

ETUC Position on the Commissions' initiative for the enhanced use of Qualified Majority Voting (QMV) in the social field (the 'Passerelle clause')

adopted by the ETUC Executive Committee of 20 September 2019

Introduction

The ETUC has long identified the need to improve EU decision making. The publication of the EU Commission Communication "*More efficient decision-making in social policy: Identification of areas for an enhanced move to qualified majority voting*"¹ on the 16th April 2019 has opened a discussion on addressing the problems associated with the need for unanimity before advancements can be made in the social field. It is worth recalling that currently, the Council of the European Union has to vote unanimously on a number of other issues, including common foreign and security policy, citizenship, EU membership, harmonization of national legislation on indirect taxation, EU finances, along with the harmonization of national legislation in the field of social security and social protection, as well as other matters related to the social field.

The Commission Communication is focused on using 'passerelle clauses' available in the EU Treaty to move to qualified majority voting and the ordinary legislative procedure in the field of social policy.

Main message

At this stage, the main message from the ETUC are:

- a) to proceed with the activation of the 'passerelle clause' in the Social Policy Field but to do so with caution and with full respect for the role of European social partners and their agreements,
- b) to include in the Council decision implementing the 'passerelle clause' a non-regression clause,
- c) Social Partners should be involved in the decision to activate the 'passerelle clause' on the case by case basis,
- d) Adopt an incremental approach beginning with the adoption of the 'passerelle clause' in Article 19 TFEU (non-discrimination). This will help us to establish the extent to which the use of 'passerelle clauses' renders decision-making more efficient.

Background

Under the Lisbon Treaty, EU decisions in certain policy fields, including some aspects of social policy, still have to be taken by unanimity under the so-called 'special legislative procedure'. However, in some cases so-called 'passerelle clauses' are foreseen which allow for a change from the legislative procedures initially provided for by the treaties and make it possible, under

¹ [COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS *More efficient decision-making in social policy: Identification of areas for an enhanced move to qualified majority voting.* COM\(2019\)186 final, Strasbourg, 16.04.2019.](#)

some conditions, to both switch from the special legislative procedure to the ordinary legislative and to switch from voting by unanimity to qualified majority voting.²

In the social policy field, this is the case for the following areas:

- Article 153§2 TFEU: in relation to
 - social security and social protection of workers,
 - protection when an employment contract is terminated,
 - collective representation of workers' and employers' interests,
 - conditions of employment for third country nationals legally residing in the Union;
- Article 19(1) TFEU on actions to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation;
- Article 21(3) TFEU on the right of citizens of the Union to move and reside freely within the territory of the member states (social security and social protection aspects).

Although not part of this consultation, there are other fields, which have strong links to social policy and the interests of workers, like combatting social dumping and tax competition (e.g. taxation in article 113 TFEU) and environment (e.g. article 192 (2) TFEU), the use of 'passerelle clauses' is also provided for by the Treaties.

In his State of the Union 2018, and in particular the Letter of intent to President Tajani and to Chancellor Kurz³, Commission President Juncker announced his intention to ensure more efficient law-making by an enhanced use of these 'passerelle clauses', which he referred to as the 'lost treasures of the current Treaties', in the following policy fields: Common Foreign and Security Policy, environment and climate change, taxation and social policy, and all indications are that the incoming Commission will continue this development.

In line with its Work Programme 2019, the Commission launched non-legislative initiatives (i.e. Communications) for the latter three fields of policy in the first quarter of 2019.⁴ Before having launched the Communication for a more efficient and democratic decision making in EU social policy on 16 April 2019, the Commission had also launched on 20 December 2018 its Roadmap for this initiative⁵ and the ETUC submitted its views on this Roadmap on 23 January 2019. (see Annex 2 to this Position). On 3 April 2019, the European social partners met the Commission to further discuss their initial concerns and questions on the initiative and on 25 April 2019, Commission representatives presented and discussed in more detail the Communication at the meeting of the ETUC Labour and Internal Market Legislation Committee (and to which also the national TU officers were invited and attended) as well as at the Social Dialogue Committee meeting of 20 June 2019.

What is the Commission proposing?

In essence, the Commission is mainly proposing to launch

² For a more information on the 'passerelle clauses' see Annex 1: "Passerelle clauses in the Lisbon Treaty", ETUI Note by Stefan Clauwaert, November 2018.

³ https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-letter-of-intent_en.pdf

⁴ [COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL Towards a more efficient and democratic decision making in EU tax policy](#), Strasbourg, 15.1.2019, COM(2019) 8 final; [COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL A more efficient and democratic decision making in EU energy and climate policy](#), Brussels, 9.4.2019, COM(2019) 177 final.

⁵ For the roadmap and all received submissions, see https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-6446089_en

*'an **open debate** on enhanced use of qualified majority voting or the ordinary legislative procedure in social policy based on the Communication with the European Parliament, (European) Council, EESC, Committee of Regions, social partners and all stakeholders*

The Commission has set out their views on the use of the 'passerelle clauses' in the social field. Their proposals are quite limited despite the identification for each of the issues, gaps in protection in the legislative framework caused by the requirement for unanimity and political (un)willingness in a few Member States.

In summary, the Commission considers the following approach to the use of the 'passerelle clauses':

- **Non-discrimination (Article 19(1) TFEU)**

Although there are comprehensive EU legal provisions already in place on equal treatment between men/women and based on racial or ethnic origin, for equal treatment on grounds of religion or belief, disability, age and sexual orientation however this is inadequately ensured (only as regards employment and occupation), and unanimity voting has led to an inconsistent legal framework.

The Commission indicates that using the general 'passerelle clause' in Article 48(7) TEU in the near future could ensure development of equal protection against discrimination, with effective redress mechanisms for all. The Commission highlights the following particular possibilities:

- (Reviving) the 2008 proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008) 426 final)⁶ in all areas other than employment;
- The need to guarantee a more common set of EU rules to protect against discrimination in access to goods or services (but Commission argues the same time that "individuals *and businesses* should have seamless access to the four fundamental freedoms under same conditions";
- The need for legally binding provisions for the operation of national equality bodies (so far only non-binding guidelines via Commission Recommendation (2018) 3850 final of 22 June 2018); certain particular issues to be tackled that are mentioned: victim assistance, other activities for the promotion of equal treatment, the still differing grounds for protection depending on the member state to member state.

Very important to note however is that for any action based on Article 19(1) TFEU, the general 'passerelle clause' (Article 48(7) TEU) will indeed have to be used. But this implies, next to an unanimity vote in Council and after having obtained the consent of the European Parliament, also a notification of the national parliaments which have 6 months to object. If a national parliament objects, the 'passerelle clause' will not be used. (see later point 29 ff. on the operation of the various 'passerelle clauses').

- **Social security and social protection for workers (outside cross-border situations) (article 153(1)c TFEU)**

On the positive side, the Commission considers there is a need to reform national social security and social protection systems mainly because of demographic challenges, the need to look for non-labour sources, and the emergence of a variety of employment relationships (e.g. due to digital platforms) and the need to ensure that they are covered by social security and social protection systems. Furthermore, the Commission considers there is a need for

⁶ [Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM\(2008\) 426 final of 2 July 2008.](#)

substantial investment in lifelong learning, training, up- and reskilling which national social protection systems insufficiently cater for today.

However, the Commission also clearly spells out that any EU action must respect the subsidiarity principle and take into account the large differences in the Member States.

Hence, the Commission considers the use of ‘passerelle clauses’ in the near future only relevant to adopt recommendations (so without binding force) in this area. It is important to thereby note that also here the general ‘passerelle clause’ (Article 48 TEU) will need to be used with all additional procedural hurdles it entails (see above).

- **Conditions of employment for third-country nationals legally residing in Union territory (article 153(1)(g) TFEU)**

Given the different legal acts for on legal migration and rights of different categories of persons (students, seasonal workers, researchers and intra-corporate transferees) adopted by QMV (and co-decision of European Parliament) under article 79(2) TFEU as well as several Recommendations (e.g. on Youth Guarantee) and which apply to legally residing third-country national also, the Commission sees only limited potential scope and no significant added value under Article 153(1)(g) to further act in this area by using the ‘passerelle clause’.

However, at another place in the Communication, the Commission hints to a possible issue by stating that *“there are no binding EU minimum requirements explicitly designed for their effective integration in the labour market.”*

- **Protection of workers where their employment contract is terminated (Article 153(1)d TFEU)**

Because dismissal protection is at the ‘core of national law’, ‘closely linked to national social protection systems and labour market institutions (including the role of social partners and collective bargaining traditions), the Commission considers that national laws are still best placed to tackle the specificities of this protection, including fiscal considerations, and that there is no clear case at present for using the ‘passerelle clause’.

- **Representation and collective defence of the interests of workers and employers (article 153(1)f TFEU)**

In relation to this issue, the Commission is using some rather contradictory language. On the one hand, the Commission recognises the quite strict constraints in the Treaty on its powers in this area (Article 153(5) TFEU: exclusion of right of association, right to strike and impose lock-out), but it also highlights the fact that there is no specific and comprehensive EU-legislation regulation on this matter as well as very diverging rules and traditions across Member States (e.g. degree of representativeness of social partners, their general involvement in decision-making, prevalence and centralisation of collective bargaining and models of board-level representation (BLER)). In particular, the latter is used to conclude that there is no clear case at present to use the ‘passerelle clause’ in this area.

On the positive side, the Commission remains committed to supporting capacity-building of social partners and welcomes the European Social Partners work programme 2019-2021.

In sum, the Commission sees only some concrete scope for using the passerelle clause in relation to non-discrimination (Article 19(1) TFEU) and social security (Article 153(1)c TFEU) but in the latter case only to adopt recommendations. The Commission sees however no concrete case – for the moment- to act in the areas of conditions of employment for third-country, protection of workers where their employment contract is terminated nor in relation to the collective representation of workers’ and employers’ interests.

ETUC Position and concerns

The ETUC has until now not taken a specific position on (the use of) ‘passerelle clauses’. However, it did express itself at several occasions both in general (e.g. in relation to subsequent Treaty revisions) and/or in particular specific issue-related resolutions on the need to have more efficient decision-making procedures (including voting requirements) in and for the EU. For instance, in its Resolution in 2009 on “The ETUC and the Lisbon Treaty”, the ETUC regretted that its call for “qualified majority voting to become the usual procedure for social policy” was not met. In addition, this general support by the ETUC for applying qualified majority voting was/is not limited to the social policy field, but was also called for the area of taxation, with a particular focus on corporate, capital and environment taxation (for an overview of those ETUC positions, see Annex 1 to this Position).

The ETUC is broadly supportive of the EU Commission’s proposal to explore how the use of the ‘passerelle clauses’ as a means to secure improvements at EU level for working people, their families and communities. However, the ETUC support is not unconditional and our key message is that any move to extending majority voting and moving from special to ordinary legislative procedure would need to be approached with caution and in full respect of the role of the European social partners, in particular in relation to the negotiation and implementation of European framework agreements (Articles 154-155 TFEU).

Protect the Role of Social Partners

The ETUC sought assurances from the Commission that the use of the ‘passerelle clause’ would not mean a switch from the special legislative procedure to ordinary legislative procedure creating a change to the role of European and national social partners guaranteed under the Treaties. This question arose as the ‘passerelle clauses’ allow procedural changes, not only shifting from unanimity to qualified majority voting but also from special legislative procedure to ordinary legislative procedure. It is vital that the social partners’ consultation under Article 154-155 TFEU would remain unaffected by the use of any ‘passerelle clause’, and that the Commission shall in line with these articles continue to consult them before submitting any proposals in the social policy field. Likewise, the provisions whereby Social Partners may decide to open negotiations and to deal with a specific issue through bipartite social dialogue at any stage during the two (or one stage) consultation phase(s) must be guaranteed. Additionally, the move to ‘ordinary procedure’ must be clearly understood to mean that the Social Partners’ request to the Commission to put forward their Agreements to the Council to be adopted in the form of a Directive does not create an enhanced role for the European Parliament (i.e. a co-decision role instead of the current situation where the European Parliament is only informed). In addition, if the ‘passerelle clauses’ operate on a case by case basis (see also below point 31), the use of the ‘passerelle clauses’ should also be referred to the Social Partners.

In its reply to the ETUC letter of 10 July 2019, the Commission finally provided more clarification and assurances on these matters. The Commission ***“reaffirms that passerelle clauses can indeed not be used to change the role, powers and rights of the social partners guaranteed by the Treaty. The Commission Communication is clear in this respect: the role of the social partners in shaping legislation on social policy will remain unaffected. As required by Article 154 TFEU, the Commission will therefore continue to carry out the mandatory two-stage consultation of the social partners before submitting future proposals in the field of social policy, including for proposals that are made following the use of a passerelle clause. For the Commission’s proposal to trigger the specific passerelle clause itself, however, the Treaty does not specify the prior obligation to consult the social partners.”*** (See Annex 5; emphasis added)

Furthermore, on the role of the European Parliament, the Commissions' reply specifies that *“to the extent that qualified majority would apply in the areas concerned by Article 153 TFEU on social policy, it would also apply for the implementation of social partners' agreements by means of Council decisions under Article 155 TFEU, thus facilitating the implementation of social partners' agreements at EU level. **The ordinary legislative procedure, whereby the European Parliament and the Council jointly adopt a legislative act, within the meaning of Article 289 TFEU, would not apply in such cases.**”* (See Annex 5; emphasis added)

Only use the Passerelle Clause if it makes decision making easier and faster

The Communication also does not clearly identify how extending QMV to the social field could facilitate faster and more responsive policy making to the benefit of workers, their families and communities. It appears that even when such 'passerelle clauses' are applied, the power continues to rest firmly in the hands of the Member States, as the first step always needs to be taken by unanimity either by the Council or the European Council. If this is how the clauses operate there is a danger that they will simply add another layer of decision making rather than overcome any of the hurdles.

ETUC sought – but did not receive yet - clarity on the application of the subsidiarity principle/check in the use of 'passerelle clauses'. Not only the Communication confirms at several instances the need to fully respect subsidiarity and proportionality but also that the “Better Regulation Agenda” “remains at the core of EU policy making”.

ETUC also sought clarification on the practical application of these 'passerelle clauses' and in particular if they operate on a case by case basis (i.e. for each envisaged concrete initiative) or is the change a 'once off' (i.e. one overall decision to use the 'passerelle clause' in the social policy field in future). The Communication clearly recognises the need to use “a selective and case-by-case approach” to the use of the 'passerelle clauses' but on the other hand also states that “not all areas of social policy (under unanimity voting) “are equally essential to improve Union's capacity to act”. The case by case approach could however result in adding time to decision making rather than reducing it. The Commission at our ETUC Labour and Internal Market Legislation meeting of 25 April 2019 stated that both approaches (case by case and “once off”) could be used depending on the issues at stake and the objectives to be reached. In its reply of 19 September 2019, the Commission confirms that the 'passerelle clause' *“could be activated in individual cases (for a specific proposal), or for the use of a certain legal basis (in part or as a whole) in the future.”* (See Annex 5)

In that same reply, the Commission provided also some clarity on the question, that once the decision to use the 'passerelle clause' is activated, whether and under which conditions the process can eventually be stopped or deactivated (in particular the Treaties do not provide for anything in this regard). The Commission notes that *“the Treaties are silent regarding the question if and under which conditions a decision to activate a passerelle clause can be revoked”, but that “it can be argued that the competence to adopt a legal act entails also the competence to repeal that act by the same authority under the same procedure. For the general passerelle clause, for instance, this would mean that it could be deactivated by a European Council decision”.* (See Annex 5)

Given the ongoing lack of certainty and clarity about the operation of the 'passerelle clauses' and the interaction between them, the ETUC supports the Commission idea to begin with the adoption of one of the 'passerelle clauses' and evaluate if the change made a positive difference to the ability and speed of adoption of legislation in the Social Field. In this respect the ETUC recommends that progress is made on adoption of the 'passerelle clause' on Article 19(1) TFEU on actions to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Conclusions

The ETUC welcomes the discussion launched by the Commission as it is essential that progress is made in speeding up decision making in the EU. The experience of recent years has demonstrated that unanimity voting slows down the adoption of legislation of interest to workers. It creates for each Member States a de facto veto-right, which limits the incentive for European social partners or the Commission to even begin to propose solutions to some of the most pressing problems experienced by workers in Europe. It is clear that there are tensions and even unwillingness at Member State level to move forward towards a more Social Europe via concrete initiatives and this has to be overcome.

The ETUC in general supports the move to Qualified Majority Voting (both in the area of social policy and corporate, capital and environment taxation). The ETUC regrets the limited ambition set by the Commission to move to QMV in the social policy field as it sees for the moment no concrete case to use the 'passerelle clause' in the areas of conditions of employment for third country nationals legally residing in EU territory, protection of workers where their employment is terminated and representation and collective defence of the interests of workers, whereas in the area of social security and social protection for workers it considers the use of the 'passerelle clause' only relevant to adopt recommendations.

The ETUC welcomes and notes the clarifications provided by the Commission about how the different 'passerelle clauses' will operate in practice (e.g. extra delays in decision-making process, one-off or case by case use, can it be revoked/reversed?,...) and what the move to the ordinary legislative procedure actually implies. However, to ensure respect of the existing national rules as well as the prerogatives/role of national governments, parliaments and social partners, the ETUC considers it necessary that any decision whereby the (European) Council decides to move from unanimity to QMV, contains not only a firm and effective non-regression clause but also a "more favourable provision clause" recalling that any provisions adopted pursuant to the decision shall not prevent Member States from maintaining or introducing more stringent/favourable protective measures. (cfr. Article 153(4) TFEU)

The ETUC will continue to engage positively in further discussions with the Commission and in light of the assurances we expect will be received about the protection of the role of Social Partners and the effectiveness of the operation of these clauses.

However, as long as the required assurances and clarity are not received, as mentioned, the ETUC urges the Commission not to take any action for using the 'passerelle clause' in relation to the issues enshrined in Article 153(2) TFEU (see above). In addition, the ETUC recommends an incremental approach beginning with adoption of the 'passerelle clause' in Article 19 TFEU (non-discrimination). This will help us to establish the extent to which the 'passerelle clause' renders decision-making more efficient.

Finally, a word of caution, it is essential that decision-making is not put on hold while the possible activation of the 'passerelle clauses' is discussed.

Annexes:

- Annex 1: ETUI Note "Passerelle clauses in the Lisbon Treaty" (Stefan Clauwaert, November 2018)
- Annex 2: ETUC Submission on the European Commission Roadmap 'More efficient law-making in social policy: identification of areas for an enhanced move to qualified majority voting'
- Annex 3: Texts of the 'passerelle clauses' in Articles 48(1) TEU, Article 19(1) and 153 TFEU.
- Annex 4: ETUC letter to (i.a.) Joost Korte (Director General DG EMP) of 10 July 2019.
- Annex 5: Reply from Joost Korte (Directeur General of DG EMPL) to ETUC's letter of 10 July 2019 (annex 4) received 19 September 2019.