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The Lisbon Treaty: a more social Europe at last?

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Policy implications

There were high hopes of the Constitutional Treaty, above all that it would strengthen social Europe. The Lisbon Treaty only partly lives up to these expectations and is sorely lacking in ambition, particularly regarding the extension of qualified majority voting and of Union powers, as well as the introduction of social governance to reinforce the social dimension in the wake of globalisation.

Nevertheless, the minor contribution made by the Lisbon Treaty in the social sphere might serve to stem the current tendency to allow the economy to take precedence over social considerations, to the detriment of social and trade union rights at national level as demonstrated by recent cases before the European Court of Justice (ECJ). The impact of the Lisbon Treaty on social Europe will depend on the political determination of European and national institutions and on

the ability of citizens and workers to mobilise for the defence and promotion of the social dimension – a dimension indispensable to the Europe of today and tomorrow.

Introduction – a short, turbulent history

2009 was the year that saw the laborious completion of the ratification of the Lisbon Treaty following the serious setbacks that occurred from the very beginning of the ratification process of the Constitutional Treaty. Adopted in 2004 following an innovative consultation process, the Constitutional Treaty was rejected by referendum in France and the Netherlands in 2005. After a two-year reflection period, the concept of a simplified treaty was the solution that broke the political and institutional deadlock in which Europe found itself. The draft submitted by the Intergovernmental Conference (IGC) was endorsed by the EU Heads of State and Government and signed in Lisbon on 13 December 2007. The Member States of the European Union thus abandoned the draft European Constitution which would have repealed the previous treaties, and returned to the traditional method of modifying a treaty, amending the EC Treaty and the Treaty on European Union simultaneously. Each Member State then proceeded to ratify the text, the majority by parliamentary process. Only Ireland rejected it, in its June 2008 referendum, and it was only after the country received legal guarantees, in particular on the right to life, neutrality and

corporation tax that the text was again put to a referendum and ratified in October 2009. Therefore, with the ratification process completed, the way was clear for the entry into force of the Lisbon Treaty on 1 December 2009.

Besides the institutional amendments that provide, relatively speaking, for the simplification of decision-making within the European Union of 27 Member States, can the Lisbon Treaty be expected to bolster the social dimension of the EU, a dimension already subject to such ill-treatment?

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With the EU originally built on the economic foundations of the Common Market and later the Single Market, i.e. the free movement of persons, goods, capital and services (Treaty of Rome 1957), it was the 1986 Single European Act that gave social policy its rightful place in the European Community, a position later confirmed by the Maastricht Treaty (1992). The Amsterdam Treaty (1997) provided the opportunity to include employment promotion and to strengthen the principle of non-discrimination, in particular on the grounds of sex, race or ethnic origin, religion or beliefs, disability, age or sexual orientation, among the objectives of the EU. The Treaty of Nice (2001) was a vital prerequisite for enlargement. It ensured smooth institutional operation of the enlarged Union, in particular by reforming the composition and functioning of the European institutions as well as the decision-making procedure within the Council and the enhanced cooperation mechanism. For example, the use of qualified majority voting was extended to economic and social cohesion policy in 2007. What does the Lisbon Treaty contribute to social issues, and to what extent can this counteract the recent rulings of the Court reaffirming the primacy of economic over social considerations?

The Lisbon Treaty contains few areas of progress on social issues, falling far short of the demands of the European social movement (ETUC 2004, 2007a). Decisive progress could have been achieved if there had been no need for the undignified horse-trading that ensued with the most reluctant Member States of the European Union, notably Great Britain and Poland; as a result, the Lisbon Treaty undeniably constitutes a retrograde step compared with the Constitutional Treaty. So what can we expect from the recognition of the social dimension of the rights, objectives and policies of the European Union? What results can we hope to see from the changes to decision-making on social matters? This Policy Brief will analyse the contribution of the Lisbon Treaty in the social sphere. At the same time, it should be pointed out that the actual potential of the Lisbon Treaty will largely depend on the extent to which the institutional players and social partners are capable of utilising the possibilities that it contains.

Downgrading of the Charter of Fundamental Rights

The Charter of Fundamental Rights, which was adopted and promulgated by the Presidents of the European Commission, the European Parliament and the Council of the European Union on 7 December 2000 and again on 12 December 2007, is no longer an integral part of the Lisbon Treaty (having formed Part II of the Constitutional Treaty). It is now appended to the Treaty, which refers to it as having the same legal status as the other Treaties: the Treaty of European Union (TEU, amended) and the Treaty on the Functioning of the European Union (TFEU or Lisbon Treaty, replacing the former Treaty Establishing a Constitution for Europe, TCE). This means that the fundamental rights set out in the Charter have exactly the same legal status as other rights enshrined in the Treaties, in particular economic freedoms (Bercusson 2009, 92); In comparison, the Constitutional Treaty went so far as to raise the status of the

Charter to that of constitutional norm within the hierarchy of legal norms, thus ranking it higher than the rights set out in Part III of the Constitutional Treaty, in particular economic freedoms. This downgrading of the Charter in the hierarchy of norms represents a substantial threat to the maintenance of fundamental social rights. Moreover, it does little to encourage the European Court of Justice to hand down more ambitious rulings with more respect for fundamental social rights than for economic rights. Indeed, in the light of the *Viking* and *Laval* rulings of the ECJ, this constitutes a definite threat to social Europe, for 'if economic freedoms trample on the right to strike, then why not the entire social *acquis communautaire*?' (Bercusson 2009, 104).

Furthermore, the Lisbon Treaty mentions at several points that European Union powers cannot be increased in order to guarantee the implementation of the Charter of Fundamental Rights. This considerably limits the scope of the Charter and is characteristic of the political aim of the United Kingdom, in particular, to place a strict limit on Union competence in social affairs. Finally, the Charter of Fundamental Rights is legally binding on 25 Member States, with the United Kingdom and Poland benefiting from a derogation with regard to its implementation.

Nonetheless, the fundamental rights laid down in the Charter have the binding force of law from now on and must therefore be guaranteed by Community and national judges when applying Community law. Divided into three groups, fundamental rights consist of civil rights (human rights such as those guaranteed by the European Convention on Human Rights drawn up by the Council of Europe), political rights specific to European citizenship as laid down in the treaties, and economic and social rights arising from the Community Charter of the Fundamental Social Rights of Workers adopted in 1989. The Charter of Fundamental Rights (Bercusson *et al.* 2006) recognises not only the right to equal treatment and non-discrimination, but also and above all workers' rights such as the right to information and consultation of workers within a company, the right to collective bargaining and industrial action, access to placement services and protection against unfair dismissal, fair and equitable working conditions, a ban on child labour and protection of young people at work, the right to family and working life, social security and social assistance, health protection, and access to services of general economic interest.

Given that the ECJ already refers to the Charter as a source of law and has even identified the right to strike as a fundamental right that is integral to the general principles of law (Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and Others*, of 18 December 2007, para. 90 and 91), what is significant is not so much the recognition of a specific social right and its binding force of law as the extent to which its exercise is limited, particularly when it conflicts with one of the fundamental principles of the European Community (the free provision of services in the case of *Laval*) and must undergo a proportionality test.

In overcoming this sizeable obstacle, the accession of the European Union to the European Convention for the Protection

of Human Rights and Fundamental Freedoms could prove to be a sizeable asset.

Accession to the ECHR: a saving grace

The European Union has now been granted legal personality (Art. 47-50 TEU), allowing it to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Accession has been provided for (Art. 6(2) TEU), but there is no further indication of when this will occur or the procedure to be followed. A consequence of accession will be a proposal to take as a basis the interpretation of the Community Treaties made by the European Court of Human Rights. This has major implications because, unlike the ECJ, the European Court of Human Rights takes fundamental social rights as the baseline when determining the proportionality of any limitation imposed on them, particularly by the implementation of economic freedoms. This would therefore lead to the status of fundamental social rights and of economic freedoms being reversed. Specifically, in the *Viking case (International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti, (Case C-438/05))*, it could be possible to invoke Article 10 or 11 of the ECHR, and as a result the proportionality test would apply not to social rights but to economic freedoms. This would ascertain whether the restrictions on fundamental social rights set out in the ECHR, restrictions designed to allow the implementation of economic freedoms, are proportional.

While it is clear that accession must not affect the powers of the Union as laid down in the treaties (Art. 6(2) TEU), and that neither the Council of Europe nor the European Union is inclined to cause a dispute, legal experts tend to agree that the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms could be a way of aligning the jurisprudence of the ECJ with that of the European Court of Human Rights, creating a healthier balance between fundamental social rights and economic freedoms.

New social objectives of the Union to be integrated into all European policies

The Lisbon Treaty sets out new social objectives for the European Union, such as a social market economy aiming at full employment and social progress, the combating of social exclusion and discrimination, solidarity between the generations, the promotion of economic, social and territorial cohesion and solidarity between the Member States. A number of so-called horizontal social clauses stipulate that all European Union policies must take into account social and environmental requirements and so guarantee that the various policies and actions of the Union are coherent. Article 5a of the Lisbon Treaty thus contains an obligation to meet the requirements of promoting a high level of employment, of guaranteeing adequate social protection, of combating social exclusion and of ensuring a high level of education, training and protection of human health. Other horizontal provisions stipulate that

the social dimension must be taken into account in all actions of the Union such as the combating of inequality, promotion of gender equality or the fight against discrimination. This constitutes a safeguard designed to protect social policy which, combined with the modified values, aims and objectives of the Lisbon Treaty and particularly the reference to 'an internal market founded on a competitive social market economy' (Art. 3(3) TEU), might influence not only the ECJ to take decisions that are more in keeping with the new values of the Union, but the other European institutions, too, in their activities.

Qualified majority voting on social matters

Generally speaking, social policy is an area of what is called shared competence between the European Union and the Member States (Art. 4(2b) TFEU). This means that both the Union and the Member States can legislate and adopt legally binding instruments. The Member States exercise competence insofar as the Union has not exercised its own. The Member States also exercise competence insofar as the Union has decided to cease exercising its own. Since the Treaty of Amsterdam (1999) and the Treaty of Nice (2001), the European Council has acted by qualified majority on issues relating to improving the workplace to protect the health and safety of workers, working conditions, information and consultation of workers, the equal treatment of men and women on the labour market and in the workplace, and the integration of people excluded from the labour market. The European Council acts by unanimity (as laid down in previous Articles 137 and 251 TCE, now Articles 153 and 294 TFEU) for matters relating to social security and the social protection of workers, termination of employment contracts, collective representation and defence of workers' and employers' interests, conditions of employment for third country nationals with legal residency in the territory of the Union, and financial contributions for employment promotion and job creation. The European Council has no competence in matters of pay, the right of association, the right to strike or the right to impose lock-outs.

The Lisbon Treaty makes no provision for qualified majority voting to become normal procedure for matters of social policy, as called for by the European Trade Union Confederation (ETUC). As a consequence, the unanimity rule remains in place for all decisions relating to social protection. However, an exception has been introduced to this rule with the extension of qualified majority voting to matters involving social benefits for migrant workers and their families. This was to promote the free movement of workers by means of a 'special legislative procedure': where the Treaty on the Functioning of the European Union provides that the Council shall act unanimously in a specific field or case, the European Council may adopt a decision authorising the Council to act by qualified majority in this specific field or case (Art. 48(7) TEU).

Furthermore, the Lisbon Treaty repeats a 'bridging clause' (Art. 153(2) Treaty of Lisbon) permitting the use of qualified majority voting to avoid a stalemate arising from the use of unanimity on a number of social issues, such as the protection of workers in the

event of termination of an employment contract, the collective representation and defence of workers' rights, and conditions of employment for third country nationals. According to legal opinion, the bridging clause and the extension of qualified majority voting to social benefits for migrant workers and their families could be beneficial to social policy (Sauron 2008, 96). However, there is still the 'appeal clause' to reckon with (Art. 48 TFEU), which provides that if a Member State considers that a legislative act would adversely affect an important aspect of its social security system that is in conflict with a decision taken by qualified majority, it may appeal to the European Council to obtain the suspension of the ordinary legislative procedure for a period of four months. This right, tantamount to a veto, reinforces the fact that the European Union must not undermine the ability of the Member States to define the fundamental principles of their social security systems, nor must it affect the financial equilibrium of these systems (Art. 153(4) TFEU). It is thus becoming extremely hazardous – if not actually impossible – to imagine any introduction of substantial changes intended to step up the coordination of social security systems.

Role of the social partners

There has been no substantial amendment to the articles on European social dialogue, but the formal recognition of the role of the social partners in a new Article (152 TFEU) constitutes symbolic progress, as it not only recognises their autonomy but also reaffirms the support that the European Union is obliged to give them for the promotion of social dialogue. This article appeared as Article I-48 of the Constitutional Treaty under the heading 'Democratic Life of the Union'. The fact that it is now included in the chapter on the functioning of the European Union rather than in the Union Treaty remains difficult to interpret. Some (ETUC 2007b) view this as a weakening of the social partners' contribution to democratic life and to social dialogue as set out in Article 152 TFEU. Others consider that since both Treaties have the same legal status (Art. 1(3) TEU), moving this reference to action by the social partners is designed to strengthen representative democracy (Syrpis 2008, 227). The Tripartite Summit for Growth and Employment is acknowledged as the institutional body that contributes to the social dialogue. This establishes an important institutional link between the social partners, the social dialogue and, more generally, the economic policies of the European Union. Whilst the European institutions regularly call on the social dialogue to contribute to the European Employment Strategy, without, however, increasing the resources available to the social partners, a number of scholars agree that the new Article 152 TEU recognises the practical support to be provided by the institutions (Bercusson 2008, 100).

Public services: long-awaited recognition

Public services or services of general economic interest receive clear support in the Lisbon Treaty (Protocol No. 9 on Services of General Interest, appended to the TFEU): the Treaty creates

a legal basis for them so that the European Union will be able to define the principles and conditions governing their provision (Art. 14 TFEU). It also recognises the essential role of public services and guarantees the principle of universal access to services of economic interest, as well as recognising the competence of the Member States with regard to non-economic services of general interest. It gives national, regional and local authorities wide discretion in ensuring the smooth functioning of these services and their financing.

At European Union level, services of general interest are therefore no longer treated as exceptions or special cases in a universe dominated by the law of competition. On the contrary, they are viewed as constituent parts of the European political project and as necessary for the future. Such recognition ought to pave the way towards establishing a regulatory framework that reflects European values and in which services of general interest have their rightful place. However, there is a danger that, in the medium term at least, this institutional commitment may fail to produce the necessary specific regulations as called for by the ETUC and numerous European trade union federations (such as the European Federation of Public Service Unions, EPSU) and national trade unions (Kowalski 2008), since the European Commission will refrain from submitting any legally binding Community initiatives, viewing the current framework set out in the protocol appended to the Lisbon Treaty as sufficient. Moreover, the related dossier dealing with the social aspects of public procurement has been passed on to DG Enterprise and DG Employment, Social Affairs and Equal Opportunities, the latter of which treats services of general interest as initiatives falling within corporate social responsibility, and advocates not only a voluntary and non-regulatory approach, but, in addition, different approaches for different services, preferring to work on a case-by-case basis (European Commission 2008). Such regulatory inertia represents a retrograde step that has been condemned by many of the social partners (EPSU 2009).

The open method of coordination remains an implicit reference in the Lisbon Treaty

Finally, the open method of coordination (OMC) introduced at the European Council in Lisbon in 2000 remains an implicit reference in the Lisbon Treaty (see Art. 149, 156, 165 and 166 TFEU). It represents a flexible and non-binding instrument for coordinating national policies, with Member States essentially having competence for social affairs, and has applied in particular to employment since 1997, social inclusion since 2000, pensions since 2001, the modernisation of social protection as well as education and training since 2002, and long-term healthcare since 2004. According to Declaration 31 on Article 156 TFEU, 'These measures to provide encouragement and promote coordination (...) shall be of a complementary nature. They shall serve to strengthen cooperation between Member States and not to harmonise national systems'. While the OMC promotes a certain degree of coordination of national social policies, does it not move the Member States further away from the traditional integration process? Generally speaking, the Lisbon Treaty does not modify the division of competences between the Union and

the Member States, and its potential impact on social issues will continue largely to depend on the dynamism and political will of the Community institutions and the social partners in making full use of the competences granted to them.

The citizens' initiative: strengthening democratic legitimacy

The Lisbon Treaty introduces into Article 11(4) TEU the possibility for not less than one million citizens of the Union, who are nationals of a significant number of Member States, to take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. According to Article 24 TFEU, the European Parliament and the European Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for the submission of a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come. This new addition considerably strengthens European democracy and the active participation of citizens, particularly in social affairs. Here, too, the success of this measure will depend on the ability of those involved to use this right. To guarantee the exercise of this right, the European Union must adopt a Regulation setting out the rules and basic procedures. The European Commission has therefore launched a consultation exercise with civil society by means of a Green Paper on a European citizens' initiative (COM (2009) 622 final), describing in full the legal, administrative and practical issues to be clarified in the Regulation. The consultation will conclude in January 2010.

Conclusion: a missed opportunity for boosting a social Europe

Legal opinion is unanimous: the Lisbon Treaty will have only a minor impact on social Europe, since it not only constitutes a retreat from the forward-looking proposals in the Constitutional Treaty, but also fails to open up any prospects for a genuine social Europe (ETUC 2007b and 2009). It seems that in the long term, European social policy will remain subordinate to the economy until such time as national sovereign powers in social matters are transferred – even partially – to the European Union, since the Member States are primarily responsible for holding up progress on social affairs in Europe (Trepant 2002, 111). Finally, while the Lisbon Treaty states that 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. (...) It shall combat social exclusion and discrimination, and shall promote social justice and protection' (Art. 3(3) TEU), a balance needs to be re-established in Community law – as interpreted by the ECJ – between economic rights and freedoms and fundamental

social rights by challenging the primacy of the internal market over other Community policies, and social policy in particular. Lastly, there is room for hope, especially in view of the fact that the Charter of Fundamental Rights is now formally recognised as legally binding on the European Union and the Member States, and with regard to the accession of the European Union to the ECHR. In conclusion, it is clear that a social Europe will only be brought about by a state of permanent mobilisation and deep commitment on the part of the institutional players and social partners.

Bibliography

Bercusson, B. (2009) *'The Lisbon Treaty and social Europe'*, Paper presented at the ERA conference on recent developments in European Labour Law, 3-4 April 2008.

Bercusson, B. et al. (2006) *European labour law and the EU Charter of Fundamental Rights*, Baden-Baden: Nomos.

Charter of Fundamental Rights of the European Union (2000), solemn proclamation, European Parliament, Council of the European Union, European Commission, OJEC C 007/8 of 11/01/2001. http://www.europarl.europa.eu/charter/pdf/text_en.pdf

European Commission (2009) *Green Paper on a Citizens' Initiative*. COM 622 final. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0622:FIN:EN:PDF>

European Commission (2008) *Study Contract: Social Considerations in Public Procurement*. <http://ec.europa.eu/social/main.jsp?catId=331&langId=en&newsId=417&furtherNews=yes>

European Trade Union Confederation (2007a) *EU Reform Treaty: Statement by the ETUC*. <http://www.etuc.org/a/4176>

European Trade Union Confederation (2007b) *Reform Treaty: ETUC laments a missed opportunity to boost social Europe*. <http://www.etuc.org/a/4117>

European Trade Union Confederation (2004) *The ETUC Steering Committee supports the European Constitution as a "starting point" for progress towards stronger social values in the European Union*. <http://www.etuc.org/a/415>

European Federation of Public Service Unions (2009) *Further comments from trade union Federations and affiliates on European Commission consultation on the draft guide of 3 April 2009 taking account of social considerations in public procurement*. http://www.epsu.org/IMG/pdf/consultation_SRPP_guide_further_comments_May_2009.pdf

Kowalski, W. (2008) 'ETUC perspective on public services in the light of the new Treaty of Lisbon', *Transfer* 15 (2), 351-354.

Sabatakis, E. (2008) 'A propos du Traité de Lisbonne et de l'Europe sociale', *Revue du Marché commun et de l'Union européenne*, (520), 432-441.

Sauron, J. L. (2008) *Comprendre le Traité de Lisbonne*, Paris: Gualino.

Schömann, I. and Clauwaert, S. (2003) 'The EU Charter of fundamental rights in the case law of the courts of the European Union: towards recognition of the constitutional value of the EU Charter', in E. Gabaglio and R. Hoffmann (eds.) *European trade union yearbook 2002*, Brussels: ETUI, 65-86.

Syrpis, P. (2008) 'The Treaty of Lisbon: much ado ... but about what?', *Industrial Law Journal*, 37 (3), 219-235.

Toulemon, R. (2008) 'Regard sur le Traité de Lisbonne', *Futuribles*, (340), 57-64

Trepant, I. (2002) *Pour une Europe citoyenne et solidaire: l'Europe des Traités dans la vie quotidienne*, Bruxelles: De Boeck, bibliothèque de droit social.

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