THE HERITAGE LECTURES

372

The E.C. Social Charter: The New Wave of Re-Regulation in Europe

By Dr. John Addison

The Heritage Foundation

The Heritage Foundation was established in 1973 as a non partisan, tax-exempt policy research institute dedicated to the principles of free competitive enterprise, limited government, individual liberty, and strong national defense. The Foundation's research and study programs are designed to make the voices of responsible conservatism heard in Washington, D.C., throughout the United States, and in the capitals of the world.

Heritage publishes its research in a variety of formats for the benefit of policy makers; the communications media; the academic, business, and financial communities; and the public at large. Over the past five years alone The Heritage Foundation has published some 1,500 books, monographs, and studies, ranging in size from the 927-page government blueprint, *Mandate for Leadership III: Policy Strategies for the 1990's*, to the more frequent "Critical Issues" monographs and the topical "Backgrounders," "Issue Bulletins," and "Talking Points" papers. Heritage's other regular publications include the *SDI Report, Business/Education Insider, Mexico Watch,* and *Policy Review*, a quarterly journal of analysis and opinion.

In addition to the printed word, Heritage regularly brings together national and international opinion leaders and policy makers to discuss issues and ideas in a continuing series of seminars, lectures, debated, briefings, and conferences.

Heritage is classified as a Section 501(c)(3) organization under the Internal Revenue Code of 1954, and is recognized as a publicly supported organization described in Section 509(a)(1) and 170(b)(1)(A)(vi) of the Code. Individuals, corporations, companies, associations, and foundations are eligible to support the work of The Heritage Foundation through tax-deductible gifts.

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

The Heritage Foundation
214 Massachusetts Avenue, N.E.
Washington, D.C. 20002-4999
U.S.A.
202/546-4400

The E.C. Social Charter: A New Wave of Re-Regulation in Europe

by Dr. John Addison

In December 1989 the European Community adopted the Community Charter of the Fundamental Social Rights of Workers at the Strasbourg summit (of Heads of State). The sole dissenting voice was that of Mrs. Thatcher whose negative vote was entirely consistent with her rejection of earlier intrusive Community draft legislation bearing on the so-called "social dimension" of the common market.

The social charter, which has no binding force per se, takes the form of a declaration of social rights as these relate to such areas as freedom of movement, employment and remuneration, freedom of association and collective bargaining, gender equality, information, consultation, and participation, health and safety at the workplace, and social protection.[1] Such rights are broadly specified in Title I of the social charter. Title II covers implementation, it being announced that the European Commission,[2] the body responsible for framing EC legislation, would as soon as possible submit initiatives for the effective introduction of the measures envisaged under Title I. As a practical matter, the Commission had already published its detailed proposals in this regard in November 1981! In this 'action program,' the Commission set out no less than 47 proposals for implementation of the social charter, of which 20 were binding either directly and in their entirety on member states or as to the results to be achieved.

In the two years that have passed the Commission has formulated (or 'adopted') the bulk of these proposals. A brief description of the measures and their current status is provided in Table 1. Further detail is added in the text.

In what follows, we trace the evolution of the social charter, identify its rationale, offer both a general and a more specific critique, and reflect on its likely development. The discussion will incorporate the results of the very recent Maastricht summit.

It should be noted at the outset that some items in the social charter and its associated action program are utterly uncontroversial. Examples include measures to facilitate the transferability/portability of pension schemes and procedures for the

---

[1] The social charter also contains clauses covering vocational training, the protection of children and adolescents, the provision of resources for the elderly, and the integration of disabled workers.

[2] The Commission comprises seventeen members, two of each from the five larger countries (France, Germany, Italy, Spain and the U.K.) and one each from the other seven countries. Members are appointed by, but are independent of, their member states. The Commission is functionally subordinate only to the European Council of Ministers which is the supreme decision making body in the Community. The Council is responsible for discussing and passing (or 'adopting') Community legislation on the basis of proposals from the Commission which it may also ask to study an issue and draw up proposals. Council decisions have historically been made on the basis of unanimity, although the Single European Act of 1986 (see below) modified the voting system to allow for qualified majority voting, defined as 54 votes out of 76. (The four largest nations have ten votes each, Spain has eight votes, Belgium, Greece, the Netherlands and Portugal have five votes each, Denmark and Ireland have three votes each, and Luxembourg has two votes.) Note that the directly elected European Parliament currently has not legislative power as such although its advisory legislative role was extended somewhat under the 1986 Act.

Dr. John Addison is a Professor of Economics at the University of South Carolina and a Bradley Resident Scholar at The Heritage Foundation

He delivered this speech at The Heritage Foundation on November 20, 1991.

ISSN 0272--1155.

recognition of occupational qualifications granted in other jurisdictions. That said, the overwhelming majority of the proposals are controversial. They are the focus of this inquiry.

Something Borrowed, Something New. At the time of its adoption it was not uncommon to dismiss the social charter as just another pious declaration of principle, a substitute for action. But history and the logic of the moment belie this interpretation. As early as 1974 the Commission had formulated an ambitious social action program that sought to advance the rights of workers by strengthening the role of unions, and by imposing social obligations on employers in such areas as health and safety at work, minimum wages, employee participation, and contract hiring, among other things. To be sure, Council's response was the most guarded of endorsements, but this was not to deter the Commission from formulating a large number of draft directives in the following decade on the lines foreshadowed in the 1974 program. Indeed, virtually all of the substantive proposals contained in the action program accompanying the social charter either build on the Commission's 'successes' [e.g. health and safety, gender equality, and mass layoffs] or are re-runs of previous initiatives stalled in Council often as a result of stiff British opposition [e.g. information and consultation rights, the regulation of part-time and temporary work, and the organization of working time]. Not all is déjà-vu. The proposals concerning social clauses in public contracts, worker financial participation, and the provision of written contracts of employment are new.

Despite the Commission's proven tenacity, the judgment that the social charter was little more than a divertissement may have been rooted in the very failure of the Commission's more ambitious and now resurrected proposals, on the reasoning that what had earlier been stalled in Council was likely to remain so. But this judgment is to ignore at least three other developments propitious to the Commission's agenda. First, there was the 1984 appointment to the presidency of the Commission of M. Jacques Delors. M. Delors not only invigorated the elusive concept of the social dimension (see below)[4] but was to prove adept at outflanking the British, who appeared in 1986 to have managed the impossible; namely, to have imparted a sharp deregulatory thrust to Community labor market policy. Second, in her desire to achieve an acceleration of *economic* integration, Mrs. Thatcher compromised on the unanimity rule which had previously governed decision making in Council. The amendments to the Rome Treaty introduced by the Single European Act allowing qualified majority voting were not only to provide the impetus to economic integration but also to assist the Commission in its pursuit of the social dimension.[5]

---

[4] Among other things, M. Delors advocated the corporatist notion of a "social dialogue" as a solution to the stalemate of the previous Commission's social policy, the intention being to encourage the two sides of industry to conclude joint agreements on social policy that would then serve as the basis for Community legislation.

[5] From the perspective of social policy, the amendments to Articles 100 and 118 of the Treaty of Rome were of special relevance. Article 100 A (1) provides for majority voting on measures having to do with the "establishment and functioning of the internal market" (although Article 100 A (2) appears to limit what can be achieved in this area by excluding from the majority voting procedure any provisions "relating to the rights and interests of employed persons"). Article 118 A provides that "Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization [i.e. standardization] of conditions in this area, while maintaining the improvements made, "and establishes majority voting.

Third, the decade of the 1980s saw the accession of three low-wage states into the Community: Greece in 1981, and Spain and Portugal in 1986. The implicit threat to wage development and/or the social systems of the more advanced nations, known in Eurospeak as "social dumping," served to underline the value to the latter of erecting a plinth of worker rights immune to the forces of competition.

Finally, in addition to the above factors one may also identify a permissive factor; namely, the continental European mindset that is distrustful of an 'at-will' employment relation and more predisposed toward a social market economy in which certain guarantees are extended to labor against the vicissitudes of competition. The limited flexibility of the early to middle 1980s was increasingly perceived of as social deregulation.

In short, the circumstances that were to lead the Commission to pursue its social agenda on a wide front were also more favorable than at any other time since 1974 for the success of the individual measures contained therein. Even if the progress was to appear uneven in the path from the Commission's communication on the social dimension of the internal market in September 1988 though the initial draft charter of May 1989 to the final iteration in October 1989, the re-regulatory die was cast.

Basis of and Rationale for the Social Dimension. The thrust of both the Treaty of Rome and the Single European Act is unequivocally economic. In neither case is the role of the social dimension transparent. The 1957 Treaty establishing the common market does contain social provisions (in the form of Articles 117 through 122) and does indicate that the goal of equalizing living and working conditions will not be achieved solely by the normal operation of markets but will also hinge on "the procedures provided for under this Treaty" (Article 117). Such procedures include Articles 100 and 54 dealing with the approximation (i.e. harmonization) of laws on matters having a direct incidence on the establishment or functioning of the Common Market and affecting freedom of establishment. Both Treaty bases, especially the former, were used by the Commission as the basis for draft *social* legislation prior to the Single European Act of 1986.

Although the social dimension was clarified somewhat under the 1986 Treaty via Articles 130A, which addressed the need to strengthen economic and social cohesion, 118A, which as we have seen for the first time gave an explicit basis for the harmonization of health and safety conditions, and 118B, which sought to develop the "social dialogue" between the two sides of industry at European level (with a view to establishing collectively agreed social provisions), it remains very loosely articulated. Accordingly, the Commission has had to fill the vacuum, guided by pronouncements in Council and communiqués issued by the various summit meetings. Although it is often alleged that the Commission has exceeded its Treaty powers, this criticism would seem to ignore the political nature of the Treaties as well as imparting altogether too static an interpretation to them.

To exonerate the Commission of usurping its powers is of course not to address the rationality or internal consistency of the measures proposed under the action program. The Commission does not rest the case for intervention on efficiency grounds. Rather, the stated goal is to achieve greater equity in outcomes. Living and working conditions are to be upgraded and harmonized on between member states, between full-time and part-time workers, between unionized and nonunionized firms, and so on. This is termed "social cohesion" and is to be effected by a "minimum platform of guaranteed social rights."

The role of economic forces in bringing about the harmonization of wages and other terms and conditions of the employment relation ex post is either ignored or challenged since the social charter is viewed by its architects as an instrument for ensuring that the

search for competitiveness and greater economic efficiency is simultaneously accompanied by equal advances in the social field. The Preamble to the social charter seems to indicate that it is in fact conceived as an antidote to excessive competition: " ... the same importance must be attached to the social aspects and, therefore, they must be developed in a balanced manner."

The Preamble also makes reference to the "distortions of competition " by which is meant competition leading to labor market segmentation, social exclusion, and competition based on different social standards in member states or "social dumping." Curiously enough at the same time as championing the latter argument, the Commission denies the presence of any clear link between social regulation and economic performance; that is, improving the social wage in poorer member states need not adversely impact their competitive position.

It is also asserted by the Commission that social consensus may itself be a critical ingredient to the success of economic integration. Without it , so the argument runs, the advantages of the single market will be put at risk. But the fact remains that neither this argument nor the related notion that the economy may be trapped into a socially suboptimal position (which would undoubtedly commend itself to the Commission) is ever formalized. Thus, to repeat, the Commission does not offer an efficiency rationale for its measures, presumably because it does not subscribe to the body of economic theory that in principle would admit of market failure. Since the Commission does not rely on the market failure argument, we see no reason to make the case here. Accordingly, much of the following discussion is given over to a review of the likely effects of the mandated benefits approach to see whether it may be expected to succeed in making the desired transfer.

Critique. Much of the harmonization of living and working conditions sought under the social charter might be expected to result from the purposive movement of labor and capital in search of the highest valued alternative. Although the process would not be instantaneous or uniform in outcome it would promote efficiency and provide gains which in principle could be used to satisfy the equity criterion.

As Paqué has argued,[6] the social dimension, by which is meant the web of rules governing labor markets and the employment relation, health and safety regulation, and welfare systems, is in essence just another determinant of a country's competitive position. It is no different in principle from real wages or the human capital embodied in the labor force. By seeking to harmonize such conditions, the Commission is merely equalizing on one dimension of the mix of factors that determine a country's overall competitive position while leaving others untouched.

Paqué also makes the important related point that international competition allows us to identify which social system is economically viable. Competition, here as elsewhere, is a process of discovery. The relevance of this point is that although the Commission are quite right to observe that advanced social systems do not necessarily place a country at a competitive disadvantage (possibly the German case) they are wrong to suppose that systems appropriate to one regime may be grafted uncritically, and without fear of rejection,

---

[6] Karl-Heinz Paqué, "Does Europe's Common Market Need a Social Dimension?" Paper presented to the Mont Pelerin Society, Munich, September 2-8, 1990.

onto others. There is in fact considerable diversity of extant practice in Europe[7] leading Paqué (p.9) to conclude: " ... the cultural space of Europe provides enough leeway for a broad social search process which may lead to very different results depending on the mentality of the population, and the particular local conditions." Moreover, as the recent experience of Sweden appears to demonstrate, the social dimension is not a static concept, which provides an inauspicious backdrop to Community social engineering.

Now it may of course be argued that this competitive milieu abstracts from market failure arguments associated with adverse selection and other externalities, the presence of which may justify a mandated benefits approach à la social charter. But as we have noted the Commission largely eschews an efficiency rationale for its proposals and manifestly the process of economic integration can proceed without any ex ante harmonization along the social dimension. We have elsewhere demonstrated the logical and empirical difficulties with the efficiency case for mandatory benefits,[8] and would simply note here that to recognize the possibility of market failure is not to demonstrate its importance or that the problem, if problem it be, admits of easy 'solutions.'

As far as social dumping is concerned, this concept has an undistinguished pedigree dating back to the League of Nations debates of the 1920s. The lower degree of social protection in the less developed member states reflects a choice made by such countries and may be linked quite straightforwardly to their income levels. It scarcely makes sense to refer to the transitional attraction to foreign capital as either unfair competition or social dumping.

Next consider the individual proposals outlined in Table 1 with a view to examining their likely effects.

Health and Safety. Community intervention in the field of health and safety legislation pre-dates the social charter and may be counted as one of the Commission's major success stories. The Commission's view that "the improvement in workers' safety, hygiene and health at work should not be subordinated to purely economic considerations" has in fact secured widespread acceptance across all member states. To be sure, the use of the health and safety rules, which require only a qualified majority vote rather than unanimity, to justify proposals on working hours and pregnant workers (see below), has been a major source of controversy but it is a distinctly different stretching-the-EC-law point. Nowhere is there acceptance of the view that it is valid to compete on the basis of lower health and safety standards. Yet the advanced standards set for itself by the Community cost money. Poorer countries, just like poorer people, can afford to be less choosey. High wage countries and large firms will be advantaged by ambitious legislation of this type. The disadvantage of higher fixed costs for the survival (and entry) of small firms may of course be offset in practice by the difficulty of monitoring them and the frankly deficient systems of control in southern Europe will doubtless limit the impact of the measures in these countries. The inevitable consequence of the legislation, however,

---

[7] See John T. Addison and W. Stanley Siebert, "Worker Job Rights: National Practices in Member States of the European Community, and Implications of the Social Charter," unpublished paper, Department of Commerce, University of Birmingham, November 1991.

[8] See John T. Addison and W. Stanley Siebert, "The Social Charter: Whatever Next?" unpublished paper, Department of Commerce, University of Birmingham, December 1991. (Forthcoming in British Journal of Industrial Relations, December 1992.)

is reduced competition. **Working Hours.** The market impact of the proposed directive on the adoption of working time hinges here as elsewhere on the severity of the regulations and on the extent of differences in practice among member states. From this perspective neither the requirement set for daily and weekly rest periods (under the initial draft) or the four-week holiday entitlement could be said to be other than marginal. But the main thrust of the legislation is toward the regulation of nightwork via the establishment of normal hours of work, restrictions on overtime, bans on back-to-back shifts, and *special* health and safety requirements. Difference between member states guarantee more substantive effects in this area; for example, Britain has at least 16 percent of its industrial workers on regular night shifts as compared with 11 percent in the rest of Europe. The subsequent modification of the draft legislation to fix a 48-hour limit on weekly working hours compounds the difficulties likely to be confronted by British firms because of the particular distribution of hours worked in that country. British Rail alone estimates that the general effect of the 48-hour rule will be to add £500 million to its operating costs.

Atypical Work. The Commission seeks to make these growing forms of employment less prevalent, hoping that more full-time jobs will be created as the sector shrinks. Presumably, the attempt to control working hours, noted above, is also of relevance here as it should serve to limit any induced substitution of hours for workers.

The growth in part-time employment among member states was approximately 29 percent over the interval 1983-88. The corresponding growth in full-time employment was just 2.4 percent. [Temporary employment has also grown, although the figures are less reliable than for part-time employment. By 1988 roughly 10 (14) percent of Community employment was temporary (part-time)]. This growth can be attributed in part to the lower social costs and indirect costs of employing part-time workers. The Commission seeks to eliminate such cost advantages by requiring that part-timers are to be guaranteed equal access to social and employment protection. It also seeks to ensure part-timers equal access to training and private pensions, each of which raises important problems. Because they have lower expected tenure, part-time workers will logically choose less firm-specific training, and firms will likewise offer less training. As a result, part-timers will enjoy higher starting salaries than would otherwise obtain. Similarly, the lower incidence of pensions among part-time workers is not so much an indication of discrimination as it is again a reflection of shorter tenure. Mandating pensions implies a change in the earnings profile and increased tenure. If this does not eventuate, then pensions will be lower, their costs will rise, and the effort motivating effect of the instrument will be reduced.

It is strange that the Commission views within-country differences in the social and indirect costs of employing atypical workers vis-à-vis their full-time counterparts as causing distortions of competition between nations. It is strange because it is nowhere claimed that wage differentiation is also a distortion. Why some costs termed 'exogenous' disqualify and others do not is a typical oddity of Commission thinking.

The Commission again fails to offer a diagnosis of the growth in atypical work within the Community (part of which is undoubtedly a market escape process), still less of the nature of atypical markers, the employment opportunities they offer and to whom, or of the permeability of the walls between atypical and regular markets. The remedies offered threaten not only the employment of such workers but also that of full-timers too because of complementarities between the two groups.

There is in fact considerable diversity among states in the size of the atypical worker sector, or at least components thereof. These are also marked differences in the size of the

underground or illicit economy which will continue to offer some countries a degree of freedom not available to others. For the U.K. with its narrower market escape route, the costs of complying with the atypical worker and working time directives have been officially estimated at between £2.5 and £5 billion according to whether or not the costs of the 48-hour week ceiling, noted earlier, are factored in.

Workers Posted Across Borders. Although the atypical worker directives eschew any attempt to regulate wages, in its proposal on subcontracted workers the Commission abruptly changes tack. Member states are to ensure that subcontractors, temporary employment agencies and companies posting workers offer the same terms and conditions of employment as obtain for work of the same character in the host country. Specifically, such workers must be paid the appropriate minimum wage or the wage fixed under collective bargaining by extension. (We note parenthetically that the U.K. abolished all such extensions of collectively agreed terms and conditions in the early 1980s.) Although there is no publicity available information on the numbers of workers currently posted across state borders, the Commission is determined to plug a potentially important loophole through which "distortions of competition" could develop. Expressed another way, this measure is a means of stopping poorer countries from competing. More importantly perhaps, it presages involvement by the Commission in the establishment of a Community minimum wage.

The measure has also to be taken in conjunction with a recent Council directive on the procurement procedures of public utilities which makes provision for the contracting agency to require tenderers to meet ruling employment protection practices and working conditions and to have budgeted for these obligations in drawing up the tender.

Pregnant Workers. The Commission's proposals on the protection at work of pregnant women and those who have recently given birth contain a mixture of employment rights and health and safety entitlements. The ban on nightwork (for a period of at least 16 weeks around the time of childbirth) and exposure to a specific list of agents and processes taken in conjunction with dismissals protection and maternity pay entitlements, will add to the costs of employing female labor. The disemployment consequences will have been reduced somewhat following the recent modification of the maternity pay entitlement to a (minimum) level of that set for sickness pay rather than full pay but the virtual absence of any eligibility requirement remains intact and this may be expected to add significantly to firms' costs *unless* the social security system (or the wage) take up the slack. In this latter context, the directive simply notes that the funding arrangements fall outside the scope of legislation.

Had the Commission included paternity leave and parental leave within the directive, the disemployment consequences for married women would be less pronounced, at least in relative terms. It is of course difficult to believe that the overall disemployment consequences will be averted by shifting the burden of proof on to firms in unfair dismissal cases or by the insistence of the directive that the employment rights of pregnant workers be preserved intact. This is narrowly to equate employment consequences with flows from employment to unemployment when the dominant effect is likely to be in reducing the flows unemployment to employment.

The draft legislation on pregnant workers is but one element of the Commission's agenda on gender. Thus, its new five-year plan on equal treatment for men and women includes the two nonbinding recommendations noted in Table 1 and, more importantly, presages further implementation of comparable worth. If the U.S. evidence is any guide,

the end result of the acceleration in comparable worth determinations will be greater inequality of female earnings, since the women most likely to be affected are located in large firms offering higher wages to begin with, and reduced overall employment. Not for the first time, a policy designed to produce greater equality may be expected to yield exactly the opposite effect.[9]

Worker Participation. Of all the Commission's proposals, those dealing with worker involvement in their companies have proven to be the most controversial. Although the action program announces just two proposals – concerning the information, consultation, and participation rights of workers and profit/equity sharing – there exist two additional initiatives of this genre which, while not part of the action program as such, remain important components of the Commission's agenda. We refer to the European Company Statute and the Fifth Company Law Directive. Any discussion of the social charter would be seriously incomplete without some reference to the latter.

Beginning with the initiatives announced in the action program, considerable controversy has surrounded the Commission's proposed directive on the establishment of supranational or European-level works councils in enterprises with 1,000 or more employees that operate in at least two member states with at least 100 employees in each. These European Works Councils are to bring workers together regularly from the company's subsidiaries to consider reports on production, sales, employment, and their trends. Separate meetings are to be held for the purposes of consulting with the workforce on decisions likely to have "serious consequences for the interests of the employees."[10] Without such supranational institutions, the Commissions asserts, traditional rules and procedures for consulting workers would be inadequate because material decisions are increasingly taken outside of national jurisdictions. Quite apart from the unsubstantiated claim that such firms will seek to exploit information asymmetries to the disadvantage of labor, the Commission here ignores the trend toward decentralized decision making in the modern corporation and the effects of its proposals on costs. (Indeed, in the explanatory memorandum accompanying the proposed directive the Commission baldly concludes that "the impact is hardly measurable.") In fact, the direct costs could be significant. No limit was placed on the size of an EWC under the initial draft of the legislation. In principle, it could even exceed 100 members. Daimler-Benz with subsidiaries in eleven member states and staff speaking nine languages is reported as claiming that it would require up to seventy-two interpreters for each session. Although the directive was subsequently modified to fix a size limit of 30 members per EWC, it remains the case that groups with many Community-scale undertakings will have to set up *multiple* EWCs. The direct costs could

---

[9] We might also note the increasing emphasis being placed by the Commission on notions of "indirect discrimination." This concept is of most relevant for atypical workers since the majority of this group is female. By penalizing firms that indirectly discriminate the Commission hopes to improve women's working conditions. In the endeavor, its actions have been strengthened by the legal manoeuver of reversing the burden of proof in discrimination cases.

[10] The Commission's proposed directive on collective dismissals (Table 1) has an obvious affinity with the works council directive. Not only does it strengthen existing Community legislation on information and consultation requirements in the event of such layoffs but it also widens the definition of the employer to encompass the central administration of a multi-establishment (transnational) undertaking or controlling undertaking, as appropriate. This stricter regulation of layoffs means less flexibility and, in the long run, reduced employment of unskilled labor.

thus be sizeable.

But more important than the direct costs, however, are those indirect costs stemming from divergent views on consultation as between national and the European levels bodies, which may be expected to produce delays in decision making, and from the pressure to re-centralize management. Decentralized company groups will find it impossible to resist the tendency to refer matters upward, despite the harm done to the business. By construction the new bodies will inevitably strengthen unionization and likely encourage pan-European bargaining. Given the problems occasioned by the inflexibility of national bargaining, the impetus toward European-wide bargaining can only be viewed with alarm.

The Commission's proposals on the financial participation of workers in their companies do not lie at the heart of its agenda and no binding directive is offered, merely a 'recommendation' seeking to achieve a greater diffusion of equity sharing and financial participation schemes without *on this occasion* pursuing "active harmonization" of the wide array of schemes in operation. It is widely regarded that this limited initiative was intended as a sop to the British who have increasingly favored this form of worker involvement over direct participation (see below). Despite the widespread approval of such schemes, it is as well to point out that subsidized employee stock ownership is not necessarily innocuous while evidence on the 'productivity' of worker financial involvement is mixed. From a theoretical viewpoint expanding employee ownership in this manner may represent a weakening of property rights because of the transfer of wealth from the owners of capital to labor. Furthermore, such schemes may expose workers to an unacceptable degree of risk, leading to political problems when companies fall into liquidation. At the empirical level, there is no clear suggestion in the data that worker financial participation improves the firm's economic performance. It has been argued that success, where observed, is attendant on workers also having direct participation.[11] Although the evidence is underwhelming in this regard, it is not hard to see how the Commission might seek to link industrial relations and financial participation. Thus, the British emphasis on indirect participation is unlikely to ensure a 'fire-wall' between the two forms of participation.[12]

As was noted earlier, the Commission's information, consultation, and participation agenda is not confined to the measures announced in the action program. Existing draft legislation in the form of the European Company Statute and the Fifth Company Law Directive each provide for worker representation on company boards as one of three principal employee involvement options – the other two being employee-only company level representative bodies or some other institutional form to be decided upon collectively by the two sides. Although much more flexible than their antecedents of 1970s vintage which sought to mandate board representation, the degree of flexibility offered is less than might appear at first blush. In the first place, existing procedures among member states are more diverse than the three models admit. That is to say, existing information and consultation rights *which are to be equivalent across the models* vary widely among member states. Similarly, the influence of worker directors varies widely: French worker directors in private-sector enterprises have a purely consultative function while their Dutch counterparts

---

[11] See the evidence contained in Alan S. Blinder (ed). Paying for Productivity, Washington, D.C.: The Brookings Institution, 1990.

[12] This distinction between direct and indirect participation is made for convenience of exposition and is necessarily somewhat artificial because of the link between ownership and control.

are specifically excluded from discussions in which their interests are likely to diverge from those of the enterprise. Second, it will not in practice be possible for German companies, for example, to opt out of that country's unique system of Mitbestimming, or codetermination. Third, increased flexibility has at best been partial. In the case of the May 1991 revisions to the latest (1989) draft of the European Company Statute, for example, reductions in the quantity of information to be supplied workers by management were accompanied by other changes the net effect of which has been to produce a more detailed and prescriptive piece of legislation. Finally, since failure of the negotiated solution may lead to the imposition of a "standard model" by the member state, unions may have an incentive not to reach an agreement.

Note in all of this that no criticism of an individual country's system of information disclosure, consultation, and participation rules is necessarily implied. Such systems have been put up for adoption by the market. Their survival *and* adaptation is a measure of their appropriateness. But there is no justification for seeking a more or less homogeneous set of rules, still less for selecting supposedly best-practice regimes. Alternatively put, systems are endogenous. The Commission identifies neither the factors that produced the arrangements in the first place, nor does it chart their adaptation through time in response to changes in the external environment. Even in this area harmonization could be the final consequence of integration but there is nothing to suggest that it is a prerequisite of that integration. Uncritical transplants may be expected to lead to tissue rejection.

Summary. It is hard to resist the conclusion that the Commission, and in particular its social and employment affairs directorate (DG5), both distrusts and misunderstands market forces. This conclusion is dramatically reinforced by the cursory nature of its economic impact audits, or fiches d'impacte. Moreover, it appears not to understand the nature of the institutions of the labor market, treating them as exogenous and as such subject to external manipulation. It seeks to impose order out of chaos, end-state justice as it were. The goal of this social engineering is to secure greater equality of outcomes and, it has to be said, a kinder, gentler functioning labor market. If greater equality is measured by a less differentiated pattern of working conditions and on-the-job rights across member states, then the social charter might appear to fit the bill. But we have also to consider those without work. We have argued that the corollary of greater standardization of working conditions throughout the Community is greater inequality in the structure of unemployment, an outcome that is at odds with the stated equity goal of the social charter. We again note that the Commission does not offer a cogent economic efficiency case for its proposals and in fact the market failure argument cannot bear the weight of the mandated benefits which the social charter seeks to impose.

Some might nevertheless see the glass of reregulation as more empty than full, noting the opposition encountered by many of the Commission's initiatives, the modification of certain of the draft directives in light thereof, the adoption by Council to date of just a handful of the directives foreshadowed in the action program, and domestic legislation that often goes further than what is proposed. Our evaluation would be altogether less sanguine since we would argue that the Community is today much closer to adopting ambitious social legislation than at any other time in its history. One aspect of this is the recent agreement between management and labor at European level. On October 31, 1992, the ETUC, the federation of European trade unions, reached an agreement with UNICE, the federation of European employers' groups, on a proposal designed to give the 'social partners' the opportunity to draft and/or amend legislation or implement social policy directly. This

long-awaited corporatist solution ("social dialogue") heralds the emergence of pan-European collective bargaining and arguably the involvement of the social partners in industrial and macroeconomic policy. Inescapably it represents a growth in union power. Part of the reason prompting the employer side to enter into such an agreement was precisely the fear of yet more intrusive social legislation. In this sense, the accord represents a form of insurance policy to employers. This example illustrates that a simple head count of the measures currently adopted in Council provides a grossly misleading picture of the status of the social charter and its action program.

In its present form, the social charter need not of course produce unemployment on net. Adverse consequences for employment will be masked by otherwise favorable prospects opened up by other barrier-flattening Community legislation, the emergence of new market escape routes, and cheating on the part of certain member states. The most obvious effect will be to slow employment growth, and the recovery process in the event of a recession. The costs, then, will not be immediately transparent. But if there are no efficiency gains, and the measures do not produce greater equality, then what is the purpose of the social charter? Here is seems one must look to the demand for and supply of regulation using public choice theoretic analysis. This task is (reluctantly) left to others.[13]

There is a widespread perception in Europe that the American hands-off model is too harsh, too divisive, and ultimately unstable. The social charter is very much in the spirit of the times. Unfortunately, the Europeans lack an alternative model. The unfavorable employment growth record of the European economies did after all lead many member states, some more than others, to experiment with deregulation in the first half of the 1980s. Despite the euphoria of surrounding the new Europe, the forces that led to deregulation have not fundamentally changed. (Germany to whom the rest are harmonizing has an active Deregulation Commission.) Measures seeking to standardize across member states are, then, not only flawed but curiously old fashioned. *If* Europeans are concerned to produce a kinder, gentler functioning labor market, the first lesson to be learned is that it will not come about by mandating firms to provide benefits or meet arbitrary standards. The focus instead must be upon supply side measures and public provision. The point is that lower income groups tend to have fewer opportunities. Imposing extra costs on employers will further limit these opportunities (e.g. one does not gather experience on the dole). Rather, Europeans should be thinking of ways to increase the opportunity set – for example, by improving training or reducing taxes – not to restrict it. Unfortunately, supply side measures seeking to operate on the characteristics of workers are difficult to devise and have tax implications. Instead of grasping this nettle, the Commission has opted for the quick fix, costless to them, of mandated benefit programs.

The Maastricht Summit of 9-11 December 1991. The treaty on political union agreed upon at the Maastricht summit, while committing member states to " ... a high level

---

[13] It has yet to be commented upon why the poorer countries of the Community have so willingly embraced the social charter. The answer is apparently ideology sustained by heavy doses of transfer payments, amounting to around four percent of GDP in the case of Portugal. Subventions of this magnitude from agricultural, social, and regional funds may outweigh any immediate cost to Portugal of the social charter, even assuming that it is rigorously applied in that country. In the interim, having demonstrated that they are "good Europeans," countries such as Portugal are well poised to receive further infusions of monies to offset the impact of both old and new social measures. Indeed, it is not coincidence that the increased social cohesion agreed to at the Maastricht summit was accompanied by a further augmentation of the EC transfer program with the creation of a new cohesion fund.

of employment and social protection, the raising of the standard and quality of living, and economic and social cohesion and solidarity ..." does not strictly change the Rome Treaty so as to extend Community competence into new areas of social and employment law. In other words, the social charter is unreformed at Treaty level. However, somewhat confusingly, the agreement on political union *does* contain a separate *social protocol* on the quality of life, which was agreed to by all member states other than the U.K. This protocol commits 'the eleven' to "the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labor, the developments of human resources with a view to lasting high employment and the combatting of exclusion." Qualified majority voting will be used to decide on the form social policy in five specific areas: improvement in the working environment to protect workers' health and safety; working conditions; information and consultation; gender equality; and the integration of persons excluded from the labor market. Action on other issues such as social security and social protection, dismissal rules, and what is referred to as the "representation and collective defence of the interests of workers and employers" will require unanimity.

As noted, Britain has been allowed to opt out of the social protocol, but remains subject to social charter per se. What is different is the emergence of a two-tier system, even if the manner of its operation is not yet clear. Presumably, issues introduced under the social charter that require unanimity will, if vetoed by the British, find their way to the eleven via the protocol route. Measures, currently introduced under qualified majority voting (e.g. working hours) will likely go through, albeit subject to varying degrees of controversy and subsequent modification. Indeed, the Commission may choose to float all social measures before the twelve member states before proceeding to 'the eleven' in the event of deadlock.

This does not of course mean that British companies will be exempted from legislation remitted to and then agreed by the eleven. British firms within overseas operations will be subject to the relevant Community legislation, and it is hard to see how such rules can be sterilized from domestic procedures. Thus, British unions have already announced their intention of incorporating the precepts of the social protocol into their collective agreements[14]. But even if a fire-wall could be so erected, Britain still risks legal challenge on the grounds that its less onerous labor laws thereby convey an 'unfair' cost advantage and infringe the competition rules of the single market.

The events at Maastricht reinforce the conclusions reached earlier to the effect that Europe is in a re-regulation phase. The unreformed social charter is retained and alongside it a new social protocol has been erected that allows, indeed implies, more intrusive legislation because of the extension of qualified majority voting. And sooner or later the British will accede to a wider range of social legislation than has been discussed here. It will be sooner if a socialist government is returned in April 1992, since the Labour Party has already committed itself to both the social charter and the new protocol. It will be later, but arguably no less certain, if Mr. Major is reelected since the opting out provisions on political and monetary union agreed to at Maastricht may be seen as short-term face-saving formulae.

---

[14] Mr. John Edmonds, general secretary of the General Municipal and Boilermakers' Union, puts the situation thus: "British employees will not put up with second-class status and they are looking to their trade unions to negotiate equal conditions with Europeans: (Financial Times, January 6, 1992, p.6).

These European developments are likely to have a demonstration effect of sorts on this side of the Atlantic. Many of the selfsame arguments deployed by the Commission may be expected to resurface as discussions on the North American Free Trade Area continue and as the perception of the need for a U.S. 'industrial policy' gains hold. That the Europeans have boldly gone before will also strengthen the hand of those in congress who favor the mandated benefits approach. But any notion that the U.S. will enjoy an improved competitive edge as a result of European moves to regulate the labor market should be dispelled. If the regime shift we have described adds significantly to the cost structure of European business, we may expect to see protectionist moves that blunt any such advantage, and which will in the process make us all poorer. Plus ça change....

Table 1: Selected Measures Introduced Under the Social Charter's Action Program [1]

Clause	Measure	Status
Employment and Remuneration[2]		
3 'atypical work' directives covering workers on other than full-time open ended contracts who work at least 8 hours a week (i.e. part-timers, agency and seasonal workers, and those on fixed-term contracts).	(i) 'Equivalent' treatment of atypical and full-time workers in respect of access to vocational training, contributory and non-contributory social security schemes, and company pensions. Worker representatives to be informed and consulted on their use.	Unanimity required. Measure submitted by Commission to Council in June 1990.
	(ii) To eliminate "distortion of competition" arising from differences in the social and indirect costs of employing atypical workers vis à vis full timers. Repeats previous directive's requirements on social protection. Atypical workers to be given the same (pro rata) entitlement to holidays, dismissal pay, and overtime allowances. Restrictions also placed on the utilization of fixed term contracts and agency workers.	Qualified majority voting. Submitted to Council in June 1990. Treaty basis challenged.
	(iii) Health and safety standards set for atypical workers who are said to confront greater risk than full-timers. Weighted toward agency workers.	Qualified majority voting. Submitted to Council in June 1990 and adopted by Council in July 1991.

Improvement of Living and Working Conditions		
3 directives covering the adaptation of working time, written contracts of employment (if at least 8 hours worked), and mass layoffs.	(i) Minimum daily and weekly rest periods (and, more recently, maximum weekly working hours), restrictions on night and shift work, and fixing of holiday entitlements. Measure introduced under health and safety rules and therefore also includes such terms for night and shift workers.	Qualified majority voting. First draft submitted to Council in August 1990 and amended version in April 1991. Decision shelved by Council until 1992 but likely to be adopted.
	(ii) Detailed contracts to be given workers to provide them with "more security, a better idea of their rights, and more mobility within the Community."	Unanimity. Submitted to Council in December 1990 and adopted in December 1991.
	(iii) Amendment of existing legislation on collective redundancies. Widens definition of the employer. Also enhanced information and consultation rights.	Unanimity. Adopted by Commission in September 1991.
Freedom of Movement		
Subcontracted workers directive. Applies where there is a continuing relation between the posting agency and the worker and where the duration of the temporary assignment is at least three months.[3]	Workers posted from one member state of the Community to work in another to enjoy the same terms and conditions of employment or obtain for work of the same character in the host country. 'Terms and conditions' include maximum hours and minimum holiday entitlements in addition to 'minimum ' wages. The latter will include union wage scales where there exist ergo omnes collective agreements.	Qualified majority voting. Adopted by Commission in June 1991.

Social Protection		
Two non-binding instruments on the convergence of objectives of social security schemes and the "combatting of social exclusion."	The recommendations seek to establish rights to minimum levels of above-subsistence income and other support under national social security systems.	Unanimity required. Measures submitted to Council in May/June 1991.
Information, Consultation, and Participation[4]		
Proposals for the direct and indirect involvement of employees in their companies.	(i) Transitional European Works Councils to be established in Community-scale undertakings with minimum information and consultation rights. Information to include data on production, sales, employment, and investment and their probable trends. Consultation required on management proposals likely to have serious consequences for the interests of workers. U.S. multinationals not required to provide information on their organization's non-EC undertakings.	Unanimity. First submitted to Council in December 1990. Amended in September 1991.
	(ii) Non-binding recommendation on profit and equity sharing.	Unanimity. Adopted by the Commission in July 1991.
Equal Treatment[5]		
Pregnant workers directive.	Fixed maternity leave with minimum compensation (initial levels subsequently modified). Working hours and conditions to be adapted if job endangers health. Pregnant women to be given alternative to nightwork for set interval which can be extended. Prohibition on work involving contact with specific list of agents and processes. If transfers not feasible then paid leave. Employment rights to be fully protected.	Qualified majority voting. Submitted in Council in September 1990 and amended draft informally accepted in November 1991.

Health and Safety

Action program introduced 12 new health and safety initiatives, comprising 10 directives, a recommendation on a European schedule of industrial diseases, and a proposal for the establishment of a safety, hygiene, and health agency. Note that prior to be social charter 16 health and safety directives had been adopted in council. The number had risen to 21 by June 1990, and has continued to rise.

6 of the directives (plus the recommendation on a European schedule of organizational diseases) have been submitted to Council. These cover improved medical treatment on board vessels, health and safety requirements at temporary or mobile work sites, improved protection in the extractive industries (a conflation of two directives announced in the action program), the provision of health and safety signs at work, and protection against exposure to asbestos.

Qualified majority voting. Council adopted the directives on improved medical treatment on board vessels and protection against exposure to asbestos at work in June 1991.

ENDNOTES

[1]Not shown in the table are measures introduced to improve transport for the disabled and yet to be announced instruments on access to vocational training, the protection of young people, and on the situation and problems confronted by the elderly. Some of these are likely to be highly controversial (e.g. restrictions on working hours of young people).

[2]The Action Program also announced under this heading a non-binding 'opinion' on the introduction of an equitable wage. The Commission introduced a draft statement in December 1991 which makes no mention of a "reference fair wage," which would of course then serve as a basis for collective bargaining, focusing instead on the anodyne notion of a "just wage," namely, that sufficient to enable workers to maintain a decent standard of living.

[3]Separate legislation adopted in Council in September 1990 made provision for the introduction of a labor clause into public contracts.

[4]As noted in the text, two other important initiatives on the direct participation of workers pre-date the social charter and are not displaced by it, namely, the European Company Statute and the Fifth Company Law Directive. Other company law directives not considered here also have a bearing on worker participation in the event of mergers and takeovers.

[5]The Commission has also issued recommendations on childcare and a code of good conduct on the protection of pregnancy and maternity. These form part of the Commission's its third action program on equal opportunities for women and men.