

Statement on Art 9 TFEU: Horizontal Social Clause

EXECUTIVE SUMMARY

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Executive Summary

Since 2009 (and for the first time) European Primary Law comprises a „Horizontal Social Clause“ (HSC) in the Treaty on the Functioning of the European Union (TFEU). Art 9 TFEU, including the HSC, has no direct predecessor in the primary law although it catches up on Art 127 (2) Treaty of Nice („high level of employment“).¹ Art 9 TFEU goes back to the European Convent’s working group XI („Social Europe“) whose members discussed horizontal clauses on social values as well as on topics like gender mainstreaming and social cohesion.² However, departing from the decision of the plenary session the convent adopted the Constitutional Treaty without an appropriate horizontal clause. Finally Art 9 TFEU was inserted by the Treaty of Lisbon, modifying the text of Art III-117 of the agreement on an European Constitution.³ Against this background Art 9 TFEU has to be understood also in context with the model of a social market economy, enshrined in Art 3 (3) TEU.

The HSC in Art 9 TFEU reads: „In defining and implementing its policies and activities, 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.“ The challenge of interpreting the scope and potential of Art 9 TFEU for legislation, lobbying and the enforcement of social interests lies above all in the use of abstract or vague legal terms (*high level, adequate*), in the ambiguous purpose (*shall take into account*), in the ambiguous degree of obligation (binding or non-binding character of the provision) and in the unclear normative quality (whether or not Art 9 TFEU entails the power and the legitimacy for legislation).

Art 9 TFEU is not part of the powers and responsibilities of the EU. It represents a ‘**state goal resolution**’ and a ‘**referral norm**’ directly referencing to basic rules for determining the Community’s powers. Moreover, it needs to be implemented in context together with and on the basis of these powers and responsibilities. The respective legal norms could be found in Art. 147, 151 and 153 TFEU as well as Art 3 TEU. However, the terminology used in these norms is not congruent with Art 9 TFEU. Regardless of this contradiction, Art 9 TFEU does not represent a formal legal basis to set into force legal frameworks (regulations, directives) or policies (OMC, IA). On the contrary, it is an instrument of ‘**soft law**’ and ‘**procedural law**’, formulated as a ‘**balancing clause**’. Nevertheless, the legal provision demands the **procedural** integration of matters of social policy into all of the Community policies as a general goal without setting measurable objectives or targets. Art 9 TFEU is of **binding nature** from the **procedural** point of view, but not in view of its substantive content.

In this (procedural) respect, Art 9 TFEU embodies a **formal requirement** („take into account“) and, with respect to substantive law, a non-binding regulation, which does not establish a legal obligation to realise the objectives mentioned in the wording of Art 9 TFEU

¹ Folz in Vedder/Heintschel von Heinegg (2012), Art 9 AEUV, Rz 2.

² CONV 516/1/03 REV1, 4.2.2003; CONV 624/03, 17.3.2003.

³ Fischer (2010), Art 9 AEUV, Rz 1.

itself. But still it is an obligation to take into account several criteria, expressed as indeterminate legal concepts, which partly derive from Art. 147, 151, and 153 TFEU. From a legal point of view Art 9 TFEU is **not sufficiently determined**. It says nothing about the possible qualification criteria applied to determine a „high level“of employment, „adequate“ social protection or a „high level“of education. The impact of the respective objectives enshrined in Art 9 TFEU is rather left to processes of **flexible adaption**. In this respect the provision does not entail a legal requirement in which mode and to which extent the process has to be carried out.

From a juridical point of view, the legal and socioeconomic impact of horizontal clauses is limited. Art 9 TFEU does **not provide or require concrete actions**, does **not include individual rights**, remedies or legal claims, does **not constitute legal rights** with regard to the Member States. The HSC could nonetheless contribute to the achievement of objectives enshrined in Art 14, 29, 31, 34, 35, and 36 of the EU Charter of **Fundamental Human Rights** (education, access to labour market, fair working conditions, social security, health and security, access to services of general interest).

With respect to the policy making process the HSC enshrined in Art 9 TFEU is functionally embedded in the **OMC-methodology** and reproduces its structural problems. The Social Inclusion Strategy based on the OMC was both too inconsistent and too weak, lacking a critical review of its impact, suffering from low transparency and the failure to include local or regional actors. Against the background of the Europe 2020 strategy (youth on the move, agenda for new skills and jobs, european platform against poverty and social exclusion) the HSC is linked to the **Social OMC**, the **mainstreaming methodology** and **impact assessment methodology**. Notwithstanding the **non-binding character** of Art 9 TFEU the HSC could nevertheless **improve the performance of the OMC** and could make, in terms of the social policy objectives and targets, fruitful use of the impact assessment methodology possible. The HSC gave the OMC a new twist in **adding criteria** which took the form of loose legal terms, but could nevertheless guide the process of mutual learning, the horizontal coordination and cross-sectoral integration of interdependent policy areas.

Furthermore, the HSC enshrined in Art 9 TFEU stands in tension with the Fiscal Compact, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, the „six pack“ and the „European Semester“. In this regard criticism underlines the **informal nature** of the HSC, characterising it as an instrument limited to the **symbolic use of politics** while missing **predictable** impact.

What could be **done** by the **European stakeholders** in the field of social and labour market policy in order to strengthen the HSC ? Although part of soft law mechanisms, the HSC could be explicitly addressed in the OMC process as well as the impact assessment process.

Pertaining to the **OMC** process the **HSC added criteria** which could guide the mutual learning process, the horizontal coordination and cross-sectoral integration of interdependent policy areas.

When it comes to **impact assessment** (IA) the HSC could yield potential for a modernisation of the IA-procedure especially when it comes to the implementation of measurement-

criteria. The HSC definitely gives room to argue for taking into account **social key criteria** measuring effects of policies on the **quality of employment** (full-time or part-time jobs, on typical or atypical employment, on working poor) or the reduction of the low-pay sector. By the same right the HSC gives room to argue that the **legal quality of claims on allowances and benefits**, the level of transfers compared to the poverty threshold, **access to social services**, the **quality** of these services, **job-conditions** in social services have to be taken into account while carrying out the impact assessment procedure.

The European stake holders could push for assessment criteria reflecting the **living and working conditions**, the **quality of social services** (structural, personal, professional; output and outcome), the **participation** in administrative decisions on personal services or the **access to social law**, but also positive and negative spill over effects of social policies. However, the HSC will not rectify the problem of incoherent assumptions underlying the European Social Model.

At the bottom line the HSC opens up the possibility to **anchor** the EU **social goals** and objectives in the Europe **2020 strategy**. In this regard the European Platform against Poverty and the social OMC could use the (although limited) possibilities of the HSC by assessing how other EU policies (structural funds) are contributing to achieving the common social objectives.⁴

⁴ Zeitlin (2010).