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How the Horizontal Social Clause can be made to work: the lessons of gender mainstreaming

Pascale Vielle

Pascale Vielle is a lecturer at the University of Louvain (CIRTES) and member of Recwowe[1]

Policy implications

The new Article 9 of the Treaty on the Functioning of the European Union requires the EU institutions and the Member States to assess all their policies and activities in the light of their implications for the achievement of social goals. The implementation of gender mainstreaming over the last ten years enables identification of the key factors required if horizontal European policies are to succeed. The experience of gender mainstreaming shows in particular that, in order to develop its full potential, the new Horizontal Social Clause will require firm commitment on the part of all European actors involved in the fields of employment, social protection, the fight against social exclusion, education and training, and human health. Subject to impetus by a strong political will, Article 9 has the potential to prompt significant redirection of the most liberal European policies towards social ends and to contribute to the emergence of a European social model.

Introduction[2]

The Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community, was signed on 13 December 2007 and came into force on 1 December 2009. The section entitled "Treaty on the functioning of the European Union" contains the following new provision, widely referred to as the "Horizontal Social Clause":

Article 9
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 first commentators on the social dimension of the Treaty, when they do not lament the inbuilt ineffectiveness of this article, given the extremely limited extension of the EU's social competences[3], accord it no more than marginal significance[4]. As related by the European Commission, the story of the social clause is a tale of enshrinement in the Treaty of a practice of "intelligent regulation" developed by the Commission itself

1 RECWOWE is a Network of Excellence (NoE) of the European framework programme (FP6), grouping together 23 European centres of excellence specialised in the study of labour markets/and or social protection and focusing on the topic "Reconciling Work and Welfare in Europe" (http://recwowe.vitamib.com/).

2 This text has been adapted from a paper for the conference "Alternatives to flexicurity: new concepts and approaches", M. Keune and A. Serrano (eds.), organised by the ETUI, the University of Amsterdam (AIAS/HSI) and the Industrial Relations School (UCM) (in collaboration with the TRANSOC Institute), Madrid, Escuela de relaciones laborales, 6 and 7 May 2010.

3 Damjanovic, D., Elquist, E.; Hien, J., and Ponzano, P., *Legislating After Lisbon, New Opportunities for the European Parliament*, edited by Alexander Trechsel and Bruno Dewitte, Florence, (EUDO) Observatory on Institutional Changes and Reforms, 2010.

4 See, for example, Schömann, I., "The Lisbon Treaty: a more social Europe at last?", *ETUI Policy Brief*, n°1/2010.

etui.

since 2002[5]. It was indeed in that year that the Commission put in place an integrated Impact Assessment (IA) procedure designed to examine the economic, social and environmental effects of its policy proposals. This procedure was subsequently applied in 2005 in the context of the European employment strategy and the Lisbon strategy. In 2009, following an external assessment of the IA, the guidelines for intelligent regulation were amended , and the IA was extended to cover all legislative initiatives. The Lisbon Treaty came into force in the same year. In 2010 the Belgian presidency launched a debate on strengthening the social dimension of the IA in the context of the Horizontal Social Clause. The Commission, taking the view that IA already suffices to meet its new obligation under the Lisbon Treaty, henceforth stresses the need for the Member States themselves to adopt appropriate processes geared to similar ends[7].

Over and above this narrative couched in a technocratic register inspired by private management practices[8], it is nonetheless important to point out that the social clause is rooted in a fundamentally progressive vision of the purpose of public policies. Such a vision finds expression, for example, in the theoretical works of Amartya Sen and his practical contribution, within the United Nations framework, to a "human development index"; or in the highly instructive pursuit, since 1995, of gender mainstreaming within both the United Nations and the European Union.

What the Horizontal Social Clause actually asserts is the primacy to be accorded to social goals in EU activities and policy-making, and this includes those fields where "hard" economic considerations appear to reign supreme. The new provision is worded so as to apply to all the European institutions (Parliament, Council, Court of Justice[9], Commission, Committees involved in the Lisbon or Europe 2020 process[10], etc.), as well as to the Member States. Each of these actors is henceforth required to ensure that the clause is appropriately implemented within the sphere of its own responsibilities.

In the field of hard law the new clause protects from annexation by the laws of economics several fields of social action of quintessential significance in relation to what might be called the "European social model"[11]. In the field of soft law, the Horizontal Social Clause could, appropriately handled, allow the Lisbon and Europe 2020 process to become relatively exempt from application of the economic convergence criteria; it could even entail subjecting the various economic fields to the test of their compatibility with the social purposes of the Treaty as enshrined in the new clause. It is, however, up to the European institutions and social actors to recall and draw attention to the demands stemming from the new provision and to propose appropriate institutional mechanisms that will ensure its effectiveness. Interestingly enough, the Social Protection Committee lost no time in taking the measure of the potential offered by the Horizontal Social Clause[12].

In theory, therefore, it is possible, on the basis of Article 9 of the TFEU, to supply the European Social Question – on the European as much as the national level – with answers that transcend the traditional scope of social policy implementation and social law. This is true whether one speaks of the personal and material scope and targets of social policies, or of the instruments, actors and government levels whereby, by whom and at which they are implemented.

In order to indicate how such an approach might be implemented, I shall base my considerations on the Horizontal Social Clause's "elder sister", namely, the gender mainstreaming clause, introduced by the Amsterdam Treaty, in order 1) to show that it is indeed possible, under certain conditions, to develop horizontal policies on the scale of the EU, and 2) to identify the potential benefits and likely pitfalls associated with the horizontal social clause in the light of the experience of the gender mainstreaming clause.

From a legal standpoint, three arguments may be put forward to justify the comparison with gender mainstreaming. The first argument is textual: the wording of the horizontal social clause is, *mutatis mutandis*, very similar to that of the gender mainstreaming clause. The second argument is contextual: the Horizontal Social Clause was introduced into the Treaty just after the gender mainstreaming clause and just before

5 See the European Commission site: http://ec.europa.eu/enterprise/policies/better-regulation/impact-assessment/index_en.htm, and Belgian Presidency of the European Union, background paper: *The horizontal social clause and social mainstreaming in the EU - The Horizontal Social Clause as a call for intensified cooperation and exchange of knowledge through the Commission's Impact Assessment*, 3ème Forum sur les Services sociaux d'intérêt général (SSIG), Brussels, Belgian Federal Public Service Social Security, 26-27 October 2010 - (http://www.socialsecurity.fgov.be/eu/docs/agenda/26-27_10_10_sia_en.pdf).

6 European Commission (2009), Impact Assessment Guidelines which can be found on the site: http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_en.pdf

7 See Kühnemund, M., "Social impact Assessment as a tool for mainstreaming social inclusion and social protection concerns in public Policy in EU Member states", in Marlier, E. and Natali, D. (eds.), *Background document prepared for the international conference on EU coordination in the social field in the context of Europe 2020: Looking back and building the future, organised by the Belgian Presidency of the Council of the European Union with the support of the European Commission (14-15 September 2010, La Hulpe, Belgium)*, pp. 68 to 75.

8 See on the Commission website : Social impact assessment, background : http://ec.europa.eu/enterprise/policies/better-regulation/impact-assessment/background/index_en.htm

9 While it may indeed not be possible to deduce from it any direct effect, either horizontal or vertical – which means that an individual cannot derive rights from this clause and demand their implementation, either by a Member State or by another individual –, the Court of Justice should in principle refer to it in the framework of its classical teleological interpretation method.

10 Thus, at the request of the Belgian EU Presidency, the EPSCO Council has already begun to give thought to how to step up social mainstreaming in the wake of the horizontal social clause. See http://www.eutrio.be/pressrelease/informal-meeting-epsco-council-social-security-and-social-inclusion

11 For the same purpose, it is also possible to refer to the EU Charter of Fundamental Rights or to a future ratification by the EU of the European Convention of Human Rights.

12 Contribution by the Social Protection Committee finalised at its meeting on 18 May 2010 and presented in the run-up to the EPSCO Council meeting on 7 and 8 June 2010, *Council of the European Union, memorandum, Brussels, 21May 2010 (27.05) (OR. en) 9964/10SOC 35*8.

the environmental clause. The third argument pertains to a common articulated structure which, in these fields, establishes links between the law – a formal guarantee of fundamental rights – and public policies for the achievement of substantive goals (genuine equality, social justice).

This third argument deserves further development given its extreme importance for understanding the function of the Horizontal Social Clause within the overall rationale of the reforms introduced by the Lisbon Treaty. Gender mainstreaming was conceived and came into being as a result of the observed incapacity of "hard" law to ensure substantive equality between men and women. Once the effectiveness of law in *formally eliminating discrimination* had been demonstrated, it was necessary to implement a strategy suitable for *promoting the material equality of situations*. Accordingly, the United Nations, in 1995, adopted the Beijing strategy to complement the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW - 1979) and, a few years later, a gender mainstreaming strategy was enshrined in the Amsterdam Treaty to complement the provisions of European law that prohibited discrimination between women and men. While individuals may claim effective rights only under article 157 TFEU (on the prohibition of discrimination) and its derived directives, the gender mainstreaming clause requires the European institutions and Member States to assign egalitarian aims to all their activities and policies. Similarly, the Horizontal Social Clause can be understood only when viewed in conjunction with the new Treaty provisions that, on the one hand, enshrine the European Charter of Fundamental Rights, and, on the other, allow the EU to seek accession to the European Convention on Human Rights[13]. These latter provisions recognise formal rights – to which individuals can or will be entitled to lay claim in the law courts –, whereas the Horizontal Social Clause requires the EU and its Member States to assess the consequences of their activities and policies from the standpoint of the effective realisation of certain of these rights.

Gender mainstreaming: a partial and real – but insufficiently well known – instance of social progress

The Amsterdam Treaty, which came into force on 1 May 1999, amended Article 3 of the European Community Treaty. After the enumeration of the policies that may be conducted at European level, Article 3 henceforth states: *"2. In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women"*.

In conjunction with Article 2 of the same Treaty, this clause establishes a legal base for the gender mainstreaming strategy at the level of the European Union. It commits the institutions to the devising and conduct of active policies to promote gender equality, over and above the mere elimination of discrimination. It is impossible not to be struck by its close similarity to the Horizontal Social Clause.

13 See for example Schömann, I., op.cit..

When the idea of introducing gender mainstreaming into European policies was enshrined in the Amsterdam Treaty, it was not a brand new concept. It was at the Fourth World Conference on Women, which met in Beijing in 1995 under United Nations auspices, that the concept had first found formal expression, even if it had not yet received a name. At this gathering 189 countries adopted the Beijing Platform, setting up a programme for equality between women and men in twelve critical fields of action. In the accompanying declaration, the governments undertook "to implement the following Platform for Action, ensuring that a gender perspective is reflected in all our policies and programmes". In the wake of this declaration, the European Commission, on 21 February 1996, adopted a communication in which it undertook to "incorporate equal opportunities for women and men into all Community policies and activities"[14]. It was in this communication that the first explicit definition of gender mainstreaming was to be found[15]:

> *"This involves not restricting efforts to promote equality to the implementation of specific measures to help women, but mobilising all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account at the planning stage their possible effects on the respective situations of men and women ("gender perspective"). This means systematically examining measures and policies and taking into account such possible effects when defining an implementing them (...) The systematic consideration of all the differences between the needs of women and men in all Community policies and actions, this is the basic feature of the principle of "mainstreaming" which the Commission has adopted."*

Even if its results are not always apparent, even if they vary from one field to another, gender mainstreaming has contributed, without any doubt whatsoever, to improving equality between women and men in the European Union. In 2009 the Swedish Presidency reported its assessment of 15 years of Community implementation of the Beijing Platform[16]. While an examination of European policies reveals a somewhat limited impact of gender mainstreaming in relation to the Lisbon Process and the European structural funds[17], major efforts and progress are to be observed in the areas of research policy, external relations, development aid, humanitarian aid, as well as in the framework of the process of EU enlargement. As a means of ensuring less fragmentary progress, the report recalls the importance of systematically subjecting all EU policies and activities to a gender test. However uneven the outcome so far, the

14 COM(96) 67 final of 21 February 1996.

15 It is to be noted that in 1998 the Commission was to adopt the Council of Europe's definition: «Gender mainstreaming is the (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making."

16 Beijing + 15 : The Platform for action and the European Union, Report from the Swedish Presidency of the Council of the European Union, 2009.

17 On this point see also Vielle, P. et al., « L'égalité des genres et conciliation travail famille », in Vanhercke, B. ; Verschraegen, G. ; Van Gehuchten, P.-P., Vanderborght, Y. (eds.), *L'Europe en Belgique, la Belgique dans l'Europe, Configuration et appropriation des politiques sociales*, Louvain-la-Neuve, Academia-Bruylant, 2010 (forthcoming).

development and institutionalisation of gender mainstreaming have enabled the gender dimension of numerous European and national public policies to be revealed and have served to ensure that the aim of promoting substantial equality between women and men remains on the political agenda.

With reference to these fifteen years during which gender mainstreaming has been implemented, the key factors of success can today be identified. With the noteworthy and unfortunate exception of the Court of Justice, gender mainstreaming methods and structures have been put in place by all the European institutions. However, for ease of presentation, the illustrations that follow will be taken from the experience of the Commission alone.

Research has stressed that the existence of a motivated, committed and cooperative "velvet triangle" – made up of 1) political and administrative institutions, 2) civil society, and 3) scientific expertise – forms the backcloth of the implementation of an effective gender mainstreaming strategy[18]. These ingredients are found within the European context. The Commission, for its work in this sphere, relies on the "Commissioners' group on fundamental rights, anti-discrimination and equal opportunities" (2004) to enhance consistency among the Commission's activities in these fields in accordance with (former) Article 3 of the Treaty. The "interservice group on gender equality" (1995) is composed of representatives of all the DGs and is responsible for developing gender mainstreaming in all the Commission's activities and programmes and for contributing to the annual report on equality. The "equality and anti-discrimination group", responsible for overseeing transposition of European directives in the Member States, also provides coordination for a network of bodies responsible for equality in the different Member States (EQUINET), oversees the uniform implementation of equality directives and encourages the exchange of best practices. But it is the "equal opportunities unit" that forms the administrative pivot of this whole group of bodies and supplies the necessary impetus by developing the promotion of general and specific gender mainstreaming measures. In this task it is assisted by the "advisory committee for equal opportunities", composed of representatives of the Member States, the European social partners and civil society – including the European Women's Lobby (EWL) – which provide help in devising and implementing equality policies. The role of civil society is decisive here: the EWL and the social partners – with financial support from the Commission – are valuable interlocutors in prompting debate, in initiating and implementing equality policies. The "high-level group" – an informal group composed of representatives from the Member States responsible for gender mainstreaming on the national level – is the forum for planning the strategic follow-up to gender mainstreaming, including the highly political task consisting in the development of indicators and preparation of the annual report on equality presented each year by the Commission to the European Council and European Parliament.

The implementation of gender mainstreaming requires, in addition, the availability and development of a series of *specific instruments*. These include a methodology for the assessment in terms of gender – ex ante and ex post – of the situations covered by the European programmes, policies and activities; the development of a battery of statistics and indicators broken down by sex and presented from a gender standpoint; and quality research conducted for the purpose of diagnosing inequality and its causes. The "roadmap for equality between women and men" (2006-2010), which has replaced the earlier "five-year action programmes", is a concentrate of the Commission's efforts on these aspects of the government of gender mainstreaming. In future, however, it will be the recently set up "European gender institute" that will take charge of the development and dissemination of tools to be used by the European institutions and Member States for strengthening the gender mainstreaming strategy.

Financial support is essential for encouraging and accompanying the European and national actions in the priority fields, from research on specific topics to the implementation of pilot schemes, through awareness-raising, information and training initiatives. This financial support comes from two sources: from the integration of the gender dimension into all the European financial funds, on the one hand, and from the adoption of specific budgets closely linked to the five-year action programmes for equality (or, since 2006, the "roadmap for equality") on the other.

Finally, the introduction of a gender mainstreaming dimension must not be allowed to entail neglect of the *continuation of specific measures to promote women* in a series of vitally important areas. It is thus that the Commission conducts affirmative actions, for example in the fields of research or female entrepreneurship.

The history of Article 3.2 of the Amsterdam Treaty and of gender mainstreaming in Europe reveals the potential and the limits of horizontal clauses on the European level. It thus offers a wealth of experience and numerous lessons for the possibilities of concrete implementation of a Horizontal Social Clause.

Towards a form of social mainstreaming? Taking the horizontal social clause seriously

We have seen that an assessment of experience to date in relation to the gender mainstreaming clause is somewhat mixed[19].

The Horizontal Social Clause presents some similarities with gender mainstreaming, but also some significant differences. The first such difference relates to its subject matter which is more diversified and complex than the concept of gender equality. In this case, it is a question of simultaneously mainstreaming concerns associated with employment, social protection, human health, education and training. Unlike

18 Woodward, A., "Building Velvet Triangles: Gender and Informal Governance", in Christiansen, T.; Piattoni, S., *Informal Governance in the European Union*, Cheltenham, Edward Elgar, 2004.

19 See Vielle, P. *et al.*, op.cit.

gender equality (present since 1957 in Article 119 of the Treaty of Rome[20]), several of these topics are subject to only very limited EU competence. However, as we have seen, it is the activist stance of the "equality actors" that has enabled the value of gender equality, as a general principle, to be gradually asserted, in spite of the fact that the original formulation of this principle in the Treaty is confined to the matter of equal pay. It is, however, important not to underestimate the scale of the difficulties entailed by the diversity of the social clause goals. The difficulties stem not only from the diversity of the actors concerned, but also from the diversity of the – sometimes contradictory! – interests, priorities, and solutions which these actors pursue. To overcome these difficulties, it might perhaps be appropriate to put the Horizontal Social Clause to the test, in the first instance, in areas which, without being peripheral to the European institutions' missions, do not relate to their core business (like competition, for example). Such areas might include, for example, energy, mobility, training, new information and communication technologies, etc.

Another difficulty, stemming this time from the wording of the social clause, relates to the fact that employment appears to be considered from a quantitative standpoint alone. The European institutions – the Court of Justice in particular – would have to be prepared to bend the letter of the law and deploy persuasive arguments to maintain that a "high level of employment" entails a qualitative as well as a quantitative dimension. This certainly represents a strategic challenge for European actors concerned to promote the quality of employment. It is a question, indeed, of preventing a situation where a restrictive interpretation of this formulation would, for example, compromise the possibility of achieving progress in the ECJ's case law, or might exacerbate the deregulation of labour law in the discussions on flexicurity.

Unlike gender mainstreaming, the insertion of a social mainstreaming provision in the Treaty was not the outcome of an already existing strong political will on the part of the European institutions. For the social clause to deploy its full potential is clearly going to require a political commitment sustained over time and at the highest level, in the wake of the initiative taken by the Belgian presidency. All the different actors and institutions concerned must together decide to appropriate this new spirit of the Treaty which represents a Copernican revolution in relation to the initial purposes of the European Union and requires a reorientation of the whole policy corpus towards the wellbeing of European citizens. In this respect, a rapid communication from the Commission, along lines similar to the gender mainstreaming communication of 1996, and specifying the meaning and scope of the social clause, would represent a useful contribution to its effectiveness. What is more, the European social actors, with the support of the institutions, must also espouse the social clause, and develop their activism in the direction of its implementation.

Any horizontal policy requires considerable commitment and input on the part of the European civil service. To ensure that the social clause really does result in genuine change, it will be necessary to provide civil servants with training in social matters (or to appoint civil servants already in possession of the requisite specialisation) in all the Commission DGs. A special unit – ideally within the General Secretariat – should be created to spearhead and coordinate this effort, as well as internal concertation groups. Such coordination is currently non-existent, such that some social policies conducted within the employment and social affairs DG are developing quite at odds with one another. One example of a lack of synergy is to be found in the area of combining family and working life, an endeavour to which the bodies in charge of equality have been devoting considerable efforts but which has been quite neglected in the drafting of working time directives, while a gender approach is also missing from the new version of the maternity directive.

The development of a rigorous methodology applicable to the horizontal approach is indispensable. Either this must be entrusted to an appropriate existing external body, for example, the Dublin Foundation, or a new one must be set up specifically for the purpose. Such a body would be responsible for awareness-raising and for the training of national and European actors and institutions, for the collection of statistics and devising of indicators and all the other tools required to ensure effective processes and procedures (ex ante and ex post assessment methodologies, support for research in specific areas intended to identify the critical fields for intervention, networking of actors, etc.).

The process of consultation and exchange between the European institutions and all the actors involved in and affected by the formation and implementation of social policies must be institutionalised, with the aim of achieving a properly consolidated epistemic community able to focus on all issues relating to the achievement of social progress. This raises, however, the question of how to identify the actors in possession of the relevant expertise, a matter that is far from having been resolved to judge from the Commission's IA guidelines or the IA fiches already completed. In the light of the experience of gender mainstreaming, the actors concerned must – in our own view – include, at least, the social partners, as well as representatives of civil society – as already institutionalised or subject to further requisite institutionalisation – on the European level in the fields covered by the clause. Each of the actors in question must then first of all agree to take part in the process and subsequently undertake to contribute to a cooperative and constructive effort with the other categories of actors affected by the clause. On the gender question, the experience of the fight against domestic violence is edifying in this respect. A number of women's organisations (the "traditional" actors in the gender sphere) had refused, in the first instance, to cooperate with the grassroots actors invited to define and evaluate the policies, whose legitimacy in the field they contested and who, they feared, would weaken their strategic position by depriving them of their monopoly on consultation. Experience showed, on the contrary, that it is important for the effectiveness and legitimacy of ongoing policies to have all these actors present around the table and also that their respective positions are actually

20 Ancestor of the current Article 157 TFEU.

strengthened by the experience of developing cooperation and joint efforts in the field.

The process of consultation and concertation must take on a horizontal character (the full range of affected and involved European actors, i.e. institutions, social partners, NGOs active in the social clause fields) but the vertical dimension is equally important. One of the key factors of the success of gender mainstreaming is to be found precisely in this vertical integration: the European institutions are supported at one and the same time by the United Nations and by the Member States and they, in return, support these two decision-making levels. A similar dynamic – some traces of which are already apparent in the Commission negotiations with the ILO on common job quality indicators, or in the Lisbon process with the Member States – remains to be invented and put into practice in social matters.

The ex-ante and ex-post ("social test") evaluations must be generalised across the full range of European economic and social policies. The Lisbon process must be revisited, as much in terms of procedures as of substance, in order to better reflect the new balance between economic and social policies required by the horizontal clause.

Ambitious research programmes must be conducted to analyse the evolution of the social situation in Europe, identifying priority questions, understanding the causes of social problems, and exploring ways of solving them. This requires the systematic integration of the fields covered by the social clause in the European framework research programmes (incorporation of social aspects in the content of calls for tender, but also consideration of the social impact of the research being subsidised), in parallel with the specific individual research programmes on social matters.

Programmes to identify the priority actions to be conducted and the results to be achieved by specific deadlines must be drawn up by the Commission. In conjunction with this step, the structural funds must undergo revision in accordance with the clause's priorities and must be complemented by specific funds intended to initiate and support projects in the most critical fields and which will allow the conduct of specific research projects to focus on these issues, the provision of awareness-raising and training programmes, support for the actors concerned and the encouragement of pilot actions.

Finally, the EU must continue the development of legislation and social policies in those areas where it has specific competences. Such legislation and policies must serve as both foundation and cement in building the new horizontal social approach.

It is subject to these demanding but imperative conditions that the Horizontal Social Clause can be used to give a new chance to a genuine "European social model" based on the gearing of all policies, both economic and social, towards the purpose of the wellbeing and social security (in the broadest sense of the term) of all EU citizens. It is equally in the light of these considerations that a careful analysis must be conducted of the complex processes put in place by the Commission in the IA framework, and of the IA fiches that have already been produced[21].

Translation from the French by Kathleen Llanwarne

21 And which can be found on the Commission website – http://ec.europa.eu/enterprise/policies/better-regulation/impact-assessment/index_en.htm