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NOTE

From:	Presidency
To:	Delegations
Subject:	The passerelle clause in the field of social policy in the European Union legislative process - Steering note for the lunch debate

Delegations will find attached the Presidency steering note on the above subject, with a view to the lunch debate at the EPSCO Council on 24 October 2019.

EPSCO Lunch Debate

The *passerelle* clause in the field of social policy in the European Union legislative process

Unanimity in the decision-making process

Under the Treaties, a number of social policy issues still remain subject to unanimity voting in the Council and to the special legislative procedure (SLP). In the social policy area, unanimity is still required concerning:

- combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation;
- social security and social protection of workers;
- protection of workers where their employment contract is terminated;
- representation and collective defence of the interests of workers and employers, including co-determination; and
- conditions of employment for third-country nationals legally residing in Union territory.

Moving from unanimity to qualified majority voting: the *passerelle* clauses

Article 48(7) TEU introduces a general *passerelle* clause, providing the possibility for the European Council to adopt a decision authorizing the Council to act by a qualified majority where the Treaties provide for the Council to act by unanimity in a given area or case. In addition, under this Article the European Council may adopt a decision allowing for the adoption of legislative acts in accordance with the ordinary legislative procedure (OLP) where the Treaties provide for such acts to be adopted by the Council in accordance with SLP. For the adoption of the above decisions, the European Council, acts by unanimity, after obtaining the consent of the European Parliament (the Treaty does not provide for a Commission proposal in this context). Each national parliament has the right to oppose within six months.

This *passerelle* clause can be triggered, *inter alia*, to combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, and social security and social protection of workers.

In addition, Article 153 TFEU provides for a sectoral *passerelle* clause which allows the Council to render the OLP applicable to certain social policy fields, notably the following areas, which still require unanimity and SLP: (1) protection of workers where their employment contract is terminated; (2) representation and collective defence of the interests of workers and employers, including co-determination; and (3) conditions of employment for third-country nationals legally residing in Union territory. Any such Council Decision under this sectoral *passerelle* clause in these social policy fields is subject to unanimous agreement in the Council, on the basis of a proposal from the European Commission and after consultation of the European Parliament.

Communication of the Commission: extended use of QMV

In its Communication¹, the European Commission identifies a number of policy fields where it suggests considering enhanced use of QMV and/or the OLP on the basis of the general *passerelle* clause of Article 48(7) TEU, e.g. on combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, social security and social protection of workers.

In its Communication, the European Commission does not seem to encourage the extended use of QMV and/or the OLP on the basis of the sectoral *passerelle* clause under Article 153 TFEU, for example, as regards the conditions of employment for third-country nationals legally residing in Union territory.

The newly elected President of the Commission, Ms Ursula von der Leyen, politically commits to encouraging the use of QMV and to moving towards a greater involvement of the European Parliament in the decision-making process.

¹ COM(2019) 186 final

According to the Commission, the QMV is based on a culture of compromise and allows for outcomes that reflect the interests of the Union as a whole. The Commission argues that decision-making by QMV could be a powerful catalyst to engage Member States in finding a positive outcome that is acceptable to all. The Commission has also pointed out that in the social policy areas still subject to voting by unanimity, the European Parliament does not have an equal, prominent role as co-decision maker.

On the other hand, policy areas covered by unanimity vote are in most cases sensitive for Member States, and when considering a possible shift from unanimity to QMV and/or from the SLP to OLP, it is important to strike the right balance.

Since unanimity is currently required under the Treaties in some social policy areas a discussion on the possible activation of the passerelle clauses might benefit from an assessment of the exact material content of each of these areas and how they relate to other policy fields. A more thorough analysis on the current situation concerning the unanimity requirement could be useful to allow a proper assessment of impacts, inter alia, on national law or budgetary burdens.

Against this backdrop and taking into account, on one hand, the goal to improve the level of social and labour protection and guarantee non-discrimination and equal conditions of employment and, on the other hand, the sensitivity of the relevant issues to Member States, ministers are invited to address the following question:

In your opinion, could enhanced use of qualified majority voting (QMV) and/or the shift to the ordinary legislative procedure (OLP) be an efficient and necessary tool to ensure timely and effective decision-making in a number of important social policy fields?