

# Global Workplace Law & Policy

## A treaty change on the horizon? – what this could mean for social policy and labour law

Ane Fernandez de Aranguiz Chueca (Tilburg University (The Netherlands)) · Wednesday, March 29th, 2023



On 9 May 2022, the report on the final outcome of the Conference on the Future of Europe, which contained 49 proposals and 320 targetted measures, also in the area of employment and social policy, was presented to the Presidents of the European Parliament (the Parliament), the Council of the European Union (the Council) and the European Commission (the Commission). The three presidents then agreed to examine the report carefully and decide on the way forward within their own spheres of competence. In reaction to this, the Parliament [called](#) for the establishment of a Convention to amend the Treaties in a way in which they are capable of addressing the requests of the Conference on the Future of Europe. In the [state of the Union address](#), the president of the Commission Ursula von der Leyen [supported](#) this call. Although [many \(13\) Member States](#) have

shown their reluctance to any Treaty changes, their concerns being mostly grounded on the need to focus on the current crisis, **others** (7) see the need to amend the Treaties. Until now, the Council has not given an official reply, arguably **breaching** the procedure established in Article 48 TFEU but has **claimed** to postpone the response until the Committee on Constitutional Affairs is done preparing the proposals for Treaty Amendments as requested by the European Parliament. It has stressed, nevertheless, that the vast majority of the proposals can be implemented without further change. For now, it is unlikely that a Treaty change could soon take place, but it may nevertheless signal changes on the horizon. In this context, this contribution aims to clarify what the potential implications of such Treaty change could mean for the future of social policy in the EU.

In its submission to the Council, the Parliament set a number of areas of change, including enhancing its own capacity in the decision-making process by limiting the areas in which the Council may act by unanimity and through the special legislative procedure (which derogates the role of the Parliament from co-legislator to consultor). This includes, specifically, triggering passerelle clauses, which are precisely mechanisms to modify the decision-making procedures without an official treaty change. Passerelle clauses exist in the Social Policy Title (153 (2) TFEU) and therefore such an amendment could facilitate finding consensus in future social policy instruments.

In addition, the Parliament also requested to enhance its role and equip it with full co-decision rights on the EU budget and the legislative process. This amendment could, more effectively free the disproportionate use of the special legislative procedure in the Social Policy Title and the citizenship competence and, thus, benefit from a more direct citizens participation in policy making in these areas.

Leaving procedures aside, the Parliament also requested to amend the competences of the EU in a number of areas, including, in social and economic policies. In particular, the Parliament considers these changes necessary for the full implementation of the European Pillar of Social Rights (EPSR). Moreover, such an amendment could be used to incorporate the objective of ‘social progress’ within Article 9 TFEU, the so-called horizontal social clause. The goal of this provision is to **mainstream** social objectives across all policy areas. However, until now, it’s potential has been **untapped**. The revision of Article 9 TFEU, would thus aim at releasing its potential. To this end, the proposal is not only to change the wording of it, which is considerably more softly formulated than the equality horizontal clauses, but to link Article 9 TFEU to a Social Progress Protocol.

Such a Social Progress Protocol was recently **proposed** by the European Trade Union Confederation (ETUC) which aims at tackling areas in which the EU has a negative interference. This entails that, for example, in a case of conflict between the worker’s and trade union’s rights on the one hand, and the EU’s economic interest on the other, the former would have a preference in the hierarchy of norms. This is also in line with the recent **case law** of the European Court on Human Rights. Probably in response to the **EPSU** appeal case before the European Court of Justice, the proposal of ETUC also calls for reiterating the autonomy of social partners and the well-functioning of social dialogue at the European and national levels. Lastly, the Social Progress Protocol would require Member States to constantly strive for improvement in their working and living conditions. This idea of social progress matches the expectations of a progressive realisation of social rights. In this vein, it is worth mentioning that current Article 151 TFEU, which sets the social objective of the Union, already requires the promotion of employment, and improved living and working conditions. As such, a revision of Article 9 TFEU would act as an explicit

mainstreaming force of Article 151 TFEU in other policy areas. It would, moreover, serve as a non-regression clause on the one hand and as a promotion and protection of the higher social rights standards on the other. As amended, Article 9 TFEU, would give some teeth to the implementation of the EPSR by establishing an obligation for social progress. In practice, this would not necessarily mean that social rights cannot be limited in exceptional circumstances. Rather, it would ensure that limitations, much like for any other fundamental rights, are prescribed by law, pursue a legitimate aim and are necessary and proportionate. It would, therefore, prevent unjustified derogations from social rights, particularly, restrictions as a consequence or at the expense of progress in other areas of EU law.

Besides the current proposals on the table, a revision of the Treaties could also unblock some competence fields in the area of social policy. For example, by entitling the EU to adopt minimum standards in the field of combating social exclusion and the modernization of social security systems, which currently exclude harmonisation. Granted, these fields would be bound to the same limitations of Article 153(4) TFEU, which limit EU interference regarding the fundamental principles of social security (and arguably social protection) and the financing of these. However, it would allow the EU to tackle important deficiencies in the field of social protection and ensure that in this process those Member States that aim at the highest standards are not put in a strong disadvantaged position because of it. The field of combating social exclusion, differently, would allow the Union to also make some hard legislation for the third chapter of the EPSR, which at the moment, even if it contains most principles, has only been implemented through soft-law. It can even be argued that, the combating of social exclusion being one of the general objectives of the EU (Art. 3 TEU), it is illogical not to grant the Union any competence in this matter.

An important change in the personal scope of the social competences would be to address, in addition to workers, also other dependent individuals, like solo self-employed. This way, the EU would not have to resort to other legislative bases (like Article 352 TFEU in the [recommendation](#) on social protection) to extend the area of protection to the self-employed. The same goes for the potential representation of some self-employed people. As such, a future amendment could serve as an explicit acknowledgment of the changing labour markets. This would also be more in line with Commission [guidelines](#) on the right of solo self-employed people to collectively bargain in the context of competition rules.

There are, of course, many possibilities under any future Treaty change. Arguably, one of the biggest challenges of the EU, particularly when looking at it from a social policy and redistribution point of view is its lack of competence in the area of taxation (besides its impact on the internal market). Not only are taxes a key factor in the formulation of social policies, but in most countries, they are the main, if not only redistribution tool. As such, without any competence in the area of taxation, the role of the EU in ultimately reducing inequalities among its citizens is arguably rather marginal. The lack of a more comprehensive system among Member States also creates uncertainty among mobile citizens. Another possibility is for the EU itself to be able to [levy its own taxes](#) although this debate seems at least politically quite unfeasible at the moment.

The fact that both the Parliament and the Commission, as well as a significant block of the Member States supports a Treaty change clearly signals a need for action. Even if this does not materialise through an amendment in the near future, a compromise would be to [trigger](#) the existing pasarelle clauses, as it has been proposed by the [Commission](#) already in 2019, and give the Parliament a bigger role in the EU's (social policy) decision-making process, thus also increasing the democratic accountability of the EU.

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