THE LISBON TREATY AND SOCIAL EUROPE

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On 1 December 2009 the Treaty of Lisbon entered into force. Although often described as primarily technical it significantly amended the Treaty on the European Union (TEU) and the old EC Treaty (now the Treaty on the Functioning of the European Union, TFEU). The authors' aim in this book is to explore what the Treaty means for social law and social policy at the European level. The first part of the book on the general framework looks—at a time of financial crisis—for new foundations for Europe's Social market economy, questions the balance between fundamental social rights and economic freedoms, analyses the role of the now binding Charter of Fundamental Rights of the European Union, maps the potential impact of the horizontal clauses on social policy, and addresses the possibilities for social partners to enlarge their role in labour law and industrial relations.

The importance of fundamental rights is not only highlighted by the legally binding Charter of Fundamental Rights. The Lisbon Treaty has also tightened the relationship to the European Convention on Human Rights. Aware of this fact and of the new case-law of the European Court of Human Rights in respect of in particular collective social rights several authors are working on a publication which will deal with these problems and opportunities.

The second part, on the social framework of the Treaty, focuses on the development of the Union's competences. In it the authors evaluate the consequences of the new general framework on social competences, analyse the evolution of the principle of subsidiarity and its impact in the new Treaty, look at the coordination of economic policies in the light of fundamental rights, and analyse the adoption in the Treaty of a new architecture for services of general interest.

The manuscript was completed in the summer of 2011 and therefore does not cover the most recent developments in respect of the impact of the economic and financial crisis on the EU Treaties and European social law. However, the authors are currently working on a new publication dealing with the consequences of the economic and financial crisis on European social policy fields.

Foreword

The Treaty of Lisbon, which came into force on 1 December 2009, takes its inspiration from the so-called European Convention held from 2001 to 2003 and originally intended to give birth to a European Constitution. While the Lisbon Treaty fails to live up to such a far-reaching expectation, it does, nonetheless, significantly amend the Treaty on the European Union (TEU) as well as the former EC Treaty, now renamed Treaty on the Functioning of the European Union (TFEU). Though the European Union was originally launched as primarily an economic project—in the form of the European Economic Community—its social competences and regulations have developed over the years, enriched by references to fundamental rights which are now legally binding and thus serve to underpin legislation and case law relating to European social law and European social policy.

In view of a widespread tendency to regard these new social elements in the Treaty as little more than programmatic declarations of scant legal significance—especially during situations such as the present economic and financial crisis—there is a need for an in-depth analysis of the new implications as they stem from the new legal framework enshrined in the Lisbon Treaty. This book, conceived from a primarily labour law perspective, represents an attempt to fill this gap.

The authors' aim is to enquire what the new Treaty means for social law and social policy, at both the European and the national level. In a first part on the general framework of the social dimension of the European Union, the authors seek to explore, during a period marked by financial crisis, some of the possible new foundations for Europe's Social market economy. They explore, to this end, whether the distinction, as well as the relationship, between *values* and *objectives* might provoke a shift in the 'balance' between fundamental (social) rights and fundamental economic freedoms; they question the role of the Charter of Fundamental Rights; they analyse the potential impact of the horizontal clauses on social policy on the basis of the experience of gender mainstreaming; and they address the possibility given to social partners to enlarge their role in labour law and industrial relations at all EU institutional levels.

In a second part devoted more specifically to the social framework of the Lisbon Treaty itself, the authors focus on the developments of the Union's competences by evaluating the consequences of the new general framework on (social) competences. Here they analyse the evolution of the principle of subsidiarity and its impact in the new frame of the Treaty; examine the coordination of economic policies, as a reading of the Treaty which takes

its policy goals seriously by stipulating that EU economic governance must incorporate social policy and fundamental rights assessments of all proposed policy measures; and finally analyse the services of general interest, as the Treaty marks an important stage in the adoption of a new architecture to govern and underpin Services of General Interest.

The Transnational trade union rights experts' network of the European Trade Union Institute (ETUI), comprising labour law academics from different EU member states—Niklas Bruun (Finland) and Klaus Lörcher (Germany), the two coordinators of this volume, Thomas Blanke (Germany), Simon Deakin (Great Britain), Filip Dorssemont (Belgium), Antoine Jacobs (Netherlands), Csilla Kollonay-Lehoczky (Hungary), Bruno Veneziani (Italy), and Isabelle Schömann (ETUI)—undertook the task of analysing the impact of the Lisbon Treaty on social Europe out of a belief that such an analysis could provide, particularly during the current period of economic crisis, a new understanding of the Lisbon Treaty's potential to influence social Europe. The critical commentary of the social dimension of the new Treaty presented in this book is an attempt to contribute to public debate as well as to the academic arena of the future framing of social Europe. The intention is to stimulate research and deepen reflection upon the process of European integration as well as to develop arguments that may be used in legal proceedings, including before the Court of Justice of the European Union. The project was started under the leadership of the late Brian Bercusson. The authors could have paid no better tribute to Brian's memory than to complete this book in the spirit of promotion of a social Europe.

The ETUI wishes to thank the authors for their in-depth analysis which shows how a comprehensive interpretation of the Lisbon Treaty could contribute to the achievement of a better and more social Europe.

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Contents

Introduction

ON 1 DECEMBER 2009, the Treaty of Lisbon entered into force. Its content was developed around 2001–03 by the so-called European Convention, convened especially to give birth to a European Constitution. However, after the negative results of the referendums in France and the Netherlands it was decided to strip this document of the controversial epithet 'European Constitution', but to insert its text, slightly modified, into the existing European Treaties. That has been done through the Treaty of Lisbon. Under this treaty, the Treaty on the European Union (TEU) has changed significantly. The same applies to the old EC Treaty, which in future will be known as the Treaty on the Functioning of the European Union (TFEU).[1]

The EEC was launched in 1957 primarily as an economic project. The social component was largely neglected. The founding fathers had confidence in the ability of the common market to prompt social progress so that only some coordinating incentives would be needed. Consequently, the EEC Treaty did not contain many specific competences enabling the EC institutions to issue social regulations.[2]

It was only at the summit in Paris, April 1972, that it was formally recognised that the social objectives of the EEC are as important as its economic objectives. Since that time, the EEC rules in this area have increased. Even so, the harvest initially was small, because in those days European social legislation could be created only by a unanimous vote in the EC Council of Ministers, and that was seldom achievable.

However, since 1986, in successive Treaty amendments, on a steadily growing number of social issues the unanimity rule in the Council of Ministers has been converted into qualified majority voting. This has made decision making on social matters slightly—although not much—easier. Since 1992, certain provisions have also been included in the European Treaties which open up the possibility of creating, alongside heteronomous law (law created by public authorities), autonomous European social law (law created by trade unions and employers). Finally, since 1997 the EU Treaties have been enriched by references to fundamental rights, which

[1] See the consolidated versions of the Treaties in OJ C 30.3.2010.

[2] The Treaty provisions which expressed this (Articles 117 and 118 of the Treaty of Rome, 1957) have been retained almost unchanged and are now in Articles 151 and 156 TFEU.

may support legislation and case law relating to European social law and European social policy. Now there is the Treaty of Lisbon.

What do the new texts mean for social law and social policy, both at the European level and at the national level?[3] That is the theme of this book. We will deal with the economic versus the social constitution; the values and objectives; the European Court of Justice (ECJ) in conjunction with the European Convention on Human Rights (ECHR); the role of the social partners in Europe; the social competences and the law making process in social matters; the principle of solidarity; the coordination of social and economic policies; services of general interest; EU governance; and references to the EU Charter.

I. THE ECONOMIC VERSUS THE SOCIAL CONSTITUTION

In recent years it has become increasingly clear that the EU is not necessarily a boon for social justice and social policy, but entails great risks as the EU embraces the 'laws of the market' and 'free competition'.[4] The oldest text of the Treaty, which offered a very liberal market model, inspired the European authorities—notably the European Commission and the European Court of Justice—to take strong action against so-called distortions of competition and against state aid by Member States in favour of their own industries.

Over the years, however, anxiety has increased among citizens in many countries that the freedoms of the European market have led to much collateral destruction of acquired rights. European policy on the 'distortion of free competition' and state aid are understandable in relation to the major economic players. However, they have also led to highly questionable interference on the part of 'Europe' in the maintenance of employment in regional context; decent working conditions and social security; public services; and aspects of the socio-cultural policies of the Member States, for example in the areas of support for social housing, sport, public broadcasting and even zoos.

Under pressure from a restive public, politicians are more and more reluctant to apply the 'laws of the market' consistently. For instance, fear

[3] See also C Barnard, 'Social policy revisited in the light of the constitutional debate' in C Barnard (ed), *The Fundamentals of EU Law Revisited* (Oxford, 2007) ch 5; E Sabatakis, 'A propos du Traité de Lisbonne et de l'Europe sociale' (2008) *Revue du Marché commun et de l'Union européenne* 432–41; P Syrpis, 'The Treaty of Lisbon: Much Ado … But About What?' (2008) 37 *Industrial Law Journal* 219–35; B Bercusson, 'The Lisbon Treaty and Social Europe' (2009) 10 *ERA-Forum* 87–105.

[4] ATJM Jacobs, 'The social Janus head of the European Union: social market economy versus ultraliberal policies' in J Wouters et al (eds), *European Constitutionalism beyond Lisbon* (Antwerp, 2009) 111–28.

of the replacement of their own workers by cheaper foreign workers (the 'Polish plumber') has led to a substantial dilution of the Services Directive.[5] Some Member States, such as France and Spain, continue to protect their key industries and in 2006 took emergency measures to prevent the acquisition of their energy giants by Italian and German rivals, respectively. Also, state aid to national industries still frequently rears its head (see the proposed German aid to Opel, 2009). And the European Commission immediately rallied to support some Member States when their main banks got into trouble in 2008.

At present, it is notably the EU Court of Justice which in various judgments is showing its attachment to market liberalism by giving it priority over other values. In the cases *Viking*[6] and *Laval*[7] the right to take collective action was held to be inferior to the economic freedoms in an open European market. In *Rüffert*,[8] based on the grounds of the same philosophy, a German regional government was prohibited from imposing social conditions on public procurement, a tried and tested device for achieving social progress, recommended by the ILO.[9] In *Commission v Luxembourg*,[10] a Member State was prohibited from requiring higher labour standards for the employment of foreigners than prescribed in the EU Posted Workers Directive.

These judgments have brought to light two fundamental problems of social law and social policy:

— Which rules apply if the social rights come into conflict with the 'laws of the market'?[11]
— Do Member States still have the freedom to enact or maintain their labour and social security law as long as it is more favourable to the workers?

It is interesting to consider the extent to which the entry into force of the Treaty of Lisbon has changed the answers to those questions. This is the theme of the chapter by Simon Deakin.

[5] Directive 2006/123/EC.

[6] Case C-438/05, 2007 ECR I- 10779 (*Viking*).

[7] Case C-341/05, 2007 ECR I-11767 (*Laval*); see R Blanpain (ed), 'The Laval and Viking Cases' (2009) 69 *Bulletin of Comparative Labour Relations*.

[8] Case C-346/06 CoJ EC 3.4.2008 (*Rüffert*).

[9] N Bruun, A Jacobs and M Schmidt, 'ILO Convention No 94 in the aftermath of the *Rüffert* case' (2010) 16(4) *Transfer* 473–89.

[10] Case C-319/06 CoJ EC 19.6.2008 (*Commission v Luxembourg*).

[11] A Vimercati, *Il Conflitto Sbilanciato* (Bari, 2009); U Carabelli, *Europa dei mercati e conflitto sociale* (Bari, 2009).

II. VALUES AND OBJECTIVES

Regarding the first question, it should be noted that at the European Convention 2002–03 there was little discussion of whether the character of Europe as a social market economy was to be confirmed in the proposed European Constitution. There were various proposals to reinforce the social face of the EU by inserting principles such as human dignity, equality, social justice, solidarity,[12] sustainable development, social progress, full employment and the battle against social exclusion. All these concepts have finally entered the European Treaties by way of the Treaty of Lisbon and found a place in Articles 2 and 3 TEU and Article 67 TFEU.[13] Moreover, during the Intergovernmental Conference (IGC) of 2003–04 a so-called horizontal social clause was developed, which states that in defining and implementing its policies and actions, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion and a high level of education, training and protection of human health (Article 9 TFEU). This provision is seen as an expression of the desire to mainstream social policies in all areas of policy.

However, references to social values are counterbalanced by that other great EU objective, namely to maintain an 'internal market' (Article 3 TEU), characterised by an open market economy with free competition, with stable prices, sound public finances and monetary conditions and a sustainable balance of payments, among other things. In the reformed European Treaties all this has found a place in Articles 119 and 120 TFEU and is further developed in numerous Articles on the free market and competition. However, it is significant that, at the insistence of France, at the European Council in June 2007 it was decided[14] not to retain in the Lisbon Treaty the passage in the text of the draft European Constitution in the Article on the aims of the Union (Article I-3(2)) which stated that 'the Union ... will offer its citizens an internal market where competition is free and undistorted'. Apparently, the politicians found it a bit over the top to give the open market economy with free competition equal rank with the

[12] European Commission, 'Renewed social agenda: opportunities, access and solidarity in 21st century Europe' COM 2008 (412); T Hieronymi, *Solidarität als Rechtsprinzip in der Europäischen Union* (Frankfurt am Main, 2003); S Stjerno, *Solidarity in Europe: The History of an Idea* (Cambridge, 2005); L Wilde, 'The concept of solidarity: emerging from the theoretical shadows?' (2007) *British Journal of Politics and International Relations* 171; W Rehg, 'Solidarity and the Common Good. An analytical framework' (2007) *Journal of Social Philosophy* 7; N Karagiannis (ed), *European Solidarity* (Liverpool, 2007); M Ross, *Solidarity in EU Law* (Oxford, 2009).

[13] See K Lenaerts and M Desomer, 'Bricks for a Constitutional Treaty of the European Union: values, objectives and means' (2002) *ELRev* 377–407; T Koopmans, 'De Europese Conventie—een tussenstand' (2003) *SEW* 195.

[14] Document, European Council 11177/07, p 24.

other aims, including the social objectives of the EU. Free competition is now relegated to Protocol No 27 to the reformed European Treaties, which states that 'the European Union includes a system ensuring that competition is not distorted' and that 'the Union shall, if necessary, take action'.[15]

Finally, we may recall the elaborate 'Solemn declaration on the rights of workers, social policy and other issues' which the European Council adopted on 18/19 June 2009 as part of the overall package of facilities to ease the concerns of the Irish people regarding the Treaty of Lisbon.[16] While this statement contains nothing new—the content can also result from the various provisions of the reformed Treaties—it still signals that the politicians want to give the social rights extra emphasis. As such, it was endorsed in June 2009 by a petition signed by about 100 labour lawyers from many EU Member States. In all this sufficient arguments were discernible to suggest that in a future conflict between social rights and the laws of the market priority would be given to social rights. And 'priority' is stronger than the solution formula of 'proportionality' which permits limitations on social rights with regard to the laws of the free market, as the EU Court of Justice in its earlier cited decisions has used it.

Turning to the relationship between the EU and the ECHR, the Treaty of Lisbon says that the EU shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6(2) TEU), a provision which provides the necessary legal basis for such membership at any time in the future.[17] However, the realisation of this intention requires a Treaty which must be voted in the Council of Ministers with unanimity and endorsed by all EU Member States in conformity with their national procedures (Article 218(8) TFEU) and by all 45 Member States of the Council of Europe. Moreover, it is added that accession shall not affect the Union's competences as defined in the Treaties (Article 6(2), last sentence TEU) and that statement is repeated again in Protocol No 8 to the reformed Treaties (Article 2, first sentence), which ensures that accession shall not affect the competences of the Union and of its institutions nor the situation of Member States in relation to the ECHR.[18] This Protocol No 8 and Declaration No 2 in the Final Act of the IGC 2007 underline that the

[15] See Protocol No 27 on the internal market and competition, added to TEU and TFEU; Document, European Council 11177/07, p 24, note 16.

[16] Document, European Council 11225/09, pp 20–21.

[17] Such a legal basis was considered indispensable by the EC Court of Justice in its Opinion 2/94.

[18] Protocol No 8 specifies as such the special Protocols to the ECHR, measures taken by Member States derogating from the ECHR in accordance with Article 15 thereof and reservations to the ECHR made by Member States in accordance with Article 57 thereof. This is a current issue, for instance in view of a decision of the German Bundesverfassungsgericht of October 2004, in which it was stated that the ECHR is not the highest legal authority in Germany.

accession of the EU to the ECHR will be arranged in such a way that the specific characteristics of the EU and of EU law will be left untouched.

Serious problems may lie ahead when national courts are faced with a dual system of monitoring compliance with fundamental rights: the Court of Justice of the EU in Luxembourg and the European Court of Human Rights in Strasbourg.[19] This situation brings the potential risk that the number of legal disputes will double, as claimants may try to obtain adjustments of national law along two lines—in Luxembourg and in Strasbourg—and that these two courts have to rule on similar but not entirely congruent sets of rights. For labour and social security law one may think, by way of example, of the trade union rights, as mentioned in Article 11 ECHR[20] and in Articles 12 and 28 in the EU Charter of Fundamental Rights. Filip Dorssemont reflects on this in his chapter.

III. REFERENCE TO THE EU CHARTER OF FUNDAMENTAL RIGHTS

In recent decades, within the EU, increasing attention has been paid to fundamental rights. In the first place the Treaties of Maastricht and Amsterdam inserted amendments on the applicability of fundamental rights in the European Treaties. In particular, the Treaty of Amsterdam brought in a basic standard by which the ECHR and the fundamental rights enshrined in the constitutional traditions common to the Member States were recognised as general principles of Community law.[21] Moreover, the Treaty of Amsterdam inserted a few specific fundamental rights in the European Treaties.[22] Secondly, it was considered whether the EU as such could join the European Convention on Human Rights. Thirdly, the EU itself engaged in the preparation of a Charter of Fundamental Rights. This latter process was taken up in 2000 by a convention that drafted the so-called Charter of Fundamental Rights of the European Union.[23] This Charter was adopted in December 2000 by the European Council of Nice, but at that time it did not receive a legally binding character.

The European Convention that prepared the European Constitution departed from these points. It suggested therefore, first, inserting the EU Charter of Fundamental Rights in full into the European Constitution, thus making it

[19] LA Geelhoed, 'Een Europawijde Europese Unie: een grondwet zonder staat' (2003) *SEW* 299.

[20] J van Drongelen and ATJM Jacobs, 'Nieuwe vleugels voor de vakverenigingsvrijheid van art 11 ECHR' (2009) *NJB* 1781.

[21] Article 6(2) TEU as it stood until 1 December 2009.

[22] J Wouters, 'Institutionele aspecten van het Verdrag van Amsterdam' in R Blanpain et al (eds), *Europa na het Verdrag van Amsterdam* (Leuven, 1998) 77–84.

[23] G de Búrca, 'The drafting of the European Union Charter of Fundamental Rights' (2001) *ELRev* 126–38; B Bercusson (ed), *European Labour Law and the EU Charter of Fundamental Rights* (Baden-Baden, 2006).

legally binding. To gain enough support for that idea the Convention designed a number of additional provisions to limit the scope of the Charter. This was necessary to overcome the opposition of a number of governments—including those of the UK and the Netherlands—which strongly opposed the possibility that the Charter could become a source of dispute that could give the citizens direct claims against governments or employers. During the 2003–04 IGC stage the resistance to the inclusion of the Charter in the Constitution continued until the last moment. To overcome that resistance a few more sentences were added to the 'general provisions' of the Charter, particularly on the status of the official Explanations of the Charter. However, since the referendums in France and the Netherlands things have gone in a different direction. The IGC of 2007 at the insistence of (again) Britain and the Netherlands agreed to keep the full text of the Charter outside the reformed European Treaties. For the Dutch Government especially this was one of the most important points in order to provide it with enough arguments to convince the Dutch people that the Lisbon Treaty was substantially different from the European Constitution and thus that there was no need to call a new referendum. Instead of a complete incorporation of the full text of the Charter in the European Treaties, there is now only one reference to the Charter in the Treaty of the European Union, in which the Union recognises the rights, freedoms and principles set out in the Charter. It is added that the Charter shall have the same legal value as the Treaties, but it is also explicitly asserted that the Charter shall not extend in any way the competences of the Union as defined in the Treaties and that the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the Explanations referred to in the Charter that set out the sources of those provisions (Article 6 TEU). The version of the Charter established by the IGC in 2003–04 was agreed by the IGC in 2007 with another small modification and then endorsed by the EU institutions in Strasbourg on 12 December 2007 and published in the EU *Official Journal*.[24]

Many people believe that the Charter will be an engine for EU activities in the social field due to the fact that many fundamental rights have a social nature. Csilla Kollonay-Lehoczky, Klaus Lörcher and Isabelle Schömann reflect on this subject in their contribution.

IV. HOW THE HORIZONTAL SOCIAL CLAUSE CAN BE MADE TO WORK: THE LESSONS OF GENDER MAINSTREAMING

The new Article 9 of the Treaty on the Functioning of the European Union (TFEU) requires the EU institutions and the Member States to assess all their

[24] OJ EC C 303/1 of 14.12.2007.

policies, laws and activities in light of their implications for the achievement of social goals. In combination with the Charter of Fundamental Rights and the future accession of the EU to the Convention for the Protection of Human Rights and Fundamental Freedoms, it may contribute to a fundamental reorientation of EU legislation and jurisprudence towards social aims. The implementation of gender mainstreaming over the last 10 years enables identification of the key factors required if horizontal European policies are to succeed. The experience of gender mainstreaming shows in particular that, in order to develop its full potential, the new Horizontal Social Clause will require firm commitment on the part of all European actors involved in the fields of employment, social protection, the fight against social exclusion, education and training and human health. Subject to impetus by a strong political will, Article 9 has the potential to prompt significant redirection of the most liberal European policies towards social ends and to contribute to the emergence of a European social model.

V. THE ROLE OF THE SOCIAL PARTNERS IN EUROPE

In the Treaty of Maastricht (1992), the so-called social dialogue was anchored in the European Treaties. This is a remarkable process by which the European social partners have been given legislative powers of a kind (Articles 138–139 TEC). Since then, the European Commission in all its social policy initiatives must consult the European social partners. If the social partners so desire, the European Commission temporarily stops its preparatory work in order to enable the European social partners to take the matter into their own hands and to conclude an agreement on that matter. Subsequently, the social partners via the European Commission may offer their agreement to the Council of Ministers of the EU, which may convert it into a Directive, which is just as binding as other EC Directives.[25] These procedures over the past 10 years have been very little used and only for a few high profile issues.[26] Nevertheless, this possibility gives the EU a distinctive neo-corporatist streak. Not remarkable for the Benelux countries, Austria and the Scandinavian countries, but for many other EU countries it is extraordinary.

At the European Convention the European social dialogue was not called into question at all. On the contrary, it was embraced as an element of

[25] Alternatively, these agreements may be implemented in accordance with the procedures and practices specific to management and labour and the Member States (see Articles 138–139 TEC).

[26] E Franssen, *Legal Aspects of the European Social Dialogue* (Antwerp, 2002); M de Vos, *A Decade beyond Maastricht: The European Social Dialogue Revisited* (The Hague, 2003); ATJM Jacobs, 'European social consultation' in *Comission Consultative Nacional de Convenios Colectivos* (*Collective Bargaining in Europe*) (Madrid, 2004) 347–93; JH Even, *Transnational Collective Bargaining in Europe* (The Hague, 2008).