

## *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).<sup>1</sup>

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.<sup>2</sup>

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

<sup>1</sup> See the consolidated versions of the Treaties in OJ C 30.3.2010.

<sup>2</sup> 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.

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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?<sup>3</sup> 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’.<sup>4</sup> 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

<sup>3</sup> 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.

<sup>4</sup> 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.<sup>5</sup> 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*<sup>6</sup> and *Laval*<sup>7</sup> the right to take collective action was held to be inferior to the economic freedoms in an open European market. In *Rüffert*,<sup>8</sup> 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.<sup>9</sup> In *Commission v Luxembourg*,<sup>10</sup> 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’?<sup>11</sup>
- 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.

<sup>5</sup> Directive 2006/123/EC.

<sup>6</sup> Case C-438/05, 2007 ECR I- 10779 (*Viking*).

<sup>7</sup> 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*.

<sup>8</sup> Case C-346/06 CoJ EC 3.4.2008 (*Rüffert*).

<sup>9</sup> N Bruun, A Jacobs and M Schmidt, ‘ILO Convention No 94 in the aftermath of the *Rüffert* case’ (2010) 16(4) *Transfer* 473–89.

<sup>10</sup> Case C-319/06 CoJ EC 19.6.2008 (*Commission v Luxembourg*).

<sup>11</sup> 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,<sup>12</sup> 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.<sup>13</sup> 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<sup>14</sup> 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

<sup>12</sup> 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).

<sup>13</sup> 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.

<sup>14</sup> 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’.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> This Protocol No 8 and Declaration No 2 in the Final Act of the IGC 2007 underline that the

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

<sup>16</sup> Document, European Council 11225/09, pp 20–21.

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

<sup>18</sup> 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.

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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.<sup>19</sup> 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<sup>20</sup> 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.<sup>21</sup> Moreover, the Treaty of Amsterdam inserted a few specific fundamental rights in the European Treaties.<sup>22</sup> 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.<sup>23</sup> 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

<sup>19</sup> LA Geelhoed, 'Een Europawijde Europese Unie: een grondwet zonder staat' (2003) *SEW* 299.

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

<sup>21</sup> Article 6(2) TEU as it stood until 1 December 2009.

<sup>22</sup> 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.

<sup>23</sup> 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*.<sup>24</sup>

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

<sup>24</sup> OJ EC C 303/1 of 14.12.2007.

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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.<sup>25</sup> These procedures over the past 10 years have been very little used and only for a few high profile issues.<sup>26</sup> 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

<sup>25</sup> 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).

<sup>26</sup> 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).

participatory democracy and given an honourable mention in Article I-48 of the Constitution:

The Union recognizes and promotes the role of social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy. The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue.

In the Treaty of Lisbon, this text is moved to the Title on Social Policy (Article 152 TFEU) and it remains to be seen whether this recognition of social dialogue will prove fruitful. The European Trade Union Congress<sup>27</sup> hopes that this provision may stimulate the European Commission to provide the European social partners more often with more information<sup>28</sup> and consultation on a wider range of issues and may stimulate the EU Court of Justice to hear it on social matters.<sup>29</sup>

The provisions in the European Treaties on the European Social Dialogue have been largely consolidated by the Treaty of Lisbon (Articles 154–155 TFEU),<sup>30</sup> although here too a few minor adjustments have been made. It has been added that the European Parliament shall be informed about the state of affairs with the agreements of the social partners (Article 155(2) TFEU), something which is already happening in practice. The European Parliament will continue to find it unsatisfactory that it is in fact outflanked if the social partners have reached an agreement that is implemented by a Directive. If that matter had been settled under Article 153 TFEU, the European Parliament—at least in cases falling under the ordinary legislative procedure—would have had the possibility of amending the contents of the measure and even of stopping it. In Directives under Article 155 TFEU, however, this is not possible.

Employers are naturally reluctant to contribute to an increase in ‘hard law’ in the labour market. Only two things can persuade them to make concessions: collective action and the threat of legislation. Collective action at European level still appears hardly possible. They rarely have to fear threats of legislation (‘bargaining in the shadow of the law’) because of the cumbersome decision-making procedures in the Council of Ministers, which are outlined in the next chapter.<sup>31</sup>

<sup>27</sup> See the Resolution of the Executive Board of the ETUC of 1–2 December 2009, at: [www.etuc.org/a/6741](http://www.etuc.org/a/6741).

<sup>28</sup> For instance, it is remarkable that in the Consultative Committee on Employment the social partners have only the right to consultation, not information (Article 150 TFEU).

<sup>29</sup> I have elaborated this point in A Jacobs, ‘The European Court of Justice, social law, and the European social partners’ in R Blanpain (ed), *Labour Law, Human Rights and Social Justice* (The Hague, 2001) 139–50.

<sup>30</sup> No answer has been given on the question whether the social partners in their competence to conclude agreements are limited by Article 153(5) TFEU (former Article 137(5) TEC).

<sup>31</sup> See B Bercusson, ‘The implementation and monitoring of cross-border agreements: The potential role of cross-border collective industrial action’ in ETUI publication *Labour Law and Social Europe. Selected Writings of Brian Bercusson* (Brussels, 2009) 656.

Can we expect that the European Social Dialogue under the Treaty of Lisbon will produce more than was the case over the past 15 years of its existence?

This is the question that Bruno Veneziani tries to answer.

## VI. THE SOCIAL POWERS AND THE LAWMAKING PROCESS IN SOCIAL MATTERS

The European Union is a supranational organisation, which may exercise only those powers expressly conferred on it (Article 5(2) TEU). In 2002–03 at the European Convention, there were significant differences on the role of the European Union in the social field. Many argued that the EU had to be rather reticent in social affairs and to leave most initiatives to the Member States. There were also opposing voices that argued in favour of a stronger European social policy. The outcome of the fight was a draw. The Lisbon Treaty has indeed brought a number of smaller changes, but on the essential points it is the same old story.

The Articles on social policy in general as they read up until 1 December 2009<sup>32</sup> have been barely changed in the reformed European Treaties (now Articles 151–164 TFEU). They authorise the EU to promote the coordination of the social legislation of the Member States (Article 156 TFEU) and to issue its own European rules with regard to most aspects of social policy (Articles 153–155 TFEU).

The Maastricht Treaty (1991) had already divided the social field into one domain in which decisions by the Council of Ministers have to be adopted unanimously and another domain in which decisions are taken by qualified majority. The Treaty of Nice (2000) only went a small step further. It opened up the possibility that all decisions in the social field, except those relating to social security and social protection, in future could be taken by the Council of Ministers with a qualified majority if this Council decides that unanimously (the so-called ‘*passarelle*’ clause).<sup>33</sup> However, such a decision was never taken. At the European Convention 2002–03 the Presidium had proposed bringing almost the entire field of social policy under the normal legislative procedure (that is, qualified majority voting in the Council of Ministers and a co-legislative role for the European Parliament).<sup>34</sup> This text was inexplicably deleted during one of the last sessions of the Convention<sup>35</sup> and the final text of the Convention’s draft for a European Constitution contained exactly the same assignment of social

<sup>32</sup> Articles 136–148 TEC.

<sup>33</sup> See Article 137(2), last sentence, TEC.

<sup>34</sup> CONV 725/03 p 67 on Article III-99 (ex-Article 137 TEC).

<sup>35</sup> CONV 811/03 p 54 on Article III-99 (ex-Article 137 TEC).

issues partly to the unanimity procedure and partly to the procedure of qualified majority, as was already the case, as well as the same ‘passarelle’ clause as in the Treaty of Nice.<sup>36</sup> During the 2003–04 IGC, France tried to take that further step of the Presidium in the text of the Constitution, but that attempt was met with resistance from several countries, including the UK. Finally, also in the now reformed European Treaties, only half the social issues are assigned under the ordinary legislative procedure (qualified majority voting in the Council of Ministers) and the other half under the special legislative procedure (unanimity in the Council), exactly as it has been since the Maastricht Treaty plus the ‘passarelle’ from the Nice Treaty (Article 153(2), last sentence TFEU).

All this raises the question of whether one can expect a more dynamic role for EU labour law. Klaus Lörcher addresses this question.

## VII. SUBSIDIARITY

A major hurdle for European social legislation may be the principle of subsidiarity. That principle requires that the Union, in areas which do not fall within its exclusive competence, shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The principle has been in the European Treaties since 1992 and was formalised in a Protocol,<sup>37</sup> but little has been done with it since then<sup>38</sup> because it has always been perceived as vague.<sup>39</sup> Some doubt whether it is at all able to erect a barrier against the mania for regulation in Brussels.<sup>40</sup>

However, especially under pressure from Germany, the importance of the subsidiarity principle has been strengthened in the reformed European Treaties.<sup>41</sup> It now has a prominent place in the reformed European Treaties

<sup>36</sup> Article III-104.3 of the Convention—Proposal.

<sup>37</sup> Geelhoed (n 19) p 300; see Wouters (n 22) p 70.

<sup>38</sup> See the first cases mentioned by Wouters (n 22) p 70; also K Boutens, ‘Het subsidiariteitsbeginsel, een kwestie van toepassing’ (2003) (57) 3 *Internationale Spectator*; H Ischia, *Zentralisierung und Subsidiarität* (Frankfurt am Main, 2004); A Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford, 2002); CAW Timmermans, ‘Is het Subsidiariteitsbeginsel vatbaar voor rechterlijke controle?’ (2007) 6 *SEW* 224–30; M Schmitt, *Autonomie Collective des partenaires sociaux et principe de subsidiarité dans l’ordre juridique communautaire* (Aix-Marseille, 2009).

<sup>39</sup> Although it has been provided by the European Council with an Explanatory Memorandum, see the Conclusions of the Presidency of the European Council of Edinburgh, Bulletin EC 12-1992, point I.4.

<sup>40</sup> See L Siedentop, *Democracy in Europe* (London, 2000).

<sup>41</sup> See M Schröder, ‘Vertikaler Kompetenzverleihung und Subsidiarität in Konventzentwurf für eine europäische Verfassung’ (2004) *Juristenzeitung* 11; P de Jonge, ‘Het subsidiariteitsbeginsel in de Europese Grondwet: panacee of Paard van Troje’ (December 2006) *AA* 857–67.

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(Article 5(3) TEU).<sup>42</sup> To meet the needs of regional authorities in Member States with strong ‘devolution’ of government (Germany, Spain, Austria, Belgium, Great Britain and so on), the regional and local dimensions are included in the definition of subsidiarity. New also is the enforcement system as set out in Protocol No 2 on Proportionality and Subsidiarity. It is a kind of ‘yellow card’ or ‘early warning system’.<sup>43</sup>

National parliaments now have eight weeks to draw a ‘yellow card’.<sup>44</sup> If a simple majority of national parliaments<sup>45</sup> considers that a proposal by the European Commission violates the subsidiarity principle, it should be reconsidered. Moreover, the EU Council of Ministers (with a 55 per cent majority) and the European Parliament (by a simple majority) may decide to halt further consideration of the proposal.<sup>46</sup> Finally, the Committee of the Regions and the national parliaments through the *locus standi* of the Member States may approach the ECJ on the applicability of this principle.<sup>47</sup>

Although this procedure has certainly strengthened the relevance of the subsidiarity principle compared with the situation that existed until 1 December 2009, Thomas Blanke in his chapter asks whether this new arrangement will constitute a serious hindrance to the activism of the European legislator.

### VIII. THE COORDINATION OF ECONOMIC POLICIES

In the Treaty of Lisbon virtually nothing has changed in the Articles on the coordination of national employment policy as they previously existed<sup>48</sup> and so in this area the ‘guidelines’ within the framework of which policies can be made (Article 148(2) TFEU) remain as non-binding (‘soft law’) as before (Articles 2(3), 5(2) and 5(3) and 145–150 TFEU).

<sup>42</sup> R Barents, ‘Het subsidiariteitsbeginsel in het Hervormingsverdrag’ (2007) *NTER* 253–61.

<sup>43</sup> D Wyatt, ‘Could a “yellow card” for national parliaments strengthen judicial as well as political policing of subsidiarity?’ (2006) *Croatian Yearbook of European Law and Policy* 17; J Maaten, (November 2003) *Openbaar Bestuur* 9.

<sup>44</sup> This is an extension compared with the text in Protocol No 2 of the European Constitution, which mentioned a term of six weeks.

<sup>45</sup> This is a limitation compared with the text in Protocol No 2 of the European Constitution, which mentioned a threshold of one-third or one-quarter.

<sup>46</sup> See Protocol No 2 on the application of the principles of subsidiarity and proportionality.

<sup>47</sup> See Articles 6 and 7 of the new Protocol No 2 on subsidiarity and proportionality. See also A Dashwood and A Johnston, ‘The institutions of the enlarged EU under the regime of the Constitutional Treaty’ (2004) *CMLRev* 1488–89; J Peters, ‘National parliaments and subsidiarity. Think twice’ (2005) *ECLRev* 68.

<sup>48</sup> Articles 125–130 TEC.

The texts on social cohesion,<sup>49</sup> too, are virtually unchanged (Articles 174–178 TFEU). They have been decorated with fine words,<sup>50</sup> but with no extra money or power.

In the same vein, the Treaty of Lisbon has codified the views on the place of Europe in the world as they stood in 2002–03. In that period most Member States were absolutely against forceful economic governance on the part of the EU. The competences in this area are even weaker than in the social area. In the meantime, first the banks and then entire Member States have been tormented by the financial crisis. This requires more effective economic governance. In the absence of this the financial assistance to Greece, Ireland, Romania and Portugal has been made subject to strict conditions, including cuts in wages, social subsidies, pension systems and so on. Financial discipline is imposed at the expense of the wider, social objectives enshrined in the Treaties.

This makes the following question (already mentioned) a matter of urgency: do countries retain the freedom to enact or maintain labour laws which are more favourable for the workers than the rules of the European Union? Earlier it was written that the EU and the Member States have shared competence in social matters. In practice, this is so. European social law and social policy are still modest in nature, and that may be regarded as an essential part of the European Social Model. However, there is still so much room left for national social law and social policy because—as indicated above—the EU has used so little of its social competence, and where it has done so it often did it with soft law. This much room is also preserved because of the rule of thumb that, even in those areas where hard EU social law is enacted, the Member States retained leeway to enact or maintain rules that are more favourable to workers. This idea is often expressed in the Preamble and the final Articles of the social law Directives of the EU. However, the Court of Justice in the aforementioned *Laval*, *Rüffert* and *Commission v Luxembourg* cases has determined that the EU standards of the Posted Workers Directive are not only a minimum, but a maximum. This has cast doubt on whether the aforementioned rule of thumb of EU law is still functional.

This principle of the more favourable rule has been expressly stated in the Treaties for a number of years and returns unchanged in the European Treaties with the revision by the Treaty of Lisbon (Article 153(4), second indent TFEU). Some say that it applies only to the standards of the social policy of the EU and not to the standards of freedom of movement, on

<sup>49</sup> Articles 158–162 TEC.

<sup>50</sup> The European Treaties now specify that particular attention shall be paid to rural areas, areas affected by industrial transition and regions which suffer from severe and permanent natural or demographic handicaps, such as the northernmost regions with very low population density and island, cross-border and mountain regions (Article 174(3) TFEU).

which the Posted Workers Directive is founded. This interpretation would be analogous to the American doctrine of ‘pre-emption’<sup>51</sup> which considers some standards as both minimum and maximum. However, this too narrow view is to be avoided on the basis of the Treaty of Lisbon seen in its historical context. The entire operation of the ‘European Constitution’ was originally set up to stop the excessive drift of the competences of the Member States to Europe. This has resulted in a reformulation of the allocation of competences,<sup>52</sup> a strengthening of the principle of subsidiarity and the introduction of provisions useful for the defence of social policy (see above). All this suggests that the ‘principle of the more favourable rule’ in the relationship between national and European social law is broadly applicable, and not only with regard to measures based on Article TFEU 153 (ex-Article 137 EC). In short, this principle of the more favourable rule is well anchored in the Lisbon Treaty. However, will this convince the Court? The first ruling by the Court in this area after the entry into force of the Treaty of Lisbon, *Commission v Germany*, is not reassuring. The priority of the rights of the market over fundamental social rights was repeated.<sup>53</sup> For the European Trade Union Confederation this was a reason to reiterate its call that at the next amendment of the European Treaties a ‘social progress clause’ or a ‘social progress protocol’ should be included, guaranteeing a better balance between the laws of the market and the social rights.<sup>54</sup>

Niklas Bruun deals in his contribution with these issues related to the economic governance of the European Union especially from the perspective of the recent economic crisis.

## IX. SERVICES OF GENERAL INTEREST

The questionable character of the operation of the laws of the market and free competition has also become quite apparent in the area of services of general economic interest (postal services, public transport, waste management, energy, health care and so on). Already in the Treaty of Rome of 1957 it was determined that these services would be subject to the rules of the free market, but only ‘in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them’.<sup>55</sup> The Treaty of Amsterdam sang the praises of ‘the place occupied by services of general economic interest in the shared values of the Union’ (Article 16 TEC) and the Charter of Fundamental Rights called the

<sup>51</sup> See ATJM Jacobs, *Sociale Rechten in Amerika* (Utrecht, 2003) 16–17.

<sup>52</sup> Cf Article 48(2) TEU, Articles 4(1) and 5(2) TFEU and Protocol No 25.

<sup>53</sup> Case C-271/08 CoJ EU 15.7.2010 (*Commission v Germany*).

<sup>54</sup> See: [www.etuc.org/a/7521](http://www.etuc.org/a/7521) and 6741.

<sup>55</sup> Article 82(2) TEC.

access to these services a fundamental right.<sup>56</sup> This generous recognition of services of general economic interest has been fully maintained in the Treaty of Lisbon (Article 14 TEU and Article 106(2) TFEU) along with the insertion of some not insignificant additions.<sup>57</sup>

The first addition is in the final sentence of Article 14 TEU, which at the insistence of France provides that ‘the European Parliament and the Council, acting by means of regulations ... shall establish these principles and set these conditions’.<sup>58</sup> Apparently, this was not enough to reassure the citizens of Europe with regard to their worries about the dismantling of postal services and the breakup of railway, energy and other services. The French have always been very critical and this point was certainly one of the reasons for the French ‘no’ to the European Constitution. At the IGC 2007 not only France but also the Netherlands revisited this item. Together they managed to achieve that via the Lisbon Treaty Protocol No 26 has been added to the European Treaties, specifying which shared values of the Union in particular are meant in Article 14 TFEU (Article 1) and guaranteeing that the provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest (Article 2).

The second provision is not very helpful as, according to the case law of the EU Court of Justice, most public services are economic services and therefore remain subject to all the rules of the internal market, state aid and competition, whatever precious values they may represent. Thus, the drive of the European Commission to split up our railways, privatise our electricity and liberalise the financial markets, and so on, can just continue. Antoine Jacobs examines whether the new texts will do a better job than the previous ones in preventing these services being increasingly exposed to the trends of privatisation and free competition.

<sup>56</sup> Article 36 of the EU Charter on Fundamental Rights.

<sup>57</sup> See C Einem, ‘Eine Verfassung für Europa. Anmerkungen zu ausgewählten Aspekten des Verfassungsentwurfs’ (2004) *EuR* 202–06.

<sup>58</sup> S Rodrigues, ‘Vers une loi européenne des services publics’ (2003) *Revue du Marché commun et de l’Union européenne* 503–11.