters or to achieve certain goals, for example, in the environmental field.

\textsuperscript{34} See Vignes, supra note 29.
ggress in the harmonization process, the low level of Parliament’s participation in the governance of the Community, and the persistence of many barriers to market integration. In response to this “Europessimism,” the Commission produced the famous 1985 White Paper on Completing the Internal Market, which provided a program for concrete legislative efforts to remove the remaining obstacles to an integrated internal market by December 31, 1992. To move the Community forward, the Member States in 1985 agreed upon the SEA, a series of major amendments to the EEC Treaty. The SEA introduced article 8a into the EEC Treaty, thus giving legal force to the goal of achieving the internal market by December 31, 1992.

The most important legislative change wrought by the SEA was the addition of article 100a, permitting legislation (both directives and regulations) to achieve the internal market by a qualified majority vote of the Council, thus reopening blocked fields of action and permitting compromise action in lieu of total consensus. Moreover, the SEA in article 149 created a complex new form of legislative procedure, parliamentary cooperation, which became part of the process in article 100a. Parliamentary cooperation requires Parliament to be involved in the review of draft legislation and gives its proposed amendments considerable influence, even if they are not binding on the Council.


37. EEC Treaty article 148 assigns each of the Member States a weighted vote calculated to some degree in proportion to its population and economic importance, ranging from two votes for Luxembourg up to ten votes each for France, Germany, Italy, and the United Kingdom. The total of weighted votes is seventy-six. A qualified majority vote requirement is satisfied when fifty-four votes, cast by at least seven Member States, are in favor of a measure.

Unfortunately, the Member States could not agree to allow article 100a to cover all types of legislation to achieve the internal market. Article 100a(2) states that the procedure of article 100a cannot be used to adopt measures in the fields of fiscal provisions, the free movement of persons, and "those relating to the rights and interests of employed persons."\textsuperscript{39} Such measures must continue to be adopted through use of article 100 or, if applicable, some other specific grant of legislative power elsewhere in the Treaty.\textsuperscript{40} Accordingly, in the field of social action or employee rights, article 100 continues to be the principal vehicle for proposed legislation unless it can reasonably be based on article 118a, which governs worker health and safety measures.

Although the discussion thus far may seem to be rather technical, it is of capital importance in understanding the status of Community legislative action in the social sphere. At the present time, Community social action encounters three significant handicaps. First, the absence of social policy as a clearly expressed field of Community action means that all proposed legislative measures must be linked to other aspects of Treaty-authorized action, most often by a claim that the social measure serves to create more competitive commercial and economic conditions (the "level playing field" approach). Second, the need to use article 100 for most social measures means that each Member State has a veto that can effectively kill proposals which would significantly modify any Member State's existing social structure. Moreover, article 100 does not provide Parliament with any significant role in the shaping of social proposals. Finally, the absence of social proposals in the legislative program set forth in the 1985 White Paper has meant that a risk of inattention to social concerns might mar the otherwise successful attainment of an integrated internal market.

Despite these handicaps, the European Community did adopt, largely in the 1970s, a number of notable legislative initiatives through its first Social Action Program supplemented by important Court of Justice precedents. We now turn to this topic.
C. The Social Action Program of 1974

During the early history of the European Community, social legislation was noteworthy for its absence. There was one major exception, which is certainly worth noting, but only briefly: Legislation to achieve the Community goal of free movement of workers\footnote{EEC Treaty articles 48-51 govern the free movement of workers. For analysis of Community legislation and leading cases in this area, see Bermann, Goebel, Davey & Fox, \textit{supra} note 3, ch. 13. \textit{See also Nicholas Green, Trevor Hartley & John Usher, The Legal Foundations of the Single European Market} (1991); Kaptijn & Verloren van Themaat, \textit{supra} note 3; Wyatt & Dashwood, \textit{supra} note 3.} had a highly significant social aspect.

Thus, Council Regulation 1612/68 on freedom of movement for workers\footnote{\textit{See}, e.g., Case 249/83, Hoeckx v. Openbaar Centrum, 1985 E.C.R. 973, Common Mkt. Rep. (CCH) ¶ 14,184 (1983-1985) (migrant worker right to receive state welfare allowance); Case 137/84, Ministère Public v. Mutsch, 1985 E.C.R. 2681, 1 C.M.L.R. 648 (1986) (migrant worker right to use native language in criminal proceeding); Case 65/81, Reina v. Landeskreditbank Baden-Württemberg, 1982 E.C.R. 33, 1 C.M.L.R. 744 (1982) (migrant worker right to receive state loans for childbirth expenses).} contains provisions granting migrant workers "the same social and tax advantages as national workers,"\footnote{\textit{Regulation 1612/68, supra} note 42, art. 8. \textit{See} Case 367/75, Rutili v. Minister for the Interior, 1975 E.C.R. 1219, 1 C.M.L.R. 140 (1976) (migrant worker cannot be restricted on public policy grounds from exercising union rights).} a clause which the Court of Justice has interpreted broadly,\footnote{\textit{Regulation 1612/68, supra} note 42, art. 9. \textit{See} Case 305/87, Commission v. Hellenic Republic, 1989 E.C.R. 1461 (invalidating Greek law restricting ownership of housing in certain regions to Greek nationals).} as well as specific rights to equal status in unions and employee representation bodies,\footnote{\textit{Regulation 1612/68, supra} note 42. Title III of this regulation accords various rights to a migrant worker's family members. Article 12 grants a migrant worker's children equal access to state educational and vocational training systems. \textit{See} Case 974, Casagranda v. Landeshauptstadt München, 1974 E.C.R. 773, 2 C.M.L.R. 423 (1974), (migrant worker's child must be given same financial aid as provided to national's children to facilitate secondary education studies); Case C-308/89, Di Leo v. Land Berlin, 1990 E.C.R. I-4185 (same rights recognized as to grants for university studies in medicine).} and equal treatment in housing.\footnote{Thus, Council Regulation 1612/68 on freedom of movement for workers contains provisions granting migrant workers "the same social and tax advantages as national workers," a clause which the Court of Justice has interpreted broadly, as well as specific rights to equal status in unions and employee representation bodies, and equal treatment in housing. Although the EEC Treaty does not mention any rights granted to a migrant worker's family members, regulation 1612/68 provides various social rights to the worker's spouse, children, and certain other dependent family members, the most important being the children's right to enjoy equal access to a Member State's educational system, including higher education. Altogether, the Community legislative regime for migrant workers and their families, coupled with expansive Court of Justice judgments, has...} Although the EEC Treaty does not mention any rights granted to a migrant worker's family members, regulation 1612/68 provides various social rights to the worker's spouse, children, and certain other dependent family members, the most important being the children's right to enjoy equal access to a Member State's educational system, including higher education. Altogether, the Community legislative regime for migrant workers and their families, coupled with expansive Court of Justice judgments, has...
had a materially beneficial impact on social conditions within the Community.

Apart from this sector, however, the Community's social action began only in 1974. The motivation for the Community's new interest in this field was political—as so often is the case in major Community shifts in policy.

During the 1960s, the Member State governments were dominated by the Christian Democratic and other conservative or centrist parties. Presumably in part as a result of the recession caused by the oil crisis and high unemployment in the early 1970s, social democratic and other more liberally oriented governments came to power in most Member States. Thus, Community leadership in the middle and late 1970s was provided by the Social Democratic Chancellors Brandt and Schmidt in Germany, the Labour Prime Ministers Wilson and Callaghan in the United Kingdom, and the liberal President Giscard d'Estaing in France. In Italy, the coalition governments of Christian Democrats and Socialists marked an "opening to the left," and socialist or liberal parties controlled the government in virtually all the other Member States.

It is no coincidence that at the same time as the Community became active in social policy, it also commenced action programs to protect the environment and to enhance consumer interests.

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48. During most of the 1960s, President DeGaulle headed the French government, Chancellors Adenauer and Erhard led the German government, and various leaders of the Christian Democratic party governed in Italy.

49. The Community's first environmental action program began in 1973, even though at the time no clear-cut Treaty basis for legislation existed. Action was taken through use of article 100 or through the "implied powers" or "elastic" clause, article 235. The Single European Act added articles 130(r) to (t) which formally authorized environmental legislation. For an analysis of the Community's implied power to enact environmental legislation, see Auke Haagsma, The European Community's Environmental Policy: A Case-Study in Federalism, 12 Fordham Int'l L.J. 311 (1989-90). Environmental protection legislation represents one of the most active fields in Community law today. See Commission of the European Communities, Environmental Policy in the European Community, 5/1990 European Documentation (1990); BERMANN, GOEBEL, DAVEY & FOX, supra note 3, ch. 32; STANLEY P. JOHNSON & GUY CORCELLE, The Environmental Policy of the European Communities (1989); ECKARD REHBINDER & RICHARD STEWART, ENVIRONMENTAL PROTECTION POLICY (Mauro Cappelletti et al. eds., 1985).

50. The Community's first consumer protection and information policy program was launched in 1975. See 1975 O.J. (C 92) 2. A number of major legislative initiatives were adopted in the 1970s and 1980s through use of article 100. For the early history of this program, see ROGER I. GOEBEL, EEC CONSUMER RIGHTS PROTECTION, IN PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1981 (Martha L. Landwehr ed. 1982). The Community's more recent endeavors are described in Commission of the European Communities, The European Community and Consumer Protection,
cause the Member State governments represented more liberal attitudes that emphasized the need for action in these spheres, it was only logical that they should feel that in many cases policies could be more successfully carried out on a European scale, even if the EEC Treaty did not include these fields within its original scope of action activities.

As is so often the case in the history of the Community, the launching of an active social action program began with a policy decision taken by the heads of government of the Member States at their summit meeting in Paris in October 1972. The role of the heads of government requires perhaps an initial explanation.

Since 1969, when President Pompidou of France invited the other Member States' heads of government to meet to discuss major policy issues affecting the Community, these gatherings, initially called summit meetings and now referred to as meetings of the European Council, have assumed great importance in Community decision-making. The Single European Act formalized the custom of regular meetings of the European Council, which now meets at least twice a year, but assigned the European Council no particular role. Perhaps because the European Council never adopts legislation nor takes any legally binding decisions, the European Council does not receive sufficient attention or respect in academic commentary on the Community.

In point of fact, the European Council has evolved into a body that resembles in some measure a collective executive for the Community. Political issues that have divided the Member States in Council sessions, together with questions of long-term policy, are regularly threshed out at European Council meetings. The heads of government naturally cannot always reach agreement on these issues, but when they do, they set the future policy course of the Community. Because each head of government represents the ultimate center of

14/90 EUROPEAN FILE 1 (1990), and in Jérôme Huet, Recent Developments in the Field of Consumer Protection in the European Community, 16 HASTINGS INT'L & COMP. L. REV. 583 (1993). The Maastricht Treaty adds a new article 129a on consumer protection policy.

51. SEA, supra note 22, art. 2. The European Council is to be composed of the heads of state or government of the Member States, together with the President of the Commission.

52. The conclusions of the European Council meetings are featured in the monthly BULLETIN OF THE EUROPEAN COMMUNITY at the time when held and prominently described in the Commission's annual general reports to Parliament. Incidentally, the European Council also regularly adopts declarations on foreign policy issues. Title III of the Single European Act provided a formal structure in the form of European cooperation in the sphere of foreign policy, which is an accessory to but not an integral part of the European Community. Under the Maastricht Treaty, article 1 will expand the field of foreign and security cooperation as a component of the European Union.
executive power in his or her state, such policy decisions can then be set down for shaping and eventual execution in appropriate legal instruments by the Community institutions, notably the Council of Ministers.

From 1969 to the present time, most of the key decisions shaping the course of Community history have been made at summit or European Council meetings. These include, for example, the decisions to admit new Member States, the agreement to permit the direct election of Parliament, the determination of the financial resources of the Community, the resolution of critical agriculture, regional, and budgetary policy issues, as well as crucial political determinations of the form of the reshaping of the Community through the Single European Act and the Maastricht Treaty.

The 1972 Paris summit of the heads of government was one of the most significant meetings of this body in the history of the Community. Among the key decisions made at this summit meeting was the decision to initiate Community action in the sphere of social policy. The Commission in 1971 had urged a Community social action program to supplement current policies in the economic sphere. Although the 1972 Paris summit was considerably occupied by economic and monetary issues, the heads of government decided that the time was ripe for energetic social action measures as well and instructed the Community institutions to prepare a program to this effect before January 1, 1974.

In 1973, in response to this request, the Commission prepared a set of Guidelines for a Social Action Program. The Council of Ministers, using this as its basis, passed a Resolution on January 21, 1974, endorsing a Social Action Program. This Resolution represented the first structured effort to adopt either legislation or recommendations to promote various types of social action. The wave of successful initiatives in the late 1970s and early 1980s stemmed from this Social Action Program.

54. COMMISSION OF THE EUROPEAN COMMUNITIES, VIth GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES—1972 11 (1973). This highly successful Paris summit meeting also incited the Community toward further economic and monetary coordination and urged the Community institutions to commence the environmental protection and consumer rights program referred to supra notes 49 and 50.
Note that the Social Action Program took the form of a Council Resolution without any binding legal effect as such. As discussed above, social action was not considered in the 1970s (and is still not considered today) to constitute a clearly defined sector of Community action under article 3 of the EEC Treaty.\footnote{57} The Resolution, accordingly, in its whereas clauses refers to the "social objectives" of the Treaty, especially as spelled out in article 2, and concludes the initial recitals by referring to "the political will to adopt the measures necessary."\footnote{58}

Significantly, the recitals refer also to the possibility of taking action through use of article 235, the "implied powers" or "elastic" clause of the Treaty, which permits unanimous action by the Council to adopt any measure necessary to attain a Community objective whenever the Treaty has not specified a particular legislative grant.\footnote{59} As we shall see, on occasion in adopting social legislation the Council has had recourse to article 235 to supplement the general power to harmonize legislation under article 100.

The Council Resolution endorsing a Social Action Program sets out three basic goals and then discusses different types of possible action to achieve them. The first goal is the "attainment of full and better employment in the Community"\footnote{60}—an obvious one, since at the time most Member States were experiencing high unemployment levels during the energy recession. Possible actions to achieve this goal included better coordination of national vocational training programs, particularly those affecting younger workers, and efforts to improve the conditions of migrant workers. Significantly, under this heading came a proposal to achieve equality between women and men in the work place. This led to the legislation reviewed in section E hereafter.

The second goal, "the improvement of living and work conditions,"\footnote{61} picks up the language of the EEC Treaty preamble. Possible action to achieve this goal notably included worker health and safety measures and policies and legislation to protect workers' economic interests in the event of a collective dismissal or a merger or acquisi-

\footnote{57. See supra text accompanying notes 18-20.}
\footnote{58. Council Resolution concerning a Social Action Program, supra note 56, at 2.}
\footnote{59. For a description of the use of article 235 to achieve Community goals, see Kapteyn & Verloren van Themaat, supra note 3, at 113-17; id. at 636 (with specific regard to social legislation).}
\footnote{60. Council Resolution concerning a Social Action Program, supra note 56, at 2.}
\footnote{61. Id. at 3.}
tion. Measures to achieve these goals are described in sections D and F of this part.

The more complex third goal, “increased involvement of management and labour in the economic and social decisions of the Community, and of workers in the life of undertakings,” reflected policy attitudes particularly prevalent in some continental states, notably Germany and the Netherlands. This is the goal that has ultimately led to proposals for worker information and consultation rights, probably the most controversial aspect of Community social action endeavors, discussed in section D.

The Social Action Program soon began to bear its fruits. In the following sections of this Article, we will describe the most notable achievements: first, legislation to protect economic interests of workers; second, efforts to attain workplace equality between women and men; and third, measures to protect worker health and safety.

Before doing so, we should briefly mention efforts to help attain full employment. Unfortunately, as the persistence of high unemployment rates in many Member States over the years has demonstrated, this is a particularly difficult task. The Council has on a number of occasions adopted resolutions urging greater coordination of Member State efforts and the expansion of Community action programs, notably the Council Resolution of July 12, 1982 on Community action to combat unemployment, the Council Resolution of January 23, 1984 on the promotion of employment for young people, and the Council Resolution of December 12, 1981 on the social integration of handicapped people. The sphere of action of the European Social Fund was successively broadened and its financial resources expanded in 1971, 1983, and 1985.

We can conclude this section with an interesting final note. The EEC Treaty contains another social policy provision, article 120,
which declares that "Member States shall endeavor to maintain the existing equivalence between paid holiday schemes." This rather peculiarly-worded clause was inserted at the insistence of France, which feared that its rather generous legislation on paid holiday leave might make its enterprises less competitive if other states required less extensive paid holidays. Article 120 makes no reference to legislation and no attempt has been made to use it to adopt legislation.

However, in 1975 the Council adopted a recommendation urging all Member States to adopt a forty-hour week and four week paid vacations.68 The purpose was probably more to expand employment opportunities than to improve work conditions directly, but obviously both interests are served. As a recommendation, it has no force of law, but in fact, most of the continental states, either through legislation or through collective bargaining agreements, comply with it. The United Kingdom, of course, does not. As we shall see, the subject of mandatory limitations on working time and compulsory holidays reappears in the Social Charter of 1989 and in an important pending proposed directive.69

We turn now to the legislation inspired by the Social Action Program of 1974.

D. Major Legislation Protecting the Economic Interests of Employees

A major feature of the Community's first Social Action Program was the protection of the economic interests of employees. As discussed above, the political composition of Member State governments in the 1970s favored the rapid review and adoption of proposals to achieve this goal. This political picture changed in the 1980s, in particular because Margaret Thatcher had become Prime Minister of the United Kingdom and her government was implacably opposed to further social legislation of this sort.

In this section, we will describe the three principal directives adopted, as well as the controversial employee consultation proposal that was debated but never adopted in the early 1980s. We will, however, sketch only the highlights, both because these measures are adequately covered in prior academic literature and because full discussion would require considerable length.

69. See infra text accompanying notes 303, 422-26.
1. The 1975 Directive on Collective Redundancies

It is not surprising that the first Community employee rights measure in this field should deal with the protection of employees dismissed or laid-off for general business or economic reasons. The recession occasioned by the 1970s oil crisis naturally tended to provoke dismissals of this sort, which in turn prompted social democratic and liberal political leaders and unions to endorse legislation to give some degree of protection to the affected employees. Moreover, most continental states already had some form of protective legislation in place, making this directive's adoption easier since it constituted in large measure a harmonization of pre-existing national rules.

Directive 75/129 on Collective Redundancies70 (Collective Redundancy Directive) protects employees in any business entity employing more than twenty workers. The British term, “collective redundancy,” is used to describe what Americans would call a mass lay-off or dismissal of employees. The Directive's protective terms are “triggered” whenever a given number of employees are dismissed or laid off within a thirty-day period for general business or economic reasons rather than because the employees' work performance is inadequate or defective in any way. The trigger number of dismissals is ten when the business employs fewer than one hundred workers, ten percent or more when one hundred to three hundred workers are employed, and thirty or more if three hundred or more workers are employed.71

The Collective Redundancy Directive protects employees in two ways. First, the employer must give a minimum of thirty days advance notice of the proposed dismissals to the employee representatives in the business entity as well as to the public labor authorities.72 The employer must provide both the employee representatives and the authorities with “all relevant information” concerning the dismissals, es-

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71. Directive 75/129, supra note 70, art. 1. Alternatively, the Member State may set a single trigger constituted by the dismissal of twenty employees, no matter what the size of the workforce, during a period of ninety days. Id.

pecially the number of workers to be dismissed and the period of time involved.\textsuperscript{73}

Secondly, the directive obligates the employer to carry out "consultations" with the employee representatives on the proposed dismissals in order to try to reach agreement on ways of "avoiding collective redundancies or reducing the number of workers affected, and mitigating the consequences."\textsuperscript{74} Further, the public authorities shall "seek solutions to the problems raised by the projected collective redundancies."\textsuperscript{75} In some Member States the employer may be effectively obliged to accept such government-proposed "solutions" because, even though the directive makes no reference to their legal effect, it may be politically inadvisable to decline to accept them.

The economic importance of the Collective Redundancy Directive as a mode of protection of employees is obvious. In addition, the directive has served as a precedent for further Community legislation creating obligations on employers to provide information to employees and to consult with employee representatives on particular occasions.

The directive also provides an occasion for comparative legal study. In 1988, Congress passed a somewhat weaker U.S. analogue, the Worker Adjustment and Retraining Notification Act, commonly called by its acronym, WARN.\textsuperscript{76} Every enterprise employing more than 100 employees is subject to WARN. A layoff of fifty or more employees at one job site within thirty days is deemed to constitute a "plant closing." A "mass layoff" occurs whenever an employer dismisses at least fifty workers, provided that constitutes at least one-third of the work force, or whenever an employer dismisses 500 or more workers, even if that is less than one-third of the work force.

In the event of either a plant closing or a mass layoff, the employer must give sixty days advance notice to union or other employee representatives, to the appropriate state labor authority, and to the chief elected official of the local government where the affected enterprise is located. WARN provides that an employer that fails to give such notice is subject to economic sanctions: payment of usual salary or other remuneration to each dismissed worker for each day of the

\textsuperscript{73} Council Directive 75/129, supra note 70, arts. 2, 3.
\textsuperscript{74} Id. art. 2(2).
\textsuperscript{75} Id. art. 4(2).
missed notice period and damages of $500 per day of missed notice payable to the local government. WARN does not, however, require the employer to supply any specific information to or consult with the union or other employee representatives or the local government.

The Collective Redundancy Directive provides much stronger protection for employees than does WARN.\textsuperscript{77} Not only is the “trigger” number of dismissals much lower (a minimum number of ten in the EC, versus fifty in the United States), but the directive requires the employer to consult with the employee representatives and the public labor authorities, a feature absent in WARN. Such consultations may on occasion lead the employer either to delay the dismissals or to reduce their number or to take measures that otherwise protect employee interests. For example, the employer might reduce general work overtime levels in order to retain some employees, transfer to other operations or work sites some employees who might otherwise be discharged, or grant rehiring preferences to discharged employees.

Whether the United States ought to adopt worker information and consultation provisions similar to those contained in the Collective Redundancy Directive is, of course, very much a matter of debate. Any increased delay in the employer’s process of reducing excessive work force manifestly represents an economic inefficiency, particularly significant if a restructuring of a firm or industry is concerned. This disadvantage must be weighed against the advantages that social dialogue may be able to produce in the form of increased labor peace and higher productivity as well as against the partial alleviation of social distress, a concern of the public at large.

2. \textit{The 1977 Transfer of Undertakings Directive}

The second Community employee economic rights directive is designed to protect employees who might be dismissed or otherwise treated unfavorably in the context of a corporate acquisition, merger, or similar event. Employers often try to take various measures intended to reduce employee costs after an acquisition or merger, and among such measures are the reduction of wages or fringe benefits, the increase in work time, and the transfer, demotion, or outright dismissal of some employees. Directive 77/187 on the Safeguarding of Employees’ Rights in the Event of Transfers of Undertakings, Busi-

nesses or Parts of Businesses (often called the Transfer of Undertakings Directive) was intended to prevent or restrict employer actions of this sort.

This 1977 directive basically aims to protect certain so-called "acquired rights" of employees when all or part of the entity by which they are employed is transferred to a new owner. In this situation the employees of the initial enterprise are entitled to retain in full their employee status with the successor enterprise, including any specific contractual rights. Moreover, any collective bargaining agreement that bound the old enterprise continues to bind the new enterprise. The directive defines the transfer of a business in a broad manner, covering not only an acquisition or merger but also any other "legal transfer," a concept which the Court of Justice has, as we shall see, interpreted liberally.

The Transfer of Undertakings Directive also significantly limits a new employer's ability to use the transfer of the business as an occasion for dismissing all or part of the work force. A new employer can reduce the work force only if justified for "economic, technical, or organizational reasons." Moreover, any "substantial change in working conditions to the detriment of the employee" is considered to be tantamount to a dismissal. (Of course, if the former employer, at the request of the new one, were to reduce the work force prior to the transfer, the dismissal of a sufficiently large number would trigger the procedures required by the Collective Redundancy Directive.)

The directive guarantees employees certain information and consultation rights prior to any business transfer that largely parallel those provided by the Collective Redundancy Directive. Both the old and new employer must inform employee representatives of "the


80. Id. art. 3(2).
81. Id. art. 1(1).
82. Id. art. 4.
83. Id. art. 4(1).
84. Id. art. 4(2).
legal, economic and social implications" of the transfer and any "measures envisaged in relation to the employees." The new employer must consult with the employees' representatives on any measures affecting employees (such as dismissals or reallocation of employees) "with a view to seeking agreement" on the application of the measures.

Whether the Transfer of Undertakings Directive should be viewed as a highly desirable example of enlightened social policy or as an unwarranted interference with efficient business management depends of course very much on an individual's point of view. A Chicago School economist would probably deplore the directive as restricting the most efficient allocation of labor resources. Industrial organization economists might view the directive as promoting social dialogue and improving work force morale, a trade off against the introduction of efficient restructuring more slowly or in a less extensive fashion. Social liberals would tend to applaud the directive's effect in preventing employers from taking unfair advantage of employees in the guise of a corporate transfer or restructuring, and in providing an appropriate level of employment security.

The Transfer of Undertakings Directive has given rise to a substantial body of Court of Justice case law, and the process of its interpretation is certainly an ongoing one. The Court has held that a transfer of all the assets of a business enterprise may fall under the directive's scope if examination of the facts reveals that the new owner of the assets is operating a business which is virtually identical in character to that of the prior owner. The Court has also held that a transfer of an entire operating business unit or department falls under the directive. Finally, and somewhat surprisingly, the Court has concluded that a "legal transfer" of a business can occur when a lessor retakes leased property and operates a business on it similar to one previously operated by the lessee or when a new lessee operates

85. Id. art. 6(1).
86. Id. art. 6(2).
a business similar to that operated by a prior but totally unrelated lessee.\textsuperscript{90}

The United States does not have any comparable federal legislation, but a rather complex case law governs the subject of corporate successor liability. In \textit{John Wiley & Sons, Inc. v. Livingston}, the Supreme Court held that if a corporation disappears in a merger, the surviving entity constitutes a legal successor bound by the collective bargaining agreements and the employee relations of the former entity because there exists a "substantial continuity of identity in the business enterprise."\textsuperscript{91}

In the United States, an asset acquisition sometimes also creates successorship rights, even though the former entity's employee relations and collective bargaining agreement are not automatically transferred. In \textit{Fall River Dyeing & Finishing Corp. v. NLRB},\textsuperscript{92} Fall River purchased the realty and operating assets of a liquidated entity. Fall River then used the assets to carry on the same business as that of the liquidated entity, using the same premises and serving about half the former customers of the liquidated entity. Since over half of Fall River's work force had been employed by the liquidated entity and these workers had essentially the same job classifications, Fall River was held to be a corporate successor bound to bargain with the liquidated entity's union. In contrast is \textit{Howard Johnson Co. v. Detroit Local Joint Executive Bd.},\textsuperscript{93} in which Howard Johnson leased premises that had previously been used as a motel, bought from the landlord most operating assets, and continued the motel business. However, Howard Johnson hired only a few of the landlord's employees, and their total amounted to only a minority of Howard Johnson's motel employees. The Supreme Court did not consider this a corporate succession, and collective bargaining rights were not continued.\textsuperscript{94}

\begin{footnotesize}
\begin{itemize}
  \item[90] Case 324/86, Foreningen af Arbejdsledere i Danmark v. Daddy's Dance Hall A/S, 1988 E.C.R. 739, 2 CEC (CCH) 99 (1989). The Court noted that the new lessee carried on a type of business which was similar to that of the prior lessee, that the employees of the prior lessee were engaged by the new lessee, and that the employees' status was essentially the same as it would have been if there had been a direct transfer from the prior lessee to the new lessee.
  \item[91] 376 U.S. 543, 551 (1964).
  \item[92] 482 U.S. 27 (1987).
\end{itemize}
\end{footnotesize}
3. 1980 Directive on Employer Insolvency

The third employee economic rights measure is Directive 80/987 on the Protection of Employees in the Event of Insolvency of Their Employer.95 This directive does not attempt to provide employees with either prior information or consultation rights, which are apt to be useless, but rather to insure that employees will be paid, in full and with reasonable speed, any arrearages in pay or benefits owed at the time of their employer's insolvency. In the absence of the directive, employees are generally treated as unsecured creditors in an insolvency proceeding and, even if they are given some preference over other unsecured creditors, certainly experience long delays in payment and may not receive the full amount due to them if the assets upon liquidation prove insufficient.

In order to protect unpaid employees from the delays and uncertainties of an insolvency proceeding, Directive 80/987 requires that the employees be paid in a totally different manner. The directive requires Member States to ensure that "guarantee institutions" provide guarantees for payment of any outstanding employee claims for pay or benefits prior to the onset of insolvency.96 The guarantee institutions must have assets "independent of the employers' operating capital and be inaccessible to proceedings for insolvency," with the assets coming from employers' contributions or from a state agency.97 Although the directive obviously does nothing to protect the employee from the loss of employment itself, it at least provides the employee with an assurance that his or her pay and benefits arrearages will be secure and paid promptly.

Incidentally, it was Italy's failure to implement this directive on time that has recently occasioned one of the most important Court of Justice rulings of a constitutional character. In Francovich v. Italy,98 Italian workers were unable to collect unpaid salary owed by their bankrupt employer. The workers sued Italy for damages due to its failure to create in due time the state insurance scheme required by Directive 80/987.

Although the Court of Justice had previously indicated in dicta that a Member State might be liable in damages for its failure to apply

96. Id. art. 3.
97. Id. art. 5.
Community law, 99 Francovich marks the first time that the Court actually held that a Member State would indeed be liable in damages for failure to implement in due time a directive intended to give identifiable rights to its nationals. Because the amount of the pay arrearages could be clearly determined and the state insurance scheme was intended precisely to guarantee payment in case of employer insolvency, the Italian workers could easily establish Italy's liability in damages.

4. The Vredeling Proposal for Employee Information and Consultation Rights

As indicated above, the favorable political climate for the adoption of Community social legislation changed in the 1980s, largely due to the hostile attitude of the United Kingdom under Prime Minister Thatcher. This is one of the reasons why the Council failed to adopt the well-known draft directive on a Procedure for Informing and Consulting Employees initially advanced in 1980 and amended in 1983. 100 This draft directive is popularly known as the Vredeling Proposal because of its vigorous endorsement by the Dutch commissioner Vredeling, who was in charge of social policy in the early 1980s.

The Vredeling Proposal would have gone much further than the Collective Redundancy and Transfer of Undertakings Directives because it would have required the regular supply of information to employees of larger corporations and routine consultation between management and employee representatives on certain matters.

The Vredeling Proposal initially appeared to have a reasonable chance of adoption because it would have built upon a tradition of some form of management-employee representation existing in virtually all the continental Community states (but not, of course, in the United Kingdom and Ireland). The system varies from state to state but generally requires even medium-sized firms employing more than, say, fifty or one hundred persons in one site to create a works council with two or more representatives elected by the employees. 101 The

99. Case 39/72, Commission v. Italy, 1973 E.C.R. 101, ¶ 11, 1973 C.M.L.R. 439, which suggested the possible liability of Italy to "private parties" (presumably farmers) for Italy's failure to implement in due time a system of premium payments to farmers who slaughtered dairy cows or withheld dairy products from market.


101. For a description of works councils, their composition, and their powers in the various Community states, see Doing Business in Europe (CCH) under the heading "Employee Information Rights," supra note 78.
works council representatives are then entitled to receive significant amounts of information from management, usually including the annual financial statements and specified operational data. The employee representatives are also authorized to deal with management on a variety of employee concerns such as issues arising out of the discharge of individuals or groups of employees, changes in work conditions, labor grievances, and workers’ health and safety, but not economic issues such as bargaining for salary and fringe benefits.

Thus, in the view of the Commission, the Vredeling Proposal appeared to represent a sensible adaptation of this common national works council structure to cover multinational corporations that employ substantial numbers of employees in several Community states. In its 1983 version, the Vredeling Proposal called for ongoing information and consultation rights whenever a Community employer (defined to cover a group consisting of an EC parent together with its subsidiaries or a group of EC subsidiaries of a non-EC parent) employed more than 1000 employees. Employee representatives were to receive information annually on the overall economic and financial situation of the employer (or group). If the employer planned any action that would have “serious consequences for the interests of the employees” (such as a plant closing, change in the work organization, or introduction of new technology), the employer would have to inform its employees thirty days in advance and discuss any related employment issues with the employee representatives.

The Vredeling Proposal proved, however, to be highly controversial, much more so than any of the other social legislation adopted or proposed in the 1980s. The European Confederation of Industries strongly opposed it, as did many U.S. corporations with operations in Europe. The United Kingdom was adamantly opposed, and several other Member States were also unenthusiastic about the proposal. After several years of debate, the Council postponed further discussion of the proposal in 1986. However, as we shall see, a modified

102. Vredeling Proposal, supra note 100, arts. 1, 2.
103. Id. art. 3. Provisions on secret corporate information and the confidentiality obligations imposed upon employee representatives are covered in article 7.
104. Id. art. 4.
105. For a description of the proposal and the controversy that it engendered, see Richard D. Fera, The European Economic Community and the Vredeling Proposal: The Debate to Temper Ideology with Realism, 16 CAL. W. INT’L L.J. 250 (1986).
version of the proposal is being advanced currently as part of the Commission’s 1989 Social Action Program. 107

E. Measures to Promote Equal Economic Rights for Women and Men

It is difficult to try to present an overview of Community action intended to promote, and ultimately to achieve, equal rights for women and men in the workplace. This is an unusually rich field in Community law, marked not only by major and far-reaching legislative measures but also by highly influential Court of Justice precedents manifesting a profound concern for basic human rights protection. The subject merits extensive review and has in fact attracted more academic attention than other areas of Community social policy. 108 Although we will try to provide an accurate synopsis of the more important developments in this field, space constraints do not permit a detailed treatment in this Article.

1. Article 119 and the Second Defrenne Judgment

The natural starting point is EEC Treaty article 117, whose initial paragraph states the basic principle: “Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.” For the purpose of this Article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether

107. See infra text accompanying notes 436-40.
in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.109

Article 119 is surprising in several respects. First of all, it is a highly specific assertion of a social goal, as opposed to the much more general language of article 117. Secondly, it is one of the very few instances in the Treaty where a basic human right is expressly stated.110 Third, it represented a definite commitment to take action to achieve the goal by 1962, which was the end of the "first stage" within which the Treaty was to be implemented.111 Finally, although article 119 is quite precise in setting out a broad definition of what constitutes pay, nonetheless it is narrow in limiting the goal of equality between the sexes to "pay," as opposed to work conditions generally.112 As we shall see, the Court of Justice has laid emphasis on each of these points.

It is interesting to note that article 119 was requested by France, largely to ensure that its business enterprises, which were bound by the French Constitution to provide equal pay for women, should not be at a competitive disadvantage compared with firms in other Member States that did not require equality in pay.113 Thus, social directives adopted by article 119 have always been linked to the goal of achieving a level competitive playing field within the common market.114

Although the Council of Ministers ought to have taken some action to achieve the goal of article 119 by 1962, in fact it failed to do so until 1975. Then, as part of the Social Action Program of 1974, the Council adopted the Equal Pay Directive (described infra in subsection 2) to supplement article 119.115 Because of this delay until the

109. EEC Treaty art. 119.
110. Id. The other important expressly stated rights are contained in article 7, the right of nondiscrimination on the basis of nationality; article 48, freedom of movement for migrant workers; and article 52, the right of establishment for Member State nationals in other states.
111. Id. art. 8(1) (prescribing three stages of four years each during which various aspects of the common market are to be achieved, the first stage constituting the period 1958-61).
112. Id. art. 119. This limitation was presumably deliberate. In contrast is the language of article 48(2), which states that Member State nationals have the right to work in other states without discrimination not only as to "remuneration," but also as to "other conditions of work and employment."
113. See SMIR & HERZOG, supra note 25, at 3-752.18 (commentary on articles 119-20).
114. As noted above, the whereas clauses for social directives adopted by use of article 100 make the same reference to the goal of achieving equal competitive conditions within the common market. See supra text accompanying note 31.
115. See supra text accompanying note 60.
mid-1970s, the Court of Justice had the occasion to take judicial action to enforce article 119, an opportunity which it unhesitatingly seized.

In the Second Defrenne case,116 Ms. Defrenne, a retired flight attendant, sued Sabena in a Belgian court for damages to compensate her for receiving lower pay during her employment than was paid to comparable male flight attendants. As Belgian law provided no remedy, her claim was based directly on article 119. In a landmark judgment, the Court held that article 119 constituted one of the EEC Treaty articles whose language is sufficiently precise and unconditional that it can, at least in part, be given direct effect in national courts.117 Under this direct effect doctrine,118 such a Treaty article can be relied upon by individuals to provide them with rights that can be enforced by national courts against the state.

If the Court had limited its holding to the assertion that article 119 has direct effect to grant individuals' rights against the state, so-called "vertical" direct effect, the judgment would already have been striking. In fact, the Court went further and held that article 119 allows national courts to grant relief in a lawsuit between one national and another national, so-called "horizontal" direct effect, in this case a claim for damages brought by an employee against her former employer, Sabena.119 This is an unusually expansive application of the


117. The Court limited the direct effect of article 119 to remedies for "direct and overt discrimination" as to pay, particularly where the discrimination occurred as to work carried out in the same establishment or service." Defrenne (II), 1976 E.C.R. 455, ¶ 18, 22. In later cases, the Court has been willing to recognize the direct effect of article 119 even as to instances of indirect discrimination. See infra text accompanying notes 123-30.

118. The doctrine that certain Treaty articles have direct effect is one of the most important principles of Community law. It was first stated in the landmark judgment, Case 26/62, Van Gend en Loos v. Nederlandse administratie der belastingen, 1963 E.C.R. 1, 1963 C.M.L.R. 105. A substantial number of Treaty articles have now been held to have direct effect, such as articles 9, 12, 30, and 34, dealing with free movement of goods, article 48 on free movement of workers, article 52 on the right of establishment, and articles 85 and 86, setting rules on competition. For a better understanding of the doctrine, see KAPTEYN & VERLOREN VAN THEMMAAT, supra note 3, at 330-38; HENRY G. SCHEMERS & DENIS WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES (5th ed. 1992); Pierre Pescatore, The Doctrine of "Direct Effect": An Infant Disease of Community Law, 8 EUR. L. REV. 155 (1983); J.A. Winter, Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law, 9 COMMON MKT. L. REV. 425 (1972).

direct effect doctrine which reflects the great importance accorded to article 119 by the Court.\textsuperscript{120}

Why did the Court of Justice accord such high respect to article 119? It is apparent that the Court saw article 119 as expressing a basic human right so important that “the principle of equal pay forms part of the foundations of the Community.”\textsuperscript{121} Moreover, the Court viewed article 119 as achieving both an economic and social aim: economic in attaining an equal competitive playing field among enterprises of different states, and social within the context of the preamble goal of ensuring “social progress” and “the constant improvement of the living and working conditions of their peoples.”\textsuperscript{122}

The Court of Justice has subsequently been even more explicit in its treatment of the equal pay principle of article 119 as a basic human right. In the Third Defrenne case,\textsuperscript{123} whose factual circumstances and holding will be discussed below,\textsuperscript{124} the Court stated that “respect for fundamental personal human rights is one of the general principles of Community law . . . . There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights.”\textsuperscript{125} The Court’s articulation of this basic human rights principle has undoubtedly substantially influenced its later judgments, which, as we shall see, tend to read both article 119 and Council directives in this field in a very broad manner.\textsuperscript{126}

The Second Defrenne judgment has cast a long shadow, profoundly influencing Community law in the field of equality between the sexes. Its holding that article 119 has both vertical and horizontal direct effect has occasioned a flood of national court proceedings, brought principally by women plaintiffs striving to achieve equal pay with men, usually against private sector employers, although also on occasion against the state or state agencies. Moreover, the broad reading of article 119 in the Second Defrenne judgment has meant that the Court tends to decide cases involving equal pay issues without re-

\textsuperscript{120} The Court has only rarely concluded that a Treaty article has such “horizontal direct effect.” The only other clear-cut examples are EEC Treaty articles 85 and 86, which are intended to protect free competition, where it is fairly natural to conclude that individuals should be able to enforce Treaty-based competition rules against other individuals.

\textsuperscript{121} Defrenne (II), 1976 E.C.R. 455, ¶ 12.

\textsuperscript{122} Id. ¶¶ 8-10.


\textsuperscript{124} See infra text accompanying notes 159-60.

\textsuperscript{125} Defrenne (III), 1978 E.C.R. 1365, ¶¶ 26-27.

\textsuperscript{126} For an excellent analysis of the basic human rights dimension of the Court’s case law in this area, see Docksey, supra note 108.
gard to the Equal Pay Directive, discussed in subsection 2, which was intended to attain the goals of article 119.

Thus, the Court has held that “pay” should be defined to include any form of consideration, whether in cash or in kind, provided by an employer to employees or to retired employees. More importantly, the Court has held that private or occupational pension plans constitute a form of pay.

The Court has been willing to conclude that discrimination based on sex can be found to exist in violation of article 119 even when it is indirect rather than overt. Such indirect discrimination has been found to occur when part-time workers are paid less than full-time workers, the part-time workers are principally female, and there is no objective business or economic reason for the lower pay. Indeed, the Court’s present view is that the burden of proof is on the employer to establish that objective reasons justify the pay differential; if the employer cannot provide any such reason, sex discrimination can be presumed to exist.

On a comparative note, the U.S. Constitution does not contain any express provision requiring economic or workplace equality between women and men. Such requirements have been achieved through legislation, notably the Equal Pay Act (EPA) of 1963 and Title VII of the Civil Rights Act of 1964, which includes gender-based discrimination among the classes of forbidden employment discrimination. Voluminous case law interprets both of these legislative

130. Bilka-Kaufhaus GmbH, 1986 E.C.R. 1607, ¶¶ 30-36. The same principle was applied to an industry-wide collective bargaining agreement in Case C-33/89, Kowalska v. Hamburg, 1990 E.C.R. I-2591, and to a state law providing sick pay benefits only to employees who work more than 10 hours per week in Case 171/88, Rinner-Kühn v. FWW Spezial Gebäudereinigung GmbH, 1989 E.C.R. 2743. It is interesting to compare Corning Glass Works v. Brennan, 417 U.S. 188, 204 (1974), where the Supreme Court placed the burden of proof on the employer to provide objective reasons to justify higher pay to night shift product inspectors (mostly men) as opposed to day shift product inspectors (all women).
provisions. We will make occasional references to some U.S. cases which provide interesting contrasts to Community rulings, but space constraints prevent any intensive comparative examination.

2. Directive 75/117 on Equal Pay for Men and Women

The importance accorded by the Council of Ministers to Directive 75/117 on the Application of the Principle of Equal Pay for Men and Women (the Equal Pay Directive) is indicated by the fact that it was the first legislative measure adopted pursuant to the Social Action Program of 1974, barely a year after that Program was announced. The Council certainly intended the directive to provide the legal force necessary to attain the equal pay goal of article 119. However, when the Court of Justice in the Second Defrenne judgment ruled that article 119 had direct effect, enabling employees to sue in national courts both their employers and the state to vindicate their right of equal pay, the Equal Pay Directive lost part of its importance.

The Equal Pay Directive is still extremely valuable for two reasons. First, the directive expands, or at least makes more precise, the equal pay concept by stating that it includes pay "for work to which equal value is attributed," a concept usually referred to in the United States as "comparable worth." Second, the Equal Pay Directive requires Member States to take specified types of legislative, administrative and judicial action to enforce the equal pay principle.

By way of comparison, the Equal Pay Act of 1963 forbids any sex-based discrimination as to pay within the same establishment "for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions." The EPA permits exceptions based on seniority, merit, or objective factors other than sex. The wording of the EPA is thus somewhat more precise than that of the Equal Pay Directive, but,

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135. See supra text accompanying notes 56-62.
137. As indicated above, the Court of Justice tends to decide equal pay cases by immediate application of article 119 without reference to the Equal Pay Directive. This approach is undoubtedly influenced by the Court's recognition that article 119 enunciates a basic human right.
as we shall see, the Equal Pay Directive has been construed in a broader manner.

The Equal Pay Directive’s mandate for vigorous enforcement by the Member States is undoubtedly its most consequential aspect. The directive requires Member States to review their laws, regulations, and practices in order to eliminate any discriminatory provisions. This is certainly a task of major importance because, given the volume of national rules and practices, it requires a substantial commitment of time and resources. Linked to this task is the Member States’ duty to ensure that collective bargaining agreements applicable to an industry, as well as private employment contracts, abide by the equal pay principle. Finally, the directive requires that Member States generally “ensure that the principle of equal pay is applied” and specifically mandates the creation of effective judicial procedures to enable enforcement of rights. A related provision requires Member States to inform employees of their rights “at their place of employment.”

Overall, the Equal Pay Directive constitutes an effective package of procedural measures to enforce the right of equal pay. As the Member States acted in the 1970s and 1980s to carry out these obligations, certainly the application of the principle of equal pay acquired a much more concrete character.

To U.S. citizens, the most interesting aspect of the Equal Pay Directive is its declaration in article 1 that work includes “work to which equal value is attributed.” Moreover, article 1 further requires that if a “job classification system” is drawn up, it must be prepared on a gender-neutral basis.

Attempts in the United States to read an effective “comparable worth” standard into either the EPA or Title VII have not met with success. The federal courts have refused to find any implied obligation on employers to compare the inherent value of work performed by different types of employees. Thus, in Spaulding v. University of Washington, the Ninth Circuit held that the university need not compare the pay scales of the female nursing faculty with those of the predominantly male architecture or pharmacy faculties. Similarly, in

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140. Equal Pay Directive, supra note 134, art. 3.
141. Id. art. 4.
142. Id. arts. 2, 6.
143. Id. art. 7.
144. Id. art. 1.
145. 740 F.2d 686 (9th Cir. 1984).
Christensen v. State of Iowa, the Eighth Circuit held that the functions performed by female secretaries could not be compared with those provided by male physical plant employees in order to determine whether sex-based pay discrimination exists. In general, employers can look to prevailing job market pay scales to justify their lower payment of work categories in which female employees predominate. Only if an employer has voluntarily made a comparison of the objective value of the work provided by two categories of employees is the employer bound to abide by that comparison in order to avoid sex discrimination.

In contrast, Community law recognizes a “comparable worth” standard for the evaluation of pay scales, at least to the extent of comparisons among employee classes within the same enterprise. The Court of Justice has even held that this concept is implicit in article 119 itself without regard to its precise statement in article 1 of the Equal Pay Directive.

Moreover, the Court of Justice has read the Equal Pay Directive as obliging a Member State to set up a system for carrying out such comparative evaluation. In Commission v. United Kingdom, a proceeding brought under article 169 to compel the United Kingdom to remedy deficiencies in its implementation of the Equal Pay Directive, the United Kingdom contended that the standard of “work to which equal value is attributed” could only be enforced if employers voluntarily set up job classification systems, because otherwise “the crite-

146. 563 F.2d 353 (8th Cir. 1977).
147. In County of Washington v. Gunther, 452 U.S. 161 (1981), the Supreme Court held that Title VII plaintiffs can recover when employers deliberately discriminate against women employees in fixing pay scales. The Court affirmed the Court of Appeals’ conclusion that female jail guards must be paid 95% of the male jail guards’ salary once the trial court established that their employer had itself objectively evaluated the female guards’ services to be worth that much in a comparative examination.
148. Case 157/86, Murphy v. Bord Telecom Eireann, 1988 E.C.R. 673, 1 C.M.L.R. 879 (1988). The Court in Murphy also drew the sensible conclusion that female workers who performed more valuable work (telephone assembly) than male workers of a different category (those engaged in collection and delivery of telephones) could claim a right to equal pay under article 119, even though article 119 refers literally to “equal pay for equal work” (emphasis added). The judgment presumably requires the employer to pay the female workers as much as the male employees—it does not, however, indicate whether they might have a right to be paid more than the male employees in view of their more valuable work.
rion of work of equal value is too abstract to be applied by the courts.”\textsuperscript{150} The Court of Justice disagreed, holding that such comparative evaluations must be made “notwithstanding the employer’s wishes, if necessary in the context of adversary proceedings.”\textsuperscript{151} The Court held that the United Kingdom must set up an administrative or judicial system with the power to make such comparisons and to obtain whatever information might be required to carry out the process of comparison.

In another interesting precedent, \textit{Rummler v. Data-Druck GmbH},\textsuperscript{152} the Court of Justice was asked to appraise a job classification system in the printing industry that permitted higher pay for jobs involving more muscular effort (usually performed by men). The Court concluded that article 1 of the 1975 directive required that a job classification system “must not be organized, as a whole, in such a manner that it has the practical effect of discriminating generally against workers of one sex.”\textsuperscript{153} Hence, if an employer’s job classification system rewards jobs in which muscular capacity is a significant factor, then the classification must also consider “other criteria in relation to which women workers may have a particular aptitude,”\textsuperscript{154} so that women workers performing jobs requiring such criteria may accordingly receive higher pay.

It is quite clear that the European Community has gone further than the United States in moving toward judicial acceptance of a “comparable worth” standard to eliminate gender-based pay discrimination.\textsuperscript{155} However, appearances can be deceiving. Statistical evidence tends to demonstrate that women employees are still paid significantly less than male employees even in Member States such as Denmark, Germany, the Netherlands, and the United Kingdom, where there has been an abundance of litigation seeking to enforce article 119 and the Equal Pay Directive.\textsuperscript{156}

The principal limitation inherent in the Community approach is that the evaluation of job categories required to assess “work to which equal value is attributed” is to be carried out within the same enter-

\textsuperscript{150} Case 61/81, 1982 E.C.R. at 2616.
\textsuperscript{151} Id. at 2617.
\textsuperscript{153} Id. at 2114.
\textsuperscript{154} Id. at 2115.
\textsuperscript{155} For an excellent comparative analysis, see Women, Employment, and European Equality Law, supra note 108.
prise. There is as yet no effort to compare entire work sectors on an industry-wide or country-wide basis. Traditional cultural and social patterns tend to cause women to work in various job categories (teaching, nursing, secretarial services, restaurant, hotel, and other service industries) that are lower paid than other job categories in which men are customarily employed (factory production-lines, mechanics, truck driving, and skilled labor).

It is also frequently difficult to ascertain and assemble persuasive evidence to demonstrate a violation of article 119. Although in some instances when plaintiffs have alleged indirect discrimination the Court of Justice has placed the burden of proof on the employer to demonstrate that objective reasons justify a pay differential, in general the burden of gathering evidence and persuading a tribunal lies with the female plaintiff. In 1988, the Commission proposed a directive to alleviate this situation by requiring an employer to supply all relevant information and by shifting the burden of proof to the employer upon an initial showing of evidence of direct or indirect discrimination, but the Council has thus far taken no action on this proposal.

Nonetheless, one can certainly conclude that the Community, thanks in large measure to the Second Defrenne case and other striking judgments of the Court, has made very significant progress in creating legal recourse for sex-based discrimination in pay. Because of the Court’s emphasis on the basic human right dimension of the equal pay principle articulated in article 119, it may be safely predicted that future case law will continue to improve the mode of application of this principle.

3. Directive 76/207 on Equal Treatment for Men and Women

Although the Court of Justice has consistently interpreted the equal pay principle of article 119 in a liberal manner, the Court has nonetheless been unwilling to conclude that article 119 could implicitly provide any remedy for sex-based discrimination in the workplace.

157. See supra text accompanying notes 129-30. See also Case 109/88, Union of Commercial and Clerical Employees v. Danish Employers’ Ass’n, 1989 E.C.R. 3199, 1 C.M.L.R. 8 (1991) (the burden of proof was shifted to the employer to prove that wage differentials were justified when the employer’s pay system lacked “transparency,” i.e., did not have an easily understandable basis).

when the discrimination does not involve remuneration. The *Third Defrenne* case\(^ {159} \) made this principle quite clear.

Ms. Defrenne's most serious grievance was that Sabena followed a policy of retiring female flight attendants at age forty, while allowing male flight attendants to continue to work. When she was discharged pursuant to this policy, Ms. Defrenne sued Sabena for discriminatory dismissal. Again, Belgian law provided no recourse, so the issue was whether article 119 might cover this type of discrimination. Tempted though it might have been to grant Ms. Defrenne a remedy in the face of such blatant discrimination, the Court concluded that article 119's express reference to equal pay only was too precise to permit any implied obligation to achieve equal work conditions even when, as in Ms. Defrenne's case, the discriminatory dismissal terminated her remuneration altogether and therefore undeniably had pecuniary consequences.\(^ {160} \)

We noted earlier that it was in the *Third Defrenne* judgment that the Court precisely articulated its doctrine that "the elimination of discrimination based on sex forms part of those fundamental rights" that are protected by the Court as a part of Community law.\(^ {161} \) In view of this sweeping statement, one might ask why the Court declined to protect such a basic human right in this case. The answer is that the Court can protect fundamental rights only when there exists a Treaty-based context,\(^ {162} \) and in the absence of any implication from article 119, none existed here. In contrast, as the Court noted in the *Third Defrenne* judgment, it can protect this fundamental right against sex-based discrimination in any factual circumstances when a Community institution itself is engaged in the discrimination.\(^ {163} \)

\(^{159}\) *Defrenne (III)*, 1978 E.C.R. 1365.

\(^{160}\) Id. at 1377.

\(^{161}\) See supra text accompanying note 125.


\(^{163}\) The Court cited Case 207/1, Sabbatini v. European Parliament, 1972 E.C.R. 345, in which it had struck down Parliament's system of paying supplementary benefits to fathers as "head of the household," but not to mothers, as a violation of basic human rights. In a later judgment, Joined Cases 75 & 117/82, Razzouk v. Commission, 1984 E.C.R. 1509, 3 C.M.L.R. 470 (1984), the Court struck down the Commission's pension plan because it provided a 60% survivor's pension to widows but only a 50% survivor's pension to widowers, subject to the additional requirement that the widower have no income of his own. The Court declared that equal treatment of both sexes constituted a fundamental right.
The need for Community legislation to remedy sex-based discrimination in work conditions was readily perceived by the Commission and the Council. In 1976, the Council adopted Directive 76/207 on the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions,¹⁶⁴ popularly called the Equal Treatment Directive.

At the outset of this Article, we analyzed articles 3 and 117, concluding that because the EEC Treaty does not expressly authorize social legislation as such, it is necessary to use article 100, the general harmonization provision, when a social measure can be linked to the economic goals of a common market.¹⁶⁵ On occasion, a desirable social measure may not be sufficiently linked to the common market and accordingly can only be adopted by use of article 235, the "implied power" or "elastic" clause. Article 235 authorizes the Council to act unanimously to achieve a Treaty objective when the Treaty nowhere provides specific powers to do so.¹⁶⁶

Article 235 was employed by the Council to adopt Directive 76/207 because, as stated in a whereas clause, "the Treaty does not confer the necessary specific powers" for this purpose, yet legislative action is desirable to achieve the improvement of "living and working conditions" set as a Treaty objective in its preamble.¹⁶⁷ From a constitutional point of view, this use of article 235 is quite important because it represents the first time that social action legislation was deemed to be appropriate as a concern of the Community even though some form of economic or other justification related to the attainment of the common market appeared to be lacking.¹⁶⁸

Its constitutional dimension aside, the Equal Treatment Directive is of capital importance in promoting equality of the sexes in the workplace. Article 1 requires equal treatment in hiring, promotion, training, and general working conditions (which would implicitly in-
clude dismissal \(169^*\)) but not social security, \(170^*\) a subject reserved for the subsequent directives described in subsection 4.

The Equal Treatment Directive prohibits not only direct discrimination on the basis of sex but also indirect discrimination by reference to “marital or family status.” \(171^*\) In article 2, however, the directive permits exceptions for three types of discrimination. Two are for the benefit of women: article 2(3) allows protective treatment “as regards pregnancy and maternity,” and 2(4) permits “measures to promote equal opportunity . . . by removing existing inequalities” (what Americans are apt to call remedial affirmative action policies). The third exception, stated in article 2(2), allows Member States to permit discrimination in “occupational activities” for which workers of only one sex are appropriate. Not surprisingly, these three exceptional cases in which the Equal Treatment Directive allows sex-based discrimination have all been the subject of some provocative cases, several of which we will discuss later.

The rest of the Equal Treatment Directive’s provisions replicate those of the Equal Pay Directive: Member States are to review and reform their own laws and practices, police collective bargaining agreements and individual employment contracts, and introduce effective systems of judicial recourse. \(172^*\)

The U.S. analogue to the Equal Treatment Directive is Title VII of the Civil Rights Act of 1964, mentioned above, which covers not only discrimination with regard to compensation but also in hiring, dismissal, and the “terms, conditions or privileges of employment.” \(173^*\) The relatively parallel prohibitions of work place sex discrimination in Title VII and the Equal Treatment Directive provide a natural basis for comparison of U.S. and Community case law.

One instance immediately arises as to the scope of the legislation. Title VII section 701(b) expressly excludes enterprises that employ less than fifteen persons from any duty to comply with its anti-discrimination provisions. The Equal Treatment Directive does not have any

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169. Ms. Defrenne unfortunately could not rely on the Equal Treatment Directive to prevent her dismissal, or to secure damages, because she was dismissed before the directive became effective. It is clear that a state-owned airline could not set different mandatory retirement ages for male and female employees after the directive came into force. See Case 152/84, Marshall v. Southampton & South-West Hampshire Area Health Authority, 1986 E.C.R. 723, ¶¶ 49-51, 55, 1 C.M.L.R. 688 (1986).

170. Id. art. 2(1).

171. Id. art. 2(1).

172. Id. arts. 3-7.

similar express de minimis exception for small firms. When the United Kingdom adopted legislation to implement the directive, the United Kingdom excluded from its coverage private households and persons or firms employing fewer than five persons. When the Commission sued the United Kingdom for defective implementation of the Equal Treatment Directive, the Court agreed, holding that the directive does not permit any de minimis exception.\footnote{174} An interesting question of policy then arises: Should not the U.S. Congress also end sex-based discrimination even by small firms? Or should the Council create an exception for small firms in order to avoid an excessive regulatory burden upon them? The difference in approach between the United States and the European Community manifestly gives rise to an interesting comparative debate. This author believes that Title VII's exception for enterprises employing fewer than fifteen persons might have been warranted when the legislation was adopted in 1964, but looks rather dubious today.

We referred earlier to the importance of the Court's conclusion that article 119 should have both vertical direct effect, allowing private parties to sue the state, and horizontal direct effect, allowing employees to sue their employer. In the well-known Marshall case,\footnote{175} the Court had to decide whether the Equal Treatment Directive had direct effect and if so, to what degree. Ms. Marshall, a dietician, was retired at age sixty against her will by her employer, a state health authority that retired men compulsorily only at age sixty-five.

The Court held that the Equal Treatment Directive was sufficiently precise and unconditional in its terms so that it could qualify as providing rights to individuals that could be enforced in national court proceedings against the state\footnote{176} (vertical direct effect). Indeed, the Court went further to conclude that the Equal Treatment Directive could be invoked against a state agency or state-owned entity in its capacity as an employer\footnote{177} so that Ms. Marshall was able to prevail in her suit against the state health authority.

\footnote{174} Case 165/82, Commission v. U.K., 1983 E.C.R. 3431, 1 C.M.L.R. 44 (1984). The Court did, however, observe that private household employers could rely on the occupational activities exception of article 2(2) when appropriate, presumably allowing a woman to require that her maid be female. This may, however, leave open the question whether a private employer could require that a chef be male or female.
\footnote{175} Marshall, 1986 E.C.R. 723.
\footnote{176} Id. \S 55.
\footnote{177} Id. \S\S 49-51. Because of this conclusion, the Court has subsequently had to set a definitional standard to determine when a state agency or other state-owned entity can be deemed to be subject to the terms of the Equal Treatment Directive. This occurred in Case
If, however, Ms. Marshall had been employed by a private sector employer, she would not have been able to rely on the Equal Treatment Directive as such because the Court held that directives should not themselves directly create obligations on private parties178 (that is, should not have horizontal direct effect). Although this limitation is important, its significance should not be exaggerated. Once a Member State adopts legislation to implement the Equal Treatment Directive, its nationals may rely on the national legislation in suits against their employers. The national legislation will thus provide recourse for employees in the vast majority of cases. The absence of horizontal direct effect means that employees cannot rely on the language of the Equal Treatment Directive in two rather exceptional cases, either where the Member State is late in adopting national legislation to implement the directive or where the Member State has, usually by inadvertence, imprecisely or improperly drafted the implementing legislation.179

Apart from the cases dealing with the scope of the Equal Treatment Directive, some provocative judgments have analyzed the exceptional circumstances in which the directive expressly permits discrimination. As noted above, discrimination is permissible with regard to occupational activities for which “the sex of the worker constitutes a determining factor” (article 2(2)), and with regard to provisions intended to protect women (article 2(3)).

Undoubtedly the best known Court decision in this area is Johnston v. Chief Constable of the Royal Ulster Constabulary.180 Mrs. Johnston, a police officer in Northern Ireland, sued to challenge her dismissal by the Royal Ulster Constabulary (RUC). Due to the large number of police fatalities occasioned by the civil disorder in Northern Ireland, the RUC concluded that police officers should customa-

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179. Thus, in Commission v. U.K., 1983 E.C.R. 3431, the United Kingdom had improperly adopted the Equal Treatment Directive by failing to cover private households and employers of fewer than five persons. Because the directive does not have “horizontal” direct effect, a person employed in a private household or by such a small firm in the United Kingdom would have no remedy against discriminatory work conditions until the United Kingdom should amend its legislation to accord with the Court's judgment.
rily carry weapons. However, the RUC also decided that women police officers should not carry weapons for various reasons, of which probably the most important one was an attempt to eliminate the risk that they might be deliberately assassinated. Since only a limited number of women police officers could be assigned to non-arms bearing duties, such as family welfare work, Mrs. Johnston was discharged.

Somewhat surprisingly, the Court held that the RUC could justifiably conclude that public safety considerations should prevent women police officers from carrying arms, with the consequence that sex could legitimately be considered to be a determining factor in assessing a person’s qualifications to serve as a police officer in Northern Ireland. One need not be a feminist to wonder whether the Court’s conclusion is warranted. Should not women be allowed to assess and voluntarily accept the risk of being assassinated while bearing arms as a police officer just as they may assess and accept the risks to life and health involved in being a fire fighter or a mine worker? Why should a risk to life as such constitute a factor that limits the occupation of police officer to males only, or predominantly to males?181

The Court’s conclusion in Johnston to some degree parallels that of the U.S. Supreme Court in Dothard v. Rawlinson.182 In Dothard, the Court held that Alabama could restrict to men the status of prison guard in an all-male prison because of a reasonable concern that women acting as guards might be subject to the risk of rape by prisoners and might, in general, pose a security risk in dealing with aggressive prisoners.

The only other Court of Justice judgment considering whether a state might restrict an occupation to one sex permitted the United Kingdom to forbid men to practice as midwives, citing the “personal sensitivities” of patients.183 Although certainly most pregnant women would prefer the assistance of a woman as midwife, one wonders whether the profession must be restricted to women, especially since many male gynecologists and general practitioners also deliver babies.

Even more troublesome than the occupational activity issues are those relating to the exception in article 2(3) of the Equal Treatment Directive for provisions for the protection of women, particularly as regards pregnancy and maternity. There is no question that older na-

181. Id. ¶¶ 35-39. Americans will generally be surprised at the Court’s conclusion since women police officers in the United States frequently carry weapons and are occasionally injured or killed in the line of duty.
tional laws allegedly adopted for the protection of women can no longer be justified in the light of modern views that women should, generally speaking, be allowed themselves to choose the level of occupational risks they are willing to accept. The Commission in 1987 issued a Communication on Protective Legislation for Women in which it concluded that many national rules were no longer warranted and should be repealed or else the protective legislation should be extended neutrally to cover both sexes.

In a leading case, the Commission brought a successful action against France to compel the rescinding of laws or rules that were allegedly intended to protect the special interests of women but were nonetheless not objectively justified. The Court agreed with the Commission that a variety of protective rules or benefits, such as shorter work hours for women over fifty-nine, a Mother's Day holiday, time off for child care, and allowances to pay for child care centers or personnel, could not be justified. Child care benefits may, of course, be legitimately granted by the state, or the state may require employers to grant child care leave, but in both instances the benefit should presumably be available to either parent.

More recently, in the Stoeckel case, the Court held that the French Labor Code's general prohibition of the employment of women for work at nighttime (except for nurses and other specified professions) violated the Equal Treatment Directive. The Court rejected the French argument that the law was justified to protect women from assault when travelling to or from work or to facilitate women's ability to meet their obligations to care for their family. This judgment has

186. Id. ¶¶ 13-15. But see Case 184/83, Hofmann v. Barmer Ersatzkasse, 1984 E.C.R. 3047, 1 C.M.L.R. 242 (1986), where the Court allowed Germany to provide six months leave and financial benefits to mothers, but not to fathers, for the purpose of caring for a newborn infant. The Court concluded that this constituted a legitimate exercise of the protection of maternity permitted by article 2(3) of the Equal Treatment Directive because of the special nurturing relationship that exists between a mother and a newborn. Some may disagree with this opinion, believing that in a modern conception of family life, either the mother or the father may properly take the responsibility for the care of a newborn. In any event, note that the Council has recently issued a recommendation on child care that encourages employers to grant leave arrangements to both parents and which advocates the sharing of child care responsibilities. 1992 O.J. (L 123) 16. See infra text accompanying note 375.
187. Case C-345/89, Criminal Proceedings against Alfred Stoeckel, 1991 E.C.R. I-4047. The videotape producer that contested the French law noted that a majority of its seventy-seven women employees had voted in favor of a work plan that required some production work at night.
received considerable publicity because other states or local authorities have also prohibited women entirely or in large measure from engaging in nighttime work, restrictions that presumably are also invalid unless narrowly tailored to protect women during pregnancy or shortly after bearing a child.

Another fascinating question resolved by the Court concerned the ability of an employer to dismiss a woman for absence on sick leave for a long period of time (100 days in the instant case) when the illness arose initially from complications related to pregnancy. The Court held that article 2(3) of the Equal Treatment Directive would prevent the dismissal of a woman unable to work during pregnancy, or immediately following childbirth, but not dismissal for inability to work after the lapse of a reasonable period following childbirth, even if the illness had been initiated by the pregnancy. Some may find the Court’s opinion to be too narrow a reading of article 2(3), but others might agree that the focus should be on the employer’s ability to fire any employee for excessive absence on sick leave, whether occasioned by a health factor or illness exclusively limited to women or one exclusively limited to men (for example, a prostate disorder).

Equally fascinating is a recent case in which an employer refused to hire an ostensibly better qualified woman job applicant because she was pregnant and instead hired an ostensibly less qualified woman applicant who was not pregnant. The employer’s motive was to avoid the mandatory and costly Dutch social benefits for pregnant women, including compulsory leave time, and the consequent need to hire a temporary replacement. The Court held that the employer’s conduct in selecting one woman rather than another did indeed indirectly violate article 2 of the Equal Treatment Directive. Since only women can become pregnant, the employer’s refusal to hire a pregnant woman constituted indirect discrimination in hiring. Some may applaud the Court’s judgment as fulfilling the underlying intent of the directive, while others may feel that the issue goes beyond the express scope of the directive.

Before leaving the topic of equal treatment, we should mention Directive 86/613 on the Principle of Equal Treatment between Men and Women Engaged in an Activity, Including Agriculture, in a Self-

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employed Capacity.\textsuperscript{190} This 1986 directive is worth noting for several reasons.

First, this is a social directive that is not intended to advance the interests of employees. Not only was it necessary to adopt this directive through the use of article 235, but the social interest which it pursues is purely that of equality of the sexes and not in any way the protection of workers. This is a point to which we will return in discussing the Social Charter of 1989.\textsuperscript{191}

Second, Directive 86/613 is quite broad in its scope: It covers all self-employed persons, including specifically members of liberal professions and farmers.\textsuperscript{192} Within its scope, the directive requires the elimination of "all discrimination on grounds of sex"\textsuperscript{193} and obliges Member States to carry out the same sort of affirmative policing action as was required in the Equal Treatment Directive.\textsuperscript{194} Although thus far there has been no case law interpreting its provisions, the directive would appear to enable women partners in a law, accounting or commercial partnership to take recourse against the partnership if they are not equally treated in work conditions, such as contacts with major clients, fair allocation of work assignments, and appropriate allocation of managerial responsibilities.

Finally, it is interesting to observe that Title VII of the Civil Rights Act is limited to the protection of employees and accordingly does not parallel the scope of Directive 86/613.

4. The State and Private Social Security Directives

Two directives deal with equal treatment of men and women in social security schemes, a topic deliberately left for special coverage by the Equal Treatment Directive. Because the subject is quite specialized and not of great comparative interest to a U.S. audience, we will only briefly describe these directives. We should recall at the outset that the Court of Justice has held that state social security schemes are not to be considered as "pay" under article 119,\textsuperscript{195} but in contrast, benefits received under private employer social benefit plans are con-

\textsuperscript{191} See infra text accompanying note 324.
\textsuperscript{192} Council Directive 86/613, supra note 190, art. 2(a).
\textsuperscript{193} Id. art. 3.
\textsuperscript{194} Id. arts. 4, 9.
\textsuperscript{195} Defrenne (I), 1971 E.C.R. 445.
sidered as "pay" even when they are not part of the customary employment contract but are provided gratuitously by the employer.\textsuperscript{196}

In 1978, the Council adopted Directive 79/7 on Equal Treatment for Men and Women in Matters of Social Security,\textsuperscript{197} making use of article 235 to do so (State Social Security Directive). This directive covers all statutory social security benefit plans, including, for example, those for sickness, old age, accidents at work, and unemployment.\textsuperscript{198} In article 4, the directive mandates equal treatment between the sexes with regard to a) the scope of the plans and conditions for coverage; b) the obligation to contribute to the social security system and the calculation of contributions (whether they are payable by the employer or the employee); and c) the calculation of benefits to the recipients, including a spouse and dependents, as well as their duration. As in the Equal Pay and Equal Treatment Directives, Member States are required to modify their legislation and practices to comply with the directive and to create a system of judicial recourse.\textsuperscript{199}

However, the State Social Security Directive contains a major exception to the principle of equal treatment: Article 7 allows Member States to fix different ages for men and women in determining their eligibility for old-age pensions. The reason for this exception is that the United Kingdom and several other states allow women to receive old-age pensions at an earlier age than men. To raise the lower eligibility age for women would be quite unpopular, while to lower the eligibility age for men would be extremely costly. This difference has therefore persisted.

The State Social Security Directive was supplemented by Directive 86/378 on Equal Treatment for Men and Women in Occupational Social Security Schemes,\textsuperscript{200} adopted also on the basis of article 235 (Occupational Social Security Directive). The term, occupational social security schemes, refers to what we would call employer or private sector social benefit plans. Although, as we have seen, the Court of Justice had held that such employer benefit plans constituted "pay" under article 119, the directive was intended to spell out more precisely the terms of application of the principle of equal treatment.

\textsuperscript{196} \textit{Bilka-Kaufhaus GmbH}, 1986 E.C.R. 1607.
\textsuperscript{198} \textit{Id.} art. 3(1)(a). Article 3(1)(b) states that the directive covers state social assistance schemes only insofar as they replace or supplement the schemes listed in (a).
\textsuperscript{199} \textit{Id.} arts. 5-6.
The Occupational Social Security Directive’s coverage of types of private-sector benefit plans and the scope of equal treatment parallels most of the provisions of the State Social Security Directive. The Occupational Social Security Directive specifically forbids different treatment between men and women in fixing the age at which an employee qualifies to enter into a benefit plan and in setting the minimum retirement age. However, by a special derogation, the directive nonetheless permits Member States to allow employer plans to parallel different ages set by the state for men and women to determine their “pensionable age,” which means their eligibility to receive benefits from the state retirement pension plan.

Most of the case law arising out of the application of these two directives is technical in character and not of great interest. However, the permission that article 7 of the State Social Security Directive granted to Member States to fix different ages of eligibility for men and women for the receipt of old-age pensions has indirectly led to several complicated but significant judgments.

In the Marshall judgment, the Court held that an employer violated the Equal Treatment Directive when it required mandatory retirement for women at an earlier age than men. The Court ruled that when article 7 of the State Social Security Directive permitted Member States to set different pensionable ages for men and for women for state social security purposes, this provision did not somehow implicitly permit private sector employers to set different mandatory retirement ages for men and women in parallel with the different ages set by the state for eligibility to receive a state old-age pension. The Court’s conclusion in Marshall seems eminently sensible. The fact that in the United Kingdom a woman can receive a state old age pen-

201. Id. art. 6(e), (f).
202. Id. art. 9(a). This derogation would end whenever age parity should occur in setting the pensionable age in state social security schemes or when a future directive should require parity.
203. Thus, in Case 286/85, McDermott v. Minister for Social Welfare, 1957 E.C.R. 1453, 2 C.M.L.R. 607 (1987), the Court held that the State Social Security Directive had direct effect, so that Ireland could not pay unemployment benefits to married women for a shorter period of time than to men or single women, even though Ireland had not yet implemented the directive. Similarly, in Case 384/85, Clarke v. Chief Adjudication Officer, 1987 E.C.R. 2865, 3 C.M.L.R. 277 (1987), the United Kingdom was not permitted to pay a larger invalidity pension to a married man than to a married woman. Compare these cases with Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), where the Supreme Court held that widowers who cease work to care for minor children must be paid the same social security benefit as widows in the same position.
205. Id. ¶¶ 46-48.
sion five years before a man can do so should have no bearing on an employer’s mandatory retirement age. It is manifestly unfair to require women to cease working before men when many women will want to work until they reach a mandatory retirement age set at the same age for both sexes.

In the famous, or infamous, Barber judgment,\textsuperscript{206} the Court held that an employer violated the Equal Pay Directive when it granted early retirement pensions to women at age fifty, but to men only at age fifty-five. The Court refused to find that the employer’s private early retirement pension did not constitute “pay” (as it should in accordance with Bilka-Kaufhaus\textsuperscript{207}) simply because the employer created the scheme in accordance with U.K. statutory requirements for such plans. In other words, the Court declined to hold that the retirement pension plan should be considered a form of a state social security scheme, but rather concluded that it remained a private sector plan because it was funded and controlled by the employer.

Barber is well known in the United Kingdom because it requires many companies with similar schemes to pay substantially higher benefits to retired male employees than they had originally budgeted for, in order to parallel the level of benefits already set for retired female employees. It has been estimated to cost U.K. employers millions of pounds. The Barber judgment contained language intended to limit its retroactive effect\textsuperscript{208} in order to reduce its economic consequences for employers, who presumably adopted the age differential in good faith due to a general misconception with regard to their obligations under Community law. Unfortunately, the Court’s limitation of the judgment’s retroactive effect is itself stated rather ambiguously so that the Court has been requested to interpret its language in this regard in several pending cases.\textsuperscript{209}

We can conclude our coverage of equal rights to social security benefits with an interesting recent judgment that illustrates the princi-

\textsuperscript{206} Case 262/88, Barber v. Guardian Royal Exch. Assurance Group, 1990 E.C.R. I-1889, 2 C.M.L.R. 513 (1990). Barber has probably tacitly overruled Case 19/81, Burton v. British Ry. Bd., 1982 E.C.R. 555, 2 C.M.L.R. 136, which held that a private sector benefit plan that paid a higher pension to a woman taking early retirement than to a man of the same age taking early retirement was permissible because the employer’s plan was intended to parallel the pensionable age of the U.K.’s state social security system, which grants old age pensions to women at sixty and men at sixty-five.


\textsuperscript{208} Barber, 1990 E.C.R. I-1889, ¶ 44.

ple that Community social policy is essentially limited to the rights and interests of workers, and not members of society at large. In Johnson v. Chief Adjudication Officer, 210 Mrs. Johnson ceased working in 1970 to care for her daughter, then age six. When she wanted to resume work in 1980, she was prevented from doing so because of a back condition. In 1981, Mrs. Johnson began receiving an invalidity pension under the U.K. social security laws, but the pension was ended pursuant to a provision in the rules when she began cohabiting with her present partner. Mrs. Johnson sued, claiming that the U.K. provision ending her pension violated the equal treatment obligation of the State Social Security Directive.

Although the Court held that the principle of equal treatment enunciated in article 4 of the State Social Security Directive had direct effect, 211 the Court also emphasized that the directive was limited by its express terms, in article 2, to "the working population." This term included persons who interrupted employment because of illness, accident or involuntary unemployment, 212 but not someone like Mrs. Johnson who interrupted employment voluntarily to care for a child. 213

The distinction being drawn is important. The State Social Security Directive only covers worker benefits, not general social assistance schemes, no matter how meritorious. Hence, the right to equal treatment between the sexes with regard to the U.K. invalidity pension cannot be protected under Community law because there is no nexus to article 119 or an applicable directive. 214 We will return to this distinction between social issues affecting workers and other types of social issues when discussing the Social Charter of 1989.

F. Worker Health and Safety Legislation

The last field of Community social legislation—worker health and safety measures—is one all too often neglected in academic reviews

211. Id. ¶¶ 32-36.
213. Johnson, 3 C.M.L.R. 917, ¶¶ 18-19. The Court remarked further that the Community might consider taking legislative action to provide equal treatment to parents who interrupt employment in order to care for children. Id. ¶¶ 25-26. The Court also added that if the social security administrators found that Mrs. Johnson had suffered the disabling capacity during a period when she was actively seeking employment, she would be covered by the directive's terms. Id. ¶¶ 20-23.
214. See supra text accompanying note 162.
but is nonetheless extremely important. The Social Action Program of 1974 made express reference to this field of action, and a substantial volume of legislation was adopted in the 1970s. Indeed, this was the one area of social policy where the stream of legislation continued unabated into the 1980s.

There are undoubtedly a number of factors contributing to the high level of action in this field. In the last twenty years, public perception of the risks from exposure to physical and chemical agents (such as asbestos, lead, mercury, PCBs, and other chemical compounds) has stimulated interest in limiting exposure to these agents in the workplace. Technological advances have enhanced the quality of machinery and facilitated the ability to design safety features into the machinery. Industrial and business psychologists have prepared influential studies on the nature of particular health risks and the means of avoiding them. Industrial accidents such as the famous explosion at the chemical plant in Seveso, Italy have centered popular attention on the need for better accident prevention and mechanisms for reducing the impact of accidents.

A final factor of importance within the context of the common market is the spread of migrant workers who are frequently engaged in construction work and heavy and light industry. Attention has accordingly been given to the development of signs and safety warnings that require only a minimum level of comprehension of the local language in order to better protect such migrant workers.

Soon after the adoption of the Social Action Program in June 1974, the Council established an Advisory Committee on Safety, Hygiene and Health Protection at Work, composed of representatives of management, employees, and the general public. The Committee's purpose is to provide the Commission with expert advice and studies to facilitate its legislative program in all sectors of commerce and industry. A body already in existence, the Mines Safety and Health Commission, established under the Coal and Steel Community Treaty, was instructed in 1974 to deal with the particular problems of safety in mining industries.

Although action had already begun before that date, a Council Resolution of June 29, 1978, adopted an Action Program on Safety

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216. Council Decision on the Setting up of an Advisory Committee on Safety, Hygiene and Health Protection at Work, 1974 O.J. (L 185) 15.

and Health at Work,\textsuperscript{218} and a plan for new legislative proposals, as well as education and research. This was succeeded in 1984 by a Second Action Program.\textsuperscript{219}

The first important measure adopted was Council Directive 77/576 on Safety Signs at Places of Work.\textsuperscript{220} The directive's intent was to standardize basic warning notices and emergency instructions throughout the Community with particular attention to their ease of comprehension by those not fluent in the local language.\textsuperscript{221} Thus, the signs and notices must be in particular colors for specific purposes, for example, red to indicate a prohibition, yellow for caution, green for emergency exits and first aid stations, and blue for useful information.\textsuperscript{222} Standardized signs with pictures are to be used in certain cases (no smoking, fire hazards, pedestrian crossings, wearing of helmets or eye shields).\textsuperscript{223}

The largest number of directives deal with worker exposure to dangerous substances or agents. Framework Directive 80/1107 on the Protection of Workers from the Risks Related to Exposure to Chemical, Physical and Biological Agents at Work\textsuperscript{224} set up a system for identifying dangerous agents, evaluating their level of risk, limiting the extent of workers' exposure to the agents, instituting procedures for regular monitoring of the risk, and creating emergency health measures. The directive listed in an annex some of the most dangerous agents, notably arsenic, asbestos, cadmium, lead, mercury, and certain chemical compounds. The directive has been periodically amended to add additional dangerous agents and to update standards, and it has been supplemented by specific directives on exposure to lead and lead compounds\textsuperscript{225} and to asbestos.\textsuperscript{226}

\textsuperscript{218} Council Resolution on an Action Program of the European Communities on Safety and Health at Work, 1978 O.J. (C 165) 1.

\textsuperscript{219} Council Resolution on a Second Program of Action of the European Communities on Safety and Health at Work, 1984 O.J. (C 67) 2.


\textsuperscript{221} Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Provision of Safety Signs at Places of Work, 1977 O.J. (L 229) 12, second Whereas clause (stressing the accident risk due to "different languages and the resulting misunderstandings and errors" linked to the free movement of persons and services).

\textsuperscript{222} Id. art. 2 & annex I.

\textsuperscript{223} Id. art. 2 & annex II.


The catastrophic chemical plant explosion in Seveso, coupled with the inadequate containment action and warnings to the public provided by the plant management and local authorities, prompted action on Council Directive 82/501 on the Major-accident Hazards of Certain Industrial Activities.227 This is a detailed measure intended to prevent the occurrence of industrial accidents, reduce the extent of their consequences, and warn effectively and completely the potentially affected public. Because of the danger that the consequences of grave accidents may transcend national borders, especially through air or water pollution, the directive requires Member States to notify the Commission and other states of risks, safety measures, and appropriate emergency responses,228 and the Commission is to keep a register of accidents and relevant information.229

Another interesting measure is Directive 86/188 on Risks Related to Exposure to Noise at Work.230 The adverse physical and psychological impact of excessive noise has become widely recognized in recent years. The directive aims at identifying maximum daily levels of exposure to noise in the workplace, setting standards, requiring ear protection devices, and monitoring ongoing noise risks.

All of the above directives were adopted through the use of the general harmonization of laws provision in EEC Treaty article 100, occasionally supplemented by article 235. Both of these Treaty articles require the Council to act unanimously, giving any state a veto, and Parliament's role is limited to providing advice only.

As noted above, in the discussion of the present legislative process involved in adopting social legislation,231 the Single European Act, which became effective on July 1, 1987, added a new provision to the EEC Treaty, article 118a, which sets the goal of improving conditions for the health and safety for workers.232 Article 118a's chief importance lies in its specific grant of legislative power to adopt worker health and safety measures.233 The Council may act by a qualified

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228. Id. arts. 8, 11.
229. Id. art. 12.
231. See supra Part IIB.
232. EEC TREATY art. 118(a)(1).
233. Id. art. 118(a)(2). This subsection also admonishes that the directives should not create excessive administrative, financial or legal burdens on small and medium-sized firms. Article 118a(3) further grants a general permission to Member States to adopt "more stringent measures for the protection of working conditions" than those set forth in any directive.
majority, which both accelerates the process and avoids vetoes. The Parliament has the power to review drafts and propose amendments in the cooperation procedure described previously.\(^{234}\)

Several significant directives have been adopted under article 118a. Probably the most important is Council Directive 89/391 to Encourage Improvements in the Safety and Health of Workers at Work.\(^{235}\) Its purpose is to set a framework for measures in this field, with more specific directives subsequently dealing with particular sectors or issues. Directive 89/391 imposes on employers a general duty to protect the health and safety of employees, particularly by taking risk-avoidance measures, providing appropriate information to workers, and facilitating emergency aid.\(^{236}\) Not only must the employees be provided with adequate information about health and safety risks and be trained as necessary in risk avoidance, but the employers must consult with employee representatives on health and safety issues.\(^{237}\) Employers must also take adequate measures to provide first-aid, firefighting, and evacuation in emergencies.\(^{238}\)

The framework directive has now been supplemented by another to achieve similar protection for part-time or temporary workers, Directive 91/383,\(^{239}\) another to cover medical treatment for sailors aboard vessels, Directive 92/29,\(^{240}\) and a third, Directive 92/57,\(^{241}\) to cover health and safety measures at temporary or mobile work sites, such as those used in the construction industry.

With this synopsis of legislative action to protect worker health and safety, we have completed our overview of measures taken in the context of the Social Action Program of 1974. We turn now to recent developments beginning with the Social Charter of 1989.

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234. See supra text accompanying note 38.
236. Id. arts. 5-6.
237. Id. arts. 10-12.
238. Id. art. 8.
III. THE SOCIAL CHARTER AND THE 1989 SOCIAL ACTION PROGRAM


1. Circumstances Leading to the Adoption of the Social Charter

In Part II of this Article, we examined the legislative measures engendered by the Social Action Program of 1974. We observed that the momentum occasioned by that program was largely lost in the 1980s, except in the sector of worker health and safety. In some measure, this was due to the successful adoption of a number of the principal proposals in the initial program followed by a concentration upon efforts to achieve their appropriate implementation and enforcement, notably by leading Court of Justice precedents.

A more important factor in the loss of momentum was the accession to power of Prime Minister Thatcher in the United Kingdom. Mrs. Thatcher's government viewed legislation protecting the economic and social interests of employees as seriously hampering the efficiency and competitiveness of British commerce and industry. The U.K. government executed a major program of "deregulation" in the social sphere in the 1980s, eliminating or amending prior U.K. legislation introduced by Labor or more moderate Conservative governments in the past. The U.K. government was bound to oppose implacably any new Community endeavors. Because, as we have seen, Community social measures require unanimous action (except for worker health and safety measures under article 118a), the U.K. opposition could prevent Community action in this field.

Moreover, the attention of the Community in the early and mid-1980s was centered on other serious and time-consuming issues. During this period, the Community grappled, more or less successfully, with major issues regarding the raising of adequate revenues and the resolution of difficult budgetary choices, attempts to reform the agricultural policy, adoption of a Common Fisheries Policy, the process of admission of Greece, Portugal, and Spain, the attainment of a greater level of monetary stability through the European Monetary System, and the growing pressures for change in institutional structure, which ultimately led to the adoption of the Single European Act.

As noted above, undoubtedly the most important feature of Community history in the 1980s was the adoption of the program to achieve an integrated internal market by December 31, 1992, which was enunciated in the Commission’s June 1985 White Paper on Completing the Internal Market. This program, which set forth a package of 279 legislative proposals together with a timetable for each, was reinforced by article 8a of the Single European Act, which made the goal of removal of barriers to the internal market by December 31, 1992 a matter of Treaty-based law.

Although the scope of the White Paper program comprehended virtually every facet of economic operations related to the internal market, it did not specifically include any social policy measures. The White Paper stated that social policy (along with transport, environmental protection, and consumer protection) “will benefit from the stimulus” of the internal market program. The White Paper further declared that “[a]s far as social aspects are concerned, the Commission will pursue the dialogue with governments and social partners to ensure that the opportunities afforded by completion of the Internal Market will be accompanied by appropriate measures aimed at fulfilling the Community’s employment and social security objectives.”

Although this allusion to social action in the White Paper was certainly preferable to no reference at all, nonetheless it did not provide great comfort to proponents of an active Community social policy. Socialist party leaders and Socialist governments, particularly that of President Mitterand in France, together with the Socialist group which comprises the largest single faction in the European Parliament, began to advocate a more concrete social dimension for the internal market. In 1986, Commission President Delors began to promote the concept of l’espace social européen, a concept which began to resonate in working groups of the Commission and the Parliament as well as in the media.

Efforts to promote social policy at the time of the adoption of the Single European Act proved to be largely unsuccessful. As discussed earlier, social legislation was excluded from the easier mode of legislative action enabled by article 100a, although worker health and

243. See White Paper, supra note 35.
244. See supra text accompanying note 36.
246. Id.
247. BULL. EC 2-1986, at 12.
248. See supra text accompanying notes 39-40.
safety legislation can now be adopted by a qualified majority vote of
the Council under article 118a. Apart from the introduction of article
118a, the only significant comfort provided by the SEA came through
some encouraging language in its preamble where the Member States
pledged themselves "to work together to promote democracy on the
basis of the fundamental rights recognized in . . . the Convention for
the Protection of Human Rights and Fundamental Freedoms and the
European Social Charter, notably freedom, equality and social
justice."249

The European Social Charter thus cited as a source of fundamen-
tal rights in the SEA preamble should not be confused with the Social
Charter of 1989. The European Social Charter was adopted by the
Council of Europe on October 18, 1961 as an international convention
describing basic social rights in considerable detail.250 Although ratified
by most Member States of the European Community, the Euro-
pean Social Charter is neither a Community instrument nor is it
generally regarded as legally binding.251 The European Social Charter
may best be described as aspirational in character, but it does have
great influence. The Court of Justice has cited the European Social
Charter as an appropriate source to draw upon in developing its juris-
prudence on fundamental human rights.252

In any event, in the late 1980s advocates of an active Community
social policy felt frustrated by the rapid pace of progress on the many
legislative proposals designed to achieve an integrated internal market
without any concomitant progress in the social sphere. The Commis-
ion, under the leadership of President Delors, began to press more
forcefully for a new social action program. Socialist governments and
parties lobbied for the adoption of a new approach to social policy.

249. SEA, supra note 1, pmbl.
250. For a general description, see DAVID HARRIS, THE EUROPEAN SOCIAL CHARTER
251. See Mark Gould, THE EUROPEAN SOCIAL CHARTER AND COMMUNITY LAW—A Com-
ment, 14 EUR. L. REV. 223 (1989) (arguing that the European Social Charter cannot have
legally binding effect in the Community although it can be cited as a source of general legal
principles). Gould's article responds to Alan J. Riley, THE EUROPEAN SOCIAL CHARTER
AND COMMUNITY LAW, 14 EUR. L. REV. 80 (1989), arguing that the European Social Charter has
become a part of Community law, producing directly enforceable rights for individuals by
virtue of the SEA preamble reference to it. Proposals that the Community should itself
accede to the European Social Charter have met with no success. See Bob Hepple, THE
IMPLEMENTATION OF THE COMMUNITY CHARTER OF FUNDAMENTAL SOCIAL RIGHTS, 53 MOD. L. REV.
In June 1988, the European Council meeting in Hanover invited the Commission to develop proposals for social action within the context of the internal market program.\textsuperscript{253} In November 1988, the Commission in turn requested the Economic and Social Committee (ECOSOC)\textsuperscript{254} to suggest a structure for a social charter. ECOSOC rapidly produced an opinion in February 1989 outlining a Charter on Social Rights\textsuperscript{255} inspired in large measure by the European Social Charter.

The Commission then produced its first draft of the Social Charter in May 1989,\textsuperscript{256} thus launching the formal debate. The Commission proposal was extensively reviewed by the Council of Ministers, sitting in its composition of ministers responsible for social affairs, and by the European Parliament. It also occasioned wide-spread commentary by management and labor groups and the media. This process of review continued for six months, until the Commission proposed in September 1989 a significantly revised final draft,\textsuperscript{257} which was the version accepted by the European Council, the United Kingdom dissenting, in Strasbourg in December 1989.\textsuperscript{255}


We have spoken before of the vital role of the European Council, representing the heads of state or government, in the resolution of political disputes, and in the establishment of major Community policies.\textsuperscript{259} Indeed, we noted previously that it was the 1972 Paris summit meeting which instructed the Council to launch the first Community


\textsuperscript{254} The Economic and Social Committee is a permanent body described in article 4(2) of the EEC Treaty as “acting in an advisory capacity” to the Council and the Commission. Its composition and functioning is described in articles 194-98. The important point to be noted here is that it is intended to represent equally the interests of management, labor, and the general public.

\textsuperscript{255} XXIIIrd General Report, supra note 4, at 187.

\textsuperscript{256} Preliminary Draft Community Charter of Fundamental Social Rights, Bull. EC 5-1989, at 114-17 [hereinafter Preliminary Draft].

\textsuperscript{257} Community Charter of Fundamental Social Rights (Draft), COM(89)471 final.

\textsuperscript{258} The European Council's action in adopting the Social Charter is indicated in XXIIIrd General Report, supra note 4, at 198. Curiously, the final text was not published in the \textit{EC Bulletin}. The Commission Office for Official Publications published the Social Charter in a brochure in 1990 (ISBN 92-826-0975-8). The analysis of Social Charter provisions in this Article is based on this text.

\textsuperscript{259} See supra text accompanying notes 51-52.
social action program.\textsuperscript{260} The decision of the European Council (except for the United Kingdom) to adopt the Community Charter of the Fundamental Social Rights of Workers\textsuperscript{261} ranks in importance with the European Council's Copenhagen Declaration on Democracy in 1978\textsuperscript{262} and its Stuttgart Declaration on European Union in 1983.\textsuperscript{263}

When the European Council met in Strasbourg in December 1989, the Commission draft presented to it had already been significantly modified to take into account some of the objections of the United Kingdom and certain other Member States. As we shall see later, these modifications tended to reduce the scope of the Charter and to make certain provisions less expansive or less precise in character (although in some instances the revisions brought greater clarity to the text). Despite these modifications, the United Kingdom continued to reject the text. The United Kingdom denied Community competence concerning certain subjects covered in the Charter, felt that parts of the Charter were contrary to the principle of subsidiarity, and opposed the Charter's mandate for a new Community social action program.\textsuperscript{264}

Although the European Council customarily makes its decisions and adopts its resolutions unanimously, the other eleven Member

\begin{footnotesize}
\textsuperscript{260} See supra text accompanying note 54.


\textsuperscript{262} The Copenhagen Declaration on Democracy stated that the Community would "safeguard the principles of representative democracy, of the rule of law, of social justice and of respect for human rights." \textsc{Bull. EC} 3-1978, at 6. The immediate purpose of the Declaration on Democracy was to admonish Greece, Portugal, and Spain, then applicants for membership, that they could not abandon their new democratic regimes to revert to authoritarian ones.

\textsuperscript{263} \textsc{Bull. EC} 6-1983, at 24. This lengthy declaration expressed the Member States' commitment to move ahead towards a closer form of union. The Declaration on European Union represented the start of the process of institutional restructuring that has thus far produced the SEA and the Maastricht Treaty.

\textsuperscript{264} Mr. Fowler, then Secretary of State for Employment, explained the position of the U.K. government to the House of Commons, saying pithily at one point that "[s]ubjects such as holidays and hours of work should not be regulated from Brussels." \textsc{162 Parl. Deb.}, H.C. (6th ser.) 724 (1989).
\end{footnotesize}
States were unwilling to let the U.K.'s opposition torpedo the Social Charter. Instead, they formally adopted the Social Charter on behalf of the eleven Member States that were in accord with its principles.


One answer is definite: The Social Charter does not have—indeed cannot have—legally binding effect. In the first place, the European Council is not a legislative body. Although the European Council was formally constituted by Title I of the Single European Act, that Act does not provide the European Council with any specific legislative or administrative powers. The European Council has never attempted to adopt legislation; it has always called upon other institutions, usually the Commission or Council, to take action in accord with its policy statements.

Moreover, the Social Charter neither takes the form of a Community legislative act under EEC Treaty article 189 nor that of a convention under public international law. Its own preamble refers to it as a "Declaration," manifestly without binding legal effect. However, that does not totally deprive the Social Charter of legal significance. The Court of Justice may well choose to cite it in future cases, either as expressing principles of fundamental basic rights or as guiding the interpretation of future legislative acts.

More importantly, the Social Charter represents a political commitment of eleven Member States to move ahead with specific new social action measures. This commitment is clearly indicated in section 28 of the Social Charter where the European Council "invites the Commission to submit as soon as possible initiatives" to implement the Charter. The Social Charter certainly constitutes more than a rhetorical declaration; the eleven states adopting it intend the Social

265. In accord with this view are Hepple, supra note 251, at 644-46; Watson, supra note 261, at 45-49. The Parliament strongly urged in two distinct resolutions that the Social Charter be adopted as a legally binding instrument. Resolution on the Social Dimension of the Internal Market, 1989 O.J. (C 96) 61; Resolution Adopting the Declaration of Fundamental Rights and Freedom, 1989 O.J. (C 120) 51.


267. See Watson, supra note 261, at 45-46.

Charter to serve as a fundamental statement of policy upon which specific measures can be based.269

3. The Scope of the Social Charter of 1989

The preamble to the Community Charter of the Fundamental Social Rights of Workers contains several significant statements regarding its scope, its policy effect, and the role of social policy within the Community. Almost at the outset, the preamble says that “in the context of the establishment of the single European market, the same importance must be attached to the social aspects as to the economic aspects and . . . therefore, they must be developed in a balanced manner.”270 Later the preamble refers to “the social consensus” as strengthening “the competitiveness of undertakings and . . . the economy as a whole.”271 Further on, the preamble proclaims “solemnly that the implementation of the Single European Act must take full account of the social dimension of the Community and that it is necessary in this context to ensure at appropriate levels the development of the social rights of workers.”272

The concerted effect of these statements is to attempt to rectify the omission of social action from the White Paper on Completing the Internal Market and to insert it as an essential component into the internal market program. The eleven Member States are asserting both that economic policy must be coupled with social policy and that new social action measures must be taken to complement the measures to achieve the internal market.

On the other hand, the preamble does strike one note of caution: the assertion that the “principle of subsidiarity” applies.273 This principle directs that “initiatives” may be taken either by the Member States or, “within the limits of its powers,” by the Community. The precise content of the principle of subsidiarity and the proper mode of its application has recently given rise to a grand debate because the principle has been given general force in Community law by its insertion in a new article 3b of the Maastricht Treaty.274 Within the context

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269. The Commission has referred to the Social Charter as “a reference point for taking fuller account in future of the social dimension in the development of the Community,” XXIIIrd General Report, supra note 4, at 188.

270. Social Charter, supra note 258, second whereas.

271. Id. fourth whereas.

272. Id. twelfth whereas.

273. Id. fourteenth whereas.

274. TEU art. G at art. 3b, amending EEC Treaty. The definition of the concept of subsidiarity and the interpretation of its role have become hotly debated issues within the
of the Social Charter, the reference to subsidiarity is certainly not surprising—in fact, the principle of the reliance on state action rather than on Community action, where appropriate, was first proclaimed in the Social Action Program of 1974.\textsuperscript{275} Nonetheless, the debate concerning the precise application of the principle of subsidiarity to each new social action proposal may be expected frequently to become quite intense.

Title II of the Social Charter, dealing with its implementation, asserts rather categorically that it is “more particularly the responsibility of the Member States . . . to guarantee the fundamental social rights in this Charter.”\textsuperscript{276} Despite this emphasis on Member State action, which presumably reflects the principle of subsidiarity, most of the proposals in the Commission’s new action program, to be discussed in section B hereafter, take the form of Community measures. We will return to the topic of subsidiarity when discussing some of these proposals.

Before turning to the substantive provisions of the Social Charter, we should note an important modification in its scope of application in order to make it acceptable to the European Council. As adopted, the Charter title refers to the Fundamental Social Rights of Workers (emphasis added). In the Commission’s initial draft,\textsuperscript{277} not only did the title omit the limitative reference to workers, but the word “citizens” was used in several substantive sections of the Charter. The modification is not an attempt to gain greater precision, nor is it a minor rewording; rather, it significantly reduces the scope of application of the Charter because the Charter no longer covers social interests unrelated to workers.

Thus, not only did the initial Commission draft’s preamble declare that “the completion of the internal market must offer improvements in the social field for citizens,”\textsuperscript{278} but it also spoke of the right of free movement for citizens,\textsuperscript{279} non-discriminatory access of citizens

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\textsuperscript{275} Council Resolution concerning a Social Action Program, supra note 56, at 2.

\textsuperscript{276} Social Charter, supra note 258, § 27.

\textsuperscript{277} Preliminary Draft, supra note 256, at 114.

\textsuperscript{278} Id. fourth whereas.

\textsuperscript{279} Id. § 1.

to any occupation or profession, and the right of every citizen to "adequate social protection." In each case, the word "worker" replaced the word "citizen" in the final text adopted by the eleven Member States acting in the European Council.

This alteration is not a trivial one. The Commission's original draft reflected a broader conception of social policy and would have permitted Community measures to meet the needs of persons who are not workers. While the term "worker" can be expansively defined to cover those who have worked but are now involuntarily unemployed (such as those who have suffered work-related accidents or illnesses or those dismissed by their employers) and those who have retired, certainly it does not cover those who have never been employed (such as students, wives who never seek employment outside the home, persons with adequate financial resources who never work, or persons with mental or physical handicaps who are incapable of being employed). The status of farmers, artisans, professionals, or others who are self-employed is not altogether clear because the preamble of the final text refers to the "social rights of workers" as comprehending "employed workers and self-employed persons," despite the fact that the Charter's title is limited to "workers." Is this careless drafting, or is it still intended to have the Charter cover the self-employed? If it does still cover the self-employed (which seems the more probable interpretation since this part of the preamble was presumably reviewed and approved just as the rest was), then the Charter could encompass further initiatives like the directive on equal treatment for men and women who are self-employed.

That the final text of the Social Charter does not recognize a right of free movement for non-workers is no longer of any importance because the Maastricht Treaty, if ratified, would recognize this as a right of all citizens of the European Union. Furthermore, three directives adopted in July 1990 already grant rights of free movement and

280. Id. § 2.
281. Id. § 14(i).
282. See Bercusson, supra note 261, at 626-27.
283. Social Charter, supra note 258, twelfth whereas.
284. See supra text accompanying notes 190-94.
285. TEU art. G, amending EEC TREATY (adding a new article 8a; renumbering previous article 8a as 7a).
residence to students, retired workers, and those who, for other reasons, do not work.286

Of much greater consequence is the restriction of the Social Charter reference to the right of every “worker” to adequate social protection, including “social assistance,”287 instead of the right of every “citizen.” Not only does this limit the recognition of the scope of a “right” to social assistance, but it implies that the Community need take no action to coordinate national systems of social assistance, except insofar as they affect “workers.” It will be remembered that the State Social Security Directive only covers social assistance schemes insofar as they protect workers.288 The three 1990 directives granting rights of residence to students, retired workers, and those who do not work for other reasons, all contain provisions that restrict the right of residence to those who have sufficient means and insurance to avoid becoming a burden on the host state social assistance system.289

The substitution of “worker” for “citizen” does expand the scope of the Social Charter in one significant respect: it clearly covers workers who are nationals of states that are not members of the Community. The preamble makes this express in stating that “it is for Member States to guarantee that workers from non-member countries and members of their families who are legally resident in a Member State of the European Community are able to enjoy, as regards their living and working conditions, treatment comparable to that enjoyed by workers who are nationals of the Member State concerned.”290

This reference is useful in stating an obligation of “comparable treatment.” Unfortunately, the text was revised from the initial draft291 to make the obligation one of the Member States rather than one of the Community—an expression of the subsidiarity principle, but one that implies that the Community need take no legislative measures. This has been justifiably criticized as creating a serious risk

290. Social Charter, supra note 258, eighth whereas.
291. Preliminary Draft, supra note 256, sixth whereas.
of neglect of the proper concerns of migrant workers, perhaps producing a "two-tier society within the single integrated market."292

Having thus delineated the nature, legal effect, and basic scope of application of the Social Charter, we turn to its substantive coverage.


Title I of the Social Charter is divided into twelve sections that describe the contours of particular rights of workers and state obligations imposed on the Member States and the Community to provide some form of specific protection or benefits to individuals. Title II, Implementation of the Charter, declares that Member States have the primary responsibility to act to guarantee these "fundamental social rights" and urges the Commission to make proposals for appropriate Community initiatives,293 some of which we will discuss later in section B. Each of the Charter's substantive sections will be briefly described in this subsection.294

(a) Freedom of movement

This initial section of the Social Charter describes the rights of workers (not "citizens," as in the initial draft) to move and work throughout the Community, to receive equal treatment in access to occupations and professions and equal treatment with regard to working conditions and social protection, and to have a right of residence with their "families" (not a defined term).295 This section is not particularly innovative because these rights have already largely been attained by article 48 of the EEC Treaty and measures adopted pursuant to it.296 Although the section refers only to "workers," it would seem manifest that the rights described likewise apply to professionals and the self-employed, again largely already attained through articles 52 and 59 of the EEC Treaty and measures adopted pursuant to them.297

292. Watson, supra note 261, at 65. See also Laske, supra note 289, at 531-32.
294. An excellent analysis of some of these substantive provisions is contained in Bercusson, supra note 261, and in Watson, supra note 261. See also the briefer description in 1992—The Social Dimension, supra note 63, at 82-85.
295. Social Charter, supra note 258, §§ 1-3. The text is shorter and less precise than the comparable sections 1-8 of the initial Commission draft. See Preliminary Draft, supra note 256.
296. See supra text accompanying notes 41-47.
297. Community action to achieve the rights of establishment and the right to perform or receive transborder services with regard to professionals, artisans, and the self-employed are extensively covered in BERMANN, GOEBEL, DAVEY & FOX, supra note 3, chs. 15-16; KAPTEYN & VERLOREN VAN THEMAAT, supra note 3, at 427-51; DOMINIK LASOK,
The principal sector in which further action seems to be needed relates to the protection of migrant workers temporarily employed in subcontracting or public works contracts in host Member States.\textsuperscript{293}

\textit{(b) Employment and remuneration}

This section covers two principles. The first is the freedom to engage in any occupation, with any necessary assistance to be provided by public placement services without discrimination on the basis of nationality.\textsuperscript{299} This principle covers all workers, not just migrant workers, and hence comprehends nationals working in their own states. This section would appear implicitly to absorb the preamble’s antidiscrimination principle, which expressly forbids “discrimination on grounds of sex, colour, race, opinions and beliefs.”\textsuperscript{300} Presumably, enforcement of this principle is primarily the responsibility of Member States, but the Community is not expressly excluded from taking appropriate action.

The second principle is that “[a]ll employment shall be fairly remunerated,” with a further precision that “workers shall be assured of an equitable wage,” including part-time and temporary workers.\textsuperscript{301} Whether “fair remuneration” and an “equitable wage” are terms that can be sharply defined, and how they are to be attained, remains to be seen.\textsuperscript{302} Certainly, Community action is quite possible, as we shall see, although again Member States would appear to have the chief responsibility for enforcement of the right. This is also the sort of description of a right that the Court of Justice might well cite in elaborating a fundamental human rights doctrine.

\textit{(c) Improvement of living and working conditions}

This section declares that workers have a “right to a weekly rest period and to annual paid leave,” under terms to be harmonized by

\textsuperscript{293} Bercusson, \textit{supra} note 261, at 629-31. \textit{See also infra} text accompanying note 432.
\textsuperscript{299} Social Charter, \textit{supra} note 258, §§ 4, 6.
\textsuperscript{300} \textit{Id.} seventh whereas. This text did not appear in the initial Commission draft and its later introduction is decidedly to be applauded (although some might regret the failure to include sexual orientation among the instances of discrimination).
\textsuperscript{301} \textit{Id.} § 5. The Preliminary Draft, \textit{supra} note 256, § 9(i), referred to a “decent” rather than an “equitable” wage. The revision seems a decided improvement.
\textsuperscript{302} \textit{See} Bercusson, \textit{supra} note 261, at 631-32.
the Community. This is a rather audacious statement, elevating leave days to a right, rather than a privilege, and expressly mandating Community harmonization. We recall here that no effort has ever been made to exploit EEC Treaty article 120's requirement of "equivalence between paid holiday schemes" throughout the Community and that the Council in 1975 limited itself to a recommendation for a forty hour work week and four weeks paid leave. This section has already inspired the draft Working Time Directive discussed later in section E.

The section dealing with improvement of living and working conditions also states an obligation to stipulate the "conditions of employment of every worker," now achieved by the recent Written Employment Terms Directive, and to set minimum standards for the employment of part-time, temporary and seasonal workers, the subject of controversial pending proposals.

(d) Social protection

This section states a "right to adequate social protection," with a corollary of "an adequate level of social security benefits" and a second corollary of social assistance for "[p]ersons who have been unable either to enter or re-enter the labour market and have no means of subsistence." As already indicated, the use of "worker" rather than "citizen" for the beneficiary of these rights significantly reduces the ambit of this section. Manifestly, this is a provision whose enforcement is principally incumbent upon Member States. Nonetheless, the Community's present coordination directives in this important sphere certainly need re-examination and updating.

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303. Social Charter, supra note 258, § 8. The Preliminary Draft, supra note 256, § 12, had also proposed fixing "a maximum duration of working time per week." The omission of this language has not prevented inclusion of the subject in the draft Working Time Directive discussed infra in the text accompanying notes 422-30. See the careful analysis of sections 7-9 with regard to working time in Bercusson, supra note 261, at 632-38.

304. See supra text accompanying note 68.

305. See infra text accompanying notes 422-30.


307. See infra text accompanying notes 385-99.


309. See infra text accompanying notes 415-21.


311. See supra text accompanying notes 287-89.

312. See Laske, supra note 289, at 521-29; Watson, supra note 261, at 53-55.
(e) Freedom of association and collective bargaining

Freedom of association and collective bargaining are obviously topics that excite the keenest of anticipation in trade unions and the greatest of suspicion in employers' associations. The text of this section has been stated in rather moderate terms. The Charter's expression of the basic "right of association" covers both employers and workers, permitting each group "to constitute professional organizations or trade unions of their choice for the defence of their economic and social interests." 313 A corollary is "the freedom to join or not to join such organizations," 314 a rather controversial freedom because it rules out "closed shop" arrangements that require all workers in a particular enterprise or work unit to belong to a designated union. 315

Other corollaries are the right of employers or their organizations and worker organizations "to negotiate and conclude collective agreements" and the "right to resort to collective action," which expressly includes "the right to strike" 316 (but not any employers' right to execute a "lockout" of workers). This section also understandably urges the use of "conciliation, mediation and arbitration procedures," 317 but says nothing about whether these dispute-resolution modes are to be made compulsory. Presumably, this subject has been left to autonomous Member State discretion.

Although the Community presently has legislation that requires that migrant workers enjoy equal treatment in employee representation bodies, including unions, 318 it has otherwise left this sphere to Member State action, a posture unlikely to change after the Social Charter. However, the Court of Justice may well find statements of principle in this section worthy of citation in its case law.

(f) Vocational training

This is neither a novel nor a far-reaching section. It states that "[e]very worker . . . must be able to have access to vocational training and to receive such training throughout his working life" without "dis-

313. Social Charter, supra note 258, § 11. This paragraph and the others in this section are more clearly articulated than the initial Commission text. See Preliminary Draft, supra note 256, §§ 16-18.

314. For an analysis of this corollary, see Bercusson, supra note 261, at 635-39.

315. The Labour Party in the United Kingdom has expressed its strong support for the Social Charter despite its disagreement with this rejection of a "closed shop" approach. See Hepple, supra note 242, at 426-27.


317. Id. § 13.

318. Regulation 1612/68, supra note 42, art. 8.
forcement on grounds of nationality."319 EEC Treaty article 128 authorizes the Council to act in the sphere of vocational training, and efforts to facilitate such training have been continuously undertaken since the 1960s. The best known recent measure is the European Action Program for the Mobility of University Students, popularly known as the Erasmus program,320 which facilitates cooperation between academic institutions in providing courses of study and research facilities and also provides direct aid to students undertaking study or research in higher education institutions in other Community states.

Somewhat surprisingly, the Commission’s initial draft text, which stated that every Community “citizen” had the right to “enrol in occupational training courses, including those at the university level,” without discrimination based on nationality,321 does not appear in the final text. Inasmuch as the Court of Justice has concluded that virtually all university studies can be regarded as a form of vocational training and that Community nationals have a right of nondiscriminatory access to university and other vocational training studies,322 one wonders why the initial text was omitted.

(g) Equal treatment of men and women

Again, this section does not represent much that is novel. Curiously, the text is not stated in the form of a right of equal treatment but rather in the form of an obligation: “Equal treatment for men and women must be assured.”323 To have declared that equal treatment between men and women with regard to all aspects of employment conditions should constitute a right would have gone beyond EEC Treaty article 119, which, as indicated above, enunciates a right limited to equal pay.324

The text of this section goes beyond the provisions of the Equal Treatment Directive described above325 in only one respect: it calls for measures “enabling men and women to reconcile their occupational

320. Council Decision 87/327, 1987 O.J. (L 166) 20. In a challenge with regard to its proper legal basis in the EEC Treaty, the Court of Justice held that virtually all of the Erasmus program provisions were appropriate under article 128, but certain features did require the use of the “implied power” clause, article 235. Case 242/87, Commission v. Council, 1989 E.C.R. 1425, 1 C.M.L.R. 478 (1991).
323. Social Charter, supra note 258, § 16.
324. See supra Part IIE(1).
325. See supra Part IIE(3).
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and family obligations.\textsuperscript{326} Presumably this provision refers to parental leave and child care measures. As we shall see in Part IIIC, the Council has now adopted a recommendation on child care, but has not acted on a parental leave proposal.

(h) Information, consultation and participation for workers

This provision is undoubtedly one of the most controversial sections of the Social Charter. The text requires the development of "[i]nformation, consultation and participation for workers . . . along appropriate lines," although it does contain the caveat that this should take account of "the practices in force in the various Member States."\textsuperscript{327} In part, the text merely reflects the provisions of the Collective Redundancy and Transfer of Undertaking Directives previously discussed.\textsuperscript{328}

Going beyond present law is the text calling for action to provide such rights at the multinational company level, especially with regard to "technological changes" or "restructuring operations."\textsuperscript{329} This certainly foresees new attempts to relaunch the Vredeling Proposal.\textsuperscript{330}

(i) Health protection and safety at the workplace

This section largely replicates the principles of EEC Treaty article 118a and, as such, is neither novel nor controversial. There is a certain emphasis on the "need for the training, information, consultation and balanced participation of workers" in this sector,\textsuperscript{331} which may occasion resistance by some states.

(j) Protection of children and adolescents

Although the Community has in the past been concerned with the interests of young people, especially with regard to vocational training and the facilitation of initial employment,\textsuperscript{332} this section calls for new initiatives. Among the more striking provisions is a call for rules setting the minimum employment age at fifteen,\textsuperscript{333} requiring

\begin{itemize}
\item \textsuperscript{326} Social Charter, \textit{supra} note 258, § 16.
\item \textsuperscript{327} \textit{Id.} § 17.
\item \textsuperscript{328} \textit{See supra} Part IID(1), (2).
\item \textsuperscript{329} Social Charter, \textit{supra} note 258, § 18(i), (ii).
\item \textsuperscript{330} \textit{See supra} Part IID(4).
\item \textsuperscript{331} Social Charter, \textit{supra} note 258, § 19.
\item \textsuperscript{332} \textit{See 1992—The Social Dimension, supra} note 63, at 24, 78-79.
\item \textsuperscript{333} Social Charter, \textit{supra} note 258, § 20. The Preliminary Draft, \textit{supra} note 256, § 25, had set sixteen as the minimum age for employment.
\end{itemize}
“equitable remuneration” for young people, and requiring limits on maximum work time and a prohibition of night work. Although the Member States presumably will have the principal responsibility for protecting the interests of young workers in accordance with the principle of subsidiarity, it is nonetheless likely that the Commission will at some point propose minimum standards for the entire Community.

(k) Elderly persons

This section may occasion important new Community initiatives. It first states the principle that “[e]very worker” should, on retirement, possess sufficient “resources affording him or her a decent standard of living.” This may prompt new efforts to harmonize or coordinate the terms of national or private sector social security and pension schemes.

Even more significant is the declaration that every “person who has reached retirement age but” lacks an adequate pension or other sufficient source of income “must be entitled to sufficient resources and to medical and social assistance specifically suited to his needs.” Note that the text does not say “every worker;” although it changed “citizen” in the initial draft to “person” in the final language, the implication remains that the text could cover action to protect the interests of persons other than workers. While it is probable that the section is to be implemented only by Member State rather than Community legislation, it is not inconceivable that Community recommendations or even measures could be advanced, or that the Court of Justice might draw inspiration from the text in stating the rights of retired migrant workers or members of their families.

(l) Disabled persons

This section states the obligation to take “additional concrete measures” to improve the “social and professional integration” of disabled persons. Again, the text clearly goes beyond the interests of disabled “workers” by its use of the broader term “person,” which presumably includes the congenitally handicapped who have never worked or are incapable of working. Measures to be taken include

335. Id. § 22.
336. Id. § 24.
337. See Laske, supra note 289, at 516-21; Watson, supra note 261, at 53-54.
339. Id. § 26.
not only vocational training but also measures to facilitate “mobility, means of transport and housing.”

This concludes a rather brief description of the substantive provisions of the Social Charter. We turn now to a review of the major initiatives proposed by the Commission in order to implement the Social Charter, concentrating on those already adopted.

B. The 1989 Commission Action Program to Implement the Social Charter

In describing the origins of the Social Charter of 1989, we have noted that the Commission in the late 1980s had begun to press for a new program of social legislation, both as a concomitant of the energetic efforts to achieve an integrated internal market and also in order to provide further rights or modes of protection to employees generally or to specific classes of employees. The Parliament, strongly influenced by its large socialist group, and socialist parties and governments supported the Commission’s desire for a new program.

A principal concern impelling the Commission to act was its desire to prevent “social dumping,” a concept frequently cited as the internal market program began to move forward. “Social dumping” can mean different things to different people, but a useful description of its effect has been provided by the labor law expert, Roger Blanpain: “[C]ompanies will invest where the wages and conditions are the cheapest and thereby force the workers in other countries... to accept lower standards.”

An obvious instance of “social dumping” can occur when the economic infrastructure of a particular region is weaker than that of other regions, with the consequence that labor costs are significantly lower in that region’s labor intensive industries. If this factor is combined with minimal restrictions on capital investment, the availability of relatively cheap raw materials, and moderate transport costs to large sales markets, then enterprises will be inclined to shift production capacity to operations within regions which have significantly lower labor costs. Within the European Community, Ireland, Italy, Portugal, and Spain represent states containing regions whose lower labor costs, coupled with the other factors mentioned above, have tended to draw commercial and industrial development from other states. The Commission tends to view this phenomenon as relatively natural and inev-

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340. Id.
341. Blanpain, supra note 261, at 404 n.3. See also Watson, supra note 261, at 42-43.
table, to be monitored but not usually occasioning any limitative action.\textsuperscript{342}

In contrast, there is the type of "social dumping" that occurs when one or several states pursue a regulatory policy that significantly restricts or inhibits employee rights, bargaining power, or organizational capacity, with the effect that labor costs become perceptibly lower than those prevailing in the majority of states that pursue regulatory policies more favorable to employee interests. This phenomenon of regulatory "social dumping" is one which does concern the Commission and has influenced some of the legislative proposals recently advanced in the social sector.\textsuperscript{343} Quite naturally, the United Kingdom, whose Conservative government deliberately and energetically pursued a policy of "deregulation" in the 1980s and eliminated employee protection measures previously adopted, considers its policies to be economically beneficial and consequently views most of the Commission's new social action proposals as unwarranted interference in labor markets.\textsuperscript{344}

In developing a social action program, the Commission was also clearly motivated by a desire to assist classes of employees whom it regarded as particularly meriting either permanent or temporary social protection. Examples of such groups of employees are pregnant women, mothers of newborn infants, the physically or mentally handicapped, and part-time and temporary workers.

The Social Charter of 1989 represented a mandate to undertake a new social action program, which the Commission had been seeking, inasmuch as the European Council (except for the United Kingdom) invited the Commission to submit "initiatives . . . with a view to the adoption of legal instruments" in order to implement the Social Char-

\textsuperscript{342} 1992—The Social Dimension, \textit{supra} note 63, at 55-58. Of course, there are undeveloped or economically depressed regions in more industrialized states that likewise may draw new productive capacity from other regions. Examples of such depressed regions include Brittany in France, Scotland and Wales in the United Kingdom, and East Germany after the German unification. The analogous phenomenon to "social dumping" in the United States has been the movement of labor-intensive industries from the Midwest and Northeast to the South and West.

\textsuperscript{343} See Bercusson, \textit{supra} note 261, at 633. The Commission has expressly rejected the view that Member States' differing levels of social regulation can be viewed as an example of normal market competition or a desirable type of flexibility. The Commission views the "decentralized approach" of Member State autonomy in setting regulatory systems for employees as harmful to "Community-wide social progress." 1992—The Social Dimension, \textit{supra} note 63, at 68-69.

\textsuperscript{344} See Hepple, \textit{supra} note 242, at 425-30.
In fact, the Commission anticipated the European Council mandate, since the Commission issued its Communication on its Social Action Program on November 29, 1989, two weeks before the Strasbourg European Council meeting which acted on the Social Charter.

The Commission’s Communication on the Social Action Program parallels the approach taken in the 1985 White Paper on Completing the Internal Market. The Communication states certain general principles governing its new social action program and then sets forth forty-seven proposals for different types of legislative measures or recommendations listed in chapters that usually correspond to the sections of the Social Charter of 1989. Each of the chapters begins with a description of relevant factual conditions and a statement of Commission policy objectives and then concludes with an indication of the measures, if any, that the Commission proposes to initiate.

Although the Communication is interesting and important in its own right, it naturally does not have the force of the Social Charter of 1989. Rather than discussing the Communication in detail, we will review the measures already adopted at the present time, as well as the more important pending proposals.

The Commission’s Communication does, however, state an important limitative principle that merits attention at the outset. The Commission notes that the “principle of subsidiarity” constrains the Commission to make only proposals “necessary to achieve the social dimension of the internal market,” leaving other aspects of the Social Charter entirely to Member State action or to bargaining between labor and management.

Specifically, the Communication states that the Commission will make no proposals concerning the elimination of “discrimination on the grounds of race, colour or religion” or to achieve “the right to freedom of association and collective bargaining.” Thus, the principle of subsidiarity stated in a Whereas clause of the Social Charter of 1989 is expressly applied by the Commission in its new social action

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347. Id. at 4. For an analysis of the Commission’s definition of subsidiarity in the social context, see Hepple, supra note 251, at 646-47, and Watson, supra note 261, at 46-47.
349. Id.
350. See supra text accompanying note 273.
program. Of course, as we shall see, the United Kingdom maintains that the principle of subsidiarity should go further than this and likewise bar the adoption of certain proposals advanced in the Communication or at least reduce the ambit of such proposals.

The Social Charter of 1989 requested the Commission to prepare an annual report on the implementation of the Charter, both by the Community itself and by the Member States, to be presented to the European Council and the Parliament. These reports are valuable sources of information, not only because they describe the level of progress in the legislative process for each Commission proposal but even more because the reports review the extent of Member State action in this sector. Such information is quite difficult to obtain otherwise.

The Commission’s First Report in December 1991 not only provides such useful information, but it also sets forth three policy principles that will govern the Commission’s own initiatives. In addition to the principle of subsidiarity, the Commission intends to follow “the principle of the diversity of national systems, cultures and practices” but only insofar as this represents “a positive element in terms of the completion of the internal market.” This principle is clearly linked to that of subsidiarity and presumably will dictate greater flexibility and more diverse alternative approaches in the structure of Commission proposals.

The third principle cited is that of “the preservation of the competitiveness of undertakings while counciling [sic] the economic and social dimensions” in order to achieve an appropriate balance of interests. This appears to be a rather ambiguous statement of principle. While it might perhaps suggest a concern that enterprises in one state (as, perhaps, in the United Kingdom) should not escape social cost burdens that generally fall on enterprises in other states, it is more apt to be cited as a reason for limiting the costs of social burdens altogether in order to preserve the competitiveness of Community commercial and industrial enterprises operating in a global framework.

This same ambivalence appears in the Commission’s concluding statement of the goals of its action program, which are on the one

353. First Report, supra note 352, at 5.
hand to avoid any "distortion of competition" and on the other to "strengthen economic and social cohesion and contribute to the creation of jobs."\textsuperscript{354} It is by no means manifest that these are compatible goals. The adoption of minimum standards for the recognition of social rights or the enhancement of protection for employees on a Community-wide basis may reduce "social dumping" and the distortion of competition produced by sharp disparities in the employee rights legislation of different Member States; however, an increase in economic costs for enterprises due to augmented social charges is rather unlikely to result in additional jobs and may even cause job loss.

We turn now from this examination of the Commission Communication on the Social Action Program to a discussion of the measures already adopted pursuant to that program.

\textbf{C. The 1992 Directive Protecting Pregnant Workers and Workers Who Have Recently Given Birth}

The most recent Community social action measure is also an extremely important one: Council Directive 92/85 to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers Who Have Recently Given Birth or are Breast-feeding.\textsuperscript{355} Its relatively rapid adoption was somewhat surprising since the initial Commission proposal engendered considerable controversy. The present directive was adopted only after strenuous debate within the Council and the Parliament and after several significant compromises were reached.

The Commission's 1989 Communication on the Social Action Program proposed a directive to protect pregnant women from health hazards at work, making use of article 118a within the context of the general worker health and safety program.\textsuperscript{356} The Commission also proposed the issuance of a Recommendation for a Code of Good Conduct, to be respected by the Member States, in order to provide job security for and to protect the economic interests of pregnant workers and working mothers.\textsuperscript{357}

When the Commission actually submitted its draft directive on September 18, 1990,\textsuperscript{358} the proposal encompassed not only various

\textsuperscript{354} Id.
\textsuperscript{356} Communication on the Social Action Program, \textit{supra} note 346, at 36.
\textsuperscript{357} Id. at 37-38.
provisions intended to protect health and safety, but also a section enabling pregnant women to receive leave for fourteen weeks at full pay for a period before and after birth.\footnote{359} Not surprisingly, the United Kingdom questioned whether the paid leave provision, which it deemed to be purely economic in character, was appropriate in a draft directive intended for adoption under article 118a.

When the directive was finally adopted after a compromise on the paid leave provision, the directive’s sixteenth and seventeenth Whereas clauses stated that the paid leave was essential to ensure that female workers would in fact opt to take the leave period, arguing therefore for an indirect link between the economic benefit provided to female workers by the paid leave and the health benefit produced by the leave. This argument is not entirely convincing. The Commission’s draft directive might have been based more properly on article 100, in order to cover the paid leave provision in addition to article 118a—but then the proposal would have required unanimous approval instead of a qualified majority vote and would accordingly have been less likely to have achieved ultimate adoption by the Council.

Turning first to the undisputed health and safety features in the directive, articles 3-6 set forth types of protection for pregnant women as well as women who have recently given birth or are breastfeeding. The directive forbids exposure to dangerous chemical, physical and biological agents and engaging in work-related movement or conduct that might produce substantial mental or physical fatigue. The Commission, aided by Member States, must draw up guidelines on the level of the hazard involved and provide these guidelines both to employers and the representatives of female workers.\footnote{360} Employers are also to assess these risks and advise workers of them.\footnote{361}

If health risks are significant, employers are bound to ensure that the female workers who are to be protected by the directive have their working conditions or working hours adjusted to avoid or reduce the exposure to the risks.\footnote{362} If that proves impossible, the employer shall either transfer the female worker temporarily to another job or grant her a period of leave if a job transfer is not feasible.\footnote{363}

The Commission’s initial proposal would have forbidden employers from requiring pregnant women, or women who recently gave

\footnote{359} Id. art. 5.  
\footnote{360} Council Directive 92/85, supra note 355, art. 3.  
\footnote{361} Id. art. 4.  
\footnote{362} Id. art. 5(1).  
\footnote{363} Id. art. 5(2).
birth or are breastfeeding, to work at night.\textsuperscript{364} The directive’s final text obliges such women to furnish a medical certificate stating that night work is dangerous for them before they are exempted from such work.\textsuperscript{365} In that event, such women must be transferred to daytime work or, if this is not feasible, must be granted a period of leave.

The directive’s final health protection provisions require that pregnant women be given paid time off to attend prenatal examinations\textsuperscript{366} and an obligatory “maternity leave” of at least two weeks immediately before and after confinement to give birth.\textsuperscript{367} Pregnant workers are also entitled to opt for (but are not compelled to take) fourteen weeks of maternity leave.\textsuperscript{368}

As previously indicated, the Commission initially proposed that the maternity leave should be paid at normal rates. Although this proposal corresponds to present rules in most Member States, the leave period is longer than that required in the Netherlands, Portugal, and the United Kingdom, and the U.K. leave period requires pay at less than full rates.\textsuperscript{369} The United Kingdom, therefore, vigorously opposed the full pay provision, maintaining that it would cost employers substantial amounts and hence might even deter the hiring of women.\textsuperscript{370} The Council finally reached a compromise, requiring the maternity leave pay to be set at least at the level of the Member State disability or sick pay level.\textsuperscript{371}

\textsuperscript{364} Proposal for a Council Directive Concerning the Protection at Work of Pregnant Women or Women Who Have Recently Given Birth, \textit{supra} note 358, art. 3(3).

\textsuperscript{365} Council Directive, 92/85, \textit{supra} note 355, art. 7. The Commission would have preferred its initial text, but the Council was unwilling to go further than the compromise language adopted in the final text.

\textsuperscript{366} \textit{Id.} art. 9.

\textsuperscript{367} \textit{Id.} art. 8(2).

\textsuperscript{368} \textit{Id.} art. 8(1).


\textsuperscript{371} Council Directive 92/85, \textit{supra} note 355, art. 11(3). Furthermore, the directive provides that female employees who must be granted leave to avoid health hazards must receive pay at levels fixed by national legislation. \textit{Id.} art. 11(1). The Commission and the Parliament wanted the paid leave to be at the employee’s usual salary and were quite unhappy with the Council compromise language, but in the cooperation procedure of article 118a, it is the Council which finally adopts the text of a directive. The United Kingdom insisted on the lower disability pay level. Note, however, that Member States which presently require the paid leave to be at the usual salary cannot reduce this to the disability pay level because article 1(3) of the directive prohibits states from lowering any pre-existing levels of protection.
The final important provision of the directive is a prohibition against dismissal of female workers throughout the period from the start of pregnancy to the end of their maternity leave “save in exceptional cases not connected with their condition.”

Even though Directive 92/85 does not go much beyond the rules and practices protecting pregnant workers in most Member States, it does represent an important step in supplementing both the directives intended to achieve equal economic rights for men and women and the worker health and safety measures discussed before. Moreover, the Council will re-examine the situation after five years,\textsuperscript{373} which may mean that higher levels of protection will be adopted later.

The Commission’s 1989 Social Action Program also included a recommendation on child care.\textsuperscript{374} Although legislation in this area was regarded as premature, the Commission did propose, and the Council has now adopted, a Recommendation on Child Care (Child Care Recommendation).\textsuperscript{375} The recommendation is not binding on Member States, but is intended to encourage them to take action in accordance with it. Member States are to report their efforts to the Commission, which is to make a composite report in three years.\textsuperscript{376}

The Child Care Recommendation has several aspects. The first and most important is to urge states to offer public child care services or to encourage private child care services, which would provide reliable care at affordable prices. The intent is to enable parents, particularly single parents or working mothers, to engage more easily in work, training, or education.\textsuperscript{377} States are also urged to enable or at least encourage employers to grant special leave provisions to facilitate flexible child care by either mothers or fathers.\textsuperscript{378} In an interesting final note, states are urged to “encourage, with due respect for freedom of the individual, increased participation by men in order to achieve a more equal sharing of parental responsibilities.”\textsuperscript{379}

The Commission would have liked to go much further than the Council Child Care Recommendation. In 1983, the Commission proposed a draft directive on parental leave and leave for family rea-

\textsuperscript{372} Id. art. 10(1).
\textsuperscript{373} Id. art. 14(6).
\textsuperscript{374} Communication on the Social Action Program, supra note 346, at 37.
\textsuperscript{375} Council Recommendation on Child Care, 1992 O.J. (L 123) 16.
\textsuperscript{376} Id. art. 7.
\textsuperscript{377} Id. arts. 2-3.
\textsuperscript{378} Id. art. 4.
\textsuperscript{379} Id. art. 6.
sons, but this appears currently to have no chance of adoption. The proposal would have permitted either parent to claim three months unpaid leave to care for a child under two years of age or to claim a number of days leave per year to care for an ill spouse or child, or on the occasion of the wedding of a child or death of a near relative.

At this point it is interesting to introduce another comparative law note, this time to contrast the recent U.S. Family and Medical Leave Act of 1993 with Directive 92/85 and the Child Care Recommendation. The U.S. statute, the first major legislative action under the Clinton administration, represents the culmination of years of efforts to secure its adoption, which the Bush administration had previously blocked.

The Family and Medical Leave Act is broader in scope than Directive 92/85 in two significant respects: The Act grants the right to either men or women to take twelve weeks of unpaid leave per year. The leave may be claimed not only on the occasion of pregnancy or the birth of a child, but also at the time of the adoption of a child or when an employee is suffering ill health or the effects of an injury or when a spouse, parent, or child is injured or ill. Indeed, the Commission might well consider amending its thus far unsuccessful proposal on parental leave to parallel to a greater degree the Family and Medical Leave Act and then try to use the experience of the U.S. Act as a moral inducement for the adoption of Community legislation.

On the other hand, the Family and Medical Leave Act is not as far-reaching as Directive 92/85 because the Act grants only a right to unpaid leave, not paid leave, and it does not parallel the important health protection features of the directive. It may be hoped that after the United States has had an opportunity to live with the effects of the Family and Medical Leave Act for several years, the time will come for legislation requiring that pregnant workers and mothers of newborn infants receive some form of paid leave and health protection, perhaps along the lines of Directive 92/85.

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381. Id. art. 4. Similar leave could be claimed at the time of adoption of a child who is under five and during a further two-year period following the adoption.
382. Id. art. 8.
384. Id. § 102. The employee must give thirty days advance notice if practicable, id. § 102(e), and must be returned to his or her prior position at the end of the leave. Id. § 104.

Of all the proposals in the Commission’s 1989 Social Program, the first to be adopted was Directive 91/533 on the Employer’s Obligation to Inform Employees of the Conditions Applicable to the Contract or Employment Relationship.385 This measure was specifically foreseen in section 9 of the Social Charter of 1989.

The rapid review and adoption of this directive386 was perhaps due to the impression that it did not appreciably modify existing national rules or that it did not substantially increase employee rights or employer costs. In fact, the directive may prove to have considerable practical importance for many employees. It is also worth noting that the directive was adopted under article 100, which requires the Council to act unanimously. Although the United Kingdom felt the directive was unnecessary, it decided to abstain, rather than vetoing the measure, because it concluded that the directive did not significantly modify U.K. rules.

The Written Employment Terms Directive requires that every employer must inform every employee of the “essential aspects of the contract or employment relationship”388 either in the form of a written contract, a letter of engagement, or an equivalent written document.389 The contract or other document must contain considerable information of use to the employee, such as his or her title and grade, a brief description of the work concerned, the date of commencement of employment, the base pay and all components of remuneration, the normal working time, the amount of paid leave, any notice period before termination, and any relevant collective agreements.390 Any material change in these terms must likewise be provided to the employee in written form.391

One can safely predict that written specification of these terms may prove quite helpful to an employee in any dispute with the em-

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386. The Commission proposal was made on December 5, 1990, in 1991 O.J. (C 24) 3, so it was reviewed and approved in about ten months.
388. Written Employment Terms Directive, supra note 385, art. 2(1).
389. Id. art. 3(1). If not provided at the outset of employment, the written document must be provided to the employer within two months after the employment begins.
390. Id. art. 2(2).
391. Id. art. 5.
ployer. Vague or ambiguous terms in an oral employment relationship can effectively bar an employee from obtaining relief in a dispute with the employer; written terms will at least give an employee a clear starting point in such a dispute. Moreover, the directive obligates Member States to ensure that employees have appropriate judicial process to pursue any claims under the directive.\textsuperscript{392}

The directive covers all full-time employees, most part-time employees (anyone working more than eight hours per week), and temporary employees (anyone working more than one month per year).\textsuperscript{393} No exception is stated for small businesses, or professional or household employees, so presumably they are all covered. The Commission in its First Report on the Application of the Social Charter has rightly stressed the utility of the broad scope of this directive in clarifying the status of workers in various types of nontraditional employment relationships.\textsuperscript{394}

The Commission has also emphasized that the directive is intended to facilitate the mobility of workers throughout the Community while reducing abuses in the treatment of migrant workers.\textsuperscript{395} The directive requires employers to provide any employee who is to work more than one month in another country with pertinent information, such as the projected duration of employment abroad, the currency to be used in remuneration, and any conditions governing the employee’s repatriation.\textsuperscript{396}

The true merit of the Written Employment Terms Directive may become apparent only over time. Clarity and certainty in contracts is highly desirable. Achieving such clarity and certainty in employment relationships may prove of great importance to many workers, particularly part-time, temporary and other atypical workers, as well as migrant workers. The directive may substantially reduce certain types of abusive conduct by employers. Against this benefit must be reckoned the cost to the employer, especially the small-business or household employer, in maintaining the personnel records involved. Nonetheless, the benefit would seem to outweigh the burden.

On a comparative note, the traditional U.S. view that employment agreements are a type of contract at will\textsuperscript{397} tends to militate

\textsuperscript{392} Id. art. 8.
\textsuperscript{393} Id. art. 1.
\textsuperscript{394} First Report, supra note 352, at 10.
\textsuperscript{395} Communication on the Social Action Program, supra note 346, at 19.
\textsuperscript{396} Written Employment Terms Directive, supra note 355, art. 4.
\textsuperscript{397} SULLIVAN, ZIMMER & RICHARDS, supra note 133, § 36.1.
against great formality in employment relationships. Although collective bargaining agreements and union contracts provide a formal structure for the employment agreements of some workers, and middle and higher management employees often are provided with a more or less detailed written employment contract, many and perhaps most workers have no such formal written evidence of their employment terms—indeed, oral agreements are quite common. Courts in some states have treated employee handbooks and general personnel booklets as constituting some terms in an employment relationship, but this provides only partial coverage. Labor law experts in the United States would do well to monitor the European experience in the next few years to see whether the Written Employment Terms Directive would, or would not, prove a desirable model for federal or state legislation.

We turn now to the other recent measure in the economic employment rights field. The Commission in its 1989 Communication on the Social Action Program proposed to amend the previously discussed Collective Redundancies Directive in order to cover expressly the increasingly common situation where the decision to dismiss employees for economic reasons is not taken by the immediate employer but rather by a group head office or parent company located in another Member State. Manifestly, multinational enterprise headquarters often direct the closing of plants or divisions or the reduction of personnel in subsidiaries or branches in other states. The machinery set up by the Collective Redundancies Directive to require consultations only between the management and employee representatives in the affected subsidiary or branch is not always very effective.

The Commission proposal was submitted on September 20, 1991, and the Council amendment to the Collective Redundancies

398. Id. ¶ 36.3.1.
400. See supra Part IID(1).
Directive was adopted quite expeditiously on June 24, 1992.\textsuperscript{403} The amendment expressly provides that the information and consultation obligations of the directive apply "irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer."\textsuperscript{404} It is important to note that the amendment also expands the scope of the information to be provided to employee representatives. Such information must now include the employer's reasons for the proposed dismissals, the criteria intended for use in choosing the employees to be dismissed, and the mode of application of any redundancy benefits.\textsuperscript{405} The amendment would also obligate Member States to ensure that adequate judicial procedures exist to enforce the directive's obligations, in particular including the nullification of any collective redundancy as a remedy for non-compliance with the directive.\textsuperscript{406} That is a sanction that manifestly goes far beyond the penalties contained in the U.S. analogue, WARN.\textsuperscript{407}

\textbf{E. Pending Proposals for Legislation and Recommendations to the Member States}

Before closing this Article, it is desirable to review briefly some of the more important proposals introduced by the Commission as part of its 1989 Social Action Program, even though considerations of space prevent mention of all of them. We will review quickly the proposals in terms of the headings of the Commission's 1989 Communication on the Social Action Program, which in turn generally correspond to the sections of the Social Charter.

\textit{I. The Labor Market}

Despite improved employment statistics in the late 1980s, due in part to the success of the internal market program, the Communication noted the serious dimensions of long-term unemployment, particularly of a structural character.\textsuperscript{408} Since 1989, the Commission has published annual "Employment in Europe" reports, which provide an

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{404} Id. art. 2(4).
\item \textsuperscript{405} Id. art. 2(3).
\item \textsuperscript{406} Id. art. 2(6).
\item \textsuperscript{407} See \textit{supra} text accompanying note 76.
\item \textsuperscript{408} Communication on the Social Action Program, \textit{supra} note 346, at 9-10.
\end{itemize}
\end{footnotesize}
analysis of economic and labor market prospects. The Commission has also developed new initiatives to help specific groups, such as young people, women, and the handicapped. Finally, the Council has recently amended Regulation 1612/68 on the Free Movement of Workers to improve the operations of the SEDOC system to provide information on opportunities for the employment of migrant workers in the different Member States.

2. Employment and Remuneration

Although the Social Charter declares the right of all workers to have an “equitable wage,” the Commission’s Communication states that the setting of a basic minimum, or “decent reference wage,” is a matter for the Member States, and not the Community, which presumably reflects the principle of subsidiarity.

The Commission has, however, presented two significant draft directives intended to protect the interests of part-time and temporary workers, often termed “atypical” workers. The number of such workers increased substantially in the 1980s in part because their employment reduces considerably an employer’s labor costs and in part because working wives and mothers often prefer part-time employment. Part-time and temporary workers are usually paid less than full-time or permanent employees, often do not receive fringe benefits or participate in pension plans, and can generally be dismissed without compensation on termination. The Commission has expressed concern that failure to regulate the terms of employment of atypical workers may cause instances of social dumping.

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409. Id. at 10-11; Second Report, supra note 352, at 8.
410. Communication on the Social Action Program, supra note 346, at 11-12; First Report, supra note 352, at 7; Second Report, supra note 352, at 8.
411. See supra text accompanying note 42.
413. See supra text accompanying note 301.
414. Communication on the Social Action Program, supra note 346, at 15. The Commission is, however, working on an opinion that would provide its views to the Member States on the appropriate economic and social factors that should guide policies on the setting of equitable wage standards. See Second Report, supra note 352, at 10-11.
One of the draft directives, based on article 100, would require Member States to ensure that part-time and temporary workers participate proportionately in all employer social benefit and pension schemes and that they receive appropriate representation in all employee representative bodies.\footnote{Commission Proposal for a Council Directive on Certain Employment Relationships with regard to Working Conditions, 1990 O.J. (C 224) 4. The draft is discussed in Watson, supra note 261, at 60-61.} The second draft directive,\footnote{Id. art. 3.} based on article 100a, would require Member States to include such workers in all state social security plans, as well as to ensure that they receive appropriate "annual holidays, dismissal allowances and seniority allowances."\footnote{Watson, supra note 261, at 61.} The United Kingdom vigorously opposes these directives as unnecessary, reducing a desirable flexibility in employment conditions, and creating excessive burdens on employers.\footnote{Second Report, supra note 352, at 10.} At the present time, neither draft directive appears likely to move ahead.\footnote{Commission Proposal for a Council Directive Concerning Certain Aspects of the Organization of Working Time, 1990 O.J. (C 254) 4, as amended, COM(91)130 final [hereinafter Draft Working Time Directive].} 

3. Improvement of Living and Working Conditions

Apart from the Written Employment Terms Directive and the amendment to the Collective Redundancy Directive, the Commission has advanced a major proposal, the draft Working Time Directive.\footnote{Commission Proposal for a Council Directive Concerning Certain Aspects of the Organization of Working Time, 1990 O.J. (C 254) 4, as amended, COM(91)130 final [hereinafter Draft Working Time Directive].} As previously indicated, the Social Charter declares that workers have a "right to a weekly rest period and to annual paid leave,"\footnote{Social Charter, supra note 258, § 8. See supra text accompanying notes 303-05.} and foresees harmonizing legislation. In its Communication, the Commission noted the utility of flexible work time arrangements to firms seeking to improve their competitiveness, but nonetheless concluded that minimum standards on working time are necessary to protect the "wellbeing and health of workers."\footnote{Communication on the Social Action Program, supra note 346, at 18.}

The Commission's proposals, as amended to accept a number of Parliament's suggestions, set a number of specific standards: a minimum daily rest period of twelve hours in each twenty-four hour period; one rest day per week, usually to coincide with Sunday; a maximum of forty-five hours work per week; and an annual paid holi-
day of at least four weeks every calendar year.\textsuperscript{425} There are special provisions for workers who usually work at night: They should not work more than eight hours without overtime, and they are entitled to a free health check-up before beginning a night job, and at annual intervals thereafter.\textsuperscript{426} Derogations or special regimes will be possible for certain industries with unusual work patterns reasonably necessary for operational efficiency, such as air and marine transport, oil rigs, and seasonal jobs.

The Commission’s draft is based on article 118a, which protects health and safety at work.\textsuperscript{427} The United Kingdom has argued that the draft should more properly be considered as affecting work conditions and therefore be adopted under article 100, which would require unanimous approval, rather than the qualified majority of article 118a.\textsuperscript{428} Since the United Kingdom has not been able to persuade the other Member States on this point, there is a good chance that the United Kingdom will raise the issue before the Court of Justice if the draft is ultimately adopted.

The United Kingdom is also hostile to many provisions of the draft on a policy basis, contending that it would harm the flexible operations of many employers, unduly restrict the right of employees to work more than forty-eight hours per week, introduce unnecessary and expensive health inspections, and generally add significantly to employment costs.\textsuperscript{429} The Council of Ministers has worked rather energetically on the draft during the last year, adopting some compromise positions, notably one that would allow the United Kingdom to delay imposing the forty-eight hour work week until the year 2000.\textsuperscript{430} The ultimate adoption of the draft Working Time Directive now appears quite likely.

\textsuperscript{425} Draft Working Time Directive, \textit{supra} note 422, arts. 1-5.

\textsuperscript{426} \textit{Id.} arts. 7-10.

\textsuperscript{427} The Commission contends that numerous studies have shown that excessive work hours and work periods, irregular patterns of work, and night work can harm the physical and mental well-being of workers and lead to higher levels of accidents or injuries. See Proposal for a Council Directive Concerning Certain Aspects of the Organisation of Working Time, COM(90)317 final at 6-10.


\textsuperscript{429} \textit{Id.} The United Kingdom’s opposition in part stems from the fact that the Thatcher government deregulation program in the early 1980s removed some of the working time standards and protective rules, especially for women and young people, that had been adopted in earlier social legislation. See Bercusson, \textit{supra} note 261, at 634-35.

\textsuperscript{430} Working Hours Measure Approved; First Use of U.K.’s Maastricht Opt-out, 4 Eurowatch [formerly 1992—The External Impact of European Unification] (Buraff) No.8, at 7-8 (July 13, 1992).
4. **Freedom of Movement**

The Commission Communication recognized that free movement of workers has largely been attained. Accordingly, its proposals represent only relatively minor improvements in the present rules governing migrant workers and their families.\(^{431}\) Probably the most important is a draft directive that would require subcontractors and others using migrant workers temporarily in a host state to abide by some of the social laws of the host state.\(^{432}\) This draft, however, has not advanced very far.\(^{433}\)

5. **Social Protection**

Although the Social Charter stated important rights of adequate social security benefits and social assistance, the Commission Communication concludes that different "social and cultural practices" prevent any Community legislative efforts\(^{434}\)—a clear illustration of the principle of subsidiarity in action. The Commission did, however, propose to the Council a recommendation concerning sufficient resources and social assistance in the social protection system, which the Council adopted in 1992.\(^{435}\)

6. **Freedom of Association and Collective Bargaining**

As noted previously, the Commission views this topic of the Social Charter as one to be appropriately implemented at the Member State level and in management-labor dialogue.

7. **Information, Consultation, and Participation**

The Commission seized the occasion of the Social Charter's treatment of this topic to introduce a new and important draft, following in the path of the earlier blocked Vredeling Proposal.\(^{436}\) This draft di-

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436. See *supra* Part IID(4).
rective would create a European Works Council (EWC) in any multinational firm or group that employs more than 1000 workers in at least two Member States (provided that at least 100 workers are employed in both states).

If an EWC is formed, it must meet regularly, at least once a year, with the central management of the group or parent firm for the purpose of receiving essential information on the entity or group's economic and financial situation, its commercial and investment prospects, and the employment situation. The EWC would further have a right of consultation with central management whenever a management action would seriously affect employee interests, for example, a plan for the "relocation, merger, reduction in size or closure" of a plant or operating unit or department, or a plan to introduce "new working methods or production processes."

The EWC draft directive is clearly much less ambitious in scope than the previous Vredeling Proposal and would not represent as great a burden on management. Nonetheless, it has aroused substantial management group opposition and thus far the Council has not devoted much time to its review, so its prospects must be seen as uncertain.

The Council has, however, rather rapidly adopted a Commission proposal for a non-binding recommendation to the Member States to encourage employers to create or expand plans to facilitate employee equity-sharing plans (stock-option plans) or other forms of financial participations in profits.

8. Equal Treatment for Men and Women

As previously indicated, two principal new initiatives have been adopted: the 1992 Directive Protecting Pregnant Workers and Workers Who Have Recently Given Birth and the Council Recommendation on Child Care. The Commission continues to press for adoption

438. Id. annex 1(c).
439. Id. annex 1(d).
440. See Watson, supra note 261, at 58.
of the draft Parental Leave Directive\textsuperscript{442} and the draft Burden of Proof Directive,\textsuperscript{443} but their chances of adoption must be rated as speculative. The Commission's third action program on equal opportunities for men and women, adopted in October 1990,\textsuperscript{444} placed less stress on new legal measures than on encouraging Member State efforts to facilitate access by women to the labor market and improving the status of women in society.

9. \textit{Vocational Training}

This subject, one of continuous and energetic action for over twenty years, has not given rise so much to new programs as to sustained development of existing ones. Thus, the Commission’s 1989 Communication\textsuperscript{445} refers to continued concentration on the highly successful Erasmus program for inter-university cooperation and student exchanges,\textsuperscript{446} the Comett program for cooperation between industry and higher education institutions for research and technology training,\textsuperscript{447} the Eurotecnet program for vocational training to enable workers to adapt to technological change,\textsuperscript{448} and the Lingua program to support teaching and study of foreign languages.\textsuperscript{449}

The most recent endeavors to enhance vocational training are a 1991 Council Decision on the Petra program\textsuperscript{450} for action to develop

\textsuperscript{443} See \textit{supra} text accompanying note 158.
\textsuperscript{445} Communication on the Social Action Program, \textit{supra} note 346, at 39-42.
\textsuperscript{446} See \textit{supra} text accompanying note 320. In the academic year 1991-92, 1645 institutions engaged in the academic cooperation. \textbf{XXVTH GENERAL REPORT, supra} note 38, ¶ 416. The Erasmus program has been supplemented since 1990 by Tempus, designed to facilitate student and academic interchange with ten Eastern European states. Decision 90/233 on the Trans-European Mobility Program for University Studies, 1990 O.J. (L131) 1. \textit{See} \textbf{XXVTH GENERAL REPORT, supra}, note 38, ¶ 426.
\textsuperscript{447} Council Decision Adopting the Second Phase of the Program on Cooperation between Universities and Industry Regarding Training in the Field of Technology (Comett II), 1989 O.J. (L 13) 1.
\textsuperscript{449} Council Decision Establishing an Action Program to Promote Foreign Language Competence in the European Community (Lingua), 1989 O.J. (L 239) 24. \textit{See also} \textbf{XXVTH GENERAL REPORT, supra} note 38, ¶ 423.
vocational training and trans-border exchanges for young workers who do not follow higher education courses and a 1990 Commission memorandum\textsuperscript{451} on the need for coordination and concerted action among the various programs.

10. \textit{Health Protection and Safety in the Workplace}

As described above in Part IIF, Community action to protect worker health and safety has been a major program throughout the 1970s and 1980s, given added impetus by the introduction of qualified majority voting in the Council through article 118a since the Single European Act. The Commission Communication\textsuperscript{452} continues the emphasis on this sector, listing no less than twelve new initiatives.

In 1991-92, three directives were adopted, respectively to achieve health and safety protection for part-time and temporary workers,\textsuperscript{453} to cover medical treatment for sailors aboard vessels,\textsuperscript{454} and to provide for health and safety measures at temporary or mobile work sites.\textsuperscript{455} Proposals for legislation to cover the special concerns of the transport and fishing industries and to create a Community health, hygiene and safety agency are under active consideration by the Parliament and Council.\textsuperscript{456}

11. \textit{Protection of Children and Adolescents, the Elderly, and the Disabled}

Given the resounding declarations of rights of these three categories of persons who merit special protection, one might have anticipated a significant program for action. The Commission's 1989 Communication\textsuperscript{457} does indeed advance several significant initiatives, but the results thus far have been disappointing.

\textsuperscript{451} Memorandum on the Rationalization and Coordination of Vocational Training Programs at Community Level, COM(90)334 final. See Second Report, supra note 352, at 19-20.

\textsuperscript{452} Communication on the Social Action Program, supra note 346, at 43-49.


\textsuperscript{456} Second Report, supra note 352, at 21.

\textsuperscript{457} Communication on the Social Action Program, supra note 346, at 50-54.
In January 1992, the Commission submitted a draft Directive for the Protection of Young People,\(^\text{458}\) intended to set minimum standards to protect working adolescents from arduous activities, night work, and conditions of mental or physical stress, as well as to require regular medical examinations for them. The draft has perhaps been delayed by the concentration of attention on the draft Working Time Directive and has only begun to be examined by Parliament.

So far as the elderly are concerned, the Commission's Communication views legislative action as the responsibility of Member States rather than the Community, particularly because of the different "approaches, traditions and culture" among the states.\(^\text{459}\) The Council has, however, adopted a Decision on Community Actions for the Elderly,\(^\text{460}\) which is largely limited to encouraging communication, studies, and exchanges of information among Member State agencies and organizations representing the interests of the elderly.

Since 1988, the Helios program\(^\text{461}\) has attempted to set a framework for policy development and cooperation "to promote the integration and independent way of life of disabled people."\(^\text{462}\) The Commission has proposed a new action program, Helios II,\(^\text{463}\) but it is still under review.

The most important new initiative is a draft Directive for the Safe Transport to Work of Workers with Reduced Mobility.\(^\text{464}\) This proposal would set minimum standards to enable those with physical or mental handicaps to have ready access to various types of public transport by means of elevators, ramps, lifting platforms, special or reserved seats, and similar facilities.\(^\text{465}\) Member States would also be obligated to encourage measures by employers and private transport


\(^{459}\) Communication on the Social Action Program, supra note 346, at 52.


\(^{462}\) Communication on the Social Action Program, supra note 346, at 53.


\(^{465}\) Id. annex art. 3(a).
services in order to facilitate transport to and from work for workers with reduced mobility.466 The Council has only begun its review of this proposal. The draft may have a reasonable chance of adoption since it requires only a qualified majority vote under article 118a, but it would certainly increase both Member State and private employer costs and therefore may generate opposition during the current European-wide recession.

We have thus come to the end of the review of the pending Commission proposals in its 1989 Social Action Program intended to achieve some of the goals of the 1989 Social Charter. Manifestly, there are many important measures currently under review. Although several may be adopted soon (for example, the draft Working Time Directive and some health and safety proposals), others will require considerable further study, and some (like the draft European Works Council Directive) may well prove too controversial to be adopted.

IV. CONCLUSION

This Article has tried to achieve two substantive law goals: first, to provide a short yet sophisticated analysis of the origin, legislative basis, and actual achievements of the Community social action program; second, to describe the nature and scope of the 1989 Community Charter of the Fundamental Social Rights of Workers and the impact which the Charter has already had on new social legislation and proposals for further social action measures.

Trying to present such a panoramic view of social policy in the European Community has necessarily resulted in an extensive review of disparate topics, including coverage of Community constitutional principles, legislative procedures, and political realities, as well as the substantive legislation and case law in each field of social action. This Article attempts to provide a comprehensive picture of this highly important subject, particularly since prior articles have quite naturally concentrated only on specific subjects. It is hoped that this Article will not only provide a useful overview of the field, but also stimulate further research and analysis of specific Community policy initiatives, legislative measures, or Court of Justice doctrines.

A major motive for the study of Community law is to draw comparisons with U.S. law, both to facilitate an understanding of the evolution of each legal system and to commence an examination of the comparative merits and defects of each when contrasting ap-

466. Id. arts. 2-4.
proaches have been made to similar social issues. It is hoped that this Article will incite more detailed comparative examinations of some of the topics covered, especially the more recent legislative measures and pending proposals.

This Article has not dealt with the potential impact of the Social Protocol of the Maastricht Treaty and its accompanying Agreement on Social Policy. These two instruments were adopted by all the Member States except the United Kingdom in one of the most crucial and controversial compromises necessary to attain agreement on the Maastricht Treaty. The Social Protocol and the Agreement were intended to permit the Member States other than the United Kingdom to adopt social legislation inspired by the Social Charter by a qualified majority vote, but with the critical limitation that such legislation would have no effect in the United Kingdom.

The Social Protocol and the Agreement are in themselves complex and require careful analysis that is not possible in this Article due to considerations of space. Moreover, whether the United Kingdom should ratify the Maastricht Treaty without simultaneously abandoning its opt-out rights on social legislation under the Social Protocol became one of the most heated political issues in the U.K. Parliament's ratification debate. Although Parliament ultimately ratified the Maastricht Treaty by a narrow margin without modifying the Social Protocol, it is uncertain whether the closeness of the vote will affect the United Kingdom's future attitude in the practical implementation of the Social Protocol.

Thus we close somewhat on a note of suspense. The Social Charter of 1989 and the new 1989 Social Action Program mark a renaissance of interest in social policy. Will the future social action measures remain those of the entire Community or only of the Member States without the United Kingdom? The future course of Community social policy will certainly prove a fascinating study.

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467. The Social Protocol and the Agreement on Social Policy are annexed to the Maastricht Treaty, supra note 6.
