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AFTERWORD. THE EUROPEAN UNEMPLOYMENT BENEFIT SCHEME: THE WAY AHEAD

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1. The hard harmonisation of different social security systems

Fifty-five years ago, the High Authority of the European Coal and Steel Community, having plenty of awareness that the freshly introduced elimination of trade barriers would cause severe unemployment because of a loss of competitiveness of the industries affected by the Treaty of Paris, asked a group of experts to make a comparison between different disciplines of some important institutions of labour law in the six countries, which at that time had just created a common market in these two important sectors of the economy.

The first item that was the object of study was redundancy; the second was employee participation in enterprises; and the third was the protection of workers in case of loss of employment. The general report[1] of that survey, published in 1961 in a book entitled "La protection des travailleurs en cas de perte de l'emploi", summarising the contributions of each country, was very keen on describing every country's unemployment benefit system, analysing eligibility conditions, substitution rates, kinds of benefits, financing systems, with the evident purpose of verifying the possibility of a common framework.

The attempts of the High Authority did not go any further and the effort to harmonise national compensation systems remained limited to Regulation No 3 of 1958, which firstly established coordination of social security systems to encourage the mobility of European workers, and which can be described as the ancestor of the currently in force Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

There is no doubt that freedom of movement of workers will be a very fragile right if a person who moved to another State loses some or all of his or her social security benefits on coming back to his or her country of origin. So, because the social security systems of the Member States are the result of traditions and national choices that cannot be changed in just a few decades, the EU regulations have until now not yet replaced national social security systems with a single European one, but have laid down a harmonisation plan, which, under the light of the equality of treatment principle, allows for aggregation of the insurance periods and exportation of benefits for the time after such employment has finished.

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[1] From a very personal point of view, it has been pointed out that the general report was written by Luigi Mengoni, at that time Professor of Civil and Labour Law at the Catholic University of Milan.

In 2004, Regulation (EC) No 883/2004 was adopted to replace the previous Regulations (EEC) Nos 1408/71 (and 574/72), which in turn have replaced the long-standing Regulations Nos 3/1958 and 4/1958[2].

According to Article 61 of the first (see, in the same sense, Regulation No 1408/71, Article 67), special rules are established on the aggregation of periods of insurance, employment or self-employment to fulfil requirements for unemployment allowances: every country has to "take into account periods of insurance, employment or self-employment completed under the legislation of any other Member State as though they were completed under the legislation it applies"[3].

From the point of view of the principle of territoriality, Article 61 is quite revolutionary, because it provides not only for coordination between different systems, but also states that the guest State has to recognise, when a period of insurance or employment has been completed in the State where the benefit is requested, work performed in another country, as though it had been done inside its own borders. In this way contributions and benefits are not mutually linked by a reciprocity principle, breaching the main rule of the Bismarkian system.

In truth, it must be said that it is thanks to freedom of movement if such a right to benefits can be acquired under the legislation of the guest Member State even if income arises in the territory of another Member State.

In the same sense, Article 64 of Regulation No 883/2004 provides for special provisions because of the waiving of residence rules allowing a person seeking work, after being registered for four weeks on the rolls of the employment services of the competent Member State, to migrate to another country and to retain this benefit for a period of three months from the date when the unemployed person ceased to be available to the employment services of the Member State which he or she had left. In these cases, however, there is no infringement of territoriality rule, because "the benefits shall be provided by the competent institution in accordance with the legislation it applies and at its own expense", according to Article 61(1)d of Regulation No 883/2004.

In conclusion, it could be said that the harmonisation between different national systems, although still far from constituting a unitary system (Fuchs 2013), could represent a good starting point from which a European unemployment scheme could be developed, although until now it has produced only a mutual duty that obligates Member States to recognise, in a corresponding fashion, contributions paid to another national social security institution as their own.

2. A legal basis for the European Commission's initiative

The attempt to create a common European Unemployment Benefit Scheme (EUBS) requires a different approach, according to the competences laid down by the treaties,

[2] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community; Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community; Regulation No 3 of 25 September 1958 concerning social security for migrant workers; Regulation No 4 of 25 September 1958 on implementing procedures and supplementary provisions in respect of Regulation No 3 concerning social security for migrant workers.

[3] Paragraph 2 adds that: "However, when the applicable legislation makes the right to benefits conditional on the completion of periods of insurance, the periods of employment or self-employment completed under the legislation of another Member State shall not be taken into account unless such periods would have been considered to be periods of insurance had they been completed in accordance with the applicable legislation".

involving no more simple harmonisation but the distribution and use of EU funds for social cohesion and maybe also a transfer of money from national institutions towards a newly created common one.

Since many economists agree on the need to create an instrument to absorb asymmetric shocks within the area of the Economic and Monetary Union (EMU) operating in an anti-cyclical way, there are many hypotheses that have been advanced, ranging from the idea of replacing part of the existing national schemes by paying a part of social security contributions into a European fund instead of into national systems, to the idea of linking together active labour market policies for jobseekers and the expending of funds for social cohesion.

On this last point, in September 2015 the European Commission announced its initiative on getting the long-term unemployed back to work, with the proposal for a Council recommendation, presented by Commissioner Thyssen, that suggests that unemployed people, who have been out of work for more than 12 months, receive individual assessment and a job integration agreement.

An alternative idea is to establish a permanent system in which financial transfers occur only from and towards Member States, after the US system laid down by President Roosevelt during the "Great Depression", and still in force, with several changes.

3. A general framework for the EUBS

Clearly, the appropriate legal basis for legitimising the initiative of the European Commission may be different, depending on the shape that the EUBS might take.

As is well known (Schoukens, 2015), competencies in the field of social security should not be founded only on the social chapter, but also on various provisions on social items. It should not be forgotten that, with Article 175(3) of the Treaty on the Functioning of the European Union (TFEU), the European Commission has founded the institution of the Fund for European Aid to the Most Deprived – Regulation (EU) No 223/2014 of the European Parliament and of the Council of 11 March 2014 on the Fund for European Aid to the Most Deprived[4] – and that the introduction of the Youth Guarantee across the EU has been based more on the need for the full integration of the European Employment Strategy than on a specific competence recognised in the treaties[5].

In a meaningful way, it has been observed by a document of the European Commission that "while the competence to deal with long-term unemployment rests firmly at national level, the consequences of inaction transcend national borders".

Of course, if contributions from enterprises have to be collected and granted to a single entity, not only will it be a matter of making full and optimal use of the Cohesion Policy funding instruments, but a specific legal basis has to be identified among the present competences of the EU or established by a new treaty.

From this point of view, without a shadow of doubt, Article 18 TFEU, which recalls the

[4] Complementing the provisions of the chapter on Economic, social and territorial cohesion, Art. 175(3) states that: "If specific actions prove necessary outside the [Structural] Funds [already provided] and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions".

[5] See Council Recommendation of 22 April 2013 on establishing a Youth Guarantee (2013/C 120/01).

principles of subsidiarity and proportionality in shaping the Union's competence shared with the Member States in a specific area, could allow for an initiative of the European Commission in the sense of creating just a basic system that can be strengthened and improved through the initiative of individual states ("top-up").

The scheme that could be established, according to the "genuine" form of unemployment benefit (UB), belongs to the traditional kind of insurance benefit, subject to previous periods of employment, and linked to a jobseeker's availability for the labour market, verified through control of national authorities (according to the "employability" criterion of the European employment strategy guidelines). The amount of benefit granted will be calculated on the basis of the previous earned income or the individual contributions paid, and only for a limited period.

As Dullien has pointed out, the EUBS would be designed in such a way that it provides basic unemployment insurance, and only for those who have been insured for a certain number of months prior to unemployment, allowing the national system or collective bargaining to improve the benefit both for the duration of its recognition and the amount. The benefit would be financed "by contributions based on wages and collected through existing national unemployment insurance administrations".

Of course, in such a system financial balance has to be guaranteed on the basis of medium-term equivalence between contributions levied and the total amount of benefits paid, so that even if the collection of contributions can be left to individual States through existing institutions, it is essential to create a European entity, tasked with assessing the eligibility criteria and coverage rate in order to ensure the tightness of the scheme. Not too short a period of experimentation may appear necessary to avoid moral hazard.

In particular, the eligibility criteria in order to check if the unemployment is involuntary will have to be defined by European instruments, and also whether contributions (especially for workers employed on a quasi-subordinate basis) have been correctly paid, and – finally – if the jobseeker has fulfilled the required obligations relating to the activation policies so as not to lose the right to obtain the benefit. Also the holder of the right has to be defined, although not in a strict way, because the term "worker" has to be understood in a broad sense in order to harmonise all the various systems of quasi-subordinate work in the Member States.

These seem to me the minimum criteria that have to be specifically provided, in cooperation with national social security institutions, to ignite the mechanisms of the scheme, although it is clear that Europe needs not only a redistributive tool that could contribute to the stabilisation of the Eurozone, but mainly a common policy, meeting EU citizens' demands for safety and prosperity, which, as it has been conspicuously pointed out, national governments, bound to consolidation policies, are failing to provide.

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