



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR EMPLOYMENT, SOCIAL AFFAIRS AND INCLUSION

The Director-General

Brussels,
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Dear Mr Visentini,

I would like to thank you for ETUC's active engagement in the debate on more efficient decision-making on social policy that was launched by the Commission Communication of 16 April 2019.

I take note of ETUC's preliminary position on this matter, adopted by your Executive Committee in June, and would like to clarify a number of procedural issues linked to the application of the passerelle clauses which your preliminary position raises.

The two passerelle clauses applying to social policy (the general clause in Article 48(7) TEU, and the specific clause in Article 153(2) TFEU, last subparagraph) have different procedural features.

The specific clause for social policy is activated by the Council (deciding by unanimity) on a proposal from the Commission, and after consulting the European Parliament. It 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. In accordance with Article 153(2) last subparagraph, this would render the ordinary legislative procedure applicable to the protection of workers where their employment contract is terminated (dismissals); the representation and collective defence of workers' and employers' interests; and conditions of employment for third-country nationals legally residing in the Union.

The general clause (in Article 48(7) TEU) is activated by the European Council deciding by unanimity, with no objection from national Parliaments within 6 months, and with the European Parliament's consent. This allows for measures in the area or case concerned, subject to voting by unanimity, to be adopted subsequently by the Council by qualified majority, or, in the case of special legislative procedures, to be adopted by the European Parliament and the Council through the ordinary legislative procedure. It is for the European Council to take the initiative, indicating the scope of the envisaged change in the decision-making procedure.

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The Treaties are silent regarding the question if and under which conditions a decision to activate a passerelle clause can be revoked. 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.

Your preliminary position raises the question whether a non-regression clause could be included in the Council decision that triggers the use of the specific passerelle clause, in order to avoid negative consequences on existing national protection. It would be for the European Council (for the general clause) or the Council (for the specific clause) to frame the scope to trigger the respective passerelle clause, including the possible insertion of a non-regression clause against lowering the general level of protection afforded by Union law. As regards the specific clause, the Council has to act within the scope set by the proposal from the Commission.

Finally, your position paper asks for reassurance that passerelle clauses do not change the role of social partners and the procedure for adopting and implementing social partner agreements at Union level. I am happy to reaffirm 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.

It is also important to note 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.

I look forward to continue further engaging with you in this debate.

Kind regards,



Joost KORTE