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Legislating after Lisbon New Opportunities for the European Parliament

A study prepared in the framework of the European Union Democracy Observatory for the Group of the Progressive Alliance of Socialists & Democrats in the European Parliament

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Introduction

This study was prepared by a research team of the European Union Democracy Observatory (EUDO) upon a request of the Group of the Progressive Alliance of Socialists & Democrats in the European Parliament. The object of the study was described as follows in the commissioning contract: “How to maximise the influence of the European Parliament in light of the Lisbon Treaty, in order to implement the Social Agenda and get the citizens closer to the EU.” The title of the study is a short rendering of that description.

EUDO is an independent and interdisciplinary academic organization, fully integrated within the Robert Schuman Centre for Advanced Studies (RSCAS) at the European University Institute (EUI) in Florence. Its declared goals are: to produce a permanent and periodic assessment of democratic practices within the EU; to serve as a forum to exchange ideas and good practices; and to be a resource for policy-makers, academics and EU citizen. To reach these goals, the EUDO platform consists of four components, the four EUDO observatories, one of which has, as its central theme of interest, institutional change and reform in the European Union. The EUDO Observatory on Institutional Change and Reforms recently organised, in February 2010, a workshop on the institutional implementation (la mise en oeuvre institutionnelle) of the Lisbon Treaty. The workshop was convened by Paolo Ponzano and Bruno de Witte and brought together practitioners of the EU institutions with a selected group of academics for a thorough discussion of the ongoing ‘implementation’ of the Lisbon Treaty.

The present study is closely connected to the subject of that workshop, but puts it in a longer time perspective and with a particular focus on the European Parliament. It seeks to explore the potential offered by the institutional changes contained in the Lisbon Treaty for the role and influence of the EP. The study is entirely devoted to the legislative role of the EP. This not to deny that the Lisbon reforms also have important implications for other, non-legislative, functions of the EP, such as its budgetary function and its involvement in external relations (in particular, after the creation of the External Action Service). Those

other reforms would deserve a study of their own. This study instead focuses on the EP's central legislative role, and it does so in two distinct parts.

In a first part, we examine two important innovations that are external to the European Parliament but may have important consequences for its legislative role, namely the citizen's initiative and the new role of national parliaments in controlling respect for subsidiarity. In a second part, we examine the new Treaty principles that directly affect the Parliament's own legislative powers, with particular attention to the greater prominence of fundamental rights in the Treaty system, and the inclusion of a new social clause, a new horizontal clause on non-discrimination and a new competence to act in relation to services of general interest. The focus on these principles was guided by the fact that they, together, create new opportunities for a progressive legislative agenda in the European Parliament.

Florence, June 30 2010

FIRST PART: Innovations for European Democracy

1. EUROPEAN CITIZENS' INITIATIVE

1.1 Introduction

The European Citizens' Initiative (ECI), introduced with the Treaty of Lisbon, is one of several recent attempts to tackle the European Union's democratic deficit. The basic idea is to link citizens directly to the European Union (EU) by introducing an element of participatory democracy. By gathering one million signatures across Europe, an initiative invites the Commission to take action.

Debates about a possible ECI started within the framework of the constitutional convention and it subsequently found its way into the Constitutional Treaty and later into the Lisbon Treaty. Following this, the European Parliament put forward a resolution requesting the Commission to submit a proposal for the regulation of a Citizens' Initiative¹. In November 2009, the European Commission released a Green Paper² (GP) and the consultation process came to an end with a Commission hearing in Brussels in late February 2010. On March 31 2010, the Commission put forward its "Proposal for a regulation of the European Parliament and of the Council on the citizens' initiative" (PR). It is now up to the European Parliament and the Council of Ministers to discuss the PR.

Both the Treaty and the Commission's Green Paper remain unclear in their provisions and specifications of the ECI process. The Green Paper concentrates on technical details, while the greater political implications of European-wide initiatives remain untouched. The Commission's PR, while taking over several ideas from the GP, also takes into account the various concerns voiced and ideas proposed during the consultation period

¹ See European Parliament Resolution P6_TA(2009)0389, available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0389+0+DOC+XML+V0//EN>

² Green Paper on a European Citizens' Initiative – COM(2009) 622 final: Issued 11.11.2009, available at:

http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/com_2009_622_en.pdf

in the beginning of 2010. It now has a stronger focus on the process of the ECI and, in particular, introduces an ex-ante and ex-post verification mechanism. Nevertheless, the new proposal falls short of the Commission's claim to "bring the Union closer to the citizens"³.

The PR takes up several considerations discussed during a EUDO workshop on the implementation of the Lisbon Treaty held in February 2010 at the European University Institute in Florence. The discussions revealed that solely focusing on technicalities and neglecting their interplay with the dynamics of an initiative process may be suboptimal. The dynamics unfolding in an initiative process might have vaster repercussions on the setting of the existing European institutions and the democratic fabric of Europe than has been considered so far. The potential offered by the ECI will only be fully exploited if its technicalities are implemented in a way that is adjusted to, and compatible with, the dynamic nature of initiative processes.

Nevertheless, the PR does not succeed in solving a number of problems identified during the consultation period. In this section we will first offer an introduction to the official policy documentation dealing with the European Citizens' Initiative. In particular, we will analyze loopholes in the existing proposals and discuss their possible implications for the future. The section will conclude with recommendations that can contribute to making the ECI a useful and usable instrument of European level participatory democracy, which would help to bring the project of European integration closer to its people.

1.1.1 Treaty on the European Union (TEU)

The Treaty provides that:

"not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where

³ Proposal for a Regulation of the European Parliament and of the Council on the citizens' initiative. COM(2010) 119 final. Page 2. Available at: http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/com_2010_119_en.pdf

citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties"⁴

The TEU gives only marginal guidelines for the future implementation of the ECI. In a nutshell, three points become crucial. First, an initiative should require no less than one million signatures to be valid. Second, these signatures should come from a significant number of Member States. Third, provided that both former requirements are met, the Commission is "invited" to put forward a legal act on its behalf. The Treaty's provisions left ample space for the actual implementation. Central questions such as the procedural sequencing and the question of how strongly a successful initiative will bind the Commission to act on its behalf are left open. The GP provides a more detailed picture of the future outlook of the ECI and so does the PR.

1.1.2 Green Paper

The GP sets the minimum number of Member States in which an initiative has to be successful to one third. To guarantee the 'pan-European' character of these initiatives, the minimum threshold for making an initiative successful in one of these countries is set to 0.2% of the population. The minimum age requirement for the signing of an initiative is, like the verification process of the signatures, left to the Member States. A special emphasis is given to the possibility of online-signature gathering over the Internet, though little is said on how security and personal data protection should be guaranteed. In the GP, the Commission proposes a one-year limit for the gathering procedure after having registered the initiative in Brussels, and a half-year limit for the Commission to react to a successful initiative.

⁴ TEU, Article 11, para. 4.

1.1.3 Proposal for a Regulation

Most positions that the Commission embraced in the GP became directly enshrined in the PR. The minimum age for signing an ECI is left to the Member States, in accordance with their regulations regarding elections to the European Parliament. The timeframe for the signature gathering is limited to twelve months and signatures can be collected on paper as well as online. The validity of signatures is established through passport, national ID or social security numbers. Each signature holds the “nationality” of the document provided and is counted both for the sum of signatures gathered in the corresponding Member State and for the overall sum of signatures gathered in the European Union. The validation of the signatures lies as initially advocated in the GP with the Member States. The collection procedure is launched with the official registration of the initiative with the Commission. When registering an initiative, the organisers have to provide information on its content, objective, and sources of funding. During the registration process the Commission reserves itself the right to reject proposals that are “abusive or devoid of seriousness” or which are “manifestly against the values of the Union”⁵.

A new key element of the PR is the introduction of an ex-ante verification mechanism on behalf of the Commission on whether the proposed ECI falls into the framework of powers of the Commission. As soon as an ECI has collected 300 000 signatures in at least three Member States, the organisers have to inform the Commission, which in turn will have two months to verify whether the ECI falls within the Commission’s framework of powers.

A further innovation is the abolition of the proposed signature threshold, set at 0.2% of a Member State’s population. The 0.2% rule is replaced by a set of fixed minimum numbers for each country, calculated on the basis of the EP composition. The formula chosen multiplies by the factor of 750 the number of seats of MEPs per member state. Thus, it follows the principle of degressive proportionality. The minimum number of countries from which signatures have to come from is set, as proposed in the GP, at one third of the Member States (currently at least nine Member States). Also, the PR amends the GPs

⁵ RP page 9.

proposal regarding the handling of a successful ECI. The Commission has now cut its response time from six to four months.

Finally, the PR regulates the bulk of the ECI's implementation procedure in annexes to the regulation. Note that the Commission explicitly reserves a right of revision of these annexes by means of delegated acts and foresees a review of the PR after five years.

1.1.4 General problems – process approach

When looking more closely at the state of affairs regarding the ECI, it becomes - in our view - rapidly clear that neither the TEU, nor the GP offer enough substance for a successful implementation of the ECI. Through the consultation process and with the release of the PR, the technical framework of the ECI was improved. Nevertheless, the fundamental issue that an initiative is a dynamic process unfolding over time was only rudimentarily acknowledged in the PR. Not much of the experiences made with initiatives on the national and sub-national level, in the Member States and elsewhere, seems to have found its way into the reflections regarding the implementation of the ECI. The TEU, GP and PR remain suspiciously silent on the main feature of initiatives, namely that they are actor driven, sequentially and dynamically unfolding processes.

Initiatives are not static instruments. They have to be understood as processes that stretch across different stages. In politics, processes of this sort often tend to unfold path dependently. This means that decisions taken at earlier stages affect the choice set that actors encounter at a later stage in the process. Furthermore, the process of initiatives is always embedded in its institutional and political context. The outcome of an initiative is not solely determined by the formal rules of the game, such as quorums, eligibility criteria and other (technical) requirements. Instead, it is the interplay between these rules of the game and the given overall institutional and political context that defines the potential dynamics and effects of initiatives.

It is quite surprising that the Commission so far makes abstraction of such facts, recognized by the scholarly literature on direct and participatory democracy in general, and petitions and popular initiatives in particular. The crucial interplay between the three

elements mentioned above (rules of the game, institutional context, political context) is neither considered nor explicitly mentioned in any of the proposals (GP and PR). Add to this that even when adopting a purely static view of the ECI, limiting one's scope to the technical provisions put forward in the GP, the result is rather disappointing. The PR improves on the GP's heavy focus on technicalities by specifying them in greater detail and offering a clearer, but, as we will argue, still not convincing sequencing of the ECI procedure.

Before commenting in more detail about the proposed ECI procedure, let us briefly recall the common sequence popular initiatives generally share. We identify five major phases (Figure 1). The first is the launching phase. During this phase an initiative is registered and a check is carried out by the authorities on the formal requirements. The second phase encompasses the signature gathering period, usually delimited by a start- and an end-date. When the required number of signatures is reached, the third phase kicks in, namely the validation phase, usually followed by a formal decision on the initiative's procedural validity by the authorities. If the initiative takes this hurdle it reaches the fourth phase, during which the receiver of the initiative (usually the political authorities) formulates a political reaction. They generally do so by presenting a legislative proposal on the basis of the initiative's demands or by refusing any further action. Finally, the fifth phase embodies the reaction of the sender (expressing satisfaction, protesting against the outcome, taking legal action, launching a new initiative etc.).

Figure 1: Stages of an Initiative Process



Let us now discuss the ECI against the background of this general staging of popular initiatives.

1.2 Stage 1: Launch

When an initiative is launched, three major questions arise: (i) who can launch an initiative, (ii) in what form and (iii) with what content.

1.2.1 Who can launch an initiative?

Both the GP and the TEU remain silent on who is eligible to launch an initiative. The PR specifies this and therefore clearly improves the implementation of the ECI. Initiators can be natural persons, legal persons or organizations⁶. Article 3 further specifies that a natural person must be a citizen of the EU and be entitled to vote in the European elections⁷. When the organiser is a legal organisation it has to be established in a Member State, and organisations that lack legal personality under the applicable national law must have representatives that can legally act on their behalf and assume responsibility⁸. This proposal makes the ECI extremely accessible: even individual persons can launch an ECI. While the standard in cases of petitions, this is of exceptional character in the case of popular

⁶ Art. 2 PR.

⁷ Art. 3 para. 1(1) PR

⁸ Art. 3 para. 1(2) PR

initiatives. Most countries that have experience with initiatives require the establishing of an ‘initiative committee’. The exact requirements for such committees vary but, most commonly, they contain a reference to a certain minimum amount of citizens that can constitute an initiative committee. Also, such committees usually need to be established and accurately identifiable before an initiative can officially apply for registration. The committee rule works as a filter. It forestalls that the registration institution becomes paralyzed through a flood of applications launched by individual citizens. In the absence of a committee requirement, there is the risk that, for example, euro-sceptic groups abuse the registration procedure in order to raise their public visibility and to offset EU-institutions by having their individual members spam the Commission. The committee requirement does not fully solve this problem, as spamming can also occur by committees, but it arguably protects better – if not fully – from such an eventuality.

1.2.2 In what form?

A major downside of the Treaty and the GP was their vagueness on the specific formal requirements for ECIs. Potential initiative takers must have clarity about what information they have to provide along with their initiative. Furthermore, potential signers should know what they are supporting with their signature. Here the PR marks a decisive step forward⁹. It clarifies that upon registration initiative takers must provide a title in no more than 100 characters¹⁰, a 200 characters abstract of the subject¹¹, a 500 characters description of the objectives of the proposal¹², the legal base of the Treaties which would allow the Commission to act¹³, as well as the full name, postal address, e-mail address or, in the case of a legal entity or organisation its legal representative¹⁴. Additionally, all sources of funding

⁹ Art. 4 PR and Annex II PR.

¹⁰ Annex II.1 PR

¹¹ Annex II.2 PR

¹² Annex II.3 PR

¹³ Annex II.4 PR

¹⁴ Annex II.5 PR

and support of the initiative at the time of registration have to be listed¹⁵. Note that this information is sufficient for an ECI. However, an ECI can go beyond these basic requirements. Its promoters may submit a “draft legislative text”¹⁶. In other words, the ECI can take on any form, ranging from a proposal that simply states a goal (e.g. “the Commission should act on XY”) to a fully formulated draft legislative text. In addition, the draft regulation states that “organisers may provide more detailed information on the subject, objectives and background to the proposed initiative in an annex”¹⁷. In a sense, the ECI therefore becomes unbounded. While offering an extremely flexible format that leaves complete discretion to initiative takers, this very flexibility may lead to two sorts of confusion about the purpose of the initiative. First, it may confuse signatories, who might agree with the general objectives, but disagree with the draft legislative proposal (or parts of it) and vice versa. Second, in its non-challengeable interpretation of the ECI, the Commission may privilege the general goals over the draft text or vice versa. Therefore, while the Commission maximises flexibility for the initiators it also maximises its own possibilities to interpret ECIs.

Article 5 PR specifies the procedures and conditions for the collection of statements of support. It first states that the responsibility for collecting signatures lies with the organisers¹⁸. Some of the mandatory registration information (title, subject-matter, description, name and address of organizers) must be filled into a “Statement of support form”¹⁹. This form is then used by the initiators for gathering the signatures. The provision of an ECI in more than one language (no single language currently covers at least nine Member States) constitutes a possible problem. While Art. 4 para. 1(2) states that an ECI can be registered in one of the official languages of the Union, the PR remains completely mute about possible translations of the ECI’s content (although this point was raised during

¹⁵ Annex II.7 PR (note that Annex II.6 PR does not exist...)

¹⁶ Annex II PR

¹⁷ Annex II PR

¹⁸ Art. 5 para. 1(1) PR

¹⁹ Art. 5 para. 1(2) PR and Annex III PR.

the consultation process)²⁰. In principle, this means that an initiative can be translated into any language, including languages not part of the official languages of the Union. In other words, nothing prohibits so far the translation of the ECI into Navajo or into Latin. However, this raises the question of who controls the content of the translations. What, for example, if an initiative has so many translation flaws that the actual content changes from one language to another? What if this initiative gains enough signatures to be accepted, even though people might have in effect signed different things? We recommend that first the number of potential languages be limited to official languages of the Union and, second that the Commission provides for official translations of the content of the initiative (which, however, must be dealt with in conjunction with the aforementioned problem of ‘unbounded initiatives’).

1.2.3 With what content?

Besides these formal requirements, a second hurdle is imposed on initiative takers that should not be underestimated. The GP left it entirely in the hands of the initiators of an initiative to control whether their proposal falls into the framework of powers of the Commission. The wording “framework of powers” of the Commission has three dimensions. First, it means that only matters that fall within the competences of the EU can be demanded by an initiative. Second, only issues where the Commission can initiate legislation can be demanded by an ECI. This includes almost 90% of EU matters, but nevertheless excludes crucial policy fields such as the Common Foreign and Security Policy. Third, it also means that only issues that do not violate higher law, for example the EU Charter of Rights and Freedoms, can be brought up in an initiative. This is tricky, as in some cases it might be quite hard to judge for an ordinary citizen what is covered by these three dimensions. The constantly changing nature of the relations between the different EU-institutions requires almost real-time updated knowledge. This problem might weigh especially heavily in the case of initiative proposals, as an initiative may touch on an issue on which the Commission

²⁰ See Commission’s Staff Working Document “Outcome of the public consultation on the Green Paper on a European Citizen’s Initiative”, SEC(2010) 370.

has so far not taken action, although it may do so. In other words, many of the initiatives may enter uncharted territory. In order to clarify legal issues of this nature, the Commission employs a fully-fledged legal service, whereas the proponents of an ECI are assumed to be able to judge the matter only with their own resources.

This problem is exemplified by the spectacular failure of the ‘one seat’ initiative²¹. This initiative was one of several mass-petition-initiatives that were used as test cases for the viability of a Europe-wide initiative. ‘One seat’ wanted to confine the geographic location of the European Parliament to Brussels and to abolish Strasbourg as the EP’s second seat. The initiative was launched and sponsored by several Members of the European Parliament. However, precisely during the ceremonial hand over of the one million gathered signatures in the plenary of the European Parliament, the representative of the Commission declared that he had to reject the petition since it would not fall into the framework of powers of the Commission. This shows that sometimes it is not even clear for the people who run the European institutions on what matters the Commission has jurisdiction.

Compared to the GP, the PR now includes a provision according to which ECIs can be dismissed by the Commission upon registration if they can be reasonably regarded as improper “because they are abusive or devoid of seriousness”²². Furthermore, the Commission can, according to the PR, “reject the registration of proposed citizens’ initiatives which are manifestly against the values of the Union”²³. While certainly constituting a progress compared to the GP, the PR solution contains several problems in this regard. First, formally, there is no specified timeframe within which the Commission has to take the decision on the registration of an ECI. It can, potentially, delay the registration on grounds of verification whether the proposed demand violates either Art. 4 para. 3 or Art. 4 para. 4. Second, even if this decision is immediately – or rapidly – taken, it does not have to be justified in any way by the Commission. In other words, the interpretation of what constitutes, for example, a violation of the values of the Union is entirely placed into the

²¹ 1 067 838 signatures were handed over on 18.09.2006 in the EP.

²² Art. 4. para. 3 PR

²³ Art. 4. para. 4 PR

hands of the Commission. Although the PR mentions the necessity for the Commission to “deal with registration in accordance with the general principles of good administration”²⁴, the leeway given to the Commission in this respect seems to be quite substantive. Also, it is not clear if initiators may protest or appeal against this decision and if so where, i.e. to the European Ombudsman or to the European Court of Justice. In our view, the future regulation should take these shortcomings into account.

1.3 Stage 2: Signature Gathering

Registered initiatives now enter the second stage of the process: the signature gathering period. Both the GP and the PR propose a period of twelve months during which the initiative takers can gather signatures. However, the PR subdivides this stage into three potentially consecutive periods: first, a registered initiative has to collect 300 000 signatures from at least three Member States. The organisers then need to file a request to the Commission to check the admissibility of the initiative. The second period therefore consists of the Commission’s admissibility check, for which the PR foresees a maximum time limit of two months. The third period does not follow up on the second period, but initiates at the same time as the latter. During this third period, the remaining 700 000 signatures must be gathered. In the end, the signature requirement is fulfilled if an ECI has gathered at least one million signatures within twelve months from its registration and coming from at least nine Member States, with a fixed minimum number of signatures per country. In the following we will examine this three-step process in more detail.

1.3.1 First period: get to 300 000

The PR requests from the initiators that upon reaching the 300 000 signatures’ threshold they must inform the Commission and hand in a form indicating the number of signatories

²⁴ PR p. 9

per Member State²⁵. These signatures have to come from at least three Member States²⁶. This intermediary threshold was introduced by the PR in order to enable the Commission to take a decision on the admissibility of a proposed initiative “at a sufficiently early stage”²⁷.

A first problem arises from the fact that – unlike the logic followed for the 1 000 000 threshold – no minimal number of signatures per Member State is required. In other words, it is logically possible to force the Commission to check the admissibility of an ECI that has gathered 299 998 signatures from, say, Slovenia, and one each from Hungary and Austria. Thus, framed in the current format, the three-States-requirement lacks any sense. Note also that the explanations given by the Commission for the proposed system of 300 000 signatures coming from three Member States are not convincing. It is argued that reaching one third of the requirements for a successful ECI would provide a “sufficiently representative sample in order to trigger the admissibility check”²⁸. It is far from clear why one would need any “representative sample” (which, as we have just seen, must not be representative at all) for checking legal requirements of the ECI’s content. In the next section, we will discuss the proposed intermediate admissibility check more in detail.

When thinking about the collection of signatures, one should immediately become attentive of the means through which they can be gathered. Whereas the Treaty remains mute on the requirements for the signature gathering, the Green Paper discusses various possibilities. In the end, the Commission advocates a widespread plurality for the collection process that ranges from hand-collected signatures on the streets, to signing in municipality buildings. A special emphasis is given to the online collection of signatures. The PR does not deviate from this flexible and open philosophy. It consecrates two entire articles (Art. 5 and 6) to the procedures and conditions for the collection of “statements of support”, as signatures are also called in the Commission’s jargon. According to the PR, signatures can be gathered through the means of forms (“statements of support forms”), annexed to the PR and already mentioned under section 1.2.2.

²⁵ Art. 8 para. 1 PR and Annex V PR

²⁶ Art. 8 para. 1 PR

²⁷ PR p. 9

²⁸ PR p. 6

Signatures can be either gathered on paper or electronically. When gathered on paper, the signatory must give his or her first name, family name, address (city and country), date and place of birth, nationality, personal identification number, date and signature²⁹. Also, by signing the initiative, the signatory certifies that “the information provided in this form is correct and that [he/she] has only supported this proposed citizens’ initiative once”³⁰. A signature is not required when the form is submitted electronically.

In particular, the electronic signing poses problems. For the moment, the Commission has not adopted technical specifications of this system. It proposes, however, to do so within one year³¹. In particular, it will be tricky to deal with the question of how privacy rights and data protection can be guaranteed. Without a Europe-wide electronic ID it seems hard to prevent fraud and signature falsification. Note that in Estonia a digital ID card is already in use and serves for most interactions between the state and its citizens, including for voting over the Internet. Other EU Member States are currently looking more closely into a possible introduction of similar digital ID cards. However, in most countries such forms of electronic identification and authentication procedures are not yet available.

A possible way out of this would be to apply a similar regulation to the online signature collection as used for e-commerce. An EU-directive on this exists already since 1999³². It was put forward in order to promote electronic commerce. However, a 2006 report of the Commission states that even though the principles of the directive are now implemented by the Member States there is still no “representative case law that allows for any assessment of the electronic signatures in practice”³³. It is therefore not possible to assess here thoroughly whether the directive on e-commerce would be applicable to online signature gathering for ECIs. It seems though in principle feasible. We therefore strongly

²⁹ Annex III PR

³⁰ Annex III PR

³¹ Art 6 para. 5 PR

³² See “Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures”, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0093:EN:HTML>

³³ Report from the Commission to the European Parliament and the Council - Report on the operation of Directive 1999/93/EC on a Community framework for electronic signatures, COM/2006/0120 final, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006DC0120:EN:NOT>

urge the Commission to test whether the regulation of e-commerce signatures could also be applied to ECIs.

1.3.2 Second period: admissibility check

Upon receiving the request of a decision on the admissibility of the ECI, the European Commission has to examine whether or not the ECI fulfils two major requirements: (i) whether “it concerns a matter where a legal act of the Union can be adopted for the purpose of implementing the Treaties”³⁴ and (ii) whether “it falls within the framework of the powers of the Commission to make a proposal”³⁵. The Commission has two months time for making its decision on the admissibility of the ECI³⁶.

This is an innovation not present in the GP. During the consultation procedure numerous voices mentioned that the admissibility of an initiative should be checked before one million signatures are reached. The goals of an “intermediary warning system” advanced in the consultation procedure were twofold: first, the check should not be done upon registration in order to reduce the workload for the Commission (wasting of resources). Second, it should not come at the very end of the signature gathering process as otherwise it might lead to frustrations among the signatories³⁷. However, both arguments were dropped in the explanations by the Commission for introducing the intermediate admissibility check. The PR acknowledges that an early check should be introduced, though only after a first batch of signatures has been successfully gathered.

The Commission now argues that the proposed intermediate check is to be preferred for three reasons. First, initiatives should explicitly get the right to gather signatures on issues that might later not fulfil the two major admissibility requirements mentioned above. The purpose of this is to promote public debate even on issues outside the Commission’s framework of powers. Second, the Commission does not want to judge *ex ante* (before the

³⁴ Art. 8. para. 2a PR

³⁵ Art. 8. para. 2b PR

³⁶ Art. 8. para. 2 PR

³⁷ PR p. 4

signature gathering process starts) on the admissibility of an ECI because it wants to avoid “giving the impression that the Commission has given a favourable opinion on an initiative per se”³⁸. Third, the Commission now wants to unburden the Member States by not obliging them to carry out “checks on the statements of support received for an initiative which ultimately may not be admissible”³⁹.

Before discussing this system, let us mention that it is not clear whether the initiators have to wait (up to a maximum of two months) for the Commission’s decision on the admissibility, before continuing gathering the remaining 700 000 signatures. As it stands, nothing prohibits the signature gathering effort from proceeding. In the following, we interpret this system as not exerting any suspending effect⁴⁰. This means that a very successful ECI could gather the remaining 700 000 signatures even while the Commission’s admissibility check proceeds. The Commission might therefore refuse initiatives that in practice gathered one million signatures, which functionally corresponds to the unwanted ex-post check. Such a de facto ex-post check was criticized (rightly so) in the consultation procedure as leading to potential citizen frustration. The Union would hardly be brought closer to its citizens, clearly not to the one million signatories. But let us now consider the three arguments advanced by the Commission for introducing the intermediate admissibility check.

First, this system allows for the launch of any initiative that fulfils the formal registration requirements and passes the rather opaque hurdles of the content-test (see above 1.2.3 for further explanations). The Commission’s argument is that such a system maximises the potential for public debate even on issues outside the framework of the Commission’s powers. While laudable from the outset, such a system would precisely lead to citizen’s frustration, in particular when a topic gets vividly, publicly and Europe-wide discussed, with the Commission quite surely knowing that it will have to throw the initiative into the dustbin. The voice of no less than 300 000 signatories would go unheard. If this

³⁸ PR p. 6

³⁹ PR p. 6

⁴⁰ If the system, however, should be understood as suspending the collection of signatures,, then the overall time at the disposal of the initiators to get one million signatures would be cut down from 12 to ten months.

happens repeatedly or even regularly, the entire initiative process may lose its credibility and potential attractiveness.

The Commission's second argument is that it prefers this intermediate admissibility check to an ex ante judgement in order not to send any positive signal to the initiators. However, we do not understand why such unwanted signalling would not also occur when declaring an initiative admissible that has already gathered 300 000 signatures. To the contrary, the signalling effect might be even amplified at this stage.

The third argument is the lower workload for Member States in the context of inadmissible initiatives. Although seductive at first, the argument is not convincing as a) an ex ante test would lower the workload for Member States to zero and b) with an ex post test the workload might not be higher, as the signatures would be limited to initiatives having gathered one million signatures within twelve months. There will be fewer of the latter than of those reaching the 300 000 threshold.

The only argument that remains valid, but which is not advanced by the PR, is the lower workload for the Commission compared to an ex ante admissibility check. While this will for sure be good for the Commission, such a system externalises the costs in terms of frustration onto the initiative takers. Initiatives will often touch on 'virgin soil', where the Union has not acted so far (as is implied by the wording in the TEU concerning the ECI). With the ever-changing nature of the Union, what might fall into the framework of the Commission today might not do so tomorrow. Initiative takers will often simply lack the resources to check whether something falls into the framework of powers of the Commission. Verifying for an initiative whether something falls into the framework of powers of the Commission might therefore not only be difficult, but also costly as it is most likely that such testing has to be outsourced to legal experts. This would in turn again move the ECI away from its 'citizen-orientation' and into the direction of a tool that serves strong and resource loaded organized interests. As the spectacular failure of the 'one seat' initiative has shown, at times not even Members of the European Parliament can judge what exactly lies in the framework of the Commission's power. Therefore the obligation to

test whether an initiative proposal would fall into its framework of powers should be left to the Commission – at the beginning of the entire process.

Ex-post or intermediary invalidations always carry the seed of opportunistically motivated behaviour on behalf of the Commission in order to get rid of uncomfortable initiatives. To avoid such a scenario, the Commission should, also for its own sake, split the validation procedure into one ex-ante and one ex-post phase to the signature gathering process. We describe such a possible process in section 1.5 below.

1.3.3 How many signatures and from where?

The Treaty and the GP were also unclear on whether EU citizens residing in other EU Member States would be allowed to sign an ECI. The PR puts forward that it is generally possible to sign an ECI anywhere in the EU. The signature, though, will always be attributed and counted on the quota of the country that issued the verification document of the signer. It is still unclear who will be responsible for the notification of national validation agencies about signatures from other countries that go on their quota. Does this responsibility lie with the initiative takers or the validation authorities of the country where the ECI was signed? To avoid confusion in the future, further clarification on this will be needed for the final regulation.

According to the TEU, an initiative requires at least one million signatures from a significant number of Member States. The GP discussed at length the interpretation of “significant number of Member States” and proposed, in the end, that signatures should come from at least one third of Member States (currently nine) for an initiative to fulfil this criterion⁴¹. The GP furthermore specified that these signatures should not be concentrated in one single Member State, with only a handful of signatures getting collected in eight other Member States. As one million citizens corresponds, roughly, to 0.2 percent of the population living on the territory of the EU, the GP argued, there should be at least one million signatures gathered, in at least nine Member States, and in each one of these nine

⁴¹ COM(2009) 622, op. cit., at p. 4.

Member States at least 0.2 percent of the population should have apposed their signature beneath the text of the initiative.

This was a highly complicated solution. The problem with setting percentage thresholds is that the real numbers for making an initiative work will constantly shift. Populations are not stable entities but are influenced by demographic changes and migration flows. Today 0.2 percent may correspond to one million, but it might not do so anymore by tomorrow. If one keeps the 0.2 percent hurdle in each of at least nine Member States, one changes the constitutional requirement of one million signatures.

During the consultation process, the 0.2 percent threshold solution was widely criticised and therefore dropped. As mentioned in the introduction, there are now fixed thresholds for every Member State. These thresholds are degressively proportional.

However, high concentrations of signatures in one or two Member States can still occur quite easily. The smallest eight Member States have a total population of roughly 15 million inhabitants. The cumulative minimal threshold set for these eight Member States corresponds to 48 750 signatures. An initiative would therefore be valid if it gathers 952 250 signatures in, say London, and 48 750 distributed over the smallest eight Member States. However, this is exactly what the implementation as proposed by the Commission would like to avoid. In our view, however, it could be legitimate to ask the Commission to initiate legislation regarding geographically confined matters, if requested by a sufficiently high number of people. If one million EU citizens in a particular part of the Union claim to have a problem that only the Union would have the power to solve – why should it not do so? Democratic accountability is achieved if the Union can present itself as a responsive problem-solving agent. This can be fostered by collaborating with geographically confined regional levels of Europe that have problems to be solved.

Let us add that the systems most experienced with signature gathering procedures, such as Switzerland, Italy and numerous US states, do not impose any geographical distribution for their respective procedures. A popular initiative in Switzerland could indeed be valid even if the 100 000 signatures foreseen by the Constitution only come from the two largest cantons of Zurich and Berne, or, as a matter of fact, only from one single canton. We

believe that the number for signatures required from other Member States should be significantly lower than the proposed thresholds. One could spin this argument further. Even if one wants to preserve a strong trans-European touch of the ECI, one third of the Member States seems to be a too high hurdle. It could be the case, indeed, that certain cross-border territorial entities have a common trans-national problem to solve. The national governments would not be able to handle the problem due to their geographically confined sovereignty. In this case even if the potential for one million signatures would be given in the affected region, an ECI would not be successful as the signatures would only come from two or three Member States instead of the required nine. Therefore, not only the thresholds should be lowered but also the one third of all Member State requirements. We propose here to diminish the threshold to a maximum of one fourth of all Member States. Similar suggestions have been made by the European Parliament's resolution and several institutional contributors at the Commission hearing on the ECI in Brussels⁴².

On the other hand, if one wants to emphasize the logic of the EU-wide initiative then one might want to also consider the introduction of a minimum threshold for the number of countries in which an initiative has to be organizationally launched. This requirement should be high in order to counter a bifurcation of Europe in terms of Citizens' Initiatives and direct democracy. It might be the case that after experiencing with EU-wide initiatives a pattern will take hold, with initiatives getting launched in some countries more often than in others. This might in turn lead to an accumulation of experience in how to successfully launch initiatives in these countries and further foster the trend towards using the instrument there. The result would be a two-tiered Europe, where one would find countries with stronger direct democratic ties to EU-institutions and others in which the instrument of the ECI will be barely, if at all, used. That would mean that in certain parts of Europe the democratic deficit of the EU would be reduced whereas in others it would remain the same.

⁴² European Parliament Resolution P6_TA(2009)0389, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0389+0+DOC+XML+V0//EN> "Beschluss des Bundesrats – Grünbuch Der Kommission der Europäischen Gemeinschaften zur Europäischen Bürgerinitiative", available at: http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/bundesrat_de.pdf

This would definitely not be in line with the visions that started the European integration process.

1.4 Stage 3: Validation

Stage 3 of the process encompasses the validation procedures. In particular, it raises the question of the validating entity. Who, ultimately, should attest the validity of the signatures gathered? This section also tries to answer the question of the timeframe during which the validation process should be carried out.

1.4.1. By whom?

For the validation process of the signatures, the TEU again has little to say. Contrary to this, the GP opens a lengthy discussion. It is proposed that the signature validation should lie with the Member States. According to the GP, they are the only ones that can guarantee a proper validation as they administer the national vote registers. Another dimension of the validation is the assurance that double-signing of initiatives will be controlled for, not only within but also across Member States. This is rather tricky as the experience with the European Parliament elections shows that already here difficulties exist to double-check and cross out citizens that move from one member country to another⁴³. Further consideration should also be given to the national level where the signatures have to be validated. Signature validation is costly, and some smaller Member States might simply lack the resources to constantly carry out validations. In such cases additional funding through the Commission might become necessary.

The legal requirements for signing an initiative will also lie with the Member States, as for the procedural aspects of European Parliament elections. This in turn would mean

⁴³ See Beschluss des Bundesrats – Grünbuch Der Kommission der Europäischen Gemeinschaften zur Europäischen Bürgerinitiative, available at:
http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/bundesrat_de.pdf

that Austrian citizens would be allowed to sign an initiative already at the age of sixteen whereas in all the other EU-states the minimum age requirement is eighteen. The GP argues though that there should be a unified baseline for signature gathering requirements across the Union⁴⁴. The regulation also leaves open what happens if a Member State would delay the validation of an initiative. How could the Commission sanction such behaviour? What if Member States actively seek to delay validation procedures in order to block uncomfortable initiatives?

1.4.2 For how long? - Timeframes

The Treaty remains mute on a potential time limit for the signature collection of an ECI. After discussing the pros and cons of a delimited time period during which signatures can be gathered, the GP proposes a one-year deadline. The same goes for the PR, taking up this proposal and specifying that the signatures have to be collected within a period of twelve months from the date of registration. Then follows a three-month signature verification period by the Member States and, once the necessary certificates of signature validity have been handed over to the organisers of the initiative, they can be transmitted to the Commission. Once an initiative is delivered, the Commission has four months to formally react.

The one-year time limit for the signature gathering might sound adequate, but could in reality be too short. In effect, none of the twenty test-initiatives that were launched so far managed to collect the one million signatures within one year⁴⁵. Only if the initiative prepares its signature gathering institutions and network well enough before the launching day, might it be able to make use of the entire period. Depending on the organizational means of the initiative, setting up the network and making it run properly can take months or years, due to the trans-national coordination that is needed. Only if simultaneously launched in all Member States will an initiative be able to maximize its potential. This rather

⁴⁴ COM(2009) 622, op. cit., at p. 8.

⁴⁵ See also "Beschluss des Bundesrats – Grünbuch Der Kommission der Europäischen Gemeinschaften zur Europäischen Bürgerinitiative", available at: http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/bundesrat_de.pdf

short period could therefore have the perverse effect of delaying the launching of initiatives until the organization behind the initiative is in full throttle across Europe. Timely reactions to timely issues may therefore become more difficult to achieve, or, alternatively, only be achieved by large, strong and pan-European organizations.

The initially proposed six-month time span for the Commission's reaction is instead too long. It is understandable, as following the GPs logic, during these six months the Commission would have to get the signatures counted and validated in all the Member states in which such signatures have been gathered. The dependency on national instances is here very high and costly in terms of coordination efforts. Only then the Commission would look at the question of the constitutional admissibility of the initiative (i.e. EU-competence; Commission-initiative right; no higher law violation). And only in a third step would the political reaction unfold, i.e. the Commission's opinion about the merit of taking action be communicated. While six months is rather short for the Commission, it is rather long for the initiators. For sure, the initiative's momentum would be gone.

The PR extends the total number of months for validation of signatures and political reaction to seven. We believe that the political reaction by the Commission should come at a much earlier point in time. While three months for signature verification may be an appropriate time-span, the Commission could in parallel to this process prepare its reaction so that the formal validity of the initiative can be directly followed by the Commission's reaction. It would be rather odd to imagine a situation in which the Commission does not communicate, for four entire months, any reaction to a citizens' initiative that took every hurdle.

1.5 Stage 4: Receiver Reaction – an alternative sequencing?

The most significant downside of the TEU and GP provisions are their neglect of the dynamic nature of initiative processes. Both documents treat the participatory democratic process as static. We argue that timing and sequencing are crucial. In this regard, the PR made quite some improvements on the GP, which did not differentiate between a rejection before or

after the process of signature gathering. If the PR proposal is to be retained, an intermediary check will come into effect, after the threshold of 300 000 signatures is reached. We have discussed the pitfalls of such an intermediary test and instead propose a clear two-step process, in which an ex-ante control is followed by an uninterrupted signature gathering period.

Both the GP and the PR propose only a skin-deep ex-ante control of initiative proposals. The Commission argues that an overly complicated regulation for ECI launching requirements would scare potential initiative takers fearing that the instrument would never take off. Furthermore, in line with this, the GP explicitly states that fully-fledged legislative proposals should not be a requirement for the registering of an initiative (even though that would not be prohibited either). We agree that imposing a fully blown legislative proposal to be drafted would represent a high hurdle for ECIs, as it would force initiative takers to possess sufficient resources to hammer out watertight legal proposals. This indeed would inhibit the launching of initiatives. The PR echoes this in principle. As we have seen in section 1.2.2, the extreme flexibility remains, however, problematic for several reasons.

Due to the above stated reasons we propose an alternative sequencing: first of all we advocate the splitting of the validation process into an ex-ante and ex-post part to the signature gathering. In the ex-ante part, it must be controlled if the initiative proposal fulfils all formal requirements (clear statements, correct translations, etc.) and whether the three legal requirements (EU competence, Commission initiative right, higher law compatibility), put forward above, are met. On these grounds the Commission could then decide whether the proposal should be given the green light for the signature collection to start. In either case – acceptation or rejection – the decision of the Commission should be duly motivated. Especially a thorough ex-ante control regarding the compatibility of an initiative's content with higher law is a real advantage. This would prevent that extremist political actors abuse the initiative procedure to push for example racist, homophobic, or xenophobic agendas on a European level, all of which would potentially violate the EU Charter of Rights and Freedoms. This particular ex ante check is partly proposed by the PR, but only for initiatives

that can be regarded as abusive or devoid of seriousness, as well as for initiatives that are manifestly against the values of the Union.

The ex-post validation should then again be subdivided into two stages. During the first one the Commission – in close collaboration with the Member States' administrations, would check whether the technical requirements of the various quorums are met and enough valid signatures cast. This should not take longer than six weeks. If all formal requirements for a valid initiative are met, then the Commission should formulate a political answer to the proposed initiative. If the Commission does not wish to take the proposed action, it should motivate this decision within another six weeks. If however it wishes to initiate legislative action as proposed by the ECI, then it should declare this within the same timeframe from the validation of the signatures, i.e. within six weeks. In other words, within maximum three months upon depositing the initiative in Brussels, the initiators and its supporters would be set. They would know whether or not their proposal was met with the political success they were aiming for. If the Commission is willing to follow the proposed invitation to take action, it should put forward a draft proposal within three months. This proposal has then to be presented and discussed in a stakeholder meeting - to which the initiators are invited.

The proposed sequencing for an ECI would in our view offer a better guarantee to the European citizens that their signatures will unfold real effects that eventually may make a real political difference. If such a mechanism can be implemented and the citizens get convinced of its usefulness, they become more tightly bound to the institutions.

1.6 Stage 5: Sender Reaction – appeal?

The lack of accounting for the dynamic character of initiatives opens up another pressing question. What happens if the initiative takers do not accept the rejection of an initiative be it ex-ante or ex-post? To whom can they turn for appeal if they deem the Commission's reasoning for the rejection to be inadequate?

In a way the GP puts the Commission in the position of being executive and judge at the same time. This situation grants the Commission a certain omnipotence in the initiative process. However, the usual judicial review of Commission decisions would apply here: positive or negative decisions of the Commission could be challenged before the General Court, by the initiators if they can show to be directly and individually concerned by the decision. The average timeframe for the Court to produce a judgement is roughly a year. Note that this can be speeded up by claiming “urgent matters”, but it remains in the General Court’s competence to appreciate the urgency.

Initiative takers may also use the European Ombudsman to file complaints if necessary. This could especially be done for procedural matters such as for example a too slow processing of an initiative on behalf of the Commission. Though such complaints do not have direct legal effects on the Commission, they nevertheless are a way to ‘raise voice’ and create public awareness regarding possible maladministration of initiatives.

1.7 Neither “Citizen” – Nor “Initiative”

In this concluding section we will argue that the European Citizens’ Initiative, as imagined so far by the Commission, neither deserves to be called “initiative” nor should it contain the term “citizen” in its name. At best it remains “European”. Calling such an instrument a “citizens’ initiative” is misleading, paradoxically contributing to the suspicion of the European Union’s non-willingness to truly enable citizens to take part in the decision making process at European level.

Possibly the major problem for the implementation of the ECI as the new participatory democratic flagship of EU institutions, is that it is very hard to distinguish from the existing petition right to the European Parliament.

So far the major difference is that initiatives are addressed to the Commission, whereas petitions are sent to the Parliament. The potential political impact that can be generated by both seems to hardly differ. In most polities that have a form of a popular initiative, the latter distinguishes itself from a simple petition insofar as it binds the political agent directly. A petition instead, needs a ‘relay’ in order to unfold real effects. With petitions, parliaments, governments, administrations etc. can more or less do what they want. In most cases, these agents at best acknowledge the existence of the petition, thank the petitioners for their constructive proposal and then continue with their usual work. Generally, thus, petitions are first and foremost tools that have a certain agenda setting potential. Without the agent to which it is addressed voluntarily taking up action, promoting it and eventually translating it into legislation, petitions remain what they are designed for: bottom-up signalling devices that may or may not lead to any political action. A popular initiative, on the other hand, develops direct effects, as in case of success, it is either voted upon by the entire electorate or directly implemented by the legislator.

As it remains so far unclear in the ECI provisions how tightly a successful initiative would bind the Commission to act on its behalf, and where initiative promoters can turn to when they do not feel that the Commission responded adequately, the initiative ceases to

be one. In fact, it resembles more a petition than an initiative. As long as it remains unclear how seriously the formulation regarding the invitation “to act on its behalf” is taken by the Commission, EU citizens indeed have no major incentive to initiate an ECI rather than a regular petition. Why should citizens engage in the resource consuming struggle of organizing trans-nationally if they could yield the same political effects with a simple, easy to handle and substantially unconstrained petition?

Worse, putting the term “citizen” into the name of this instrument runs the risk of becoming an illustration of political cynicism. As it is projected the ECI would be an instrument for large, trans-national, resource rich interest organizations. It is almost absurd thinking of ordinary citizens being able to organize across at least one third of all Member States and gather more than one million signatures correctly distributed across Europe within twelve months. In short, a European Citizens’ Initiative that is neither an initiative nor an instrument that can be directly initiated and controlled by citizens is, in the end, a far cry from what the European Constitutional Convention had envisaged.

A viable way out of this would be to supplement the initiative with a referendum mechanism. To stock up the ECI with a binding referendum is not possible as it would alter the balance of power between the European institutions. This would require a treaty change. Instead, we advocate a consultative EU-wide referendum that the EP can request with a simple majority. The adding of a consultative referendum to the ECI regulation is in our view legally feasible, thus it would be enough to include it in the ECI-regulatory framework. How the technical modalities of such a referendum would look like (simple population majority, double majority of Member States and population etc.) is for now of secondary importance as such reflections would clearly go beyond the scope of this study. What is instead important is the question when the EP should call for a consultative referendum. It should do so when it believes that the European electorate should judge whether to implement the initiative. This might be particularly useful in cases where the Commission decides not to act upon the ECI’s invitation to take action, i.e. when the Commission decides to not act at all on an initiative that delivered its signatures as it does not deem it politically desirable. For the EP to ask for a consultative referendum also makes

sense if the Commission departs from what the initiative aimed at and proposes to only very partially fulfil the demands of the initiators. In both cases the European Parliament should function as a watchdog for the initiative takers and launch a consultative EU-wide referendum in order to mobilize the European people and raise awareness about the initiative. A successful Europe-wide referendum demanding the Commission to act in line with the initiative would, albeit only consultative in character, put the Commission in a situation in which it would become politically difficult not to do so. This is at the moment in our opinion the only option to guarantee at least some of the participatory promises of the ECI.

If the implementation follows the indications given in the PR, the ECI will become a toothless pseudo-direct and pseudo-democratic tool. If this is the wish of the European decision-makers, the latter should at least have the courage and honesty to depart from the “bringing the citizens in”, “listening to the people” etc. jargon. In the case the Commission’s proposals become reality, the only way to get some participatory democratic effects out of the ECI would be for the European Parliament to become its designated watchdog. It should use its institutional power resources to guide and facilitate initiative processes and especially to blemish arbitrary behaviour of the Commission vis-à-vis initiatives. Only so can be fulfilled what the Constitutional Convention of Europe had envisaged with the ECI, namely to bring European citizens closer to Europe.

2. SUBSIDIARITY AND PARLIAMENTARY RELATIONS AFTER LISBON

The national parliaments of EU Member States have had trouble finding their place in the intensified multi-level structure of European integration. However, this has changed with the Lisbon Treaty⁴⁶. Now national parliaments are expected to act as subsidiarity watchdogs. At their disposal are two tools to review compliance of Commission proposals⁴⁷ with the principle of subsidiarity: one is the “yellow card” and the other one is the “orange card”. The yellow card is activated if one third of national parliaments claim that the subsidiarity principle has not been duly respected⁴⁸. The proposal is then sent back for the Commission to reconsider, and the Commission should thereafter justify whether it decides to keep, change or withdraw it. The orange card requires that a simple majority of national parliaments complain. In this case, if the Commission wishes to stick to the contested proposal, it has to send a justified opinion to the European Parliament and the Council, who then undertake a new subsidiarity review before deciding whether to move on with the legislation or not⁴⁹.

Such is the formal skeleton of the subsidiarity review process, but formal design is only the starting point. As has been made clear by previous EU experience, the outcome of institutional innovation depends intimately on the commitment of actors to transform the

⁴⁶ The Treaty grants national parliaments three types of rights: extensive information rights, rather narrow active participation rights, and finally rights to objection, among which the subsidiarity review is most important, see A6-0133/2009 REPORT on the development of the relations between the European Parliament and national parliaments under the Treaty of Lisbon, (2008/2120(INI)), Committee on Constitutional Affairs Rapporteur: Elmar Brok, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2009-0133+0+DOC+PDF+V0//EN>

⁴⁷ Protocol (No 2), annexed to TEU/TEFU “On the Application of the Principles of Subsidiarity and Proportionality”, Art 3, states that “draft legislative acts” that are to be reviewed are “proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a legislative act.” However, considering the Commission’s role as prime initiator of legislation, we focus solely on the review of proposals from the Commission.

⁴⁸ 25 % is sufficient for the field of Freedom, Security, and Justice.

⁴⁹ If 55% of the Council or a majority in the European Parliament consider subsidiarity not to be respected, the proposal is stopped.

paper product into real political tools. In this section, we offer a forward-looking analysis of possibilities and problems that are likely to occur as the subsidiarity review procedure is put into operation.

2.1 Two Cards and a Slippery Concept

In essence, the yellow card is a purely advisory measure, whose impact will depend on the goodwill of the Commission. The orange card does offer more concrete potential leverage for national parliaments, but only if they manage to reach the simple majority threshold. However, the subsidiarity review system sets in motion core issues about the functioning of European politics that go way beyond this. The value of subsidiarity in Europe's multi-level reality is unchallenged, but the principle remains political and its practical meaning is notoriously difficult to agree on. Or, as put by the Commission (COM2009 504 final), it is a "dynamic concept and any assessment of it will evolve over time"⁵⁰. The Lisbon Treaty (Art 5.3 TEU) provides the following definition of the principle of subsidiarity:

"Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar 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 institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol."

⁵⁰ COM(2009) 504 final Report from the Commission on Subsidiarity and Proportionality (16th report on Better Lawmaking covering the year 2008), available at:
http://ec.europa.eu/governance/better_regulation/documents/com_2009_0504_en.pdf

Subsidiarity is, thus, about judging the appropriateness of Union action, which has to be justified in relation to action on lower levels. This makes it, essentially, a principle of ideological character. Nonetheless, the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC⁵¹) calls for the Commission to present qualitative and quantitative indicators of this principle. In line with this, the subsidiarity check is supposed to be entirely procedural, since any substantial review of the proposals should be taken care of at the national level. However, to separate between substance and procedure when confronted with salient political issues can be tricky. In addition, as expressed in the Commission's 2008 annual report⁵² on parliamentary dialogue, national parliaments are ready to engage in topics beyond the subsidiarity (and proportionality) principles. The test rounds of subsidiarity and proportionality check that were carried out between 2006 and 2009⁵³, also showed varying interpretations of the principles. There is the idea that the very process of the yellow and orange card scrutiny will bring about a harmonisation of interpretations of the principle of subsidiarity, and later a strengthening of the same around the agreed definition⁵⁴). Whether or not this is feasible or wishful thinking will in the end depend on the extent to which national parliaments and EU institutions are willing to engage in true deliberation or not.⁵⁵ The yellow card will be pointless unless the Commission enters into deliberation with parliaments on proposals and counterproposals regarding subsidiarity. In this regard, the Commission's dialogue initiative⁵⁶ is promising. National parliaments can nowadays give their opinions on white and green papers launched by the Commission, and the exchange of views is thereafter accessible to the public online.

After all, parliamentarians are politicians, usually interested in substantive problems,

⁵¹ CONCLUSIONS OF THE XLII COSAC, Stockholm, 4–6 October 2009, available at: <http://www.cosac.eu/en/meetings/stockholm/ordinary/contrconcl.pdf/>

⁵² COM(2009) 343 final, Annual Report 2008 on Relations between the European Commission and National Parliaments, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0343:FIN:EN:PDF>

⁵³ Subsidiarity control in national Parliaments, available at: <http://www.cosac.eu/en/info/earlywarning/>

⁵⁴ Cooper, Ian, "The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU" *Journal of Common Market Studies* (2006) Vol. 44, No. 2, pp. 281-30. See also COSAC 2009: <http://www.cosac.eu/en/info/earlywarning/doc/>

⁵⁵ See Cooper 2006.

⁵⁶ COM(2009) 343 final, Annual Report 2008 on Relations between the European Commission and National Parliaments.

and not bureaucrats preoccupied mainly with procedural compliance. Giving them the assignment to provide a technical evaluation of a basically political principle could therefore be seen as puzzling. It would have been 'easy', but hardly in the spirit of diminishing the democratic deficit, to place the subsidiarity issues entirely in the lap of the European Court of Justice. Instead, national parliaments are now given a central role in ex ante subsidiarity control, through the yellow and orange card mechanisms. In addition, if allowed by national law, national parliaments have the possibility to propose legislation for ex post review by the European Court of Justice (ECJ)⁵⁷. Formally the complaint is brought to the ECJ by the Member States, i.e. the national governments, who are bound by the writing of the Treaty to act "on behalf of" their national parliaments (Protocol No 2, Art 8; annexed to TEU, TFEU).

2.2 National Parliaments, Legitimacy, and Interests

National parliaments were not randomly picked for the job. Instead, they were selected in the hope that their review will provide legitimacy to a European political project that faces an increasing gap between a small Europeanised and Europhoric elite, and less convinced European citizens. Thus, national parliaments are perceived as an unexploited reservoir of legitimacy that the Union can use to counter the democratic deficit. For the issue of subsidiarity, this legitimacy is connected to a view of parliaments as carriers of a presumed interest to safeguard the own legislative sphere, thus putting a strain on EU legislation frenzy⁵⁸. No one argues that national parliaments are better capable to understand the actual contents of the principle than the Commission itself. On the contrary, due to lacking

⁵⁷ Press release, European Parliament's analysis of the Lisbon Treaty 07-05-2009, available at:

<http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20090506IPR55226&language=EN>

⁵⁸ See, however Duina & Oliver, who argue that EU legislation beyond the traditional field of national parliaments actually improves their regulatory role. Duina, Francesco and Michael J. Oliver "National Parliaments in the European Union: Are There Any Benefits to Integration?" *European Law Journal* (2005), Vol. 11, No. 2, March 2005, pp. 173–195.

experience and co-ordination, national parliaments may be “structurally handicapped” to enter the multi-level games of EU politics⁵⁹.

However, considering that central parts of the expansion of EU competence has been approved by national parliaments, in what has been called acts of self-mutilation⁶⁰, the basic premise of national parliaments as interest and power maximisers cannot go unchallenged. The historical record of national parliaments is one where most “have been slow and retarding adapters”, whose “access and influence was below the potential participation offered by the EU’s and the national ‘legal constitutions’”⁶¹. That national parliaments have tolerated, more or less actively, the erosion of their own powers throughout all years of European integration, could put into question their assumed function as guarantees of subsidiarity.

2.3 Subsidiarity Review between Interests and Resources

Anytime a new actor is allowed to enter EU politics, this move is shadowed by a fear that it will further complicate the institutional system and slow down decision-making in a way that cannot be justified even though there is possible gain in legitimacy. For the subsidiarity review, we would argue that this prospect is exaggerated. If the review mechanisms succeed in generating a mutually agreed operational meaning of the concept of subsidiarity, such a consensus would be oil on the gears of EU decision-making in the long run, and compensate for initial efficiency losses. However, it is unlikely that decision-making will be slowed down disproportionately in the first place. First, there is a strict time limit to push national parliaments to perform the subsidiarity review quickly. In the final protocol, the allowed period is extended from the initially proposed six weeks to eight weeks, plus an additional four weeks over the summer break (Protocol No 2, Annexed to the TEU, TFEU, Art

⁵⁹ Maurer, Andreas and Wessels, Wolfgang (eds.), (2001) National Parliaments on their Ways to Europe. Losers or Latecomers? Nomos Verlag, p. 23, available at:

http://aei.pitt.edu/1476/01/National_Parliaments_Losers_or_Latecomers.pdf

⁶⁰ Ibid, p. 28.

⁶¹ Ibid, p. 20.

6). The pilot rounds where national parliaments were asked to perform both subsidiarity and proportionality review on especially sensitive issues⁶² revealed that national parliaments had trouble performing the review within the then proposed timeframe of six weeks. Even though the time limit has been extended, the existence of a cut-off date guarantees that the subsidiarity review will not be long-drawn-out. It will also likely diminish the amounts of complaints actually put forward. In addition, for the yellow card, the Commission retains the final say. The orange card does set out a more protracted process, but due to the majority threshold it will likely be activated only rarely. Moreover, if a majority of national parliaments actually complain, their concerns probably have some reason. A slowing down of the treatment of such proposals would therefore be welcome, and should not be regarded as a matter of inefficiency.

Instead, the more urgent danger is that the increased 'powers' vis-à-vis the EU will result in a reprioritization of parliamentary activities from their core assignments to subsidiarity review. The Treaty finally opted for a strengthening of the role of national parliaments without altering the Union's institutional setting, but this does not mean that the yellow and orange cards will not have consequences beyond the very mandate specified by this innovation. The multilevel character of European politics makes it resemble an inversed mikado game, where it is virtually impossible to add a new stick to the game without making the old ones move. Thus, even though the yellow/orange card is a EU-initiative with the purpose to diminish the EU's democratic deficit, it might also reshape the functioning of democracy at the national level. Some parliaments are doubtlessly very apt to take on the new role as subsidiarity watchdogs, while others might find themselves overburdened with information and unable to reply within the time limit.

Moreover, the trial rounds resulted in a clustering of opinions from a handful of parliaments, whereas other parliaments were completely silent. Between 2006 and 2007, the French Senate expressed thirty-six opinions, the UK House of Lords seventeen, the German Bundesrat sixteen, the Swedish parliament thirteen, the Portuguese parliament thirteen and the Danish parliament took the opportunity to express its views on twelve

⁶² Subsidiarity control in national Parliaments, available at: <http://www.cosac.eu/en/info/earlywarning/>

occasions.⁶³ This shows that we cannot treat national parliaments as a homogenous group. They differ in political culture, resources and relations to their own executives. To reach ‘unity in diversity’ among national parliaments will be a true challenge.

2.4 The Role of the European Parliament: Cooperation to Mutual Benefit

A way to avoid that, especially the weakest, national parliaments turn apathic faced with the watchdog assignment, would be to upgrade and intensify contacts with the European Parliament, that has more expertise, experience, and resources⁶⁴. The European Parliament has also expressed its willingness to provide such support⁶⁵. This could hopefully inspire national parliaments to a more active stance, provided that their integrity in giving opinions is protected. In addition, the European Parliament will review the subsidiarity critiques from national parliaments in the orange card framework, and it then has the power to block the proposal from moving forward. Constructive exchange, already at the stage where national parliaments are drafting their opinions, would increase the chance that legitimate objections manage to go the whole way through, and are not put to a halt once put back into the EU system.

In other words, the two bodies that enjoy direct democratic mandates can join forces and put action behind the Lisbon Treaty’s aspiration to give the democratic deficit a real punch. Whereas the European and the national parliaments should keep their “distinctive and complementary roles”⁶⁶, we should not be too quick to assume that they are competitors when it comes to subsidiarity. Sure, the appearance of national parliaments as watchdogs in the EU machinery may at first sight seem to be a threat to the EP’s exercise of its newly expanded powers. However, if the subsidiarity review manages to clarify the

⁶³ EU Observer 05.11.2007, by Beunderman, Mark “Apathy undermines national parliaments’ EU power”, available at: <http://euobserver.com/9/25087>

⁶⁴ In comparison with the European Parliament, most national parliaments have modest staff resources to assist parliamentarians.

⁶⁵ A6-0133/2009, REPORT on the development of the relations between the European Parliament and national parliaments under the Treaty of Lisbon, p. 6.

⁶⁶ Maurer & Wessels (2001), op. cit., at p. 31.

borders for appropriate Union action, it will also clarify the division of labour between national parliaments and the European Parliament. Hence, to safeguard the sphere for Member State legislation would not only be beneficial for national parliaments, but also give the EP a welcome chance to focus on truly Europe-wide issues.

Another reason not to exaggerate the conflict of interest between national parliaments and the European Parliament is the connections that exist between the people who work in the different institutions. Such linkages are provided by the political parties, by networks around topical interests or by a personal experience of working both at the national and the European levels. Until 1979 the European Parliament and the national parliaments were closely intertwined, since the representatives of the former were appointed from the latter. With the direct elections to the Parliament in 1979 began a gradual separation, and with that a parliamentarisation of the European level at the expense of the national parliaments. However, for long a human overlap between national parliaments and the European Parliament continued through the dual mandate, which made it possible for members of the European Parliament to simultaneously serve as national parliamentarians. As pointed out by Schmitter and Trechsel⁶⁷ (2004, p. 82), multiple offices create problems in terms of “unambiguous relations with constituents and accountability in the exercise of authority”, and after the abolition of the dual mandate in 2002, few calls have been heard for its resurrection. Nonetheless, for the particular topic at hand, the end of the dual mandate is symptomatic for a detachment between the European and national representative chambers. More than three decades since the first direct elections, the European Parliament has become both more ‘European’ and more of a parliament. Still, many members of the European Parliament are recruited from current or former national parliamentarians, whereas others make the opposite journey⁶⁸. This double experience is a potential asset for cooperation between national parliaments and the

⁶⁷ See Schmitter, Philippe C. & Trechsel, Alexander H. (eds.), (2004). *Green Paper on the Future of Democracy in Europe. Trends, Analyses and Reforms*. Strasbourg: Council of Europe.

⁶⁸ See study for the European Parliament’s Committee for Constitutional Affairs (2009) “The Selection of Candidates for the European Parliament by National Parties and the Impact of European Political Parties” STUDY PE 410.683, available at: <http://www.soc.utu.fi/sivustot/pcrc/files/mickelssonurmi.pdf>

European Parliament in general, and might turn out to be vital for the yellow/orange card system.

In the pilot subsidiarity check rounds, none of the proposals met the one-third threshold for re-submission to the Commission⁶⁹. Doubtlessly, there is a need for active and strategic alliance building, if the required thresholds are to be reached. However, acting collectively requires thinking collectively⁷⁰. To enable this on the European level, the use of existing channels for contact should be improved. There is already the Conference of EU Speakers, the COSAC, the Joint Parliamentary Meetings, the Joint Committee Meetings/Committee Meetings with National Parliaments, the European Centre for Parliamentary Research and Documentation (ECPRD), and the Cooperation and Exchange programme, that all have as their purpose to promote relations between national parliaments and the European Parliament.⁷¹ However, also in inter-institutional co-operation it is a virtue to keep it simple. This myriad of organs does not signal determination, focus, and readiness to set priorities. It does not matter how many new control instruments or working groups are created, without a clear and mutually agreed operational purpose a real platform for cooperation between national parliaments and the European Parliament will fail to materialise.

The subsidiarity review offers an opportunity to gather around a clear and mutually beneficial task, instead of creating new groups with unclear *raison d'être*. This offers a chance for the representative chambers of the EU to not only intensify but also put straight the basic parameters of this co-operation. Possibly diverging interests and interpretations of the subsidiarity principle between national parliaments and the European Parliament can be turned into assets in a genuine argument about the appropriate mandate for EU action.

⁶⁹ Subsidiarity control in national Parliaments, available at:

<http://www.cosac.eu/en/info/earlywarning/>

⁷⁰ See EU Observer 16.10.2009, by Ian Cooper “[Comment] Will national parliaments use their new powers?”, available at:

<http://euobserver.com/18/28839>

⁷¹ European Parliament Relations with National Parliaments, available at:

<http://www.europarl.europa.eu/webnp/cms/lang/en/pid/3>

2.5 So, What Is In It for the Citizens?

In the end, one question about the yellow/orange card-procedure overshadows all others: will it bring the EU closer to its citizens? For sure, simply repeating the mantra of national parliaments' importance over and over does not make EU politics more pertinent to citizens. In the very worst case, the subsidiarity check will have little actual outcomes on the EU level, and create new democratic problems on the national level. Possible gains such as increased dialogue with EU institutions, or a harmonisation of interpretations on subsidiarity, can never compensate for a weakening of national parliaments vis-à-vis their executives.

Yet, if serious investments are made, the yellow/orange card system can develop into a switchboard between national and European level politics. Yet, it will not automatically fix the democratic deficit of the Union. The most important opportunity provided by the subsidiarity review is not welcoming national parliaments into EU politics, but rather bringing EU matters closer to domestic politics. If the orange card manages to bring life to domestic EU politics, by strengthening rather than weakening parliamentary scrutiny of government positions, and thereby allowing more forceful electoral scrutiny of the same, this would be a non-trivial leap forward⁷². In the long run, this could work as a catalyst for a more vivid public debate on EU politics, and make it harder for national governments to play the 'parliamentary card' when meeting their colleagues in Brussels. Increasing the awareness of European politics at the national level is a core challenge for democracy in Europe, and to take it on would benefit all involved institutions – including the European Parliament.

⁷² See Maurer & Wessels (2001), *op. cit.*, at p. 25.

SECOND PART: NEW PERSPECTIVES FOR THE EUROPEAN PARLIAMENT'S LEGISLATIVE ROLE AFTER THE LISBON TREATY

In this second part of the study, we will examine the 'internal' perspective: that is, the new potential offered for the European Parliament itself by the constitutional changes introduced by the Lisbon Treaty. We will focus our analysis on the legislative role of the Parliament, which is both a central function of the EP and also the domain in which the Lisbon innovations are particularly relevant. The changes brought by the Lisbon Treaty do not relate so much to the operation of the legislative process (the codecision procedure is now called, by the new Treaties, the ordinary legislative procedure, but its rules of operation are unchanged) but to the institutional and substantive framework within which the Parliament's legislative role will be played out. In institutional terms, the main change is obviously the extension of the codecision procedure to a whole range of new domains; this is, of course, very well known to the members of the EP, so that we only touch upon this very briefly in section 1 of this Part. Most of the analysis will instead be devoted to the new substantive framework within which EU legislation will take place, and which can globally be seen as an encouragement, by the drafters of the Treaties, to develop a progressive legislative agenda for the European Union: on the one hand, there is stronger insistence than before on the importance of respect for fundamental rights in the EU's laws and policies (section 2); on the other hand, social values have acquired greater prominence in the Treaty text, more particularly through the inclusion of a horizontal social clause (section 3), a horizontal non-discrimination clause (section 4) and a new competence to formulate principles for the functioning of services of general interest in Europe (section 5).

1. A MORE DEMOCRATIC DECISION-MAKING PROCESS

The Lisbon Treaty undoubtedly makes the Union's decision-making process more democratic. Beyond the text of the Treaties, as amended by the Lisbon Treaty, lies a challenge for the EU institutions, and in particular for the European Parliament, to make use of the new potential offered by these Treaty changes in their institutional practice.

1.1 The Extension of Codecision and Consent

With the entry into force of the Lisbon Treaty, approximately 90% of future EU laws will be adopted in accordance with the ordinary legislative procedure, that is: codecision. In qualitative terms, the extension of codecision to new areas is particularly important (and particularly challenging for the Parliament) in the following areas: agriculture and fisheries, common commercial policy and police and criminal justice (although, in the latter two areas, there will still be some exceptions to the use of codecision). In the external relations domain, the European Parliament will, from now on, have the power to consent to the vast majority of international agreements to be concluded by the European Union. In particular, Art 218 TFEU specifies that the EP will have to give its consent to external agreements covering fields in which internal measures are adopted according to the ordinary legislative procedure. Since that procedure now applies to 90% of internal laws, the domain of parliamentary consent to international agreements is also more extensive than in pre-Lisbon times. A first illustration of this new competence, and of the Parliament's willingness to make active use of it, was provided by the Resolution of 11 February 2010 in which the EP withheld its consent to the agreement with the United States on the transfer of financial messaging data (the so-called SWIFT agreement). Consent to this agreement was required because it dealt with subject matter which is covered by the codecision procedure at the internal level (namely, data protection and criminal justice cooperation), and the rejection was mainly inspired by concern for the protection of the data protection rights of European

citizens. This event thus illustrates both the extension of the decision-making role of the European Parliament and the greater prominence of fundamental rights in the EU legal order post-Lisbon (on which, see the next section of this study).⁷³

1.2 Improving the Democratic Performance of the Parliament

The strengthening of the Parliament's role in the decision-making process makes it all the more important that its internal operation, and its relations with the other institutions, should strive at maximising openness, transparency and public deliberation. The ongoing discussion about the practical operation of the codecision procedure acquires renewed urgency in this respect. As is well known, the codecision procedure has operated very efficiently in recent years, in terms of the 'success rate' and in terms of the average time needed to reach agreement between the institutions. This is due to a complex and tightly regulated system of 'trilogues' and other informal meetings, which entails that compromises between the institutions (and particularly between the Council and Parliament) are hammered out in smaller meetings involving the key actors and are then submitted to the 'official' settings of each institution for approval. It has been widely observed that this mode of operation, while certainly beneficial in terms of efficient decision-making, curtails the possibility for public deliberation about the content of legislation. If the Parliament aims at connecting better with the EU citizen, it will have to consider whether it should not reconsider the emphasis on 'trilogues' and 'early agreements', at least when important and controversial subjects are on the legislative agenda.

⁷³ See also, and similarly, the EP resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, in which the Parliament expresses concern about the secrecy with which the Commission conducts the negotiations of a multilateral Anti-Counterfeiting Trade Agreement which raises, among other things, serious fundamental rights issues. Here again, the Parliament's warning carries more weight due to the fact that the final outcome of the negotiations will require its consent. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+20100310+ITEMS+DOC+XML+V0//EN&language=EN#sdocta7>

In particular when the Parliament will legislate about matters that are of direct concern to European citizens (which will happen more frequently with the extension of the EP's powers), it should consider the need of having more open-ended debates in committee and plenary rather than try to precook a compromise in smaller settings – even if this would be at the cost of slowing down the legislative process. This would help to raise greater attention from the media for the European public debate and for the Parliament's legislative activity. Obviously, such a greater willingness to bring political controversy 'in the open' presupposes, from the side of the European Parliament and from the political groups within it, a willingness to develop a consistent 'legislative agenda' which is not merely responsive to the initiatives of the Commission but is also the result of the Parliament's own reflections and own preferences. In this respect, the Treaties, in their post-Lisbon version, offer new legal arguments for developing a progressive legislative agenda for the European Union, by the greater prominence given to fundamental rights, the inclusion of a new horizontal social clause and a non-discrimination clause, and a new legislative competence in respect of services of general interest. These new 'substantive building blocks' offered by the Lisbon Treaty will be examined in the following sections.

2. A NEW FUNDAMENTAL RIGHTS PERSPECTIVE

2.1 The EU Charter of Rights and Freedoms Becomes Formally Binding

"The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties." (Art 6.1 TEU)

As long as fundamental rights had the status of unwritten general principles of Community law, they were prominent in the judicial discourse of the European Courts but remained relatively invisible in the law-making and executive activities of the European Community and the European Union. This has changed quite noticeably after the adoption of the EU Charter of Rights and Freedoms in 2000, and is likely to change even more now that the Charter has acquired binding force as primary EU law, after the entry into force of the Lisbon Treaty. By adopting the Charter in their solemn proclamation made in Nice in December 2000, the three main institutions (Commission, Council and European Parliament) had assumed the task of respecting and promoting the rights contained in the Charter. This was reflected in the frequent references since 2000, usually in the preambles of EU legislative acts, to the provisions of the Charter which those legislative acts were declared either to respect or to implement. Logically speaking, one could expect the Charter to exercise a stronger influence on the content of the EU's legislation now that it has acquired full binding force, but that will depend on the willingness of the EU institutions (including the Parliament) to take the Charter seriously.

'Taking the Charter seriously' means two different things for the EU institutions:⁷⁴ negatively, they will have to make sure that new legislative texts do not infringe any of the rights of the Charter; positively, they must seek to promote the effective enjoyment of the Charter rights by means of their legislative measures. The relative importance of the negative and positive duty depends on the nature of the right at stake: whereas all rights include a negative duty to respect, most of the rights also include a positive duty to promote. For example, freedom of expression imposes an obligation on the Union institutions not to abridge protected forms of speech through their laws, but also requires them to adopt measures that will enhance the means for citizens to make effective use of their expression rights and their access to information and ideas. A progressive legislative agenda must pay particular attention to the positive dimension of Charter rights, a dimension which, admittedly, is more difficult to define and implement.

⁷⁴ In addition to the Charter's role in the Union's decision-making process, it will of course also be used by citizens and firms in front of the national and the European courts in order to challenge EU acts or national acts implementing EU law. Given the nature of the study, we will not engage in a discussion of this future role of the Charter in litigation.

In this respect, it must be recalled that the Charter, according to its Article 51(2), does not “establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”. This point was hammered in again by the second sentence of the new Article 6 TEU (see above) stating that the “provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties”. The intention of the drafters of the Charter, and of the authors of the Lisbon Treaty, was clearly to avoid that the mere mention of a fundamental right would create a competence for the European institutions to act for the protection of that right (for example, that the mention of freedom of expression in the Charter would entitle, by itself, the Union to set legal standards in respect of media pluralism). The scope of the rights follows existing EU competences rather than the other way round. However, even though this intention is clear, the actual wording of Article 51(2) of the Charter is misleading by its use of the word ‘tasks’. Whereas it makes legal sense to affirm that the Charter does not extend the powers of the European Union, if one takes ‘powers’ as meaning ‘legal competences’, it does not make sense to state that the Charter will not extend the tasks of the European Union. Indeed, the very purpose of adopting a Charter of Rights was to make it a task for the European institutions to apply the Charter rights in their various activities. So, Article 51(2) of the Charter does not, and can not, mean that the policies of the Union remain unaffected by the Charter. That would reduce the Charter to a charade. Moreover, the first paragraph of the same Article 51 of the Charter imposes an obligation on the Member States and the European Union to “promote the application” of the rights contained within it. Many Charter rights require positive action for “the progressive achievement of their full realization” (to use the words of the UN Social Covenant), so that the right only becomes meaningful when seen in conjunction with the legislative and executive measures taken for its effective enjoyment.

Thus, the question is not so much whether the European Union might gain extra legislative powers under the Charter for the promotion of human rights (it does not), but whether the existing legislative and other powers of the EU will be re-oriented and infused with a range of different values and policy considerations after the enactment of the

Charter.⁷⁵ In exercising its responsibility in this respect, the European Parliament will be able to avail itself of the precious help of the Union's Fundamental Rights Agency. The EP will be able to call in the opinion of the Agency about the human rights compatibility of legislative proposals, but will also have the possibility to call on the expertise of the Agency in order to help defining its positive duties under the Charter. In addition to the Agency, the European Data Protection Supervisor offers support to the Parliament in exercising its 'watchdog' function in respect of the right to privacy.

In fact, data protection is one of the rights-sensitive areas in which the European Parliament will be able to make a difference in the years to come. In several 'security' measures adopted by the Council under the third pillar, data protection was far from adequate.⁷⁶ In the future, given the new codecision power of the EP in areas that used to belong to the 'third pillar', the Parliament will be able to insist on stricter respect for fundamental rights in measures involving the collection and exchange of personal data. Still in the same area of what used to be the 'third pillar', the Parliament is faced with an early opportunity to promote the effective exercise of fundamental rights, as it enters the codecision procedure on the Directive on the right to interpretation and translation of criminal proceedings.⁷⁷

⁷⁵ Whereas this study concentrates on legislative activities (given their centrality for the European Parliament), one may note, nevertheless, that the Charter could also infuse the non-legislative activities of the EU institutions. For example, the Charter's social rights could play a more central role in defining the 'indicators' adopted in the context of the open method of coordination as used in social and educational policy.

⁷⁶ See, for example, Council Framework Decision 2008/977 of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ 2008, L 350/60, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:350:0060:01:EN:HTML>
For a critical analysis of the 'securitization' of data protection in recent EU legislation: F. Dumortier and others, 'La protection des données dans l'Espace européen de liberté, de sécurité et de justice', *Journal de droit européen* (2010), 33-46.

⁷⁷ The proposal of this Directive is in COM(2010) 82 of 9 March 2010. The Directive has as its legal basis Art 82(2) TFEU which provides for the ordinary legislative procedure (codecision). The Committee on Civil Liberties, Justice and Home Affairs adopted, on 10 June 2010, its report for the EP's first reading, A7-0198/2010 (Rapporteur: Sarah Ludford).

2.2 Policy Implications of Future Accession to the European Convention of Human Rights

“The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.” (Art 6.2 TEU)

“Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.” (Art 6.3 TEU)

Although Art 6(3) TEU was slightly rephrased compared to its pre-Lisbon version (when it figured in Article 6, para. 2 EU Treaty), the wording of its core normative statement has remained unaltered ever since the Maastricht Treaty, when the sentence was first introduced in the EU Treaty. Its significance is that the European Convention of Human Rights is already part and parcel of the EU legal order, albeit in an indirect way, through being ‘transmuted’ into general principles of EU law. In its case law, the European Court of Justice has made frequent reference not only to the text of the ECHR but also to the judgments of the European Court of Human Rights, when interpreting and applying the general principles of EU law. Similarly, preambles of EU legislative acts frequently have referred to articles of the ECHR. In addition, almost all the Convention rights have been included also in the EU Charter of Fundamental Rights and the Charter’s legal ‘upgrading’ by the Lisbon Treaty, discussed above, gives automatically added strength to the Convention rights that are encapsulated within it.

Seen against this background, a future accession of the European Union to the ECHR will not mean a major change within the legal order of the European Union. The major difference will be the creation of an external control on the compatibility of EU legal acts with the European Convention: this control will then be entrusted, in final instance, to the Strasbourg Court. The effect of this new external control should normally be that the

European Union institutions will be even more careful than they would otherwise be in ensuring the human rights compatibility of their policies and legal acts.

The Parliament is called to play an active role, first in helping to formulate the conditions for the accession to the ECHR. The EP must give its consent to the agreement by which the EU will accede to the Convention, as is expressly foreseen in Art 218 (6) (a) TFEU. This allows the EP to ‘weigh’ on the accession negotiations,⁷⁸ for example by insisting that the European Union should ratify not only the Convention itself but also the various Protocols of the Convention which contain additional rights. Of particular importance, in this respect, is the decision whether or not to ratify Protocol No. 12 to the Convention, containing a general prohibition of discrimination, which only few of the EU Member States have so far ratified. The European Union could very well decide to ratify this Protocol even if some or most of its Member States have not done so; even though this situation would not be very coherent, it would not raise practical problems for the EU legal order. Secondly, once the European Union will have become a party to the Convention, the European Parliament will have a special responsibility in ensuring that European Union legislation and its external agreements with third countries are in accordance with the standards of the Convention, so as not to provoke complaints by individuals about human rights violations that could ultimately be brought before the Strasbourg Court (naturally, after exhaustion of the judicial remedies offered by the EU legal order itself). That task of the Parliament will, in reality, run strictly parallel to its responsibility of ensuring compliance with the EU’s own Charter of Rights, and therefore will not require any special monitoring arrangements in the EP beyond those already mentioned in the previous section with regard to the Charter.

⁷⁸ The European Parliament is already engaged in this process, by preparing an ‘own initiative’ Report on the institutional aspects of the accession of the EU to the European Convention, (Rapporteur: Ramón Jáuregui Atondo), A7-0144/2010, adopted by the Constitutional Affairs Committee on 10 May 2010.

2.3 The European Union as a Party to Other International Human Rights Treaties

Beyond the specific case of the European Convention of Human Rights, where the Treaty strongly “encourages” the European Union to become a contracting party, it is now clearly established that the Union possesses the necessary competence to accede also to other international human rights treaties or conclude new international human rights treaties. Indeed, the European Community had, in its final years of existence, started to participate in the adoption of multilateral human rights treaties and one may expect its successor the European Union to continue doing so when the occasion arises (apart from performing its Treaty duty to seek accession to the ECHR). The European Union, being an international organisation and not a state, is an unusual subject of international law, and therefore its participation in multilateral human rights conventions requires those conventions to have a clause allowing for accession not only by states but also by ‘regional integration organizations’ or similar expressions. The classical international human rights conventions do not have such clauses, but when new initiatives are taken, the European Union is able to appear on the negotiation scene and can insist on their inclusion.

Thus, the European Community helped to negotiate, and signed, the UN Convention on the Rights of Persons with Disabilities, which was adopted by the United Nations General Assembly on 13 December 2006. This Convention does indeed contain a ‘regional integration organizations’ clause. The competence of the European Community to sign the Convention was based, by the Commission, on Articles 13 and 95 EC Treaty, thus connecting the Convention to both the anti-discrimination and internal market competences of the EC.⁷⁹ The EU has recently decided to ratify this Convention without waiting for most or all of its Member States taking that step.⁸⁰ Ratification not only entails the binding effect of this

⁷⁹ Proposal for a Council Decision on the signing, on behalf of the European Community, of the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol, COM(2007)77 of 27 February 2007.

⁸⁰ Council of the European Union, Press release of the session of 26 November 2009. For a discussion of the role of the EC in the negotiation of the Convention and its possible impact on EU law after its ratification, see Lisa Waddington, ‘Breaking New Ground: The Implications of Ratification of the UN Convention on the Rights of Persons with Disabilities for the European Community’, in Arnardottir and Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities – European and Scandinavian Perspectives* (2009) 111-140.

Convention for the European Union institutions, and possibly its direct effect in the EU and national legal orders, but also the submission by the Union to the international monitoring mechanism set in place by the Convention, and which the European Parliament should closely follow.

The Disability Convention is hailed as the first human rights convention ever concluded by either the EU or the EC. But that qualification depends on how one defines a human rights convention – there is no authoritative definition of that term. On a broader view, one could say that the EC and EU have already signed and ratified some human rights treaties earlier on. One candidate for receiving this human rights label is the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 25 June 1998. It was declared open for signature “by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention” (Article 17), which was a very cumbersome way of referring to the European Community! The EC duly signed and ratified the Aarhus Convention, and implemented it both for its own institutions (by means of Regulation 1376/2006), and for its Member States, by means of two Directives of 2003 dealing respectively with the first two elements mentioned in the title of the Convention, namely access to information and public participation. On the other hand, the Commission’s proposal for a Directive on access to justice in environmental matters (the ‘third pillar’ of the Aarhus Convention) has been blocked in the Council since 2003, probably because of the major impact it would have on national regimes of civil procedure. So, this piece of fundamental rights legislation is still in the legislative pipeline of the EU and of its Parliament.

Further examples could be mentioned, such as the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse,⁸¹ whose Article 45(1) specifies clearly that it is open for signature by the European Community alongside its Member States. That reference should now be held to refer to the European Union,

⁸¹ Convention adopted in Lanzarote on 25 October 2007, Council of Europe Treaty Series No. 201.

following its succession to the European Community. One may expect further examples in the future. This development is linked to the extension of the EU's internal competences way beyond economic life into human rights-sensitive policy areas. The existence and use of internal EU competences in fields such as non-discrimination, employment and social policy, immigration and asylum is likely to raise the question, sooner or later, whether the European Union should adhere to existing human rights instruments related to those policy fields, or participate in new drafting initiatives. For example, both the United Nations and the Council of Europe have adopted conventions for the protection of the rights of migrant workers. Those conventions suffer from a lack of ratification by immigration countries.⁸² One may wonder whether the European Union, if it takes its commitment to guarantee the fundamental rights of all persons seriously, and in view of its growing body of migration law, should seek to become a party to one or both of those Conventions or, if this is practically difficult, recommend to all its Member States to ratify them.

Finally, one may mention the question of EU Accession to the Social Charter of the Council of Europe. It is very clear that many of the provisions of the Charter are relevant for policies of the European Union. It is also clear that the Social Charter has been a source of inspiration for the drafting of some of the provisions of the European Union's own Charter of Rights. It is curious, therefore, that the general concern for joining the European Convention of Human Rights has not been accompanied with a similar attention to the question of joining the Social Charter, which is the ECHR's 'twin treaty' within the Council of Europe system. Since the Treaty of Lisbon does not deal with this question, either negatively or positively, the European Parliament could decide to initiate a discussion on the desirability for the EU to accede to the Social Charter. Arguably, such accession would be possible on the basis of the current Treaties and would not require a 'special' accession clause similar to the one inserted for the ECHR.⁸³

⁸² The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, of 18 December 1990, has 42 contracting parties, among which there is not a single EU state. The European Convention on the Legal Status of Migrant Workers, adopted on 24 November 1977 (Council of Europe Treaty Series No. 93), has been ratified only by seven EU member states so far.

⁸³ See, for a recent indication in this sense, the Report for the Committee on Constitutional Affairs by R. Jáuregui Atondo on the institutional aspects of the accession of the European Union to the European Convention, (A7-0144/2010) of 10

2.4 What to Do About the Rights of Minorities?

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities (...).” (Art 2 TEU)

There is one particular area of human rights law which is not covered by the Charter of Rights, namely minority rights. The Lisbon Treaty has now introduced a prominent reference to the rights of minorities into Art 2 TEU. That reference was not yet included in the Draft Constitutional Treaty of July 2003, which was the (remote) basis for the Lisbon Treaty. Despite repeated attempts and proposals by individual members of the Convention on the Future of Europe and by some NGOs, no reference to minority protection had been included in the text adopted by the Convention. However, a surprising development occurred during the Intergovernmental Conference that followed the Convention. The Hungarian government strongly insisted on the inclusion of minority rights in the introductory articles of the Constitution, and despite the initial opposition of some delegations, an agreement emerged among the then 25 governments to amend Article 2 of the draft Constitution (which listed the fundamental values of the Union), so as to add a reference to the rights of persons belonging to minorities. The text of Article 2 Constitutional Treaty was carried over, without any further changes, into the Lisbon Treaty and has now become the new version of Article 2 TEU.

The wording of this reference to minority rights is highly ambiguous: it could be read either as stating that the (general) human rights of members of minorities must be respected like those of everyone else or as stating that minority members should be protected in special ways which reach beyond the generally applicable human rights. In view of the redundant nature of the former interpretation, the latter interpretation seems

May 2010, at point 30: accession to the ECHR ‘should subsequently be complemented by accession by the Union to the European Social Charter’. For a powerful academic argument (written in pre-Lisbon times) that the EU should accede to the European Social Charter, and has the legal competence to do so, see Olivier De Schutter, ‘Anchoring the European Union to the European Social Charter: The Case for Accession’, in Gráinne de Búrca and Bruno de Witte (eds), *Social Rights in Europe* (2005) 111-152.

preferable. But then the question arises: which are those special forms of protection for the 'rights of persons belonging to minorities'? Unlike the other human rights that are spelled out elsewhere in primary law (namely in the Charter of Rights and, through the reference in Article 6, in the European Convention on Human Rights), minority rights are not listed anywhere else in the founding Treaties nor are they included in the Charter of Rights, except for the fact that its Article 21, following the wording of Article 14 ECHR, prohibits discrimination on grounds of membership of a national minority. Thus, the new Treaty text points to the existence of rights situated outside the EU legal order that are being incorporated into the EU legal order. One may wonder whether the European Court of Justice will be encouraged by this provision to insert minority protection rights into the general principles of Union law, finding inspiration, for example, in the Framework Convention on the Protection of National Minorities adopted within the Council of Europe. It may be observed, in this regard, that the Framework Convention has, so far, been ratified by most but not all EU Member States (France, Belgium and Greece have refused to do so). Turning now to the role of the European Union legislator, it seems clear that minority protection concerns may, and must, be taken into account when formulating EU norms that may directly or indirectly affect the rights and interests of minorities. One recent example where this happened (though still under the pre-Lisbon rules) is the Regulation on the marketing of seal products which contains a reference to the UN Declaration on the Rights of Indigenous Peoples in its preamble.⁸⁴

⁸⁴ Regulation of the European Parliament and of the Council of 16 September 2009 on trade in seal products (OJ L 286/36). This is an internal market measure 'harmonising the rules across the Community as regards commercial activities concerning seal products, and thereby prevent the disturbance of the internal market in the products concerned.' The main objective of this measure, though, is the protection of the welfare of animals whilst taking account of the protection of the traditional lifestyle of minority groups: a general ban on the marketing of all products made from seals is accompanied by a derogation for products resulting from hunts traditionally conducted by Inuit and other indigenous communities, and in this connection the preamble (in its recital 14) refers to the UN Declaration on the Rights of Indigenous Peoples.

3. THE HORIZONTAL SOCIAL CLAUSE

“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” (Art 9 TFEU)

3.1 Background and Context

This provision originally emerged from the ‘Social Europe’ working group of the European Convention drafting the EU Constitution. It was already contained in the Constitutional Treaty [Art III-117]. It must be read in conjunction with the former Art 136 TEC,⁸⁵ which defined, prior to Lisbon, the objectives of EU social policy and which remains in force, in parallel with the new social clause, also under the Lisbon Treaty (now as Art 151 TFEU). Compared to the objectives named in Art 151 TFEU – promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the combating of social exclusion – the new social clause also refers to a high level of education and training and protection of human health. This extension of the social policy objectives of the Union might indicate that the European Union’s social policy which focused so far primarily on worker related social policy and equality is becoming broader and also covers public education and health care.

Apart from Art 151 TFEU, one may also note other references to social values and objectives in primary EU law, namely in Art 2 and 3 TEU, as well as in the Charter of Fundamental Rights. Indeed, the social clause overlaps to a certain extent with the fundamental social rights of the Charter. In order to understand the significance of the new Art 9 TFEU, its possible scope and the way in which it could be used by the Parliament and

⁸⁵ See the Report of the ‘Social Europe’ Working Group, CONV 516/1/03, at p 8 ss.

made effectively operational, it has to be read in conjunction with those other social policy provisions of the Lisbon Treaty.

3.2 No Sufficient Basis for a Pro-Active and Comprehensive EU Social Policy...

The first thing to note is that Art 9 TFEU does not transfer any new competences to the EU. Thus, it cannot be used as a legal base for the establishment of a pro-active and comprehensive EU social policy, covering all the domains mentioned in the text of the article. Compared with earlier Treaty revisions (in particular the Maastricht Treaty), this time almost no new competences and/or legal instruments were added by the Lisbon Treaty,⁸⁶ through which the European Union could actively try to achieve the goals defined in Art 9 TFEU.

So, the European Union's legislative competences in the social field remain, as before, essentially limited to the protection of the worker (thus, basically, to the harmonisation of national employment law).⁸⁷ Redistributive social policy continues to stay essentially outside the sphere of EU competences. Education and health care, two of the core areas of redistributive social policy, are also after Lisbon expressly defined as reserved areas of the Member States. As for the provision of social assistance and social security - the other central pillars of redistributive social policy – the legal scope for EU activity is constrained in three respects: (a) it follows the logic of market integration, in that it falls within the EU domain only where necessary to ensure the smooth functioning of the

⁸⁶ The only changes with regard to the redistributive social policy fields consist in a) declaring "common safety concerns in public health matters" a shared power of the Union (Art 4 para 2 lit k TEU), which is primarily a change at the formal level, as it just provides a clearer presentation of the previously existing delimitation of powers between the Union and the Member States in this area; and b) modifying the legislative procedure for social security measures connected to the free movement of workers from unanimity to QMV (Art 48 TFEU). Despite the shift to QMV, social security coordination measures will, however, still be subject to a veto power of the single member states, so that, in reality, the unanimity requirement is maintained.

⁸⁷ In this area the Lisbon Treaty has increased the use of qualified majority voting, thus giving more room for manoeuvre to the Parliament. See Brian Bercusson, "The Lisbon Treaty and Social Europe" ERA Forum (2009) 87-105, at p. 99.

internal market⁸⁸, (b) it takes the form of coordination of national policies, rather than the harmonization of national laws and (c) it is still subject, directly or indirectly, to the veto power of single states.

However, the primary responsibility of the Member States for performing the social redistributive functions, i.e. to run the welfare systems in Europe, must now be read in the light of the new enabling clause for services of general economic interest (Art 14 TFEU) which has the potential of allowing greater involvement of the EU beyond the public utilities also within the redistributive social policy fields (i.e. in the fields of health care, social security and social assistance). We will examine the significance of this new clause in a later section of this study.

3.3 ...But Not a Purely Rhetorical Statement Either!

What does it enable the Parliament to do? A positive duty for the EU and the MS

By mainstreaming social policy into all EU policy fields, Art 9 TFEU affirms that social objectives are equivalent to economic objectives within EU primary law. Thereby it requires all EU actors (in particular also the Parliament) to find a proper balance between economic, social and other policy aims in all fields of public policy making and implementation in which the EU is engaged. The fields of EU policy making of particular relevance in this context are internal market law and external trade law – which are also policy areas in which the EP now possesses full codecision and/or consent powers. ‘To find a proper balance’ concretely means – one might argue – that social considerations shall play a greater role than they have done so far in EU policies outside the strict domain of social policy integration. Only such an understanding of the clause could make a difference compared to the pre-Lisbon

⁸⁸ But see in this respect the new provision in the Treaty chapter on Union citizenship (Art 21 para 3 TFEU) that allows for measures on social security or social protection that facilitate free movement of all Union citizens, which is moving beyond the logic of the internal market (in which coordination of social security was functional to the mobility of economically active citizens).

situation and could thereby adequately mirror the increased recognition given to the idea of a Social Europe by the text of the Treaties in their post-Lisbon version.

In any case the clause makes the topic of the proper balance a subject for discussion within the Council and of course the Parliament, as soon as proposed EU legislation is likely to have an impact on the national social policies and welfare systems. Arguably, this mainstreaming clause should also be observed by the European Court of Justice, when interpreting the Treaties and secondary legislation, in particular in relation to the internal market. Although the mainstreaming clause is not directly addressed to the Court, it certainly expresses a value judgment which the Court cannot ignore

3.4 How to achieve the better balance at the EU level? A passive and an active approach

The way how to reach the proper balance between (European) economic and (national) social policies is not defined in the treaties. In principle, as long as the EU does not possess competences in the welfare state areas and thus cannot develop a genuine EU social policy, a better balance must be achieved primarily by putting limits on an excessive use of EU market competences where this might have negative consequences for the social standards in Europe.⁸⁹ From the EP's perspective this means, to stop or tweak proposed EU legislation based on its internal and external economic competences where this might impact negatively on national social policies and could lead to a levelling down of social standards in Europe.⁹⁰

This is, of course, a rather passive way of ensuring the balance between economic and social values at the EU level, as it in principle just enables to refrain from EU integration where this is negative from a social perspective. Within such an approach, the 'social market economy' referred to in Art 3 TEU as a central objective of EU integration can only be conceived as one which operates at different levels: the establishment and safeguard of a

⁸⁹ In the same vein see also Bercusson (2009) op. cit., at p. 102 who discusses the application of the market rules to regulative social policies, as e.g. the social right to strike.

⁹⁰ This could be expressed through the inclusion of standard social safeguard clauses in relevant pieces of EU legislation. As to the formulation of such clauses see Bercusson (2009), op. cit., at p. 104.

free market as a mechanism for organizing efficient resource allocation within a social market economy is the primary task of the European Union, whereas resource allocation through social policies and other public policy instruments – the other pillar of the social market economy – remains the primary task of the Member States.

A more active approach in the post-Lisbon period could consist in using the social clause and the reference to the social market economy as arguments for a redefinition of the market rules (competition, state aid and internal market) in the sense that their aim should not merely be that of establishing and safeguarding a free competitive market but, more broadly, that of improving the functioning of a social market economy at the EU level. The aims listed in the social clause should become part and parcel of the objectives of internal market and competition policies. In fact, this already happens occasionally with internal market legislation: such legislation never consists in harmonization for its own sake but always entails the explicit or implicit formulation of policy objectives which often comprise also non-market objectives such as the protection of health, the environment, the protection of workers, of culture or animal welfare.⁹¹ The ‘level-playing field’ which internal market laws seek to achieve is not necessarily a deregulated field; rather, the appropriate regulatory mix is, in each case, decided by the EU legislator in the framework of the codecision procedure; there is, thus, every opportunity for the European Parliament to push for the incorporation of social policy objectives in internal market rules. As far as competition and state aid are concerned, the room for manoeuvre for the European Parliament is more limited, since those policies are mainly conducted by the Commission; still, the EP can put pressure on the Commission to recalibrate those policies so as to make them more sensitive to the social policy values contained in Article 9 TEU.

3.5 What is protected? The national welfare systems or social values as such?

In any case, the social clause cannot be read as prohibiting any interference by EU economic or external policies with the current structure of a Member State’s welfare system (or

⁹¹ See Bruno de Witte, ‘Non-Market Values in Internal Market Legislation’, in N. Nic Shuibhne (ed), *Regulating the Internal Market* (2006), pp. 61-86.

certain areas of it). It does not act as a provision that preserves the existing structures in the Member States, but is only a safeguard for certain very broadly defined social standards. So, if it can be shown that EU-inspired reforms of national welfare systems are conducive to a better guarantee of social standards in Europe, then the social clause cannot be used to stop the Union from acting. For example, the currently proposed Directive on patients' rights in cross-border health care, which is legally speaking an internal market measure, should not for that sole reason be considered as incompatible with the social clause; rather, what is needed is an open discussion of the content of the Directive so as to make sure that it will not have negative consequences for the quality and accessibility of health care in Europe.⁹² Note however that the fundamental social rights of the EU Charter, which overlap with the horizontal social clause and thereby concretize it for particular sectors (social security, health care, education), seem to point in another direction. For example, the wording of the provision on access to health care (Art 35 EU Charter: 'under the conditions established by national laws and practices') might be interpreted as protecting not only a high level of health (as mentioned in Art 9 TFEU), but also the existing structures of health care within the Member States. These words can be seen as an indirect protection of national competences in the field, and should be taken into account when developing EU action.

4. THE HORIZONTAL ANTI-DISCRIMINATION CLAUSE

"In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." (Art 10 TFEU)

⁹² A number of the amendments of this draft directive adopted by the EP in its first reading reflect that concern: European Parliament legislative resolution of 23 April 2009, P6_TA(2009)0286.

4.1 Background and Context

Art 10 TFEU has been taken over, without changes, from the lapsed Constitutional Treaty (Art III-118 CT). It is embedded within an already quite dense EU equality law framework, consisting of:

- the general non-discrimination clause, which forbids discrimination on the ground of nationality, which was already included in the original text of the Treaty of Rome in 1957 (Art 12 EC Treaty, now Art 18 TFEU);
- a provision which obliges the EU to mainstream gender equality within all policy fields, introduced by the Amsterdam Treaty (Art 3 para 2 EC Treaty, now in Art 8 TFEU);
- a legal basis for the adoption of measures combating discrimination on grounds of sex, racial or ethnic origin, age, disability, religion and sexual orientation, introduced by the Amsterdam Treaty (Art 13 EC Treaty, now slightly modified by Art 19 para 1 TFEU),⁹³ on which basis a number of important equality law directives has already been adopted since 2000; and
- a number of fundamental equality rights laid down in chapter three of the EU Charter of Fundamental Rights. They range from a formal principle of individual equality before the law (Art 20) to a general prohibition of discrimination on any ground (Art 21). Art 22-26 Charter contain more proactive principles seeking to promote substantive equality for specific groups (women, children, elderly, persons with disabilities). As argued in a preceding section of this study, the Parliament's role in respect of these Charter rights is a double one: on the one hand, to check that no Commission legislative proposals contain directly or indirectly discriminatory provisions; on the other hand, to remind the other institutions of the need to

⁹³ See below.

include, where appropriate, positive measures designed to contribute to the substantive equal treatment of vulnerable groups. At least with regard to Art 20 and 21 Charter, these rights are also enforceable by individual persons before the European and national Courts.

Against this background, the question arises whether the new horizontal clause on non-discrimination – Art 10 TFEU – can offer any added value to EU equality law and policy. Does it provide new perspectives for the EU Parliament to develop a more comprehensive or incisive policy on equality?

4.2 Mainstreaming as the Innovative Element of Art 10 TFEU

Art 10 TFEU is a ‘mainstreaming’ provision, like Art 9 TFEU that was discussed above. This concept of mainstreaming refers to a very simple idea, namely that issues of equality and non-discrimination should be seen as an integral part of all public policy making and implementation within the EU, rather than as something separated off in a policy or institutional ghetto.⁹⁴

This idea is also inherent to the fundamental rights in the Charter; as was mentioned before, the Charter does not create new competences but creates an obligation to respect and promote the Charter in all relevant policies of the Union. Given the fact that the Charter contains a complete set of equality rights (the scope of Art 21 Charter is even more broadly formulated than that of Art 10 TFEU since it prohibits discrimination on any grounds and not just on the six ‘suspect’ grounds listed in Art 10), what is the concrete added value of Art 10 TFEU?

That added value, it seems to us, is that it raises the political saliency of non-discrimination compared to all other fundamental rights of the Charter. The task of the Union is not just to generically ‘respect and promote’, as with other Charter rights, but more

⁹⁴ Christopher Mc Crudden, ‘Equality’ in C.J.Harvey (ed) Human Rights, Equality and Democratic Renewal in Northern Ireland (2001) 75-112, at p. 75.

actively to combat discrimination. In relation to gender equality (Art 8 TFEU) the Union is even mandated to ‘eliminate inequalities’. This indicates that the Union should take a particularly pro-active approach in the field of non-discrimination and equality law. Non-discrimination is part of the social impact of proposed EU legislation which the Commission must systematically consider when preparing its impact assessment of proposed new EU legislation,⁹⁵ but it is only one element among the very numerous parameters of impact assessment. The Parliament should feel encouraged by the text of Article 10 TFEU to single out the equality element in the Commission’s impact assessments and give it special attention and scrutiny.

The mainstreaming duty is not limited to the Union’s legislative activity but extends to all the Union’s activity, including its funding programmes and external policies. Lessons on how to conduct a successful mainstreaming policy can be learned from the Union’s earlier experience with gender mainstreaming, whose achievements are uneven.⁹⁶ That experience shows that it is not easy, even where there is a strong political commitment, to achieve cross-cutting horizontal objectives such as the fight against discrimination, in the context of policies whose main objectives are otherwise defined. One way for the European Parliament to put more pressure on itself and the other EU institutions would be to produce an annual report on the extent to which the non-discrimination mainstreaming has ‘coloured’ the various EU policy measures during the preceding year, or, alternatively, to entrust the elaboration of such a report to the Fundamental Rights Agency.

⁹⁵ See European Commission, Impact Assessment Guidelines, 15 January 2009, SEC(2009) 92, available at: http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_en.pdf

See also, for more detailed information on how the Commission envisages the social dimension of impact assessment: Guidance for assessing Social Impacts within the Commission impact assessment system, Ref. Ares (2009)326974, 17 November 2009, available at: <http://ec.europa.eu/social/BlobServlet?docId=4215&langId=en>

⁹⁶ See for example the study by Emilie Hafner-Burton and Mark Pollack, Mainstreaming Gender in the European Union: Getting the Incentives Right, Jean Monnet Working Paper 08/08.

4.3 No New Competences for Non-Discrimination Legislation

The strong wording of Art 10 TFEU in terms of objectives to be achieved is not accompanied by the inclusion of new competences for the EU in the fields of non-discrimination and equality. But in contrast to EU social policy, where the Lisbon Treaty confirms an existing gap in EU legislative competences, the Union already before Lisbon possessed a wide competence in the field of non-discrimination, based on Art 13 EC Treaty, and that competence has already been used repeatedly. So, even if the Lisbon Treaty did not alter the scope of this competence and still requires, regrettably, a unanimous vote in the Council for anti-discrimination legislation (see now Art 19 TFEU), there is at least a clear legal basis on which EU legislative measures can be issued to achieve the goals of Art 10 TFEU. The new perspective opened up for the Parliament is that the Lisbon Treaty has entrusted the EP with a more active role in law-making in this field. Whereas previously the EP was merely consulted, anti-discrimination legislation will henceforth require the consent of the European Parliament, thus leading to a rather unusual quasi-codecision procedure.⁹⁷ This new 'rule of the game' already applies now to the pending proposal for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.⁹⁸

5. THE CLAUSE ON SERVICES OF GENERAL ECONOMIC INTEREST

“Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in

⁹⁷ Since the Treaty of Nice it has already been possible for so-called incentive measures to be adopted under the existing Article 13(2) EC by qualified majority.

⁹⁸ COM (2008)425 of 2 July 2008. The EP gave its opinion under the 'old' consultation procedure on 2 April 2009 and is now called to give its consent to the future final text, which allows it to continue informal negotiations with the Council and Commission.

promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.” [Art 14 TFEU]

5.1 Background and Context

The current Art 14 TFEU is based on the former Art 16 EC Treaty, but has modified it significantly. Those changes were already contained in the Constitutional Treaty and were carried over in the Lisbon Treaty.

The main novelty consists in the creation of a new legislative competence for the European Union in respect of services of general economic interest (SGEI), which – due to a quite complicated drafting process⁹⁹ – is laid down in an ambiguous way. The second part of the sentence (‘without prejudice to the competence of member states...’) was added in a second stage of the drafting process, during the IGC that followed the Convention, and seems intended to restrict the scope of the competence given in the first part of the sentence; but it is not clear to what extent it does so. It seems rather contradictory to state, on the one hand, that the European Union will have the competence to lay down the main principles and conditions for the operation of the SGEI, but on the other hand, that this leaves untouched the Member State competence to provide, organize and finance these

⁹⁹ For more details on this drafting process, see Alexander Winterstein, ‘The Internal Market and Services of General Interest’ in G. Amato, H. Bribosia and B. De Witte (eds) *Genesis and Destiny of the European Constitution* (2007) 645-661, at p. 656 ss.

services. The new legal base for the SGEI is therefore open to widely different interpretations as to its potential scope and impact.

Apart from this reformulation of the former Art 16 EC Treaty, the Lisbon Treaty includes another new provision directly related to the SGEI: Protocol no 9 on Services of General Interest. Art 1 of Protocol no 9 purports to lay down an authoritative interpretation of Art 14 TFEU, but actually just spells out (in a grammatically and systematically quite clumsy way) the shared values referred in Art 14 TFEU. It gives a flavour of the subject matter of a potential future Regulation based on Art 14 TFEU,¹⁰⁰ but it does not help us to understand how to divide the competences between the Union and the Member States in these fields and, thus, does not clarify the scope of the legal base for EU action which Art 14 TFEU has created. Art 2 of the Protocol confirms that the new legislative competence under Art 14 TFEU does not extend to non-economic services of general interest - but that follows already from the fact that the text of Art 14 TFEU only refers to services of general economic interest.¹⁰¹

5.2 Scope and Purpose of Art 14 TFEU

As mentioned above, neither the wording of Art 14 TFEU nor that of the directly related Protocol no 9 on SGI provide us with a clear understanding of the potential scope and impact of the new EU competence.

¹⁰⁰ It shall specify the competences of the national, regional and local authorities in commissioning, providing and organising SGEI, highlight the diversity amongst the various SGEI and lay down a set of fundamental principles in relation to the universal provision with such services. As to the possible content of a framework directive see also Markus Krajewski, 'Providing Legal Clarity and Securing Policy Space for Public Services through a Legal Framework for Services of General Economic Interest: Squaring the Circle?' *European Public Law* (2008) 377-398, at p. 388 ss.

¹⁰¹ Actually the wording of Art 2 of the Protocol is quite broad: it states that 'the treaties do not affect in any way' the non-economic SGI. But this is difficult to take at face value, as it is clear from ECJ case law that Union citizenship and the general non-discrimination clause do affect also the non economic SGI. Accordingly, Art 2 of the Protocol has to be interpreted restrictively, so as to be compatible with the judicial acquis of the Union.

In the debate which accompanied the drafting of Art 14 TFEU¹⁰², it was emphasized that it shall provide a basis for a horizontal legislative framework for SGEI. This, again, has been regarded necessary to secure and guarantee – against the background of liberalisation of the SGEI on the basis of the EU market rules – the universal provision with SGEI, i.e. the availability of the SGEI to everybody at a certain quality and a reasonable price.¹⁰³ In the course of the debate the purpose of a horizontal legal framework came to be defined also in much looser and broader terms, ranging from:

- laying down the objectives and principles for a smooth functioning of the SGEI within the EU¹⁰⁴, to:
- providing a consolidation and harmonisation of the community *acquis* in relation to SGEI by extracting and structuring the common elements of existing sector specific legislation in this field,¹⁰⁵ and to:
- providing for more legal clarity and certainty as to the regulation of SGEI within the EU.¹⁰⁶

When defined in such broad terms, however, the idea of a horizontal regulatory framework for SGEI has also met with a lot of criticism within the EU. In particular the Commission, but also a number of Member States and some parts of the Parliament do reject it,¹⁰⁷ claiming that, pitched at such an abstract level, it cannot provide any added value.

¹⁰² On this, see Markus Krajewski, 'Background paper on a legal framework for services of general (economic) interest' on behalf of EPSU (2006).

¹⁰³ As to the concept of the universal service provision, see the Green Paper of the Commission on SGI, COM(2003) 270 final, at p. 18 ss.

¹⁰⁴ See eg Stéphane Rodrigues, 'Towards a General EC Framework Instrument Related to SGEI? Political Considerations and Legal Constraints', in Krajewski/Neergaard/v.d. Gronden (eds) *The Changing Legal Framework for Services of General Interest in Europe* (2009) 255-266, at p. 262.

¹⁰⁵ As formulated by the Commission in its Green Paper on SGI as a basis for the debate, para 37.

¹⁰⁶ Krajewski (2008), *op. cit.*, at p. 383 s.

¹⁰⁷ See the Commission in its White Paper on SGI, COM(2004) 374, at para 4.1. Available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0374en01.pdf

5.3 Towards a Comprehensive Horizontal Regulation of SGEI

Various proposals have been put forward, already before the entry into force of the Lisbon treaty, for such a framework act.¹⁰⁸ One must be aware of potential risks in following this approach. If a framework regulation is to contribute to securing the universal provision of SGEI and leading to more legal clarity and certainty within this policy field, it should not be formulated in too general terms. Indeed, at an abstract level the framework virtually cannot do anything more than to replicate general principles which are already part of EU primary law or ECJ case law. But if so, what useful purpose would it serve? In addition, such an approach may lead to deviations from ECJ case law or existent sector specific EU secondary law measures, which again may produce even more legal uncertainty, instead of providing more legal clarity.

When considering that the notion of SGEI has become, in the course of time, a very broad one – covering not only the public utilities (the traditional SGEI: gas, electricity, telecoms...) but also a wide range of core welfare services (e.g. health care, social security, social assistance)– adopting horizontal standards applicable to all SGEI might run the risk that concepts developed for the traditional SGEI (the public utilities) are automatically also carried over to core welfare services. This would be undesirable from a social perspective, as the welfare services substantially differ from the public utilities, both in their mode of operation and in the objectives they pursue. Indeed, the core policy aim for the welfare services is not so much to ensure a universal provision (the provision of certain services to everybody at affordable prices), but, above all, a social provision (i.e. the provision of certain services to those who are in need of them at no cost or at substantially reduced costs).

Thus, from the perspective of developing a progressive policy agenda for the European Parliament, it might be good to aim at a horizontal approach which makes use of Art 14 TFEU in a specific thematic manner, meaning the adoption of several legislative measures that deal, in a systematic and structured way, with various thematic issues related

¹⁰⁸ See in particular the Proposal for a Framework Directive on Services of General Economic Interest which was published by the PSE on 30 May 2006. Available at: http://www.socialistsanddemocrats.eu/gpes/media3/documents/1927_PL_text_project_directive_en_revised_060530.pdf

to the SGEI, rather than one single measure trying to cover the entire range of questions regarding SGEIs. The thematic issues to be covered by the legislative measures based on Art 14 TFEU could be those that are not sufficiently or adequately covered by existing legislation for SGEI that was adopted in the course of the years on the basis of the Union's internal market competences. In fact, those issues include everything that goes beyond securing an efficient provision of services through market mechanisms – which was the primary aim of that earlier internal market legislation.

The main topics for such future Union legislation based on Art 14 could be the following:

- Universal service regimes within the public utilities sectors: a legislative text on this issue would lay down the conditions and principles of the universal service regimes for the various public utilities. In some cases (for example, in energy) existing EU internal market law already contains rules on universal service provision, but those rules are very rudimentary and leave this matter primarily to the Member States. For some other utilities (e.g. water distribution) there are no European rules on universal provision at all.
- Application of the EU market rules to welfare services: legislation on this issue shall lay down the general principles and conditions on how to balance, from a European Union perspective, the respective role of market and non-market values in the delivery of welfare services. Such a regime could consist of a single legal instrument or several specific instruments and should be structured in such a way that it deals separately with the impact of the various single market rules (competition, free movement, state aid and public procurement) and with the different categories of welfare services (health care, public education, social services of general interest, i.e. social assistance and social security). The "Frequently Asked Questions" (FAQ) documents of the Commission on the application of the state aid rules to social services of

general interest (SSGI)¹⁰⁹ or on the application of the public procurement rules to SSGI¹¹⁰ could serve as prototypes for such legislative measures, but the Parliament could use its role as co-legislator to strengthen the non-market values. As ECJ case law on these issues has not yet developed on such a large scale as is the case for the public utilities, such legislative measures could do more than just clarify and consolidate existing case law, but instead give an important new direction to EU law in this field.

- Development of common social standards within the EU: In addition, Art 14 TFEU could also serve as a basis for the development of common social standards within the EU, to which the horizontal clause of Art 9 TFEU refers.

This approach would, in fact, be in line with the idea of a comprehensive horizontal framework for SGEI, such as the one proposed by the PSE in 2006, and one might consider the adoption of one framework regulation that would serve as an umbrella for the specific regulations on the thematic issues mentioned above. Its main added value would be to provide a structure and a systematic approach to the relevant thematic issues. It could contain central definitions and clarify the distinction between the public utilities (the traditional SGEI) and the welfare areas (the 'newer' SGEI), or between universal provision and social provision, etc.

¹⁰⁹ Commission Staff Working Document SEC(2007) 1516 final, available at: http://ec.europa.eu/competition/state_aid/legislation/faq_sieg_en.pdf

¹¹⁰ Commission Staff Working Document, SEC(2007) 1514 final, available at: http://ec.europa.eu/services_general_interest/docs/sec_2007_1514_en.pdf

Conclusion

This study provides the reader with a critical assessment of the European Parliament's legislative opportunities in the post-Lisbon era. It carefully examines the new spaces, opened up by the Lisbon Treaty, by analysing the Treaty provisions and the current efforts in view of their concrete implementation. The study focuses on new instruments, such as the European Citizens' Initiative, new procedures, such as the active involvement of the national Parliaments in subsidiarity controls, the extension of existing procedures, such as the spread of co-decision, and new requirements, such as the respect and promotion of the EU Charter on Freedom and Rights. For each of these institutions, procedures and requirements the study asks the following questions: how will these changes affect the legislative role of the European Parliament? What are the opportunities – and obstacles – the EP will be facing in the post-Lisbon era of legislating within the European Union?

In the field of the European Citizens Initiative, the study highlights the crucial role to be played by the draft regulation the European Commission presented to the EP at the end of March 2010. A large number of ideas, discussed and proposed by the Commission's Green Paper, are contained in the Commission's proposal to the EP. At the same time, the proposal went beyond the GP, reacting to the consultation process that followed the publication of the GP. The authors of this study therefore critically commented on these draft provisions, both in the GP and in the proposal, strongly arguing in favour of a future regulation that truly translates the spirit of the Treaty provision, offering the European citizenry a real instrument for having a say in the legislative process. If the proposed implementation, as discussed in the Green Paper and laid down in the Proposal for a Regulation, becomes reality, the European Union will have missed the announced rendez-vous with its citizens. The ECI will remain *lettre morte*.

However, the study goes beyond this rather sobering assessment and proposes concrete steps towards the implementation of a truly European Citizens Initiative as contained in the TEU. And here, so the study argues, the European Parliament may play a crucial role, first, by critically examining the content, scope and potential effects of the draft

regulation and secondly, by taking the reflections contained in this study seriously. If it does so, then thirdly it may ask the Commission to re-formulate a draft regulation so that it satisfies the spirit of the ECI more fully. Finally, the EP may want to give itself the opportunity to submit an ECI to a popular, Europe wide consultation.

With regard to the new procedures offered by the Lisbon Treaty for more closely involving the national Parliaments of the EU Member states, the study examines above and foremost the football-inspired early warning systems in the form of a yellow and an orange card. It argues that these procedures should be seen as opportunities for the European Parliament to constructively participate in the subsidiarity checks. The study underlines the “joining of forces” between the democratically elected chambers of and within Europe. The subsidiarity review by national Parliaments therefore also offers the EP a proactive role and a stronger link to its national counterparts.

The second part of the study, dealing with the new principles governing the Parliament’s own legislative role, proposes a number of concrete recommendations for the European Parliament. In relation to the role of fundamental rights, it makes recommendations on the different ways in which the European Parliament can decide to take the Charter of Fundamental Rights ‘seriously’ now that it has acquired the status of binding primary law, in particular by exploiting both the ‘negative’ and the ‘positive’ dimension of fundamental rights. It draws the attention to the possibility for the European Union to accede to international human rights treaties, in addition to the planned accession to the European Convention on Human Rights, and it raises the question of how to think about the Union’s role in relation to minorities. It warns not to put too high hopes in the new social clause and the new non-discrimination clause, since they do not by themselves create new legislative competences, but nevertheless highlights ways in which these new Treaty clauses can be put to fruitful legal and political use. Finally, it proposes a cautious strategy for using the Union’s new competence to develop common principles on the functioning of services of general economic interest.



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