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In the Beginning, There Was Social Policy: Developments in Social Policy in the European Union from 1972 through 2008†

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Abstract
This paper argues that the evolution of social policy – *vulgo*: labor market mandates – in the European Union seems to follow a set path. Intervals of activism have been followed by challenges and checks to its development, but Treaty innovations (inter al.) have provided the impetus for further activism. The classic and first case in point was the Single European Act (1976), which presaged a new bout of legislation by widening the reach of qualified majority voting. The next was Maastricht, or the Treaty on European Union (1991) and the Agreement on Social Policy, which for the first time established a firm basis for social policy. An intermediate but instructive step was passage of the Treaty of Amsterdam (1997) which formally incorporated the latter into the main body of the treaty rather than leaving it as a Protocol appended to the treaty, The most recent instance is the Treaty Establishing a Constitution for Europe, which was to morph into the Reform (or Lisbon) Treaty of December 2007. This agreement portends more fundamental reforms for two reasons. First, it implies new legislation in the area of labor relations (issues such as pay determination, the rights to strike/lockout, and the right of association) previously expressly excluded from social policy. Second, it will test some member states applying European law, which means that theoretical opt outs may be just that. And, if history is any guide, there will be subsequent consolidation to bring the labor standards set under legislation into line with European Court of Justice decisions and a further ratcheting-up of standards.

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I. Introduction

We are now in the fifth phase of social policy in the European Union. The most recent phase associated with the abortive *Treaty Establishing a Constitution for Europe* cannot be understood in isolation of the preceding phases. Indeed, in seeing distinct connections between the various phases, we shall argue that it is déjà vu all over gain or, in more measured fashion, that history casts a long shadow in matters concerning the erection of a plinth of worker rights at European level. Since neither the institutions nor the phases of labor market regulation are well known to U.S. observers, our discussion is primarily descriptive. (For a formal economic analysis of the economics of mandates, see Addison, Barrett and Siebert, 2006; Addison and Hirsch, 1997).

Our presentation proceeds as follows. We first outline the various phases of policy, concluding with an interpretation of the most recent phase. In a summary, we draw together the threads of our discussion and assess the likely evolution of policy. Our evaluation is altogether more pessimistic than that of American commentators such as Krueger (2000), who offers a blanket market failure argument by way of justification for all sorts of labor mandates, or European observers such as Adnett and Hardy (2005) who see policy as becoming more pragmatic and steadily modernizing (via the substitution of soft law for hard law) to allow accommodation to local needs.

II. The Phases of Social Policy

Phase 1. The 1974 Social Action Plan

The first phase can be traced back to October 1972 when a summit meeting of the heads of state of the member nations of the European Community (the European Council) gave support to a "vigorous" social policy having the same importance as the achievement of economic union. In response, the European Commission – the body responsible for proposing Community legislation – put forward an ambitious *social action plan* that proposed mandates in the areas of health and safety at work, minimum wages, working hours, employee participation, and the hiring of contract labor (Commission, 1974). The European Council of Ministers, the agency responsible for discussing and approving Community legislation (but see below) issued a Resolution that endorsed the action plan while cautioning that a standard

solution to all social problems should not be attempted and that the "subsidiarity" principle be respected. The Resolution amounted to a declaration of general principles but it provided a foundation for Community social policy, taken in conjunction with Articles 117 and 100 of the Treaty of Rome.[1]

What was the result? The Commission, strictly DG-V, achieved some early success. Thus, each of its proposals to strengthen job rights in the event of collective redundancies, transfers of undertakings, and firm insolvencies were adopted in Council/enacted into law between 1975 and 1980. Somewhat more substantive equal opportunities legislation was also passed that extended the definition of equal pay contained in Article 119 of the Rome Treaty. Similarly, substantial progress was made in the area of health and safety despite the absence of any treaty basis for such intervention: between 1978 and 1987, some 11 such directives were adopted in Council.[2] (We should note here that Article 118(1) of the Single European Act marks the introduction of a firm treaty basis for health and safety measures, while Article 118A(2) provides for qualified majority voting in Council in respect of such measures.)

That said, prior to the Single European Act (SEA), which delineates the second phase of Community social policy, the Commission's successes were overshadowed by its failures. No progress was made on its proposals dealing with employee rights to information, consultation and participation (in ascending order of intervention, the Vredeling initiative, 1980/83; the European Company Statute, 1970/1975; and the draft Fifth Directive on Company Law, 1983). Similarly, impasse was reached on its proposals seeking equal treatment of part-timers with full-timers as regards working conditions, dismissal protection, and occupational security schemes in 1982/83, on its attempt to place curbs on the operation of temporary employment agencies in 1982, and its initiative seeking 3 months parental leave in 1983/84.

In all these cases, if not health and safety per se, the Commission's proposals strayed too far from national practice, and not just that of the United Kingdom.

Phase 2. The Social Charter

In an attempt to facilitate completion of the internal market (i.e. economic integration) the United Kingdom conceded ground in the issue of qualified majority voting (QMV) in Council. The unintended consequence was that it would now be easier to pass social legislation by undercutting the British veto. Strictly speaking, the SEA

only provided for QMV on matters of health and safety under Article 118A. Also the thrust of the SEA like that of the Treaty of Rome remained distinctly economic.[3]

Just two years after the implementation of the SEA, the Commission was to issue in December 1989 a solemn proclamation of fundamental social rights: the so-called *social charter*. The social charter was not binding on its signatories (and in fact the United Kingdom refused to endorse it), but it was accompanied by a detailed social action program which contained no less than 47 separate initiatives, some 23 of which were to be the subject of binding legislation (see Addison and Siebert, 1991, 1994).

Draft legislation swiftly followed, the hallmark of which was the Commission's creative use of the health and safety criterion under article 118A. Examples included directives on the 48-hour maximum working week, pregnant workers, and child labor. These measures had no well determined link with health and safety and insofar as they dealt with "the rights and interests of employed persons" seemed to be directly undercut by another provision of the SEA (viz. Article 100A) requiring unanimity.

A list of the principal social charter initiatives in ascending order of controversy is as follows:

1. Two council decisions on measures to assist the elderly (adopted);
2. Modifications to existing Community vocational training programs for young people and employment information systems (adopted);
3. A slew of 11 health and safety initiatives, mostly rooted in the pre-social charter health and safety framework directive 83/391/EEC that noted inter al. that improvements in safety, hygiene, and health at work *were not to be subordinated to purely economic considerations* (all adopted with one exception relating to chemical agents at work that was only adopted in April 1998);
4. An atypical workers (health and safety) directive requiring agency workers and those on fixed-tern contracts to be informed of job risks and trained appropriately (adopted);
5. Modifications of the earlier directive on collective redundancies (adopted);
6. Employers duty to inform employees of the conditions applicable to the contract or employment relation (adopted);
7. Protection of young people at work, basically seeking to ban child labor (adopted, with transitional relief to the United Kingdom);
8. Posted workers directive guaranteeing host country conditions to posted workers (adopted);
9. Pregnant workers directive providing maternity leave, dismissal protection, and preservation of employment rights, and provision of risk assessments (adopted);
10. Working Time Directive establishing the 48-hour week, rest periods, annual paid leave, and regulating night work (adopted, although the United Kingdom abstained

from the vote in Council and unsuccessfully challenged the treaty basis of the directive);
11. Two further atypical worker draft directives extending to part-timers and fixed-term contract workers comparable working conditions to those enjoyed by full timers and providing such employees (and agency workers) with the same protection under statutory and social security provisions as full timers (deadlocked);
12. European Works Councils (withdrawn and processed under the Agreement on Social Policy).

On balance, the Commission had secured most of its objectives, even if it had to compromise on items 5, 9 and 10 in particular. But it continued to be frustrated by British opposition and sought a way out.

Phase 3. The Agreement on Social Policy and Two-Track Social Europe

During the 1991 intergovernmental negotiations leading up to the revision of the treaties establishing the common market, the Commission sought to extend the reach of social policy and to widen the treaty basis permitting qualified majority voting beyond the tenuous hold of Article 118A. To this end it proposed a special social chapter to the new treaty – the Treaty on European Union, or Maastricht Treaty as it is more popularly known.

The opposition of the United Kingdom meant that a political compromise was necessary to save the wider treaty. The formula was to relegate the terms of what would have been the social chapter to a *Protocol on Social Policy* appended to the Treaty on European Union of 1991. Annexed to the Protocol was an *Agreement on Social Policy.* The Protocol was signed by all (the then) 12 member states and noted the intention of eleven of their number to use the machinery of the Community to implement an Agreement on Social Policy that specifically excluded the United Kingdom.

The two key innovations of the Agreement on Social Policy pertain to treaty basis and the social dialogue process.[4] Crucially, the Agreement confirms and clarifies the legal competence of the Community in matters of social policy while extending the basis of QMV. Thus, Article 2 of the Agreement on Social Policy sets down five areas where QMV would apply, and another five areas requiring unanimity. Specifically, QVM is permitted for measures dealing with (a) improvement in the working environment to protect workers health and safety, (2) working conditions, (3) the information and consultation rights of workers, (4) gender equality, and (5) the integration of workers excluded from the labor market. Unanimity would still be

required for measures concerning social security, dismissals protection, freedom of association, conditions of employment for third-country nationals resident in the Community, and financial contributions for the promotion of manpower instruments.[5]

The upshot was that were now to be two sets of rules governing social policy in the new EU: the standard treaty route under which Commission proposals would be processed before all member states (15 with the accession of Austria, Finland, and Sweden in January 1995) and the Agreement on Social Policy route before the reduced Council of 11 (14) member states.

The second key component of the Agreement on Social Policy was the role reserved for the two sides of industry at European level/social partners: at that time the Union of Industrial and Employers' Confederations of Europe (UNICE), the European Centre of Enterprises with Public Participation (CEEP) and the European Trade Union Confederation (ETUC).[6] Under Article 3 of the Agreement, prior to submitting proposals in the social policy field, the Commission had to consult the social partners on the possible direction of Community action. Following such consultation, if the Commission decided to pursue legislation, it had again to consult them on the proposed details. At any stage in these second-stage negotiations the social partners could inform the Commission that they would like to negotiate on the issue. At their joint request, any resulting framework agreements could be implemented (i.e. given the force of law) by a Council decision following on a proposal from the Commission.

While not eschewing the standard treaty route, it soon became clear that the Agreement on Social Policy was to be used by the Commission to attend to unfinished business. In the summer of 1994, just prior to the first application of the Agreement, of the 26 binding measures stemming from the *social charter* no less than 18 had been enacted into law, another 4 were close to passage, and just three – the two proposals on atypical work and the draft directive on transnational works councils in European-scale organizations – remained deadlocked in Council. There were also a number of other draft directives left over from the earlier social action plan (most obviously, those dealing with systems of worker participation).

The first use of the Agreement was the controversial draft legislation on European Works Councils. This was also the first occasion on which the social partners tried to negotiate their own accord. When the latter proved abortive, the Commission stepped in and issued its own proposals which were adopted by the

reduced Council in September 1994 (OJ L254 of 30.9.94). But the social partners were able to reach their own framework agreement on parental leave in December 1995 (OJ L145 of 19.6.96) and on part-time work in May 1997 (OJ L14 of 20.1.98). That said, no framework agreement could be reached on a number of other issues[7] and it looked as if the process of social dialogue might be fatally compromised in March 1998 when UNICE pulled out of discussions on the subject of worker information and consultation at national level. Nevertheless, a framework agreement on fixed-term (but not agency) contracts was jointly reached in February 1999 (OJ L175 of 10.7.99).[8]

Finally, during this third phase of policy, the Commission was to process a number of social charter and other proposals through the standard treaty route. Adopted legislation – in addition to the long-delayed posted workers' directive noted earlier – included a measure providing equal treatment for men and women in occupational social security schemes (OJ L46 of 17.2.97), and amending earlier legislation; an initiative safeguarding worker rights in the event of business transfers (OJ L201 of 17.7.98), replacing earlier legislation in the light of evolving case law; a consolidating collective redundancies directive (OJ L225 of 12.8.98); and a measure safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community (OJ L209 of 25.7.98). Further, the Commission *proposed* legislation on worker involvement attendant upon the formation of the European Company (OJ C138 of 25.9.91), a measure that dated back to 1970, as well as two directives seeking to extend the 1993 working time directive to hitherto excluded sectors and to the road haulage industry (see OJC249 of 1.9.99 and OCJ43 of 7.2.99, respectively).

In sum, this phase of social policy contains few truly new binding initiatives and patently lacks the detail of the social charter's action program. Instead, policy was to be guided by a "rolling action plan," designed to be added to as circumstances changed and in the light of perceived needs (see Commission, 1995). The lack of detail reflects European preoccupations with unemployment and reduced competitiveness on the one hand and the certain revision of Community competence in matters of social policy attendant upon the deliberations of the intergovernmental conference on changes to the treaties establishing the Community.

As a postscript, the appearance of two-track social Europe was to prove short lived. Within a month of the election of New Labour in May 1997, the United

Kingdom was to opt in to the Agreement on Social Policy, which was to become part and parcel of the new treaty.

Phase 4. The Long March: The Treaty of Amsterdam, the Social Chapter, the Open Method of Coordination and Modernization

The Treaty of Amsterdam, 1997, incorporated the provisions of the Agreement on Social Policy directly into the main body of the Treaty.[9] It had therefore become a Social Chapter after all. But the new treaty did not become effective until May 1999. In the interstices, to extend directives to the United Kingdom, the Commission readopted the Agreement on Social Policy legislation on a whole Community basis (under Article 100). In this way, the EWC directive, the social partners' framework agreement on parental leave and on part-time work, as well as the burden of proof in sex discrimination cases were all extended to the United Kingdom in advance of treaty ratification. (Most of the other legislative adoptions in the second half of 1998 have already been discussed under Phase 3.)

Immediately after treaty ratification, the most important proposal being processed through the social chapter route concerned draft legislation on a general framework for informing and consulting employees. Although at this time there were already a number of pieces of legislation in place covering worker information and consultation – namely, directives on collective redundancies, transfers of business, European Works Councils, and the provisions for worker participation implicit in the plethora of Community health and safety measures) the Commission had enjoyed little success in its flagship employee involvement proposals. Thus, it will be recalled that the deliberations on the European Company Statute (ECS) and the Fifth Company Law Directive proceeded along the social charter initiatives but were not part of that legislative agenda. They foundered partly because of British opposition (the voluntaristic tradition) and material diversity among member states in their procedures for informing and consulting workers.

In its medium-term action program, the Commission (1995a) had suggested that Vredeling would be withdrawn in the wake of the European Works Council (EWC) Directive, while a subsequent Commission (1995b) communication indicated that it favored a single new instrument on ways of consulting workers at national level to complement the transnational provisions of the EWC directive. As we shall see, the path was to be tortuous.

The Commission had launched consultations with the social partners in June 1997 on the subject of possible Community action on worker involvement and consultation. The timing as is usual with controversial Commission initiatives is no accident. It followed on the Vilvoorde incident, publication of the Davignon (1997) report into worker participation, and the election of New Labour in Britain. Davignon focused solely on the ECS. It recommended that companies setting up as a European Company voluntarily negotiate a form of participation with their unions. A default would apply in the form of standardized procedures The Davignon Report was incorporated as a (revised) ECS text on worker information and consultation and discussed in Council in October and again in December 1997. But both board representation and the default proved controversial, and despite progress attendant upon the insertion of a zero participation option and the removal of the guarantee of board representation the measure remained stuck in Council until the end of the social action program 1998-2000.

Besides, because of its voluntary nature – companies had first to elect to become a European Company – the ECS was of limited help to the goal of harmonizing national systems of informing and consulting workers. The Commission sought to pursue harmonization because of the alleged weaknesses of national mechanisms of informing and consulting workers, the need to avoid distortions of competition, while supposedly increasing the competitiveness of firms, as well as the need to render existing systems more transparent and consistent. Following UNICE's decision not to proceed with a European-level agreement, the Commission issued its own proposals in November 1998 but the measure was not to be discussed in Council for almost two years.

But our narrative is running ahead of some other key developments. An important social policy innovation in the Treaty of Amsterdam was a new chapter (Title VIII) dealing with employment. It set a high level of employment as a central objective of the Community and committed member states to developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labor markets responsive to economic change. The goal was to be facilitated by Community measures to supplement the actions of member states. The European Council was to review the employment situation annually and reach conclusions on the basis of a joint annual report issued by the Council and the Commission. Acting on a qualified majority on a proposal from the Commission, the

Council was to formulate guidelines that were to be taken into account by member states in drawing up their own employment policies. They had to furnish the Council with annual reports on the implementation of their national employment policies in the light of the Council's guidelines. And the Council could in turn make nonbinding Recommendations to the member states on their performance, again by QMV on a recommendation from the Commission. It could also adopt incentive measures to facilitate cooperation among member states (such as comparative analyses and pilot projects). Initially, four Commission guidelines (rather than targets) were accepted by Council: the promotion of a culture of entrepreneurship (e.g. more self employment and new business start-ups); the creation of a culture of employability (ensuring inter al. that each unemployed adult (young) worker was offered a job, training, retraining, work experience, or other employment assistance within the first 12 (6) months of becoming unemployed; the promotion of adaptability (i.e. accommodating to flexible work arrangements with no loss of employment security; and the strengthening of equal opportunities by raising female participation rates via career breaks, parental leave, and the like.

Note that unlike the other terms of the Treaty of Amsterdam, which would not be activated until ratification (May 1999), action pursuant to this employment chapter was immediate. Employment policy had moved the top of the European agenda. (Given the hiatus over employee involvement, the only other major ongoing initiative at this time was the extension of the 1993 working time directive, consultations on which had – as noted earlier – begun in 1997 before the treaty was signed.).[10]

The employment chapter was followed up by the Luxembourg jobs summit to discuss the employment situation in November 1997. This led to a revised set of guidelines on employment policy in the following year and to a new social action program for 1998-2000 (Commission, 1998). Like its immediate predecessor, the social action program is pretty thin on detail. Three principal lines of action are outlined. The first covers *jobs, skills and mobility*, where the employment chapter is seen by the Commission as very much the central plank of social policy. It refers to the introduction of a new generation of education and training programs, inter al. The more substantive themes covered under the second heading of the *changing world of work* concern the organization of work and the "anticipation of industrial change." Under the first heading the broad aim is to secure proper training, the development of new forms of contractual relationships, and career paths that are consistent with job

security (employment continuity, social security coverage, and training opportunities, and the promotion of worker adaptability/motivation through increased involvement**.** Apart from the extension of the working time directive, the measures anticipated include consultation with the social partners on the protection of teleworkers, the encouragement of financial participation, and new guidelines on member-state training measures. For its part, the anticipation of industrial change encompasses such measures as the preparation by large companies of a *managing change* report providing information on what structural changes are foreseen and how they will be managed, underscoring the responsibility of companies for maintaining the employability of their workers, coupled with sanctions for companies that dismiss workers without having taken the necessary steps to safeguard this employability, and legislation on the adoption of minimum standards for informing and consulting workers. The third major theme is an *inclusive society*. Here the Commission's proposals are more conventional and they include the modernization and improvement of social protection schemes together with a raft of actions geared to the achievement of gender equality and the implementation of an action plan against racism.

If the Luxembourg jobs summit of November 1997 launched the European Employment Strategy (EES) or Luxembourg process (i.e. coordination of member states' employment strategies) on the basis of the new Treaty's employment chapter, a better-known summit rooted in the EES was that held in Lisbon in March 2000. The Lisbon summit sought to make the European Union the most competitive economy in the world while achieving full employment by 2010. Alesina and Perotti (2004, p. 7) refer to the Lisbon summit as having a "quasi-mythical status" in Europe because of the lofty goals set for the employment rate, the prevention of long-tern unemployment, participation rates in active labor market programs, and so on. These targets were to be achieved via the *open method of coordination* created as part of the employment policy and the Luxembourg process, namely, an annual program of planning, monitoring, examination, and readjustment. The process thus involves employment guidelines, national action plans, a joint employment report summarizing those action plans, and country-specific recommendations in Council based on QMV.

This OMC is represented as a "soft" law approach to EU social policy as opposed to the "hard" approach of Council directives and recommendations as a means of delivering social policy agendas (e.g. Adnett and Hardy, 2005, p. 15). But

note the use of numerical targets in the guidelines and the prescription of controversial policies as self-evident goods. Further note that the hard law approach of binding instruments has not been abandoned by the Commission.

The Lisbon summit emphasized that people were Europe's main asset and should be the focal point of the EU's policies, such that the knowledge-based economy which it wholeheartedly embraced did not exacerbate existing problems of unemployment, social exclusion, and poverty. It also stated that the European social model had to underpin the transformation to the knowledge economy. In the process the model had to be adapted and modernized.

The Commission social policy agenda for the years 2000-2005 (Commission, 2000) is intimately lined to the Lisbon summit on which it seeks to build. It refers to the need to "ensure the positive and dynamic interaction of economic, employment, and social policy, and to forge a political agreement which mobilizes all key actors to work jointly towards the new strategic goal" (p. 6) and "to harness the full benefits of change while managing its disadvantages" (p. 5). The document identifies a number of objectives, including full employment and the quality of work; the quality of social policy; and the promotion of equality in industrial relations. Its legislative commitments include completion/codification of Community legislation on working time; adoption of the ECS and its proposals for the national-level consultation of workers; codification and simplification of health and safety legislation; adoption of measures on social security for migrant workers and on the freedom of movement for workers; a proposal on the transferability of supplementary pensions; and a variety of initiatives on equal treatment and the outlawing of discrimination. Not surprisingly. a key role is reserved for the social dialogue partners in the entire process. Key themes set for action under social dialogue include lifetime learning, continued consultation on the modernization of employment relations, consultations with a view to establishing at European level voluntary mechanisms on mediation, arbitration, and conciliation in respect of conflict resolution, negotiations on issues related to the organization of work, investigation of the contribution of the social partners to the modernization and improvement of social protection, as well as their sustained engagement in the areas of equal pay, gender desegregation, and the eradication of discrimination at the workplace.

This is hardly an empty agenda as is perhaps made evident by the Commission's phrase *social policy as a productive factor*. Note also that the

Commission as in previous action programs firmly commits itself to the promotion of international cooperation by ratifying the ILO convention on child labor, supporting the debate on respect for core labor standards via a dialogue with the ILO and the WTO, and generally developing cooperation with international organizations in the field of social protection and fundamental social rights.

What policies were adopted in this five year-period, marked by the appointment of a new Commission. The early years were to be sure characterized by a flurry of adoptions. The major adoptions in 2000 were the horizontal directive extending the provisions of the working time directive to excluded sectors and activities (Directive 2000/34/EC; OJ L303/16 of 27.11.200), together with a directive implementing the social partners' agreement on working time in civil aviation (Directive 2000/79/EC; OJ L 302/57 of 1.12.2000); a measure on minimum requirements for improving the safety and health protection of workers potentially at risk from explosive atmospheres (OJ L23/57 of 28.1.2000) and a directive codifying the 1990 directive on the protection of workers from risks related to exposure to biological agents at work (OJ L262/21 of 17.10.2000); and no less than three separate discrimination initiatives, namely, a directive implementing the principle of equal treatment regardless of racial or ethnic origin (OJ L180/22 of 19.7.2000), a directive implementing the principle of equal treatment in employment and occupation (OJ L303/16 of 2.12.2000), and a Council decision on establishing a community action program to combat discrimination (OJ l303/23 of 2.12.2000). These measures considerably broadened Community anti-discrimination legislation which had previously been largely restricted to sex discrimination.

But if 2000 was marked by legislative activism 2001 was to prove a banner year for the Commission. This was principally by virtue of consensus reached in Council on the worker involvement provisions of the ECS (actually reached in December 2000), some three decades after the issue was first debated in Council, and real progress on a number of other important initiatives, most notably a conciliated text on the proposed directive establishing a general framework for informing and consulting workers (see below). Actual legislation was confined to consolidation of the 1977 transfer of undertakings directive (2001/23/EC of 12.3.2001) and a health and safety directive on the use of work equipment at work (OJ L195/46 of 19.7.2001).

2002 saw the adoption of legislation establishing a general framework for informing and consulting employees (OJ L80/35 of 23.3.2002), a little under 4 years

after it was first mooted. In common with the ECS a number of significant modifications had been made to the draft legislation over the course of its history – in this case, most notably with regard to sanctions for non-compliance and longer transposition intervals for smaller companies in countries without statutory systems of employee involvement. The legislation applies to undertakings employing at least 50 employees in any one member state or establishments employing at least 20 employees in one member state (at the discretion of the member state). While allowing flexibility as to institutional form, the directive requires that information should cover the recent and probable development of the unit's activities and economic situation, information and consultation on the employment situation and its structure, including any measures contemplated for dealing with threatened job loss, and information and consultation on decisions likely to produce major changes in work organization and contractual relations. Collective agreements could vary the content of information and consultation. More generous implementation timetables were set for Ireland and the United Kingdom by size of undertaking/establishment.

The other major piece of legislation adopted in 2002 seeking to extend some of the protection of the 1993 working time directive to mobile workers in the road transport industry (OJ L80/35 0f 23.3.2002) also dated from 1997 and had proved equally controversial. The sticking points here concerned, first, the definition of working time (in abortive negotiations between the *sectoral* social partners) and, second, the application of the agreement to self-employed drivers (when the process shifted to the Council). Compromises included the exemption of the latter from the terms of the agreement for the first four years of its application.

Apart from these two measures other adoptions during included legislation updating the 1976 equal treatment directive (OJ L269 of 5.10.2002), a directive amending 1980 legislation on the protection of employees in the event of insolvency of their employer (OJ L270 of 8.10.2002), and a physical agents health and safety directive that (OJ L177 of 6.7.2002) that had first been proposed in 1992.

The pace of legislation slowed further in 2003. Perhaps the main development was a measure on worker involvement in the new European Cooperative Society (Directive 2003/72/EC of 22.7.2003). There was also a piece of health and safety legislation concerning the protection of workers from risks related to exposure to asbestos at work (OJJ L97/48 of 15.4.2003) that amended legislation dating from 1983.

Social policy developments in 2004 and 2005 were overshadowed by the agreement in the European Council on the draft of the EU Constitutional Treaty and its rejection by two member states in referendums, respectively. We shall treat mid-2005 as the dividing line. This is inevitably somewhat arbitrary but it falls between the end of one Commission and the appointment of its successor in November 2004, the relaunching of the Lisbon strategy, and the fleshing out of a new social policy agenda.

2004 saw agreement on the text of the new Constitutional Treaty in June (see next section), preceded in May by the entry of 10 new nations into the EU. For its part, social policy focused largely on a takeover bids directive and several health and safety initiatives. The former legislation dealt with the information and consultation of workers, or their representatives, in the event of takeover bids (OJ L142 of 30.4.2004). It followed on unsuccessful Commission action in 2001 and the appointment of an expert group (of company law experts) to look into the question. The legislation requires that when a takeover offer bid is made public, the boards of the both companies must communicate it to the employees concerned or their representatives. The legislation thus stands alongside the EWC directive, the business transfers directive, the collective redundancies directive, and the most recent addition on national systems for informing and consulting workers. The two pieces of health and safety legislation dealt with the protection of the workers from the risks arising from electromagnetic fields (OJ L184 of 24 May 2004) and exposure to carcinogens or mutagens (OL L158 of 30.4.2004). Relatedly, the social partners reached agreement on procedures to increase awareness and understanding of stress at work. The framework agreement, which will not on this occasion be implemented through a Council decision, tackles the identification, prevention and management of stress at work.

Although 2005 saw discussion in Council of a number of important and controversial themes – in particular, revisions of the 1993 working time directive, draft legislation regulating the working conditions of temporary workers, and discussions linking revision of the EWC directive to industrial restructuring – very few pieces of legislation were enacted into law. That being said, the Lisbon strategy was relaunched in March 2004 (Commission, 2005a). Adopted legislation comprised a Council regulation governing the application of social security schemes to employed persons, self-employed persons and their families moving within the EU (OJ L117/1

of 4.5.2005), a proposal on cross border mergers (OJ 301/1 of 25.11.2005), and an agreement on working time for rail workers (OJ L195/15 of 27.7.2005). The first measure sought to update existing regulations on measures to facilitate labor mobility given differences in member states' social security schemes in the light of developments in national legislation and European Court of Justice case law. The second sought to prevent any loss in worker participation in circumstances where at least one of the merging companies already practices such employee involvement. The final measure gave effect via a Council decision to an agreement earlier arrived at by the sectoral social partners.

As far as the Lisbon strategy was concerned, the backdrop to the relaunch (half-way through its life) was a highly critical retort on its operation by an expert group (Kok, 2004). The EU response was to renew the strategy according to three main strands: encouraging knowledge and innovation; making the Community an attractive area in which to invest and work; and encouraging greater social cohesion through growth and employment. No sacrifice of the European social model was implied. Indeed, under the third heading, the new social agenda set by the Commission was welcomed. That document, published earlier in 2005, states: "The added value of the Social Agenda is beyond doubt. The Agenda makes it possible to facilitate the modernization of national systems against the backdrop of far-reaching economic and social changes. It supports the harmonious operation of the single market while ensuring respect for fundamental rights and common values" (Commission, 2005b, p. 2). The two priorities set by the Commission were the achievement of full employment and a more cohesive society. Apart from a revamped EES, the former goal included "anticipating, triggering and managing" economic change. It also required a "new dynamic for industrial relations," involving changes in labor law, enhanced social dialogue, the promotion of corporate social responsibility, consolidation of the various provisions on worker information and consultation, and transnational collective bargaining as part of the partnership-for-change priority. For its part, the requirements of a more cohesive society involved the modernization of social protection, initiating the open method of coordination for health and long-term care, new initiatives on minimum income schemes, and further initiatives in the area if equal opportunities and antidiscrimination (including a new European gender institute). There was to be no retreat in the area of European social

policy. Indeed, wider circumstances seemed to presage a deepening of policy activism.

Phase 5. The Treaty Establishing a Constitution for Europe, the Reform Treaty, and the Charter of Fundamental Rights

The path toward major institutional reform of the treaties establishing the Community was opened up by the 2001 Treaty of Nice which became operational in 2003. The treaty established a number of institutional reforms[11] and the Nice Declaration annexed to that treaty called for a broad debate on the future of the European Union in the light of the impending accession of countries from eastern and southern Europe (10 in 2004 following the enabling Treaty of Athens, 2003, and a further 2 in 2007 via the Treaty of Luxembourg, 2005). The next steps in the process were the Laeken declaration of the European Council in December 2001, which set out the process by which a constitution could be arrived at, the European Convention which provided a rough draft document in July 2003, and the summit meeting of heads of state, acting as an intergovernmental conference, which accepted that constitution with some compromises in June 2004.

As is well known, however, there were difficulties in ratifying the new constitutional treaty – it was rejected by voters in France and the Netherlands in 2005. The solution took the form of convening another intergovernmental conference to adopt a so-called Reform Treaty for the European Union. The latter was agreed to on October 19, 2007 and formally signed on December 13, 2007. (Its formal title is the *Treaty of Lisbon Amending the Treaty on European Union* [i.e. Maastricht] *and the Treaty Establishing the European Community* [i.e. the Treaty of Rome].) As is equally well known, much of the Constitutional Treaty carries over to the Reform Treaty.

This is true of the employment chapter and the eleven-element social policy provisions, including the rules on qualified majority voting (now extended to cover social security for migrant workers).[12] The main source of controversy as regards social policy concerns the so-called *Charter of Fundamental Rights of the European Union* (OJ C364/1 of 18.12.2000). The Charter was first drawn up under the auspices of the Nice Treaty but at that time was only a (solemn) declaration that would not be legally binding on member states. It is based on the Community Treaties themselves, International Conventions such as the 1950 European Convention on Human Rights

and the 1989 European Social Charter (considered earlier), as well as constitutional traditions common to the member states and various declarations of the European Parliament. Had the Constitutional Treaty passed muster, it would arguably have assumed central importance in the development of social policy since it was to be integrated into the treaty and thus legally binding.

But the Charter is also incorporated into the Reform Treaty ("The Union recognizes the rights, freedoms and principles set out in the charter of Fundamental Rights of 7 December 2000 … which shall have the same legal value as the Treaties.") and may be expected to influence EU regulations and directives. However, the United Kingdom secured a Protocol designed to prevent the application of the Charter by the European Court of Justice. Article 1 of the Protocol states: "The Charter does not extend the ability of the Court of Justice, or any court or tribunal of [Poland or of] the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action [of Poland or] of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirm. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to [Poland or] the United Kingdom except in so far as [Poland and] the United Kingdom has provided for such rights in its national law." Article 2 states: "To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to [Poland or] the United Kingdom to the extent that the rights and principles that it contains are recognized in the law or practices of [Poland or] the United Kingdom."

Nevertheless, it is moot whether the British opt out will succeed. At issue, then, is whether the redlining will be a sufficient safeguard to prevent court interpretation of the charter forcing a change in British laws. Given the elevated status of social policy (at the expense of free and undistorted competition) in the Reform treaty, the European Court of Justice may be expected to rule in favor of social rights when these clash with the needs of competition. It is entirely possible that safeguards may be expected to leak (some would allege like a sieve) because the Charter is subject to case law. Thus, for example, individuals from other member states working in Britain might seek to use the Charter in defense or a British company outside of the U.K. might raise the Charter in litigation. *In any event, this episode revisits instances of earlier British opt-outs and invites comparison*: *any multipspeed Europe that emerges is unlikely to persist.*

The social and economic contents of the Charter are contained in four chapters.[13] The first is *Dignity*, where Article 5.2 proclaims that no one shall be required to perform forced or compulsory labor. The second is *Freedom*, where for example Article 12.1 provides that "everyone has the right to freedom of … association at all levels, in particular in political, trade union and civic matters, which implies that everyone has the right to join unions for the protection of his or her interests." The third is *Equalit*y, where among other clauses Article 23 provides that "equality between men and women must be ensured in all areas including employment, work and pay" and "that the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favor of the under-represented sex." The fourth chapter is *Solidarity* which covers worker rights to timely information and consultation (Article 27), the right of collective bargaining and industrial action (Article 28), protection against unfair dismissal (Article 30), safe working conditions that are subject to maximum working hours, rest periods, and annual paid leave (Article 31), the prohibition of child labor and the protection of young people at work (Article 32), legal, economic and social protection of the family unit (Article 33), and an entitlement to social security benefits and social assistance (Article 34). The potential scope for the extension of social policy is thus material.

Given the hiatus over the Constitutional Treaty, and the appointment of a new Commission, however, it is not surprising that legislation processed through the EU decision-making process has been light. During 2006 the measures encompass a piece of consolidating equal opportunities legislation (OJ L204/23 of 26.7.2006),[14] a directive to protect workers from exposure to optical radiation (OJ L114/3 of 27.4.2006), action to harmonize social legislation in road transport (OJ L102/1 of 1.4.2006), and a regulation on the registration, authorization, and restriction of chemicals (REACH).[15]

For its part, the first half of 2007 saw no significant legislation adopted and even less in the way of new proposals. Apart from an *autonomous* framework agreement between the social partners on harassment and violence at work at work, there were no adoptions and just one new proposal seeking to sanction employers of illegal immigrants from outside the EU (COM(2007) 249 final). No agreement could be reached on a draft directive on the portability of supplementary pension rights (COM(2005) 0507) and no progress was made on the draft directive on working conditions for temporary agency workers (OJ C203/1 of 27.8.2002; COM(2002)

0701) and the revision of the working time directive (first adopted in 1993 and thence consolidated in Directive 2003/88/EC) (see COM(204) 0607; COM(2005) 0246).

Somewhat greater progress was made in the second half of the year. Abstracting from one piece of health and safety legislation (namely, a directive rationalizing the regular reports that member states are required to make on the practical application of a number of health and safety at work directives; see OJ L165 of 27.6.2007), there was some action on the draft directives on agency work and working time – dormant since October 2004 and deadlocked in Council since November 2006, respectively. As regards the former, exceptions from equal treatment in pay and conditions for temporary workers in relation to regular workers employed by the user undertaking were introduced together with the maximum length of assignment over which such exceptions could apply. As regards the latter, the stumbling block of the individual opt-out from the maximum average working time of 48 hours was met by preserving the possibility of the opt-out but with safeguards to protect workers' health and safety from excessive hours (e.g. some weekly hours limit would have to be set for workers who agreed to an opt-out and the national authorities would have to monitor its use). Despite the device of the two drafts being linked with the aim of finding a balance between the two, in neither case, however, was a decision reached in Council.

There was also action on the draft directive on the portability of pensions. While no political agreement could be reached in Council, the sole issue yet to be decided in what is accepted to be a much watered-down directive hinges on the vesting period that triggers entitlement to a supplementary pension (COM(2005) 0507; COM(2007) 603 final).

New proposals initiated during the latter half of 2007 included two directives on labor migration from outside the EU encompassing a common application procedure/set of rights for such workers (COM(207) 638 final), and new procedures for the admission and residence of highly qualified immigrants (COM(2007) 637 final). Finally, the Commission also launched consultation over the transfer of undertakings directive (2001/23/EC) to deal with the issue of transfers that involved a change in the place of work, concluded its (abortive) discussions with the social partners on improving workers' protection against musculoskeletal disorders at work, and continued the consultation process in respect of the integration of disadvantaged groups into the labour market.

As far as 2008 is concerned, votes are likely on the agency temporary work, working time, and pensions directives, all foreshadowed in the Commission's work program for 2008 (see Commission, 2008). In addition, debate will begin on the various labor migration draft directives. Further themes from the action program include the revision of the 1994 directive on EWCs, amendments to the 1992 pregnant workers' directive and the 2001 transfer of undertakings directive, two new pieces of legislation on non-EU labor migration (concerning transferees/trainees and seasonal workers, and a European *Private* Company Statute covering small and medium-sized firms.

Although these are nontrivial measures**, r**evisions of existing legislation dominate new legislative proposals, as has been true for some years now. In particular, little dramatic is expected from modernizing employment legislation where flexicurity currently involves little more at present than a tissue of themes (see Commission, 2007). But, as we have indicated throughout, intervals of thin legislative are part and parcel of the evolution of social policy.

III. A Summing Up

Having traced the development of social policy in the European Union from its origins in the early 1970s to the present time, there can be little doubt that it has come of age, even to the extent of enjoying the same status of the goal of economic integration in the European endeavor. There is now an unambiguous treaty basis for social policy and now arguably, via the Charter, an extension of social policy provisions. Yet even without such support, earlier Commissions have been able to secure much of their basic agenda and in the process create a veritable web of rules governing the employment relation, as well as a set of constituencies favoring further social legislation. Even unemployment crises, while in one sense constraining Commission activism, have also provided opportunities – witness the rolling action program referred to earlier – and the occasion to insert a new aspect of social policy into the treaties establishing the community (viz. the employment chapter).

We would argue that the Commission has been single minded in pursuit of the social dimension and that its dogged persistence has paid off. This is not to say that the path of legislation has been smooth – the evidence is indeed to the contrary – or that the Commission has achieved all of its goals in those mandates that have been

enacted. But there is more than one way of skinning a cat and the Commission has proved adept in addressing such issues (and in choosing its moment) through other instruments, albeit at the price of overlapping and at times seemingly inconsistent legislation. And, as have seen, the Commission has often revisited its mandates (often with minimal analysis of their consequences), and unsurprisingly the adjustment of the terms and conditions has been upward.

But if the basis for social policy is much stronger in the wake of the Treaty of Amsterdam, the Treaty of Nice, and the Reform Treaty, the course of policy is likely to be much messier than before. This is partly the result of the open method of coordination and soft law in delivering the social policy *alongside though certainly not substituting for* the Community Method of directives and regulations (however these are redesignated). Another reason is the piecemeal actions of the social partners in formulating some policies and accommodating to others. Yet another reason is that the Commission is now seeking a framework of new labor standards appropriate to the information society, introducing an intergenerational approach to policy, suggesting a new dynamic for industrial relations, and so on.

Given the large number of Community instruments already in place (by no means all which have been identified here), it would be reassuring if there were a firm economic basis for policy and some accounting of the effects of the measures in place. As is well known, while recognizing that economic efficiency is not the sole justification for policy, a prima facie case for mandates can be based on specific instances of market failure. Thus, both information asymmetries and externalities can be deployed to support a worker participation mandate, and an information failures argument to help sustain health and safety initiatives). As a practical matter, the Commission has not relied on such specific arguments, and it has tended to paint with much broader brush typically invoking notions of distortions of competition and social dumping. Latterly, with disappointing economic aggregates, these have admittedly given way to notions of "unity in diversity" attendant upon the soft *acquis* and the open method of coordination. But this is to deny the Community Method and in itself is no excuse for not undertaking efficiency audits. The device of appointing expert groups has proven no such guarantee and more often than not has seemed to have provided new headings for new lines of policy.

There is nothing in any of this to deny the usefulness of the search for an alternative to the U.S. model. Arguably, truly embracing a soft *acquis* might permit

the emergence of a viable European social space. But there is no real sign in the developments charted here that the Commission has given up on advanced social engineering or abandoned the one-size-fits all approach. This is turn raises an interesting research question. With the Europeanization of labor law in all countries of the EU, can deteriorations in competitiveness rankings be observed for those countries (most obviously the United Kingdom) that have had to travel the furthest in accommodating to the Rhineland model?[16]

Endnotes

1. Article 117 sets the goal of improved working conditions and an improved standard of living for workers so as to maker possible their harmonization while the improvement is being maintained. It notes that such a development will not solely be achieved through the functioning of the common market but also from the provisions of the Rome treaty. Article 100 is one such provision. It states that: "The Council shall, acting unanimously on a proposal by the Commission, issue directives for the approximation of such provisions laid down by law, regulation, and administrative action in the member states as directly affects the establishment or functioning of the common market."

2. Full references to the actual legislation as well as the abortive legislation noted in the next paragraph are contained in Addison and Siebert (1991) and Addison (2001).

3. Note that the new treaty contained a new title on economic and social cohesion, while also initiating a process of social dialogue (see below). At the same time, the SEA also introduced the *cooperation procedure* which increased somewhat the role of the European Parliament in matters covered by QMV.

4. The Treaty also increased the authority of the European Parliament somewhat beyond the cooperation procedure. Under a new *codecision procedure*, the Parliament could for the first time veto legislation at the second reading stage. If the Parliament decides to amend a proposal and the Council cannot accept the amendments, a joint compromise must be agreed through the agency of a conciliation procedure. Note that at this time only the posted workers directive was covered by the new procedure.

5. The Agreement also identifies areas that lie outside its competence: legislation on pay, the right to strike/lockout, and the right of association.

6. UNICE was renamed BusinessEurope/the Confederation of European Business in January 2007. Earlier, the number of social partners at cross-industry level had grown to four when in December 1998 the European Association of Craft, Small and Medium-Sized Enterprises (UEAMPE) reached an agreement with BusineesEurope allowing it to take part in the social dialogue process.

7. Namely, on the issue of the burden of proof in sex discrimination cases (OJ L14 of 20.1.98) and on combating sexual harassment at work.

8. We note that the first agreement negotiated under the *sectoral* social dialogue was concluded in September 1998 on the organization of working time of seafarers, representing an extension of the 1993 working time directive (see Phase 1) to sectors and activities excluded by that directive (OJ L167 of 2.7.99).

9. Apart from closing two-track social Europe, the main change introduced by the treaty was the extension of the scope of the *codecision procedure* and hence an increase in the authority of the European Parliament. It also to confuse matters renumbered all the Treaty articles.

10. In addition the Commission adopted a directive to give legal effect to the social partners' agreement on working time in the maritime sector (OJ L167/33 of 2.7.99) and sought a mechanism for the compliance of ships of all flags with this directive.

11. The main changes introduced by Nice had to do with limiting the size and composition of the Commission, extending QMV, and establishing a new weighting of votes in Council.

12. These social policy provisions are as follows: (a) improvements in particular of the working environment to protect workers' health and safety; (b) working conditions; (c) social security and social protection of workers; (d) protection of workers where their employment contract is terminated; (e) the information and consultation of workers; (f) representation and collective defense of the interests of workers, including codetermination (although not in the areas of pay, the right of association, the right to strike, or the right to impose lock-outs); (g) conditions of employment for third-country nationals legally resident in the EU; (h) the integration of persons excluded from the labor market; (i) equality between men and women with regard to labor market opportunities and treatment at work; (j) the combating of social exclusion; and (k) the modernization of social protection systems. Note that the Treaty of Nice extended QMV where the Council decides to apply the codecision procedure in respect of items (d),(f), and (g) that would otherwise subject to unanimity.

13. The other chapters cover citizens' rights, justice, and general provisions.

14. The equal opportunities legislation seeks to improve legal clarity and certainty and to reflect two decades of ECJ case law. It consolidates 7 existing directives covering equal pay, equal treatment as regards access to employment, vocational training, and promotion, and working conditions, equal treatment in occupational social security schemes, and the burden of proof in sex discrimination cases.

15. I do not comment on the services directive as it seeks to legislate not on employment matters but rather to remove obstacles to the freedom of establishment for service providers and the free movement of services between member states of the EU (Directive 2006/123/EC; OJ L376/36 of 27.12.2006).

16. See, for example, the 'burdens barometer' of the British Chambers of Commerce (http://www.britishchambers.org.uk/policy/pdf/budens_bar2006.pdf). See also the regulatory impact assessments of the U.K. Department for Business Enterprise and Regulatory Reform (http://www.berr.gov.uk/consultations/ria/index.html)

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