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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN  
ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE  
REGIONS**

**More efficient decision-making in social policy:  
Identification of areas for an enhanced move to qualified majority voting**

## 1. Introduction

The social dimension of the European Union is enshrined in Article 3 of the Treaty on European Union (TEU). It highlights the Union's objective to, inter alia, promote the well-being of its peoples, work for sustainable development and a highly competitive social market economy, aiming at full employment and social progress, combat social exclusion and discrimination and promote equality between women and men.

In this context, the Union's role is to support and complement the Member States' social policies and ensure a level playing-field, upward convergence in employment and social performance, and a well-functioning single market and Economic and Monetary Union. EU-level legislation, policy coordination and funding have brought tangible progress over the past 60 years (see Annex 1).

In the context of changing labour markets and societies, and new opportunities and challenges arising from globalisation, digitalisation, climate change mitigation and adaptation, changing working patterns, migration and ageing populations, social issues are among EU citizens' primary concerns. In response, the European Commission put forward a comprehensive agenda of initiatives to renew and modernise the EU social acquis.<sup>1</sup> EU leaders also pledged in March 2017 to continue working towards a social Europe.<sup>2</sup>

The proclamation of the European Pillar of Social Rights in November 2017 was a major breakthrough. Proposed by the Commission and proclaimed together with the European Parliament and the Council of the European Union, the European Pillar of Social Rights<sup>3</sup> provides a renewed compass for addressing current and future challenges. Several initiatives have already been taken at EU level to follow up on the Pillar and modernise the rights of citizens in a fast-changing world,<sup>4</sup> contributing also to the delivery of the UN Sustainable Development Goals.

In times of rapid, sometimes disruptive change, it is more important than ever that the EU, alongside the Member States, is able to formulate effective policy responses swiftly. This involves efficient decision-making whereby the EU can deliver in terms of supporting and complementing national policies; tackling emerging challenges timely; making the most of the opportunities brought about by such changes; defending the Union's collective interests; and protecting EU citizens.

As announced by President Juncker in his State of the Union address of September 2018, it is opportune to take stock of the framework for EU decision-making set out in the Treaties for different key policy areas in order to make sure that the EU can use all the tools at its disposal and maximise their added value.

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<sup>1</sup> See more information at [https://ec.europa.eu/commission/sites/beta-political/files/social\\_priorities\\_juncker\\_commission\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/social_priorities_juncker_commission_en.pdf) and in Annex 2.

<sup>2</sup> Declaration of the leaders of 27 Member States and of the European Council, the European Parliament and the European Commission (Rome, 25 March 2017): [http://europa.eu/rapid/press-release\\_STATEMENT-17-767\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-17-767_en.htm)

<sup>3</sup> The Pillar was proclaimed by the European Parliament, the Council and the Commission at the Gothenburg Social Summit for Fair Jobs and Growth (November 2017): [https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights\\_en](https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en)

<sup>4</sup> See Annex 2 for an overview of initiatives adopted in the social field under the Juncker Commission.

This Communication is thus part of this Commission's broader commitment to examine ways to make decision-making more efficient by identifying areas for an enhanced use of qualified majority voting<sup>5</sup> and follows on from earlier Communications on Common Foreign and Security Policy,<sup>6</sup> taxation,<sup>7</sup> and energy and climate.<sup>8</sup>

It is important to note that, for almost three decades, the vast majority of decisions in the field of social policy have been taken according to the ordinary legislative procedure, whereby the Council (deciding by qualified majority) and the European Parliament act as co-legislators on an equal footing (see section below). The formulation of EU policy in social affairs is thus very different from the other areas, notably taxation and common foreign and security policy, where unanimity is still the norm.

A further specificity is that the Commission must consult social partners before submitting proposals in the social policy field.<sup>9</sup> Moreover, social partners can negotiate agreements that can be implemented either autonomously according to national practices, or be implemented at their request at EU level through a Council decision.<sup>10</sup>

## **2. The current EU framework for decision-making in social policy**

The social policy *acquis* comprises 125 legal acts covering areas ranging from equality between women and men, labour mobility, the rights of posted workers, the protection of workers' health and safety, working conditions, and information and consultation of workers. Under the Juncker Commission, 27 proposals for legal acts on social policy have been tabled and agreement has been reached on 24 so far (see Annex 2).

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<sup>5</sup> See President Juncker's 'state of the Union' speech of 12 September 2018 and the Commission's 2019 work programme (COM(2018) 800 final).

<sup>6</sup> COM(2018) 647 final.

<sup>7</sup> COM(2019) 8 final.

<sup>8</sup> COM(2019)177.

<sup>9</sup> Article 154 of the Treaty on the Functioning of the EU provides for a compulsory two-stage consultation procedure: in the first stage the Commission consults the social partners on the possible direction of an initiative, whilst in the second stage on the content of the envisaged initiative. During both stages, social partners may inform the Commission of their wish to initiate a negotiation process for a social partners' agreement in this area. In such a case, the Commission suspends its initiative for the durations of the negotiations. If these are successfully concluded, social partners may request that their agreement be implemented by the Commission presenting a proposal for a Council Decision. In the absence of a social partner agreement after second stage consultation, the Commission may decide to put forward a proposal.

<sup>10</sup> Article 155 TFEU.

Much of the social policy *acquis* has been adopted under qualified majority voting and the ordinary legislative procedure. Moreover, social partner agreements implemented at EU level have played a significant role in developing the EU social *acquis*. Legislation has been adopted by unanimity in certain areas, e.g. the first legal acts related to the coordination of social security systems<sup>11</sup>, and fighting discrimination based on gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

However, a limited number of areas of social policy are still subject to voting by unanimity in the Council and the special legislative procedure, in which the European Parliament does not have a role as a co-legislator. These are:

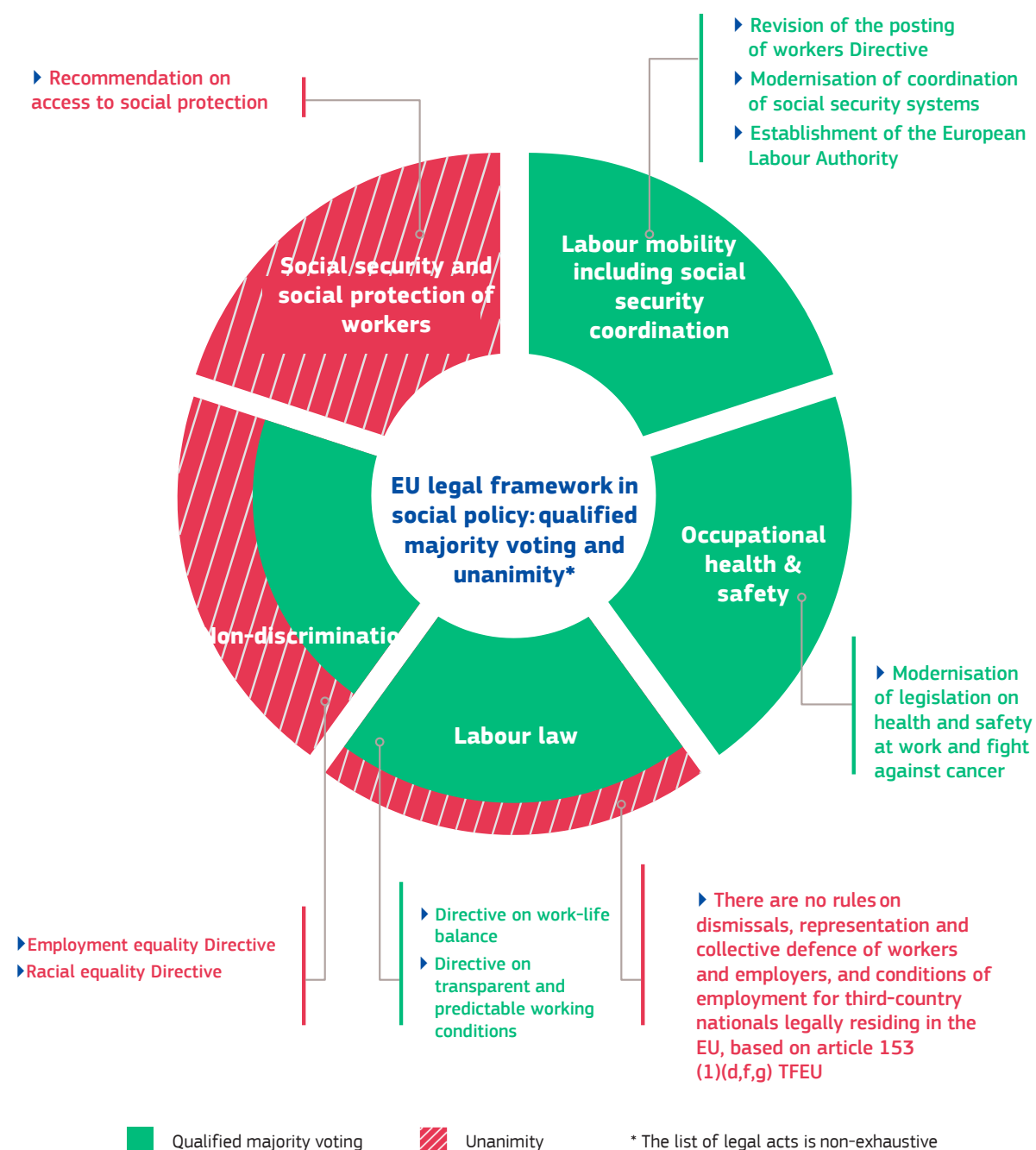
- non-discrimination (Article 19(1) TFEU);
- social security and social protection of workers (outside cross-border situations) (Article 153(1)(c) TFEU);
- the protection of workers where their employment contract is terminated (Article 153(1)(d) TFEU);
- the representation and collective defence of the interests of workers and employers (Article 153(1)(f) TFEU); and
- conditions of employment for third-country nationals legally residing in the EU (Article 153(1)(g) TFEU).

Apart from the fact that certain aspects of these policy areas may have an impact on the financial balance of national welfare systems, there is no particular logic as to why, after successive Treaty revisions, these few domains are still subject to voting by unanimity and the special legislative procedure, in particular when compared with areas that already fall under qualified majority voting.

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<sup>11</sup> With the Lisbon Treaty in 2009, the coordination of Member States' social security systems in the context of the free movement of workers under Article 48 of the Treaty on the Functioning of the EU (TFEU) became subject to qualified majority voting and the ordinary legislative procedure, rather than voting by unanimity. See Annex 1 for an overview of the evolution of the EU social policy *acquis*. This change was accompanied by the introduction of an 'emergency brake' clause under Article 48 TFEU, whereby a member of the Council can declare that a draft legislative act on social security coordination would affect important aspects of its social security system (including its scope, cost or financial structure) or the financial balance of the system, and ask for the matter to be referred to the European Council; the ordinary legislative procedure is then suspended. Within four months, after discussion, the European Council either refers the draft back to the Council, which terminates the suspension of the ordinary legislative procedure; or takes no action, or asks the Commission to submit a new proposal (in which case, the act originally proposed is deemed not to have been adopted).

**Graph 1: Social policy *acquis* – unanimity and qualified majority voting, illustrated by examples of existing legal acts**



### **3. Supporting the development of EU social policy**

#### ***a) Closing the protection gaps***

Decision-making based on unanimity on the one hand, and the fact that there is voting by qualified majority and unanimity in the same policy field on the other hand have led to unevenness in the development of the social policy *acquis*. While protection standards are high overall, there are gaps as a result of which some groups are not equally protected. For example:

- There are comprehensive EU legal provisions on equal opportunities and equal treatment between men and women, and on equal treatment based on racial or ethnic origin, but equal treatment on grounds of religion or belief, disability, age and sexual orientation is not ensured to the same degree; this is an example of an area subject to unanimity where rules have not developed evenly;
- Legally residing third-country nationals are guaranteed equal treatment with EU nationals in terms of labour market access and working conditions (and also in terms of access to education and vocational training, recognition of diplomas and other professional qualifications, social security, access to goods and services), but there are no binding EU minimal requirements explicitly designed for their effective integration in the labour market; this is an example of two procedures in the Treaty with different voting rules, which concern similar areas, namely legal immigration and working conditions for legally resident immigrants;
- Workers have to be informed and consulted ahead of decision-making by management, in particular where restructuring, collective redundancies or the transfer of undertakings are envisaged, and in the case of EU-scale companies (through European works councils), but (apart from rules on the involvement of employees in European company forms)<sup>12</sup> there are no common minimum requirements for the representation and collective defence of workers' and employers' interests. Also, there are only limited provisions on the specific protection of individual workers in the event of termination of employment.

#### ***b) Keeping pace with evolving social challenges***

The EU and all its Member States face common challenges as regards the impact of new technologies, increasing competitive pressures in the globalised economy, new forms of work and demographic trends (including ageing). Importantly, they need to take full advantage of the opportunities brought about by some of these changes (for example digitalisation). Safeguarding the fundamentals of the European social model for future generations requires action in a wide range of areas, notably:

- ensuring sustainable and adequate pension and long-term care systems in the face of population ageing and changing private and family life patterns;

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<sup>12</sup> Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.

- supporting people over longer and more diverse careers, and increasingly frequent work-life transitions;
- raising the skills level and providing relevant life-long learning opportunities to ensure the competitiveness of our economies; and
- promoting the benefits of diverse societies, while ensuring social inclusion and equal opportunities for all.

To address these evolving challenges, the EU needs quick, efficient and flexible EU decision-making, so that legislation and non-binding instruments, such as recommendations, can keep up with economic and societal developments.

### ***c) Fostering a culture of compromise***

Qualified majority voting is based on a culture of compromise and allows for discussion and pragmatic outcomes that reflect the interests of the Union as a whole. Flexible, efficient and quick decision-making has allowed the EU to become a global reference and standard-setter in policy areas such as health and safety at work. The prospect of a vote by qualified majority can be a powerful catalyst that engages all actors in the search for compromise and an outcome acceptable to all.

*Qualified majority voting goes beyond the simple majority rule requiring reaching more than 50 % of the votes cast. As abstentions are not counted as votes in favour, obtaining a majority requires Member States to pronounce themselves explicitly in favour of a proposal and cast a positive vote. To reach a qualified majority, two conditions need to be met:*

- *55 % of the Member States vote in favour; and*
- *the proposal is supported by Member States representing at least 65 % of the EU population.*

Unanimity voting does not provide for these incentives, since its main characteristic is that, in effect, each Member State has a veto. This increases the risk of the law-making process being severely slowed down. For instance, the Directive proposed in 2005 to protect the supplementary pension rights of mobile workers was blocked in the Council for six years. Following the entry into force of the Lisbon Treaty in 2009, the voting rule changed to qualified majority and the proposal was subsequently adopted in 2014<sup>13</sup>, thus making it possible to better protect workers moving within the EU.

### ***d) Greater involvement of the European Parliament***

Special legislative procedures, as they apply in the social policy areas still subject to voting by unanimity, do not give an equal, prominent role as co-decision maker to the European Parliament, which is often only consulted.

However, a general case can be made – *especially* in the social policy field – for the European Parliament to have a greater say. Members of the European Parliament represent the citizens

<sup>13</sup> Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights.

who are directly benefitting from EU social policy and should have a say in its formulation through their elected representatives.

A move to the ordinary legislative procedure, where the Parliament becomes a co-legislator on an equal footing with the Council, would allow the citizens' representatives to make a full contribution to shaping EU social policy.

#### 4. Current options for moving from unanimity to qualified majority voting

Under the EU Treaties, two *passerelle* clauses apply in social policy:

- a **specific clause** for social policy (Article 153(2) TFEU, last subparagraph); and
- a **general clause** (Article 48(7) TEU).

There are important procedural differences between these two clauses.

##### ***Passerelle clauses***

**Article 48(7) TEU provides a general *passerelle* clause.** This allows for measures in the area or case concerned, subject until then 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.

To activate this clause, the European Council has to take the initiative, indicating the scope of the envisaged change in the decision-making procedure, and notify it to the national parliaments. If there is no objection from a national parliament within six months, the European Council can, by unanimity and after obtaining the consent of the European Parliament, adopt a decision authorising the Council to act by qualified majority or allowing for the adoption of the relevant acts in accordance with the ordinary legislative procedure.

The general *passerelle* clause provides the option of introducing qualified majority voting, but remaining under the special legislative procedure. It also gives the option of moving to qualified majority voting under the ordinary legislative procedure – with co-decision powers for the European Parliament.

**Article 153(2) TFEU, last subparagraph, contains a specific *passerelle* clause** for social policy measures currently subject to voting by unanimity and the special legislative procedure in the areas covered by Article 153(1)(d), (f) and (g) TFEU. This is relevant for measures supporting and complementing Member States' activities in the following fields:

- 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.

Any switch to the ordinary legislative procedure in these fields is subject to unanimous agreement in the Council, on the basis of a proposal from the Commission and after consultation of the European Parliament.



The Treaties provide for another means of overcoming a situation where a decision is blocked by one or more Member States using their veto right. The **enhanced cooperation procedure**<sup>14</sup> allows a group of nine or more Member States to move ahead with a proposed initiative, when it proves impossible to reach unanimous agreement in the Council. Other EU Member States still have the right to join the initiative at a later stage. Under this procedure, Article 333 TFEU also provides for a specific *passerelle* clause allowing the Member States participating in a specific enhanced cooperation to decide to move to qualified majority and/or the ordinary legislative procedure.

However, in the social policy field enhanced cooperation is not a solution to broader, EU-wide problems, as it creates a risk of fragmenting the single market, creating a two-tier Europe and of different treatment of EU citizens depending on the Member States where they live. In this context, Article 326 TFEU specifies that enhanced cooperation is not to undermine the internal market or economic, social and territorial cohesion. It must not constitute a barrier to or discrimination in trade between Member States, nor distort competition between them. This is particularly relevant for social policy. The alternative of using the enhanced cooperation procedure thus appears unsatisfactory for proposals ensuring the application of fundamental rights, which should apply to all individuals in all EU Member States. Already in 2014, the idea to use enhanced cooperation for the horizontal equal treatment Directive proposal<sup>15</sup> was overwhelmingly rejected in the Council.

Activating the *passerelle* clauses in order to move to qualified majority voting does not have these disadvantages, as they allow the EU to move forward as a whole, thus maintaining the integrity of the single market and of the social dimension of the EU. Also, while it would change the voting and decision-making method, the overall legal framework for EU action would remain unaffected; in particular:

- i. Union action would continue to focus on areas where the objectives cannot be sufficiently achieved by the Member States, by reason of the scale and effects of the proposed action, in full respect for the principle of **subsidiarity**. Under the principle of **proportionality**, the content and form of Union action must not exceed what is necessary to achieve the objectives of the Treaties;
- ii. **The scope of and conditions for the exercise of EU powers do not change.** Article 153 TFEU provides for a series of criteria that need to be fulfilled by EU measures in the field of social policy; for example, directives may provide for *minimum requirements only, having regard to conditions and technical rules in each Member State* and must *avoid unduly burdening SMEs*. EU measures may not affect *Member States' right to define the fundamental principles of their social security systems* and must *not significantly affect the financial equilibrium thereof*. EU measures do not prevent Member States from maintaining or introducing more stringent and protective measures. Article 153(5) TFEU also *excludes* any measures with regard to pay, the right of association, the right to strike or the right to impose lockouts. Article 151 TFEU requires that EU measures *take into account the diverse forms of national practices*;

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<sup>14</sup> Article 20 TEU, Articles 326-334 TFEU.

<sup>15</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final, 2.7.2008.

- iii. **The role of the social partners in shaping legislation on social policy will remain unaffected.** As required by Article 154 TFEU, the Commission would continue to carry out two-stage consultation of the social partners before submitting future proposals in the field of social policy. It would consult the social partners on the possible direction of EU action and on the content of the envisaged proposal. It is important to note that, to the extent that qualified majority would apply in the areas concerned by Article 153 TFEU, it would also apply for the implementation of social partners' agreements by means of Council decisions under Article 155 TFEU;
- iv. **Better regulation remains at the core of EU policy-making:** any proposal would be prepared in line with the better regulation guidelines. These ensure that EU policy and law-making are open and transparent, underpinned by evidence and an understanding of the impacts on citizens, businesses and public administrations. Citizens and stakeholders can contribute throughout the process; and
- v. **Moving to qualified majority voting is a decision entirely under the control of the Member States.** It would take a unanimous decision of the European Council, or the Council, to activate the *passerelle* clauses. In addition, under the general clause (Article 48(7) TEU), the move to qualified majority voting or the ordinary legislative procedure has to be supported by all national parliaments and the European Parliament has to give its consent.

## 5. Analysis of specific policy areas still subject to voting by unanimity

The purpose of this section is to assess the case for the use of the *passerelle* clauses in the social field. The analysis is done case-by-case for the five areas identified in section 2 that are still subject to voting by unanimity and special legislative procedures.

### a) *Non-discrimination*

EU action to combat discrimination has been subject to unanimous agreement since its introduction in the Amsterdam Treaty in 1997. The Treaty of Nice introduced qualified majority voting when it comes to defining the basic principles of Union incentive measures, excluding any harmonisation of national laws, to support Member States' action to combat discrimination.<sup>16</sup>

Current EU legislation<sup>17</sup> (adopted by unanimity) provides for varying levels of protection depending on the grounds of discrimination. EU directives provide a degree of protection of

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<sup>16</sup> Article 19(2) TFEU.

<sup>17</sup> Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

Other instruments were adopted under qualified majority voting because they were based on a different provision in the Treaty, but concern similar areas: Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; and Directive 2010/41/EU of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

gender and race equality in employment, occupation and a range of other fields. However, equal treatment on the grounds of religion or belief, disability, age and sexual orientation is protected only as regards employment and occupation. The need for unanimity voting in the Council has led in this area to an inconsistent legal framework and an incoherent impact of Union law on people's lives, with some people better protected than others.<sup>18</sup>

Equality is one of the EU's fundamental values. Discrimination has no place in the Union.<sup>19</sup> In March 2017, EU leaders pledged in the Rome Declaration to work towards a Union which promotes equality between women and men, rights and equal opportunities for all, and which fights discrimination. Member States and the Commission have signed up to the 2030 Agenda for Sustainable Development, which involves eliminating discriminatory laws, policies and practices, and promoting appropriate legislation, policies and action.<sup>20</sup>

A 2018 study from the European Parliament<sup>21</sup> highlighted the scale of detrimental impacts that gaps and barriers in EU legislation and action have on the everyday lives of individuals, and on society (in terms of GDP, tax revenue and social cohesion). The lack of common EU rules to protect against discrimination in access to goods and services undermines the level playing-field that is key for an effective and fair single market. Individuals and businesses should have seamless access to the four fundamental freedoms under the same conditions.

EU legislation requires each Member State to set up bodies for the promotion of equal treatment.<sup>22</sup> These equality bodies are mandated to offer independent assistance to victims of discrimination, conduct surveys and publish reports on discrimination issues, but only with respect to the grounds of racial and ethnic origin, and gender. Due to the legal limitations, the Commission only issued non-binding guidelines as regards their operation.<sup>23</sup> Victim assistance and other activities for the promotion of equal treatment thus vary across the Member States and the grounds for protection differ.

**To facilitate the development of equal protection against discrimination, with effective redress mechanisms for all, the use of the *passerelle* clause could be considered in the near future.**

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<sup>18</sup> The 2008 proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final, addressing these concerns and extending the protection against discrimination on grounds of religion or belief, age, disability and sexual orientation to areas other than employment, is blocked in the Council.

<sup>19</sup> Article 2 TEU and Article 8 TFEU in particular.

<sup>20</sup> One of the targets under goal 10 (reducing inequality within and among countries) is to ensure equal opportunity and reduce inequalities of outcome.

Target 10.2: By 2030, empower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status; and

Target 10.3: Ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard.

<sup>21</sup> European Parliamentary Research Service, *Equality and the fight against racism and xenophobia (Cost of non-Europe report)* (PE 615.660, March 2018);

[http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_STU\(2018\)615660](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2018)615660)

<sup>22</sup> Article 13 of Directive 2000/43/EC, Article 11 of Directive 2010/41/EU, Article 12 of Directive 2004/113/EC and Article 20 of Directive 2006/54/EC.

<sup>23</sup> Commission Recommendation C(2018) 3850 final of 22.6.2018 on standards for equality bodies; [https://ec.europa.eu/info/sites/info/files/2\\_en\\_act\\_part1\\_v4.pdf](https://ec.europa.eu/info/sites/info/files/2_en_act_part1_v4.pdf).

### **Non-discrimination: facts and figures**

- A Eurobarometer survey<sup>24</sup> shows that 12 % of people in the EU consider themselves part of a group at risk of discrimination. Around one in five respondents reports personal experience of discrimination or harassment in the previous 12 months. Discrimination on grounds of ethnic origin is regarded as the most widespread form of discrimination, followed by discrimination on the basis of sexual orientation, gender identity, religion or belief, disability and age.
- For the individuals concerned, any denial of rights due to discrimination can lead to material and/or non-material damage, e.g. a loss of earnings and/or poorer health. For society, discrimination can have a detrimental impact on GDP and tax revenue as well as social cohesion.<sup>25</sup>

### ***b) Social security and social protection for workers (outside cross-border situations)***

The EU supports and complements Member States' activities as regards social security and social protection of workers.<sup>26</sup> This area has been subject to voting by unanimity under the special legislative procedure since the introduction of these powers in the Maastricht Treaty in 1992.

The requirement for unanimity in this area is linked to the fact that national social security and social protection systems are deeply embedded in national economic, taxation and income redistribution models. Systems differ greatly across the EU, with differences in the size of the budget and the way it is allocated, the source of financing, the degree of coverage of risks in the population and the role of the social partners.

At the same time, as labour markets evolve, social protection systems need reform at national level to ensure that they are modernised so that our social model remains fit for purpose, no-one is left behind and people and businesses in the EU make the most of the changing world of work. Demographic changes, such as population ageing, lower birth rates and longer life expectancy, will affect Member States' capacity to guarantee adequate social protection. Contributions from working-age populations will be shrinking, thus creating the need to look for non-labour sources of funding for social protection systems. The emergence of a variety of employment relationships, exacerbated by technological changes and digital platforms, has already created gaps in social protection coverage. And the future world of work will require massive investments in life-long learning, training, up- and reskilling, which national social protection systems insufficiently cater for today.

With the principles of the European Pillar of Social Rights serving as a compass, the Commission so far has proposed to focus the EU-level action on issuing recommendations, such as the Recommendation on access to social protection for workers and the self-employed. The Recommendation was politically agreed by the Council in December 2018 under unanimity and is awaiting final adoption. Once adopted, the Recommendation will start

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<sup>24</sup> Eurobarometer 437, *Discrimination in the EU in 2015*.

<sup>25</sup> See footnote 21.

<sup>26</sup> This is provided for in Article 153(1) (c) TFEU, while under Article 48 TFEU the EU has the power to adopt measures in the field of social security as are necessary to provide freedom of movement for workers. These measures are subject to qualified majority voting, and are therefore not discussed in this Communication.

to be implemented and its impact on the modernisation of social protection systems will need to be assessed.

If the European Council uses the passerelle clause in Article 48(7) TEU and makes qualified majority voting applicable in the area or case concerned, then the Council can act by qualified majority voting and no longer by unanimity when it adopts recommendations in that area or case based on Article 292 TFEU. A move to qualified majority would stimulate agreement on such recommendations to guide and help support the process of convergence towards social protection systems fit for the 21<sup>st</sup> century.

Even then, EU action must respect the subsidiarity principle and take into account the large differences between the social protection systems of the Member States. Furthermore, Article 153(4) TFEU guarantees the right of Member States to determine the fundamental principles of their social security systems and not to have the financial equilibrium thereof significantly affected.

Therefore, to support the process of modernisation of and convergence between social protection systems, **the use of the passerelle clause could be considered in the near future to adopt recommendations in the area of social security and social protection of workers.**

### ***c) Conditions of employment for third-country nationals legally residing in Union territory***

Several EU Directives on legal migration regulate the conditions of entry and residence, and the rights of different categories of third-country nationals, such as students, researchers, seasonal workers and intra-corporate transferees for example.<sup>27</sup> These Directives have been adopted under Article 79(2) TFEU on the basis of qualified majority voting, with co-decision powers for the European Parliament.

These rules aim to provide for fair treatment with EU nationals in a number of respects, including the conditions of employment (such as salary, professional qualifications, etc.). At

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<sup>27</sup> The legal migration *acquis* includes:

- Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification;
- Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (LTRD);
- Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (EU Blue Card Directive);
- Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State;
- Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers;
- Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer; and
- Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purpose of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing.

the same time, the extensive EU employment and social acquis<sup>28</sup>, notably ensuring fair working conditions and protecting health and safety at work, applies to all workers covered by national employment law in a Member State, irrespective of their nationality.

Moreover, based on different Treaty provisions that are subject to qualified majority voting, the Union has adopted recommendations regarding activation measures for those who have difficulties in the labour market. For example, the EU has already provided guidance in the form of the Youth Guarantee;<sup>29</sup> the Council Recommendation on the integration of the long-term unemployed into the labour market;<sup>30</sup> and the Council Recommendation on Upskilling Pathways.<sup>31</sup> These recommendations also apply to legally residing third-country nationals and recognise that third-country nationals are among the vulnerable groups on the labour market, requiring personalised support. These Recommendations are being implemented and their impact, including on legally residing third-country nationals, remains to be assessed.

As a result, the potential scope of Article 153(1)(g) TFEU, that allows the Union to support and complement the activities of Member States to act in the area relating to the conditions of employment of legally residing third-country nationals, on the basis of unanimity, appears to be rather limited.

In light of the existing legislation both under the migration and the social acquis and existing recommendations, **at present there seems to be no significant added value for the use of the *passerelle* clause in this area.**

#### ***d) Protection of workers where their employment contract is terminated***

The protection of workers where their employment contract is terminated (*dismissal*) is at the core of national labour law. It is closely linked to national social protection systems and labour market institutions, including the role of the social partners and collective bargaining traditions. The length and level of unemployment benefits, the degree of regulation of labour contracts, and judicial and non-judicial processes differ between Member States.

At EU level, the Charter of Fundamental Rights of the EU and the European Pillar of Social Rights<sup>32</sup> outline horizontal principles covering protection against dismissals. It is at national level that comprehensive protection frameworks set out minimum standards of protection

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<sup>28</sup> For example on worker's health and safety (Framework Directive 89/391/EEC and 25 related Directives), and working conditions: Directive 91/533/EEC (Written Statement); Directive 94/33/EC (Young People at Work); Directive 2008/104/EC (Temporary Agency Work); Directive 2008/94/EC (protection of employees in the event of the insolvency of their employer); Directive 1997/81/EC (Part-time work); Directive 1999/70/EC (Fixed-term work); 2002/14/EC (Information and Consultation Directive); Directive 2003/88/EC (Working Time).

<sup>29</sup> Council Recommendation of 22 April 2013 on establishing a Youth Guarantee (2013/C 120/01).

<sup>30</sup> Council Recommendation of 15 February 2016 on the integration of the long-term unemployed into the labour market (2016/C 67/01).

<sup>31</sup> Council Recommendation of 19 December 2016 on Upskilling Pathways: New Opportunities for Adults (2016/C 484/01).

<sup>32</sup> Principle 7(b) of the European Pillar of Social Rights provides that '[p]rior to any dismissal, workers have the right to be informed of the reasons and be granted a reasonable period of notice. They have the right to access to effective and impartial dispute resolution and, in case of unjustified dismissal, a right to redress, including adequate compensation'.

against dismissal for individual workers. National laws are best placed to take into account the specificities of diverse national protection systems, including fiscal considerations.

EU secondary legislation offers targeted measures protecting the most vulnerable workers against dismissal. This includes the protection of women against dismissal during pregnancy. The Part-time Work Directive<sup>33</sup>, the Gender Equality Directive<sup>34</sup> and the Directive on Equal treatment between men and women engaged in an activity in a self-employed capacity<sup>35</sup> also provide protection against dismissal and unfavourable treatment. The Directive on Transparent and predictable working conditions<sup>36</sup> ensures that workers have the right to be informed of the length of the notice period and prohibits dismissals on grounds of workers exercising their information rights. Also, the Work-Life Balance Directive<sup>37</sup> prohibits dismissal on grounds of having applied for paternity, parental or carers' leave and flexible working arrangements.

The strong links with, and diversity between, national social protection systems and labour market institutions, and the need to respect diverse forms of national practices and social dialogue models are strong arguments to maintain unanimity voting in the Council in this area. Moreover, some of the recently adopted Directives, as referred above, will be implemented only after a transitional period, which makes it too early to assess their performance in this area. **There seems to be no clear case at present for using the *passerelle* clause.**

#### ***e) Representation and collective defence of the interests of workers and employers***

As regards the representation and collective defence of workers' and employers' interests, including co-determination, there are strong general principles resulting from the Charter of Fundamental Rights of the EU and the European Pillar of Social Rights.<sup>38</sup> At the same time, the EU's powers in this area are quite strictly constrained by the Treaty, which specifically excludes measures on the right of association, the right to strike and the right to impose lock-

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<sup>33</sup> Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.

<sup>34</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

<sup>35</sup> Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

<sup>36</sup> [COM \(2017\) 797](#).

<sup>37</sup> [COM \(2017\) 253](#).

<sup>38</sup> Principle 8 of the European Pillar of Social Rights provides that "The social partners shall be consulted on the design and implementation of economic, employment and social policies according to national practices. They shall be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action. Where appropriate, agreements concluded between the social partners shall be implemented at the level of the Union and its Member States. Workers or their representatives have the right to be informed and consulted in good time on matters relevant to them, in particular on the transfer, restructuring and merger of undertakings and on collective redundancies. Support for increased capacity of social partners to promote social dialogue shall be encouraged."

outs.<sup>39</sup> Moreover there is no specific EU-level legislation regulating this matter in a comprehensive way.<sup>40</sup>

The rules and traditions concerning representation and collective defence vary considerably at national level. Across the Member States, there are significant differences in the degree of representativeness of social partners, their general involvement in decision-making, and the prevalence and centralisation of collective bargaining. In addition, 18 Member States have models of workers' board-level representation at company level and these differ greatly from each other.

The Commission remains committed to supporting the capacity-building of social partners, in line with the quadripartite Joint Statement of the Presidency of the Council of the European Union, the Commission and the European social partners on a *New start for social dialogue*.<sup>41</sup>

The Commission welcomed the autonomous 2019-2021 work programme agreed by the EU cross-industry social partners on 6 February 2019<sup>42</sup>, which is a testament to their strong will to promote solutions for a fair, competitive and sustainable Europe.

The strong links with, and diversity between, national rules and traditions in the area of representation and collective defence are strong arguments to maintain unanimity voting in the Council in this area. **There seems to be no clear case at present for using the *passerelle* clause.**

## 6. Conclusions and next steps

In the social field, the EU already has effective, timely and flexible decision-making processes which allow to fulfil its aims of promoting the well-being of its people, a highly competitive social market economy, full employment and social progress, and combatting social exclusion and discrimination, and to respond to the challenges of the future of work, in the face of global trends, such as digitalisation, population ageing and migration.

In the light of the considerations set out in this Communication:

- For those areas still governed by unanimity, a move to qualified majority voting or the ordinary legislative procedure could certainly render decision-making in the EU more timely, flexible and efficient. It would also foster a culture of compromise and make it

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<sup>39</sup> See Article 153(5) TFEU which provides that Article 153 TFEU does not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

<sup>40</sup> Aspects of representation and collective defence are dealt with – to various extents - under specific instruments such as the European Works Council Directive 2009/38/EC, Directive 2001/23/EC on transfer of undertakings, Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees, Directive 2003/72/EC on the information, consultation and participation rights of employees in a European Cooperative Society, and Directive (EU) 2017/1132 on certain aspects of company law.

<sup>41</sup> A new start for Social Dialogue - Statement of the Presidency of the Council of the European Union, the European Commission and the European Social Partners, 16 June 2016; <http://ec.europa.eu/social/BlobServlet?docId=15738&langId=en>

<sup>42</sup> European Social Dialogue: work programme 2019-2021 (of ETUC, BusinessEurope, CEEP and SMEunited); <https://www.busesseurope.eu/publications/european-social-dialogue-work-programme-2019-2021>



easier to take decisions that respond to the needs of the citizens and the economy in the EU as a whole, and thus ensure a fair single market;

- Having said this, a selective and case-by-case approach to the use of the *passerelle* clauses in the Treaties is warranted. Not all areas of social policy that are still subject to unanimity and special legislative procedures are equally essential to improve the Union's capacity to act;
- From the perspective of the Commission, it would be important to consider the use of the general *passerelle* clause to facilitate decision-making on **non-discrimination** and the adoption of **recommendations on social security and social protection of workers** in the near future. For the other areas (employment conditions of legally residing third-country nationals; dismissals; and the representation and collective defence of the interests of workers and employers) there seems to be no clear case at present for using the relevant *passerelle* clause, but the Commission remains open to review the situation in the future;
- The activation of the *passerelle* clause in the areas of non-discrimination and social security and social protection of workers would require the European Council to take a decision to that effect according to the procedure in Article 48(7) TEU, as outlined in section 4. of this Communication.

The Commission invites the European Parliament, the European Council, the Council, the European Economic and Social Committee, the Committee of the Regions, social partners and all stakeholders to engage in an open debate on an enhanced use of qualified majority voting or the ordinary legislative procedure in social policy on the basis of this Communication.

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