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A CURA DI

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ANDREA GUAZZAROTTI

INTRODUZIONE

I contributi raccolti in questo Volume ruotano tutti attorno allo stesso tema della mobilità del lavoro e delle persone nell'Unione europea. La diversità degli approcci con cui il tema è affrontato rispecchia in parte la particolare sensibilità degli Autori, in parte la loro provenienza disciplinare: se gli studiosi del diritto dell'UE si concentrano sull'evoluzione (o "involuzione") della giurisprudenza (Bartoloni) e del diritto derivato dell'Unione, con particolare attenzione ai *clivage* tra Stati membri affioranti nel difficoltoso processo di riforma (Costamagna, Morsa), i giuslavoristi (Borelli e Orlandini) intrecciano le analisi delle trasformazioni del diritto europeo con le prassi di istituzioni pubbliche nazionali, imprese transnazionali e lavoratori, alla ricerca di maggior effettività di tutela di questi ultimi; il costituzionalista (Menéndez), infine, predilige lo sguardo storico e ordinamentale complessivo, all'interno del quale l'evoluzione della disciplina europea della libera circolazione delle persone non è che un elemento – sia pure assai significativo – del più ampio processo di svuotamento del costituzionalismo democratico-sociale uscito dal secondo conflitto mondiale. Con tutte le forzature del pensiero altrui che si rischia di compiere in questi casi, sembra di poter dire che, dinanzi all'analisi più disincantata degli studiosi del Diritto dell'UE, i giuslavoristi sembrano ancora porre una certa dose di fiducia nel potenziale garantista del diritto e delle istituzioni europee, consapevoli che, in assenza di adeguati strumenti transnazionali di tutela del lavoro, vano risulta ogni tentativo di reagire al *dumping* sociale innescato dalla mobilità del lavoro. La visione più nettamente pessimista del costituzionalista, invece, sembra mostrarci un'amara realtà: quella per cui l'assenza della statualità nel diritto e nelle istituzioni europee non può che produrre la mercificazione del lavoro e l'esatto opposto della promessa di emancipazione delle persone di cui avrebbe dovuto essere portatrice la cittadinanza europea.

In tempi di riflusso nazionalista, non va dimenticato come il diritto alla mobilità del lavoro (e, più in generale, delle persone) sia effettivamente una conquista di civiltà da annoverarsi tra i diritti fondamentali della persona, come ricordato proprio da Menéndez all'inizio del suo lungo e appassionato contributo. In Italia andrebbe ricordato che il diritto del lavoratore a emigrare viene riconosciuto dalla Costituzione nella sua duplice dimensione individualistico-garantista e di dovere di intervento pubblico a tutela del lavoro italiano all'estero[1]. Tutela che, evidentemente, non può che aversi su un piano di cooperazione internazionale adeguata. Andrebbe ricordato anche che una delle cause che determinò l'aggravamento del divario economico tra Nord e Sud nel ventennio fascista fu proprio la politica del fascismo tesa a bloccare sia l'emigrazione esterna che quella interna[2].

Si tratta di elementi ben presenti ai Padri fondatori dell'integrazione europea, i quali tuttavia avevano anche ben presente i rischi di *dumping* salariale e sociale che la mobilità del lavoro poteva avere nelle proprie società (come ricordato anche da Costamagna). La fatidica scelta di costruire un'unione monetaria in assenza di (qualsiasi realistica prospettiva di) un'unione politica, ha caricato sulla mobilità del lavoro aspettative di riequilibrio in caso di *shock* asimmetrici nell'Unione che si sono rivelate sproporzionate con la crisi: in un'unione federale come gli Stati Uniti, come noto, la mobilità del lavoro è facilitata dall'identità nazionale condivisa ma è anche bilanciata dai trasferimenti federali a favore delle aree colpite. La troppo rapida apertura dell'Unione europea ai Paesi dell'Est Europa ha fatto il resto. Il risultato è stato quello per cui, a fronte del deciso aumento della mobilità dei cittadini europei durante la crisi ha fatto riscontro l'ostilità crescente delle opinioni pubbliche degli stati di destinazione di tale mobilità (specie Regno Unito e Germania)[3]. Le politiche restrittive nazionali (specie verso i cittadini europei "economicamente inattivi") stanno influenzando lo stesso diritto dell'Unione, svelando tutta la fragilità della portata emancipatrice della cittadinanza europea. Se, da un lato, non è dimostrato il concreto rischio di sovraccarico intollerabile dei sistemi di welfare nazionali a causa delle migrazioni intraeuropee, da un altro lato, appare sempre più difficilmente arginabile lo sfruttamento politico dell'insicurezza prodotta dalla globalizzazione anche nei cittadini degli stati più ricchi.

Si dimostra, così, che il c.d. "modello sociale europeo", basato sul mero dovere degli stati membri di aprire i propri sistemi di welfare ai mi-

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[1] Art. 35, co. 4, Cost.

[2] G. Pellegrini, *Convergenza e crescita tra le regioni italiane: quanto è importante la politica?*, in *Riv. econ. Mezzogiorno*, 2016, n. 1, p. 231.

[3] Non a caso, le decisioni della Corte di Giustizia analizzate soprattutto nel contributo di Maria Eugenia Bartoloni, sono tutte relativi a questi due Stati.

granti europei, anziché sulla creazione di reti di sicurezza federali, non ha bisogno soltanto che sia rispettata la "sostenibilità economica" dei sistemi nazionali, bensì che sia creata una "sostenibilità politica" di quel modello. Il che evidenzia ulteriormente l'insostenibilità di un progetto di integrazione europea incentrato su competitività tra economie nazionali e autodisciplina fiscale degli stati. Un modello perfettamente coerente con l'indisponibilità dei cittadini dei Paesi usciti vittoriosi dalla crisi a ritenere che il successo economico del proprio Stato potrebbe essere anche il frutto delle difficoltà patite dai cittadini degli Paesi europei più deboli[4].

Analogamente, l'inevitabile *dumping* sociale insito nel "diritto" dei Paesi dell'Est Europa a giovarsi dei divari salariali, contributivi e fiscali per aumentare la propria competitività (Costamagna, Morsa, Borelli) non viene compensato da alcuna redistribuzione della ricchezza complessiva che l'innalzamento del Pil in questi Paesi produce nell'intera Unione europea: se gli unici soggetti capaci di impossessarsi di tali benefici sono le multinazionali, è chiaro che nessuna identità civica condivisa potrà mai emergere in una simile "unione di competitività"[5].

Se alla base dell'integrazione europea dei primordi stavano (anche) idee economiche keynesiane, le cose sono profondamente mutate a partire dalla crisi degli anni settanta del secolo scorso e dalla finanziarizzazione dell'economia globale decisa dagli Stati Uniti per uscire da quella crisi mantenendo l'egemonia del dollaro (Menéndez). La forte integrazione economica già raggiunta tra i Paesi fondatori all'interno del Mercato comune rendeva assai arduo lottare contro la disoccupazione puntando su programmi di intervento pubblico nell'economia: in assenza di un forte coordinamento delle politiche economiche, il keynesismo praticato in un paese solo determina rapidi e pesanti squilibri della bilancia commerciale, come Mitterand dovette ben presto imparare a sue spese all'inizio degli anni ottanta[6]. Ecco che allora sembra farsi vincente l'idea

[4] M. FERRERA, *Rotta di collisione. Euro contro welfare?*, Roma-Bari, 2016.

[5] W. STREECK, *Il modello sociale europeo: dalla redistribuzione alla solidarietà competitiva*, in *Stato e mercato*, 2000/1, p. 3 ss.

[6] L'indisponibilità della Germania a cooperare con quella politica dei socialisti francesi, infatti, fece sì che l'aumento della domanda interna in Francia si traducesse in un aumento delle importazioni delle merci dalla Germania non compensato da un adeguato aumento delle esportazioni francesi: l'allora Ministro delle finanze francese Delors minacciò l'uscita dallo SME per poter indurre la Germania a rivalutare il marco (il che sfociò in un pacchetto negoziato con la CEE, in cui la Germania condizionava il ritocco della sua politica monetaria all'introduzione di riforme liberalizzatrici in Francia); con il che la Francia imparò che politiche espansive unilaterali non erano più possibili, se non a costo di uscire dalla stessa CEE: B. EICHENGREEN, *La nascita dell'economia europea. Dalla svolta del 1945 alla sfida dell'innovazione*, Torino, 2009, p. 219 s.

che mobilità dei capitali privati e mobilità del lavoro siano le uniche alternative possibili all'impossibilità di coordinare politiche economiche a livello europeo (ovvero: l'impossibilità di convincere la Germania e i suoi satelliti ad abbandonare politiche mercantiliste)[7].

L'idea che i problemi di occupazione siano risolvibili con la mobilità dei lavoratori nello spazio economico "non statale" europeo sembra allora un'idea vincente, assieme a quella per cui la mobilità dei capitali privati favorita dall'introduzione dell'euro avrebbe magicamente risolto i profondi divari tra economie nazionali, i quali, come noto, rendono assai sconsigliabile un'unione monetaria[8].

Per rendere tutto questo politicamente attraente, fu coniata l'idea di una cittadinanza dell'Unione, che si presentava emancipata dalla precedente visione funzionalista della mobilità per motivi economici delle persone e arricchita di tutto l'armamentario ideologico della Carta dei diritti fondamentali dell'Unione. L'esito paradossale di questa fuga in avanti è ben evidenziato dall'analisi dell'evoluzione giurisprudenziale (Bartoloni): siamo giunti al risultato paradossale per cui, da un lato, la Carta dei diritti tutela la dignità umana in genere (art. 1) e con riguardo all'assistenza sociale, in particolare (art. 34), dall'altro lato, la stessa invocazione della dignità delle persone può consentire al legislatore di uno Stato membro di tagliare fuori dall'assistenza economica ai disoccupati i cittadini europei non nazionali[9]. L'assenza di un budget federale europeo ha reso impossibile per la Corte di giustizia sostenere, quando ce ne sarebbe stato bisogno, quello che la Corte Suprema USA poté affermare quando annullò una legge di uno degli Stati (il Cunnecticut) mirante a negare l'assistenza sociale ai poveri provenienti da altri Stati dell'Unione: lo scopo legislativo di impedire la migrazione di persone bisognose è costituzionalmente inammissibile[10]. Certo, i Trattati non escludono la possibilità di introdurre riforme capaci di porre in capo all'Unione anziché esclusivamente agli Stati di accoglienza l'onere di sostenere i cittadini non nazionali bisognosi di protezione sociale: peccato che per raggiungere un simile obiettivo sia necessaria l'unanimità del Consiglio![11]

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[7] S. CESARATTO, *Chi non rispetta le regole? Italia e Germania. Le doppie morali dell'euro*, Reggio Emilia, 2018.

[8] E. BRANCACCIO, M. PASSARELLA, *L'austerità è di destra. E sta distruggendo l'Europa*, Milano, 2012, p. 61 ss.

[9] Cfr. il caso *Alimanovic*, Corte di giustizia, sent. del 15 settembre 2015, causa C-67/14.

[10] Cfr. il caso *Shapiro v. Thompson*, 394 U.S. 618 (1969), cit. da C. SUNSTEIN, *The Second Bill of Rights: FDR's unfinished revolution and why we need it more than ever*, New York, 2004, p. 157 s.

[11] Cfr. l'art. 21, co. 3, del TFUE.

La speranza che ci viene dai contributi dei giuslavoristi (Borelli, Orladini), è quella per cui, sia pure con molta fatica e lentamente, l'ordinamento europeo ha reagito e sta reagendo alle pressioni competitive dell'integrazione economico-monetaria e al *dumping* sociale che ne risulta. Dopo aver rafforzato le garanzie dei lavoratori distaccati sotto il profilo retributivo, è ora il tempo di rimediare al deficit di tutele previdenziali cui questi stessi lavoratori sono sottoposti[12]. Quanto a effettività della tutela e capacità di *enforcement*, la creazione di un'Autorità europea del lavoro realizzata nel 2019 è certamente una innovazione istituzionale da salutare con favore. Ciò, non tanto per la fiducia che si può o si dovrebbe porre nella costituzione di autorità sovranazionali di settore: il loro proliferare negli ultimi anni non sembra andare di pari passo con la crescita di un'identità civica europea. La speranza è, invece, quella che una simile Autorità sia in grado di promuovere la cooperazione transnazionale tra ispettorati del lavoro e sindacati (Borelli), rafforzando così la capacità di contrastare i comportamenti opportunistici delle imprese che sfruttano i differenziali salariali e contributivi tra Stati.

Alla sensibilità del costituzionalista, o almeno di quella di chi scrive, ogni spunto in tal senso sembra prezioso: non può esserci solidarietà federale senza soggetti politici federali (come emerge dalla ricostruzione dei lavori del Parlamento europeo sulla fallita riforma del coordinamento della sicurezza sociale transnazionale effettuata da Morsa). Questi non sono né possono essere gli attuali gruppi politici del Parlamento europeo; né le grandi famiglie politiche nazionali sembrano in grado di sciogliere le proprie identità in confederazioni europee dotate di una qualche strutturazione gerarchica. La politica vuole, specie nei Paesi più forti, restare nazionale: nessun tacchino, del resto, ha mai chiesto di anticipare il Natale! Per i sindacati, forse, le prospettive potrebbero essere diverse.

In più punti, il contributo di Giovanni Orlandini coglie questo profilo e le sue problematicità: da un lato, il diritto europeo (riforma della Direttiva sui lavoratori distaccati) attribuisce rilevanza al ruolo della contrattazione collettiva nazionale di categoria (rafforzando così il sindacato), da un altro lato, la *governance* economica europea promuove la contrattazione decentrata a supposti fini di produttività, puntando esattamente al risultato opposto (indebolire il sindacato nazionale e, di risulta, la Confederazione dei sindacati europei). Il rafforzamento del diritto all'azione collettiva e allo sciopero avutosi con la modifica della Di-

[12] Potendo le imprese distaccanti giovarsi dei minori oneri contributivi previsti nei Paesi dell'Est Europa: cfr., in special modo, i contributi di Borelli, Morsa e Costamagna.

rettiva sui lavoratori distaccati[13] fa sperare a questo Autore che ciò possa, attraverso «il diritto al conflitto», aprire nuovi spazi «di solidarietà tra lavoratori europei e recuperare sul piano transnazionale il peso che le stesse dinamiche dell'integrazione hanno contribuito a far loro perdere all'interno dei confini nazionali».

Per chi conviene che il *diritto al conflitto* è al cuore del costituzionalismo che ha dato vita alla Costituzione italiana e a quelle sorte in Europa dopo la catastrofe del secondo conflitto mondiale[14], un simile spiraglio di resipiscenza nell'ordinamento europeo, dopo l'attacco neoliberista avutosi nel 2007 con le note sentenze *Viking*, *Laval*, ecc., non può che essere salutato positivamente

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[13] Nuovo art. 1-*bis*, della direttiva 96/71, come modificata dalla direttiva 2018/957).

[14] R. BIN, *Che cos'è la Costituzione?*, in *Quad. cost.*, 2007, n. 1, pp. 11-52.

AGUSTÍN JOSÉ MENÉNDEZ

WHICH FREE MOVEMENT? WHOSE FREE MOVEMENT?

> 'Whereas it is true that the emergence of modern democracy results from the development of capitalism, modern democracy is the antithesis of capitalism, and in no way its political expression'
>
> LELIO BASSO, *Il principe senza scettro*[1]

> 'You bleed people three times. First, the market wants blood; you relocate, workers lose their jobs. Second, you bleed them as customers. Third, via Europe's debts; you zap countries and their citizens get bled. Worker, customer, citizen are the same guy, so you screw him three times'
>
> KONSTANTINOS COSTA GAVRAS, JEAN-CLAUDE GRUMBERG y KARIM BOUKERCHA, *Le Capital*

> 'Un train peut en cacher un autre'
>
> Old SNCF signal

[1] Feltrinelli, 1998 (first edition 1958), page 33: "Se è vero che la democracia moderna nasce storicamente con lo sviluppo del capitalismo, essa nasce però in antitesi al capitalismo e non come sua espressione politica".

Introduction

We are frequently told that views and attitudes towards population movements have become key factors in the fabric of European public opinion. The closeness or openness of the political community has become one of the central topics in political debates and perhaps even more so in electoral campaigns. Specific "policy" (i.e. on how to tackle the refugee crisis) or "polity" discussions (Brexit) seem to have become proxies of an ongoing debate on who can move in and out of a given state, or of the European "free movement" area (sometimes referred as Schengenland).

This chapter aims at making sense of such debates from what may be described as a constitutional perspective that tries to be very sensitive to the specific social, economic, cultural and political context in which European law has evolved and changed, and in which present debates unfold.

Such a perspective seems to me relevant because it can contribute to overcome the rather reductionistic terms according to which the discussion seems to me to proceed.

– On the one hand, we find the advocates of the present European practice, said to have a major emancipatory potential. The right to personal freedom of movement, as defined in present EU law and (perhaps above all) case law would not only allow individuals to enjoy forms of freedom that national citizenship could not guarantee, but would also be instrumental in forging a post-national political order within which new and stronger ties of cross-national solidarity would be emerging (so much so that some argue that free movement would be in itself the highest form of social policy).

– On the other hand, we find the opponents of the present European practice, which they claim has had deleterious effects on the capacity of democratic polities to forge and implement a collective political will. The most bitter criticism is premised, more or less explicitly, in the combination of appeals to pre-political, "thick" identities and calls for the "reestablishment" of physical borders through which to regain political self-determination.

It seems to me that both discourses articulate some major factual developments and normative concerns, while both rely on problematic factual and normative premises. This is why it seems to me necessary to approach afresh the debate, by means of reconstructing the transformation of European law and practice with two fundamental questions always in mind, namely:

– *Which freedom of movement?* Or What kind of fundamental legal position is the right to freedom of movement? Is it a subjective fundamental right that empowers the mover as person? Or it is an economic freedom, namely the reflex of an institutional guarantee (*mobility of labour*)? In both cases, in what relationship does the right to freedom of movement stand vis à vis other fundamental legal positions, including subjective and collective rights, collective goods, and last but not least, the other economic freedoms?

– *Whose freedom of movement?* Or Who gains and who loses when the right to freedom of movement is defined as it is in European secondary law? Which *distributive implications* result from the present practice of personal freedom of movement?

Posing such questions clarifies the shape and content of present European debates. Contrary to what is not infrequently assumed, the historical reconstruction of the European practice of free movement shows that both the "which" and the "whose" questions have been answered differently at different points in time. This reveals that the understanding of personal freedom of movement underpinning European law has not remained static. Instead of a process of unfolding of a fixed conception of freedom of movement, what we have is the succession of different conceptions of the right to freedom of movement, reflecting the political, social and economic conflicts over the point and purpose of European integration, and resulting in changes in the interpretation of the law and eventually of the letter of the law itself. At the same time, it should be said that the transformation of the substantive conception of freedom of movement has run parallel to a shift in the paradigmatic identity of the *mover*, and consequently, of the distributive implications of European law. While in the first decades of European integration the identikit of the "mover" largely corresponded to "workers" establishing themselves for good in another Member State, from the eighties the “mover” came to be identified with the tourist, the entrepreneur or the occasional or posted worker, all having a casual if not fleeting relationship with the host polity. As a result, the relationship between the European freedom of movement and national law, especially socio-economic law, has also changed over time. Free movement of workers was intended as a complement and supplement of national socio-economic laws rebalancing the power relationship between labour and capital. Free movement required the opening of national insurance and welfare communities to long-term residents, but however did not predetermine the substantive content of national policies and laws. The terms of the relationship become very different once personal freedom of movement comes to be understood as a self-standing yardstick of constitutional review, open to be used, by itself or together with other *economic freedoms*, as an instrument to challenge the validity of key national norms underpinning collective goods.

From such perspective, it becomes clear that European law has made a major contribution to the taming of the raw force when not violence that could be exerted by European states when defining the spheres of membership; in particular, when refusing to acknowledge the social and economic *membership* of permanent residents. That is the key promise of the normative vision of non-discrimination. However, my analysis also accounts for the growing resistance against the European practice of freedom of movement. The ultimate force of such growing opposition is not to be sought in the re-emergence of prepolitical and exclusionary identities. That should not be understood as a naïve statement aimed at flying in the face of social and economic reality. It would be silly to deny that the mad dog of European racism and chauvinism is barking again. Still, the key relevant question is to ask why this is so. And in that regard it seems to me that the pulverisation and fragmentation of public power is an unavoidable consequence of the present practice of *not only rendering possible movement by opening to challenge some of the key norms in the making of collective goods and collective rights, but also of wrapping in the form of freedom of movement the much less promising reality of migration under economic duress or travestying the exercise of the right to private property and entrepreneurial freedom.*

The chapter is structured in five parts. In the first part, I revisit the normative case for personal freedom of movement, in particular, the conception of freedom of movement characteristic of Democratic and Social

States. In the second part, I consider the deep ambivalence of freedom of movement as enshrined in the founding Treaties of the Communities, which reflects the complex and ambivalent relationship between the postwar democratic constitutions, national social and economic policy and the international and European arrangements through which cross-national economic activity was regulated in the aftermath of the war and the first years of reconstruction. In the third part, I give an account of how the original ambivalence of the Treaties founding the Communities was solved in favour of moulding freedom of movement in the semblance of the worker, under the normative guidance of the ideal of the Democratic and Social Rechtsstaat. In the fourth part, I engage with the second European transformation. Despite the wrapping of personal freedom of movement in the clothes of European citizenship, the transformation pushed the freedom into its original condition of an economic freedom, defined by reference to the functional needs of the creation and maintenance of the single market, not the personal concerns of movers. The last section holds the conclusions.

I. *Free Movement in the constitutional constellation of the Democratic and Social State*

1. *Postwar democratic constitutional law: the Democratic and Social Rechtsstaat*

Democratic constitutional law played a key role in the rebuilding of European societies from 1945 onwards. Most particularly perhaps in the political, social and economic ‘new beginnings’ of the three main ‘loser’ states of the Second World War, namely, France, Italy and Germany.

Postwar democratic constitutionalism gravitated around the normative vision of public power organised and exercised in a way that the three fundamental ideals of (1) the democratic state; (2) the social state, and (3) the ‘law state’ (the Rechtsstaat) would be *simultaneously* realised. In brief, around the normative vision of the *Democratic and Social Rechtsstaat*.

While a detailed description and analysis of the Democratic and Social State would out of place here, it is pertinent to remind the reader of three of its basic features:

Firstly, the regulatory ideal of the Democratic and Social Rechtsstaat is intended to be in a close (dialectic) relationship with social structures, decision-making processes and substantive norms. On the one hand, the Democratic and Social Rechtsstaat encapsulates the normative potential of *really existing* institutional structures (e.g. the different mechanisms of provision of public goods and mutual insurance)[2], decision-making processes (e.g. democratic parliamentarism and collective bargaining) and substantive norms (e.g. progressive income taxation) that are the result of social conflicts and social strives[3] [4]. On the other hand, the regulatory ideal provides the normative framework within which such elements become something more than outcomes of social transformation, and can be turned into the key pillars of a specific type of society and state[5].

Secondly, the constitutional vision of the Democratic and Social Rechtsstaat stresses the interdependence between the three ideals. To illustrate the point: The democratic ideal boils down to self-government, or what is the same, the common exercise of (public) autonomy. But that ideal is a rather empty one unless power is exercised in the grammar of law, and citizens have the effective means to participate in equal condi-

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[2] A. SWAAN, *In Care of the State*, Cambridge: Polity Press, 1988.

[3] The Democratic and Social Rechtsstaat is thus not only a *normative* alternative, but a very concrete *historical alternative.* A road that we may decide to take *again*, knowing that it has been (at least to a certain extent) already been trodden.

[4] Indeed, I would claim, that the influence of social struggles and practices has been far more decisive than that of abstract normative thinking in the development of the Democratic and Social Rechtsstaat. Simplifying, but not too much, it is to strikers and political activists that we owe the weekend and paid holidays, not to lord Beveridge. It is to the suffragettes that we owe equal political rights, it is to trade unions that we have to be thankful for the weekend and the welfare state, it is to committed liberals that we should praise for their opposition to absolute monarchical power resulting in fundamental civic rights, including habeas corpus. That does not, however, imply a judgment downplaying Beveridge, or for that matter, that ideas were irrelevant. Rather, that ideas were forged in constant interaction with realities. Indeed, the key planks in the theoretical imagination of the Democratic and Social State emerged in debates around liberal reforms in the United Kingdom, the Weimar Constitution in Germany, New Deal policies in the US, (certainly in complex ways) Soviet practices. However, the theoretical blueprints (think about Hermann Heller or Franz Neumann) remained general and abstract. Because the institutional realisations were limited, normative thinking remained exposed to its being attacked on account of reflecting 'muddled thinking', aiming at the chaotic reconciliation of contradictory views, as famously Carl Schmitt, among others, argued. The assessment became very different in the aftermath of the Second World War, not only, and in my view, not mainly, because of a change of normative hearts, but above all because of the fact that the normative intuitions started to resonate, and strongly for that matter, in actual practices and institutional realitoes.

[5] From 1945 and till this day, despite the return of normative, political and economic visions frontally opposite, and quite frequently inimical to the Democratic and Social State, its institutional realisation has grown and consolidated.

tions in political life. This is why the democratic principle *requires* the social principle *and* that power be exerted *through* law (the Rechtsstaat). Only then *formal* liberty and equality become *actual* liberty and equality, supported through institutional structures, decision-making processes and substantive norms that make it possible that not only the happy few, but also the restless many, are in a condition to enjoy their liberty and equality. This interdependency is in my view beautifully affirmed in Section 3, paragraph 2 of the Italian Constitution:

'It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country'.

Thirdly, the interrelationship between the three pillars requires viewing the constitution, and in particular the socio-economic model underpinning it, as a coherent whole, not as the amalgam of separate pieces. This should foreclose the 'fragmentation' of different areas of socio-economic regulation, replicated in disciplinary terms within legal scholarship. By the same token, it makes no sense to consider that the 'internal' socio-economic constitution and the terms of socio-economic relationships with third countries are two separate and autonomous questions. They are rather deeply interrelated issues.

Consequently, the Democratic and Social Rechtsstaat rules out a far too neat distinction of separate and distinct areas of law such as contract law, labour law or competition law, or different constitutions such as the economic constitution and the social constitution, or the internal and the external socio-economic constitution. By the same token, the close intertwinement of social practice and normative ideal at the basis of the Democratic and Social Rechtsstaat should be projected to the way in which political and legal conflicts are solved. Particular attention should be paid to the extent that existing institutions, decision-making process and not only legal norms reflect normative learning regarding how the three principles (the Democratic State, the Social State and the Rechtsstaat) should be reconciled[6]. Finally, social, economic and political issues are simultaneously considered and regulated through legal norms that are fully embedded into democratic politics. Consequently, the Democratic and

[6] In particular, conflicts between constitutional principles should be solved on the basis of a careful reconstruction of the way in which principles have been already realised through the setting of institutional structures and decision-making processes.

Social State is not merely about 'social' policy in the usual sense of the word, that is, about a given number of benefits, but is really about the way power is organised, including how power is organised in the sphere of economic production[7].

2. *Personal Freedom of Movement in the Democratic and Social State*

The *comprehensive* vision of the Democratic and Social state points to a specific conception and understanding of personal free movement. Free movement is a very important *means* to realise public and private autonomy (Section A). However, and contrary to classical liberal views (but certainly not to liberal practices), there is no blank presumption in favour of maximising the breadth and scope of freedom of movement, but rather awareness of the need of properly calibrating such freedom, in view of the distributional conflicts internal to freedom of movement and of the potential conflicts between personal freedom of movement and fundamental collective goods (Section B). The effectiveness of this form of *embedded* free movement calls for the drawing of permeable legal and physical borders (Section C).

A) *The positive case for personal free movement: a means to realise public and private autonomy*

From the standpoint of the Democratic and Social State, free movement is a fundamental means to the realisation of autonomy (both public and private), and thus, a major force in the realisation of the regulatory ideals of the Democratic state and the Rechtstaat.

In particular, freedom of movement plays a key instrumental role in the formation of persons as citizens (public autonomy) and as individuals (private autonomy). Freedom of locomotion makes an essential contribution to the dissemination of knowledge, news and opinions, which in their turn sustain and reinforce the practice of democratic politics by fostering reflexivity and informed contestation of existing institutional structures, substantive norms and current policies; as well as playing a

[7] In particular, the Democratic and Social State requires not only a welfare system, but also institutional structures and decision-making processes that organise power relations in the working place (reflected, for example, in co-determination, but also in the never realised original ordoliberal ideal of using competition law to keep the economy at a human scale), means and levers of macroeconomic government (which range from democratic planning to fiscal policy, and passing through monetary policy and industrial policy), and the means and levers of public finance (taxation and spending).

key role in the forging of the collective will[8]. Freedom to visit other cities, regions and countries contributes to the widening of social, political and economic experiences, and forces the individual to confront herself with the plurality of normative standpoints and views. Finally, free movement can turn out to be the subjective right of last resort. The right to leave (and ultimately, the factual capacity to leave) and the parallel companion faculty to gain access and (at least temporarily) residence in another political community can not only contribute to the realisation of life plans, but may allow individuals to escape oppression and eventually to organise resistance to undemocratic political regimes[9].

Freedom of movement is thus a fundamental liberty among the set of civic rights and freedoms. Sweeping restrictions on freedom of movement are thus rightly regarded as indicators of the non-democratic character of a political system.

B) *Calibrating free movement in the Democratic and Social Rechtsstaat*

But none of what has been said so far entails that freedom of movement is intrinsically or necessarily good; in other words, that the proper policy is always to maximise freedom of movement.

The right to freedom of movement is a *subjective right* whose holder is the person that *moves*. However, as is the case with all subjective rights, its effective enjoyment is only possible within a specific social context, in particular, it requires the provision of a set of *collective goods*[10]. An effective and not merely formal enjoyment of the right of freedom of movement requires structural institutions, policies and substantive norms that render possible social cooperation both in the community of origin and in the community of destination. Otherwise, it does not make sense to speak of a *freedom*, but at most, to a faculty to leave or enter a given

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[8] It is important to notice that the collective benefits resulting from free movement are not dependent on *everybody* actually moving, but in its being possible to move for those willing and capable to do so. Certainly, travelling, and eventually, residing for long periods in other places can have major educational value, and thus contribute to the development of personality. Residing in another community may turn out to be fundamental in order to achieve personal happiness or, at least, avoid chronic frustration. But it is also perfectly possible to develop as a person even when travelling little, as indeed used to be the case for most of the population for most of human history.

[9] This is clearly the case when political turmoil, political conflict, major natural disasters or structural socio-economic conflict render compelling the case for leaving the country.

[10] M. García Pelayo, *Las Transformaciones del Estado Contemporáneo*, Madrid: Alianza Editorial, 1977.

territory. So, to stress the point, *freedom* of movement hinges upon the provision of collective goods.

Two consequences follow. The first is that the right to freedom of movement, as all subjective rights in general, needs to be so calibrated as to prevent that its exercise results in the subversion of the very structures and norms of social cooperation (Section a). The second is that it is necessary to create and sustain the conditions under which the very substance of the right to freedom of movement be depleted by the *pattern* of exercise of the right, or what is the same, that the right becomes a mere formal empty shell deprived of substantive content (Section b).

a) *Preventing the subjective right turning into a licence to undermine democratic politics*

A maximalistic interpretation of the right to freedom of movement would allow those disagreeing with the terms of social cooperation to threaten outright exit. This may result in their being able to impose their own terms of cooperation, or at least, to have a disproportionate actual say on their substantive content. To illustrate the point. The holders of capital may threaten to leave the polity unless less progressive (and lower) personal income taxes and wealth taxes are introduced. This dynamic goes a long way to explain the dwindling weight of these two taxes in most countries[11]. By the same token, the resilience of specific social schemes of cooperation can be undermined by fostering the conditions under which it would be possible to keep on characterising as 'external' to the polity persons that are *de facto* made part of the community of economic risk *through work* and are physically present in the territory of the polity. This can be turned into an instrument to undermine the effectiveness of state regulations rebalancing the relationship of economic force between parties, outstandingly between capital and labour, including collective bargaining. The case of posted workers fits that description quite closely[12].

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[11] N. Shaxson, *Treasure Islands*, Penguin, 2011; W. Streeck, *Buying Time*, Verso, 2014. The fact that neither the Rawlsian "difference" principle nor Sen's capabilities take seriously enough economic power explains the extent to which they have been turned upside down to justify policies that result in much more inegalitarian societies, against the normative thrust of the theories of justice of both authors.

[12] Cf. T. Krings, 'A Race to the Bottom? Trade Unions, EU Enlargement and the Free Movement of Labour', 15 (2009) *European Journal of Industrial Relations*, 49–69; J. Cremers, 'Economic freedoms and labour standards in the European Union', 22 (2016) *Transfer*, 149-162. While regarding the 'external' sector of the economy the disciplinary effect may be achieved by means of radicalising free movement of goods and freedom of movement of cap-

It is thus imperative to calibrate the right to freedom of movement so as to avoid that it becomes a licence to escape from democratic politics[13]. Otherwise, formal equality becomes the cloak of material inequality, and law a vehicle for the *reinforcement* of raw force and violence, increasing (instead of disciplining) the resources of those who can *credibly* threat to exit because they already have economic, social, cultural force; namely, the holders of capital, very especially financial capital, and those with skills in wide demand in other polities[14].

b) *Distributional conflicts internal to the right to freedom of movement*

As we saw in the section 1, the Democratic and Social Rechtsstaat is premised on the close relationship between the right to formal and to material liberty and equality. Focusing on freedom of movement, this entails what should be rather obvious, namely, that the formal right to freedom of movement only becomes an effective means of fostering public and private autonomy if a number of collective goods are provided and maintained, ensuring in particular that the decision to leave the country of origin is actually, and not merely nominally, free and that the mover finds conditions at the country of destination that do not undermine her autonomy. This confirms that freedom of movement, as is the case with other rights, is *deeply relational*. If rights have actual bite it is because they are acknowledged as such within a given political community.

What is peculiar but far from exclusive to freedom of movement is the extent to which the pattern according to which it is exercised may undermine the very collective goods that render possible that the right can be exercised effectively.

If far too many people exercise their right to freedom of movement *at the same point in time*, the normal running of the origin society, the destination society, or both, may be (seriously) affected; this, in turn, may

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ital, for the 'internal sector' discipline, in the form of a downward pressure on wages, may be achieved by weakening the hand of labour through favouring the inflow of workers ready to work at conditions inferior to those collectively agreed at the national level.

[13] S. MEZZADRA, *Diritto di fuga. Migrazioni, cittadinanza, globalizzazione*, Verona: Ombre Corte, 2001.

[14] On the one hand, the capitalist cannot only *live out of the wealth stock that capital represents*, but can much more easily move to a different location where to place its capital. The more liquid one's investment, consequently the easier it is to shift the actual location of the investment, and thus the strongest the hand of the capital holder. On the other hand, the position of those with skills demanded in other political communities and the capacity to move is reinforced, while that of those with redundant skills, or who are impeded from moving due to their health condition, is undermined.

undermine the very reasons why individuals decided to move. Too sudden and too big a flow of persons out or in of a society affects the capacity to provide collective goods and to ensure the proper integration of residents in the different spheres of membership (physical, social, economic, political). Numbers and speed matter[15].

In other words, the material and not merely formal protection of the right to freedom of movement requires that we take seriously the *distribution* of the exercise of the right. It is a fact, not a normative desideratum, that for some to be able to be free to move, most have to stay put (not forever, but for the time being). Pretending that this is not the case does not lead to a better protection of the right to freedom of movement, but merely to the degradation of free movement into a purely formal right. If no attention is paid to the distribution of the exercise of the right, there is a serious risk that only those with sufficient material, economic and cultural resources would be able to remain effectively free to move, while others would only retain the empty formal shell of the right, and would thus be deprived of the right to move, or would move under economic, social or political duress.

There are different possible ways of ensuring that the pattern of exercise of the right of freedom of movement does not undermine the social stability necessary for the effectiveness of the right itself. Firstly, it is possible to foster adequate structural conditions, in particular, a sufficient degree of equality in economic, social and cultural opportunities, based on a homogenous provision of collective goods across the territory of the polity. This is indeed the standard way in which freedom of locomotion and of establishment is (mostly) left at the discretion of the individual within nation-states. Secondly, it is possible to establish general rules limiting freedom of movement. We will come back briefly to this question on what regards the drawing of normative borders and the entertainment of physical borders. Thirdly, ad hoc restrictions, based or not based on previous general norms, may be introduced.

To make the point clear beyond doubt: What has just been argued does not presuppose, as some do, that there are absolute limits to the ca-

[15] Where such point is located is something that cannot be answered in the abstract. Much depends on the specific social, economic, cultural, demographic and political circumstances of the concrete source and/or host societies. What can be said in general terms is that when the breaking point is reached, what remains of the right to freedom of movement is pure *formal freedom*, as the actual freedom resulting from movement would largely depend on the social, economic and cultural resources of the movers.

pacity of societies to host newcomers. Neither that migration has to be regulated by reference to the cultural origin or religious faith of the movers. The limits to which I refer are related, as pointed, to the *speed* of flows, and to the structure (economic, political, cultural) of the hosting societies and the resilience of the source communities[16]. Such structures can certainly be changed (and do indeed change over time), as well as the material resources devoted to integrating newcomers increased. What seems to me self-defeating is to deny that collective identities play a role in political, social and economic processes; or that institutions, decision-making processes, or for that matter substantive norms, are characterised by a varying degree of stickiness and resilience to formal legal change.

In that sense, the argument is not nationalist in an exclusionary sense, but certainly it is nationist, in the apt expression coined by Emmanuel Todd[17]. Any democratic and social state has to develop and nurture a collective identity; the fact that such identity is civic, and overtly political, does not mean it is not an identity.

C) *Rendering effective the terms of social cooperation; in particular, of democratic borders*

As is the case with all other legal norms, the effectiveness of the calibration of the personal right to freedom of movement requires making use of social techniques that increase the predisposition of the addressees of the law to comply with it[18]. Including institutional and normative structures that reconcile physical and normative openness (as we saw, part and parcel of the normative vision of the Democratic and Social state) with the democratic autonomy of the political community, which may be challenged by an uncalibrated opening.

The drawing and the maintenance of normative borders plays a key role in solving that conflict. They allow not only the coordination of the plurality of normative borders, but also the creation of social and economic buffers that prevent mutual encroachment and render possible adjustment over time in the terms of relation. In brief, they permit to graduate the degree of openness, ensuring that is compatible with the

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[16] This seems to me to be the rationale underpinning the arguments of P. Collier in his polemical *Exodus*, Penguin, 2013. The argument may and should be extended to the capacity of the host society to remain operative.

[17] E. TODD, *L'Illusion Economique*, Paris: Gallimard, 1997.

[18] H. KELSEN, 'El Derecho como técnica social específica' en *¿Qué es Justicia?*, Barcelona: Ariel, 1981, 152-82.

maintenance of the collective goods at the core of the Democratic and Social State. Physical borders are only one among the many techniques of implementation and reinforcement of normative borders. Currencies, safeguard clauses or monitoring bodies also play a key role in preventing, mediating and overcoming possible conflicts.

For normative and physical borders to act as means of organised pluralism, it is necessary that they remain permeable to allow polities to discharge their obligations *vis à vis* non-nationals. This requires two things:

Firstly, that democratic normative borders are designed so as to render them porous to all those who belong to the different spheres of membership to a political community, thus reflecting the relevant ways and senses in which an individual can be said to be part of a given community, ranging from full member to temporary visitor. In particular:

– the 'physical' community of those sharing the territory of the polity (which is the source of most civic rights, including eventually the right to become a citizen through naturalisation, and of some, but not all, political rights)

– the 'societal' community of those engaging into social, political, cultural or economic relationships with members of the polity (which may be a source of civic and some socio-economic rights);

– the 'welfare' community, sharing societal and economic risks by virtue of residence, and insuring in common against them (which is the key source of socio-economic rights).

– the 'political community', composed by full members who enjoy the complete set of political rights, including the key right to have a direct or indirect say in the terms of social cooperation.

Secondly, access to the different communities has to be graduated depending on the identity and personal circumstances of the mover, the reason of the movement, and the objective of the movement[19].

Democratic physical borders include institutional structures and personal means to project effective control over the territory. Democratic physical borders should not be maintained for the sake of exclusion (if only because that is bound to become opportunistic exclusion), even less

[19] Quite obviously, differentiation is not justified by itself, but only to the extent that it is compatible with the normative foundations of the Democratic and Social state itself. Paradigmatic examples in that regard are the rights granted to asylum seekers (which, I would argue, should be extended to forced migrants exposed to economic duress) and to relatives to those enjoying a right of citizenship or residence.

for the purpose of crafting a phantomatic exclusionary identity (national, regional, cultural or whatever). Rather, the case for democratic physical borders rests on their being *instrumental means* to uphold the practice of democratic politics, including the solidaristic proclivities at the base of the Democratic and Social State, *against* their subversion by opportunistic behaviour, strong on their economic, cultural and material *force*[20]. Democratic borders should not be an excuse to be unsolidaristic, to put an artificial limit to the collective responsibility of the polity (stemming from its foreign political, economic or cultural policies)[21].

II. *Personal freedom of movement in the postwar socio-economic order: foundational ambivalence*

In the summer of 1945, 'burgeois Europe' was, literally, in ruins[22]. Two catastrophic wars, and a disastrous interwar period, placed outside the realm of the feasible a straightforward restoration of the 'burgeois' European and national political, economic and social orders[23]. In particular, the war had unleashed equalising forces that could not be simply rolled back.

Still, conflicts over the concrete shape of the new order were extremely intense. While it is customary to distinguish between the processes, actors and mechanisms that led to the refoundation of the national and the European orders, it is important to keep in mind that the two processes were closely intertwined. German ordoliberal thinkers were stating the obvious when they stressed the interdependence of choices regarding the national and the international economic and political orders[24]. So while in the following I consider sequentially both processes, the reader should keep in mind that they were process that were not only unfolding simultaneously, but that were seen by the actors themselves as stages in the overall definition of the European order.

[20] The point is not to generate solidarity *through law*, but to protect *existing social* practices of solidarity against their disturbance by both opportunistic behaviour and disruption through naked economic power.

[21] Including the right to asylum which is precisely presupposed on the existence of borders, borders that should not be an obstacle to the provision of the right, but actually a condition for its effectiveness. Asylum is indeed possible because those prosecuting the refugees, or the conditions threatening their existence, can be *stopped* at the border.

[22] T. JUDT, *Postwar*, Penguin, 2005.

[23] C.S. MAIER, *Recasting Burgeois Europe*, Princeton: Princeton University Press, 1975.

[24] W. ROEPKE, *International Economic Disintegration*, New York: MacMillan, 1942.

Were this chapter an experimentalist novel, the two sections should be running as *two columns* in the same page.

1. *Constitutional new beginnings: The Democratic and Social State*

Wide convergence in normative principle came hand in hand with wide institutional and policy differences. A good deal of them are to be traced back to different historical trajectories. The past always casts a long shadow, shaping some of the core features of the social and economic models, either positively or negatively. Other differences are the result of different national conjunctures. The degree of destruction and/or dislocation of the means of production caused by the war, the speed at which the capacity of producing the most essential goods and raw materials was re-established, largely determined the extent to which policies bore fruits. The degree of autonomy of the national political process also played its role. It was clearly wider in the French or Italian cases than say in the German one.

Despite such differences, three main trends common to the founding Member States can be distinguished:

Firstly is the commitment to a deep and encompassing reorganisation of the political order. The new French (1946) and Italian constitutions (1948), as well as the German Fundamental law (1949), symbolised the new political and constitutional beginning sought by the peoples of these three core European countries. And while no new constitutions were written in the Benelux countries, new constitutional conventions and new policies marked a clear break with the pre-war past.

Secondly is the transformation of the very understanding of political order. The narrow 'burgeois' understanding of politics and of the political is rejected: politics should not stop at the borders of the institutional design of the power competition among political elites, but should extend not only its object, but participation and political agency should be widened. Thus, social and economic questions should become key planks of the political order. By the same token, the new constitutions and the new constitutional conventions reflected the strong social consensus on the key role of the state in the configuration of social and economic relations, as well as in the organisation and provision of social security and social insurance. At the same time that the right to vote was generalised (including now a full, and not only male, universal suffrage), the democratic principle was projected over all social spheres. Institutional structures, decision-making processes and substantive norms were introduced with a view to ensure that the state did not only rebalance economic force relations (above all, by supporting the structurally weakest hand of labour), but also created the conditions under which conflicts could be solved instead of challenging social cohesion[25]. Effective, and not formal equality, is to be ensured. This is magisterially encapsulated in the quotation from Basso at the beginning of this chapter. The Democratic and Social State can only coexist with capitalism if it limits capitalism, if it creates spheres of social interaction governed by the power of politics, not by the force underpinning relations under capitalism. Only then the worker can be regarded as a *person*, not as another *factor of production*. Labour law and social policies prevent the person being turned into a false commodity.

Third is the insertion of clauses that mandate the creation of institutional structures, decision-making processes and substantive norms that regulate international and transnational relations. In such a way, the state becomes a Democratic and Social State that is also open and cooperative. This is a clear instance of learning from disaster. The effective realisation of the regulatory ideal of the Democratic and Social State requires a proper coordination of democratic sovereignty. Such coordination has to be based on the protection and reinforcement of the democratic self-government of each state if we want to avoid that it becomes a lever of domination (if not hegemony).

2. *The emerging cross-national monetary and trade orders*

The reconstruction of individual European states was firmly anchored to a simultaneous (and in some respects, even earlier) processes of redefinition of the terms of commercial, monetary and economic relationships *across* national borders[26].

While the war had resulted in major human losses and massive destruction, the productive capacity of Europe was slightly bigger than at the beginning of the war. Reconstruction was still a daunting task. Communications were severely hampered, much of industry had to be reconverted from military to civilian use, and the war had had a very uneven

[25] An analysis of the transformation of European law from that perspective in M. DANI, *Il Diritto Pubblico Europeo nella prospettiva dei conflitti*, Padova: CEDAM, 2013.

[26] Not only between European states, but also, and crucially, between the European states and the two big powers emerging from the war (the United States and the USSR), and between the European states and what would soon become its former colonies.

impact on the availability of knowledge and skills. A massive *recivilising* transformation was required[27].

Thus, economic recovery was dependent on rapid access to capital goods with which to kick-start national industry, as well as on food supplies with which to ensure proper feeding of the workforce.

Western European governments opted to quickstart recovery by asking (and obtaining) loans from the United States. That was the foundation of the key role played by the United States in the process of European reconstruction. Also of the extent to which US preferences came to inform the shape of the monetary and trade arrangements through which national and cross-national economic activity was revived. Credit recipients were required not only to "open" their economies to international trade and investment, but to conduct their economic policies in ways that preserved the rights, faculties and powers of capital owners: not only their economic content, but also the powers implicit into the free disposal of such capital, including the right to decide how and where to invest it. At the same time, the US favoured the coordination of national economic policies, as a means of entrenching "openness" and as a stepping stone in the creation of a regional bloc capable of stabilising European politics. The turn towards monetary stabilisation from 1947 is paradigmatic in this regard, while the 1949 European Payments Union pointed (within limits) to a more "automomous" development of the cross-national European economic order.

3. *The new and ambivalent European order*

The result was a new but very ambivalent European order.

New constitutions pointed towards the transcendence of the old socio-economic order, while actual policies (most clearly from 1947) were premised on the primacy of stability, and very especially monetary stability. On the one hand, the fresh memories of the very inglorious collapse of the European 'burgeois order', of the extent to which state intervention during the war had disproved classical liberalism prophecies of doom if capitalist forces were tinkered with, together with the hardly reversible processes of social transformation brought about by the war came to define the very grammar of European politics. On the other

[27] A. GLYN, P. ARMSTRONG and J. HARRISON, *Capitalism Since 1945*, Oxford: Blackwells, 1991; A. MILWARD, *The Reconstruction of Western Europe, 1945-51*, Berkeley: University of California Press, 1984.

hand, the Cold War resulted in major constraints on what could actually be said by reference to that grammar.

4. *In particular, the European socio-economic order in the foundational Treaties of the European Communities*

The definition of the point, purpose and governing structure of what would become the European Communities can be regarded as a case study of how this protracted conflict for the definition of the European socio-economic order unfolded.

While there was wide consensus on the need of institutional structures, decision-making processes and substantive norms to articulate cross-national economic relations, there was major disagreement on which should such institutions, processes and norms be.

There were three major and interrelated cleavages, concerning the point and purpose of integration, the relation between European and national order, and the ways in which the new order should be governed.

There was wide consensus on the important role that external trade could play in fuelling the growth of European economies. Such agreement underpinned the decision to establish an 'internal market'. However, serious disagreements persisted regarding the future shape and consistency of the internal market, resulting from different views concerning the point and purpose of the pooling of powers in the Communities and the nature of its institutions. In particular, was the internal market to be designed and developed so as to allow Member States to implement autonomous socio-economic policies? Or was the internal market to be turned into an institutional means of realising a specific socio-economic order? Debates during the negotiation of the founding Treaties and the first years of the Communities will indeed replay national constitutional debates; it was mainly the losers at the national level that expected to be able to turn the tables at the European level.

Parallel disagreements concerned the relationship between national and supranational institutions, and in particular, between national law and European law. This was reflected in the deep ambiguity of the very documents through which the Communities were established. As is well known, all of them were international treaties (and indeed the ultimate basis of European law is still to be found in a Treaty). Still, the aims of the Treaties, the institutional structures that were set by them, as well as the substantive norms enshrined in these documents were far from standard Treaty fare. The Treaties *could* thus be interpreted as pointing to a radically different form of international cooperation, which could eventually transcend classical international law.

By the same token, it was far from obvious how the European Communities were to be governed. On the one hand, the Treaties seemed to point to a central role not only of the collective of executives, but of each national executive, in the supranational decision-making process. The centrality of national governments would create a structure guaranteeing the transmission of democratic legitimacy from the national to the supranational level (even if not devoid of its own potential pathologies, in the form of executive dominance). On the other hand, supranational institutions were granted some essential powers, which could try to expand with a view to play a key steering role in the process of integration. Thus, while the High Authority of the Coal and Steel Community was formally designed as a supranational administration, its key leaders interpreted their mandate as that of a supranational government in the making. While Member States clearly attempted to rein in such emergent supranational power by subjecting the Commission of the Economic Community to wider and clearer control by the Council of Ministers, the leaders of the Commission worked under a not too dissimilar assumption. A not too dissimilar conception of supranationalism came to permeate the self-understanding of the role of the European Court of Justice in the early sixties.

5. *Freedom of movement, between economic liberty and personal freedom*

The socio-ambivalence of the Treaties was clearly reflected in the legal discipline of movement within the Communities.

On the one hand, the Treaty contained the principled affirmation of freedom of movement of workers (Article 48) and freedom of establishment (Article 52), as part of a *quartet* of economic freedoms that protected the mobility of factors of production (goods, workers and capital). This seemed to reflect economic and trade theories that emphasised the welfare gains of liberalising the flows of the said *factors of production*.

On the other hand, the structure of the Treaties suggested that, contrary to what was the case with the right to free movement of goods, and similarly to freedom of establishment and freedom of payments, the liberalisation of the personal movements was to be heavily steered by democratic politics.

Firstly, it is important to notice that the systemic place of on the one hand free movement of goods and on the other hand the other economic freedoms, including free movement of workers and freedom of establishment was different. Free movement of goods was regulated in Title I of Part Two of the Treaty, while the other economic freedoms were affirmed in Title III of the same Part[28]. At the same time, the strength of the discipline of the former was stronger than that of the latter. There were thus good literal and systematic reasons to conclude that the nature of these two sets of freedoms was different.

Secondly, and very related to the first, the actual liberalisation of personal movements was explicitly conditioned to the harmonisation and/or coordination of national laws and practices. Most clearly and most strongly in the case of liberal professionals. Their liberty to move was actually dependent on the approval of a 'general programme' by the Council, in which the stages, forms and conditions of realisation of the right would be laid down (Article 54.2). It is also significant that directives, not regulations, were to be the legal means of fleshing out such programme (Article 54.2). While free movement of workers would be effective, at latest, by the end of 1969, independently of whether the Council regulated or not its modalities and conditions before, it was still that public authorities were still expected to play a major steering role (Article 48.3). In particular, movement was expected to follow, and not precede, a job offer, Indeed, the Treaty set as a priority objective the coordination of national administrations with a view to ensure the cross-national matching of job offers and job applications (Article 49 d). Quite revealingly, the point of such coordination was not only to facilitate movement, but also (and perhaps paramountly) to "avoid serious threats to standards of living and levels of employment in various regions and industries".

Thirdly, the key rights granted to movers under European law were formal, not material. Movers were guaranteed that they would not be discriminated against (Article 48.2). It is important to notice that while this required Member States to treat Community nationals as they treated their own nationals *as workers*, and to ensure that private employers did the same, the right to free movement did not predetermine the substantive content of national norms. In other terms, the Treaty required widening the community of social insurance to all Community nationals

[28] It is important to add that in Title II were to be found the provisions concerning the establishment and functioning of the Common Agricultural Policy. As is well known, the creation of a common market in agricultural products was not premised on the liberalisation of agriculture, but rather on an intense steering of economic activities through quotas, production permits and subsidies.

working in another Member States. European law, however, did not predetermine the terms of the socio-economic contract. Thus, states retained a lever that allowed them considerable leeway when designing their social and economic policies.

To recapitulate: freedom of movement as enshrined in the Treaties was ambivalent enough as to be open to be constructed both as an *economic freedom*, the purpose of which would *not* be to grant rights to workers, but to create the conditions under which labour could move to the locations where its employment would be more productive, or as a *fundamental right*, supporting and complementing national socio-economic rights.

As we will see in the next two sections, the transformation of the European Union as a whole would result in the practice of free movement oscillating between these two poles. But I will argue that, contrary to what is usually said or assumed, it was during the fifties and sixties that European free movement leaned towards becoming a fundamental right, while from the eighties it has acquired the structural characters and substantive content of an economic freedom.

III. *The first European transformation: leaning towards the Democratic and Social Rechtsstaat, embedding freedom of movement*

The socio-economic and political circumstances prevailing in the late fifties and early sixties (Section 1) resulted in integration proceeding along lines that turned the European Communities into a complement and, to a large extent, prolongation of the consolidating national Democratic and Social States (Section 2). This led to a specific conception of European freedom of movement. The right to freedom of movement was not only understood as supplementing national social and economic rights (at the same time protecting workers against discrimination and defining movement in ways that were compatible with national policy autonomy in socio-economic matters) but was largely shaped in the semblance of *workers*, thus projecting at the supranational level the rebalancing of power aimed and intended by national labour and industrial relations law.

1. *The Consolidation of the Democratic and Social States*

The fifties and most of the sixties were characterised by sustained economic growth in the 'Western world' as a whole. In such a context, the social forces that had sustained national democratic constitutions had real chances to transform how power was organised in society, and in particular, the underlying socio-economic structure. This was thus a period during which not only wages experienced a sustained growth and welfare states were consolidated and expanded, but during which some structural social changes took place. In other terms, postwar democratic constitutions, which laid largely dormant in many cases, came back to life and started to be acted upon.

Social, economic, cultural and political circumstances contributed to a progressive even if slow and partial convergence around policies written in the grammar of the Democratic and Social Rechtsstaat. (Relative) mild conjunctural crises favoured a 'Keynesian' turn, first in Italy (1962) and then in Germany (1967). At that point, it seemed that a process of closer convergence in the views regarding how the economy should be organised and governed had been unleashed.

2. *The European Communities*

This was the setting in which the original ambivalence of the European Communities resulted in the construction of a 'common market' which reinforced the power of Member States to apply autonomous fiscal and monetary policies, while ensuring the systematic embedding of Member States in the structure of government of the Communities, providing an indirect democratic legitimacy to Community law and policies.

Firstly, the ambivalence regarding the point and purpose of integration was largely solved in favour of understanding the Communities as a force at the service of rescuing European states and transforming them into open and cooperative states (i.e. into *Member States*). In particular, the growth of external trade was turned into a means of strengthening, not weakening, the autonomy of Member States to implement socio-economic policies reflecting the peculiar historical trajectories, conjunctural circumstances and political preferences prevailing in each state. The internal market meant thus the (graduated) opening up of national markets and societies to, firstly and foremostly, the goods produced in other Member States, and, secondly, and in carefully managed ways, to the workers aiming at establishing themselves permanently in other Member States. European practice affirmed and consolidated the symmetry of political and economic integration. Beyond the specific steps aimed at the liberalisation of the movement of goods explicitly affirmed in the Treaties, further integration steps would have to be *politically agreed*. This reflected not only the fact that national democratic processes remained the source of democratic legitimacy of the process of integration, but also the sheer complexity and marked political character of deeper economic integration. Even if all states Members of the European Communities shared a basic commitment to the Democratic and Social State, the specific institutions, decision-making processes and substantive norms through which the latter had been realised in each state were embedded in the history and socio-economic structure of each state. In the apt phrase suggested by Dani Rodrik, they were not ‘exchangeable’ (a civil lawyer would have perhaps said fungible). There was thus a need for intense political mediation of any further step of economic integration, so as to make sure that a proper balance between integration and autonomy was found[29].

Secondly, and quite relatedly, collective steering was placed firmly in the hands of national governments. The *supranational* ambitions of supranational institutions (outstandingly the European Commission) were tamed by the (re)affirmation of the role of Member States in the process of European decision-making. This reinforced the *political mediation* of European integration, favouring the acceptance of supranational legal norms (regulations and directives), and policies and concrete decisions based on them, given that they were backed up by the indirect democratic legitimacy contributed by states to the process of decision-making. The result was a symmetric *form of intergovernmentalism*[30].

3. *Freedom of movement: towards a* fundamental right of workers

In such a context, the European right to free movement was conceived as a fundamental right of workers, that complemented national socio-economic rights.

Firstly, the right to personal freedom of movement was moulded in the image of workers that established themselves in a Member State different from that of their nationality. This was first and foremost the result of the relatively rapid adoption of secondary norms facilitating the free movement of workers, which contrasted with the slow speed at which the measures of positive integration to which the Treaty conditioned, as we saw, the implementation of freedom of establishment. The normative implications of designing the worker as the holder of the right to free-

[29] D. Rodrik, *Straight Talk on Trade*, Princeton: Princeton University Press, 2018.

[30] Classical locus is J. Weiler, *The Community System: the Dual Character of Supranationalism*, 1 (1981) *Yearbook of European Law*, 267-306.

dom of movement must be considered in the social, economic and political context in which the Treaties were drafted, and later, fleshed out. Not only were the workers the weak party in labour relations, but 'work' as *the* fundamental criterion of membership implied a symbolic recognition of the fundamental contribution of labour to social life and social prosperity, despite the socio-economic system rewarding more generously the contribution of capital and management. Furthermore, in societies that were committed to full employment, the category of the worker was deemed to come close to encompass *all weak parties*.

Secondly, the core protection that workers derived from the European right to freedom of movement was their right to equal treatment, in other works, protection against discrimination on the sole account of their nationality. This entailed that Member States had to define the membership of the national community of insurance by reference to residence, not nationality. Movers had a right to become part of the welfare community on the same basis as nationals: that is, through work. It is hard to deny the importance and transcendence of this. Still, it is important to stress that such characterisation of freedom of movement left intact the discretion of Member States to define their social and economic policies. European law required that second country workers were treated in the same way as national workers, but did not determine *how* workers, national and Community ones, should be treated. There was a (social and political, but not legal) expectation that such treatment would be in line with the principles of the Democratic and Social State. But it was to the Member State to integrate into a coherent policy the many different concerns[31].

Thirdly, and relatedly, the right to freedom of movement was not only so defined as not to interfere with national socio-economic policy, but also as to fill the gaps in protection that resulted from national social systems. In particular, Community law aimed on the one hand to the coordination of national social insurance and security systems[32], and on the

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[31] A.J. MENÉNDEZ, 'Has European Law Become *More Human* but *Less Social*?', in M. MADURO and L. AZOULAI, *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford: Hart, 2010.

[32] In the absence of an explicit coordination of national social security and insurance systems, workers engaging in dependent work in several Member States would not be able to accumulate their contributions towards one single pension; more likely than not, this would result in rather meagre pensions. Cf. 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, OJ L 149, 5.7.1971, pp. 2-50; and Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC)

other hand to create transnational mechanisms of protection where such mechanisms were necessary to ensure the full protection of workers' rights in view of the transnationalisation of capital[33].

The weakening of the 'managed' or 'steered' character of free movement would not be the result of the triumph of ideas favouring the unleashing of market forces *per se*, but rather the side effect of the very high and sustained rates of growth of the European economy during the sixties. A gigantic exodus from rural to urban areas followed. But neither such exodus nor the sustained incorporation of women to formal employment were enough to fill in the jobs needed in the industry and the services sector. Internal migration had to be complemented with external migration. First *originating within* the Communities (basically, Italian workers moving to Germany and the Benelux), later *coming from outside* the Communities (prompting, among other things, the Communities to sign the first two association agreements, with Turkey and Greece).

IV. *The Second European Transformation: Away from the Democratic and Social State, enter the unencumbered mover!*

The late sixties and the seventies were marked by financial, economic and political turbulence. The monetary and economic crises of the early 1970s (with a replica in the later part of the decade) set the context in which both the European Communities and the right to freedom of movement would undergo a major transformation.

As I consider in Section 1, European integration had proceeded far enough as to create the expectations (and the functional need) of a coordinated response to the crises, but not far enough as to render such outcome likely, or perhaps even possible. In the late seventies, the way out of the seeming 'paralysis' of both the European states and of the European Communities was sought in what was formally presented as the *revival* of

No 1408/71 on the application of social security schemes to employed persons, to self-employed persons, to self-employed persons and to their families moving within the Community, OJ L 74, 27.3.1972, pp. 1-83.

[33] Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 48, of 22/02/1975, pp. 29-30. Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61 of 5.3.1977, pp. 26/28; Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OJ L 283 of 28.10.1980, pp. 23-27.

the key two goals enshrined in the Treaties establishing the Communities: the establishment of the single market and the creation of the single currency (Section 2). As a matter of fact, the means disposed to achieve such ends marked a clear break with the socio-economic vision consolidated in the first European transformation, and discussed in the previous section. Not only what was created was a single market without a state and a single currency without a state, but in the process public power, European and above all national, as enervated, fragmented and pulverised. The *symmetry* of economic and political integration was broken as capital was unleashed from political (and thus democratic) control. This was the setting in which the understanding of personal freedom of movement was radically altered (Section 3). While the institutional narrative focused on the emancipatory potential of the formal status of European citizenship, the very substance of European personal freedom of movement was altered. The worker was displaced as the European *persona* by the tourist, the entrepreneur and the capitalist. Behind the rhetoric of personal emancipation, European freedom of movement redefined in the semblance of these new characters, the identity of none of which is defined by a commitment in time and space to the political community.

1. *Financial and Economic Turbulence enter the stage*

The second European transformation was the stepchild of the monetary and economic crises of the seventies.

On the monetary side, the contradictions and asymmetries at the core of the postwar international monetary order exploded. In the early 1970s, the US government stopped acting as the anchor of the monetary order. This resulted in major and persistent monetary turbulence (a side effect of which would be the rapid financialisation of economic activity).

On the economic side, the sudden rise of energy prices in 1973 was a major shock that turned the underlying structural problems into an open and declared economic crisis. As the Western economies were pushed off balance, distributive conflicts, paramountly between capital and labour, came back in full force. The technocratic steering of economic policy characteristic of 'hybrid' Keynesianism hit the wall when confronted to structural problems that required political analysis and political decisions.

The European Communities were badly hit. European integration had proceeded far enough as to render reasonable to expect a common (or at least coordinated) policy response to the monetary and the economic crises. That was, however, not to be. Despite the high-sounding declarations of the early 1970s (very especially in the wake of the departure of De Gaulle from the French presidency) the European Communities lacked the institutional structures, decision-making processes, substantive norms and, perhaps above all, the material, fiscal, monetary and financial capacities that would have rendered possible, indeed feasible, common or coordinated action to contain and overcome the crises. To put it differently. The crises revealed the extent to which the initial success of the European Communities had been dependent on the rather exceptional set of circumstances described in the previous section.

All across Europe (and the Western World) economic activity and levels of employment declined, while inflation dramatically increased[34]. But the pace of economic deceleration and of price increases were rather different in different European states. Such differentials had many different causes, including the different structural position of each national economy before the crisis, the policies implemented to contain and overcome the crises, as well as the assessment of such policies not only by the citizenry, trade unions and industrial capitalists, but also by financial markets, which were lastly making a major comeback.

In such a context, the emergent convergence of socio-economic views among European governments, to which I referred in the previous section, was halted and indeed reversed. In particular, a cleavage emerged between countries that stuck to the Democratic and Social state goals and tried to make use of the tools of postwar hybrid 'Keynesianism' (on and off Italy, Great Britain and France, but also Austria), and countries that slowly but steadily emphasised the urgency of fighting inflation and achieving 'stability' (outstandingly, the German and Dutch governments)[35].

This affected not only internal or domestic policy, but also the way in which cooperation among European states was conceptualised. The different ranking of 'stability' and 'social consensus' translated into different conceptions of the point and purpose of the European Union. Thus, the 'Keynesian' states wanted to transform the Communities so as to increase the room for conducting such policies, while the German and the Dutch governments were firm advocates of turning European integration into a vehicle of the diffusion of 'stability'-oriented policies. By

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[34] Fuelled by macroeconomic policies, not least US ones, but also reflecting the exacerbation of distributive conflicts.

[35] F. SCHARPF, *Crisis and Choice in European Social Democracy*, Cornell: Cornell University Press, 1991.

the late seventies, a further cleavage emerged, this time confronting opposing views regarding the role of the state in the steering of the economy, and favouring the transformation of European law into the mechanism facilitating exposure to 'market' discipline, very especially, the discipline allegedly imposed by financial markets.

2. *A way out of sorts:* Europe par la monnaie, Europe par le marché

The European Communities seemed incapable not only of making a useful contribution to containing and overcoming the crises, but even of maintaining the degree of integration which had been reached so far. The relative decline of intra-Community trade was trumpeted as a key indicator of the coming unravelling of the Communities. In brief, Europe seemed to be stuck, between the devil of the impossibility of agreeing common policies and the deep blue sea of disintegration.

The very features of European decision-making process that had made major contributions to the legitimacy and efficiency of the Communities (very especially, the symmetric intergovernmentalism reinforced by the Luxembourg compromise) started to be openly criticised. This reflected a combination of views: the old-time centralising views that always regarded the Gaullist pluralistic turn with suspicion (reflected in the Commission's criticism of the central role of the Council of Ministers) and the growingly neo-liberal views that established an association between 'dirigiste' policies and European integration. It was from this latter line of criticism that the very term of 'Eurosclerosis' emerged[36]. And it would be from that line of criticism that a radical new understanding of the internal market and of the project of creating a European currency would originate, unleashing a second and radical transformation of the European Union.

A) *The new European monetary infrastructure: from ERM to EMU*

The collapse of the Bretton Woods system in the early 1970s led to the free floating of currencies, or what is the same, to exchange rates being set by the interaction of demand and offer on currency markets[37].

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[36] The term was normatively and politically loaded, informed as it was by what we would know characterised as neoliberal views.

[37] F. BLOCK, *The Origins of International Economic Disorder: A Study of United States International Monetary Policy from World War II to the Present*, Berkeley: University of California Press, 1978.

This development was regarded with marked distrust by most European politicians (and quite many European economists), even by those favouring the rolling back of state regulations and controls. Many did indeed claim that free floating could result in far too rapid and far too intense oscillations in exchange rates. This in turn had the potential of distorting investment decisions and disrupting trade. In other words, the fabric of a 'market economy' required preventing a market on currencies. In particular, free floating was said to threaten the stability of trade exchanges within the internal market, as well as the subsidy system that underpinned the Common Agricultural Policy.

This resulted in a wide consensus on the need of (re)creating a European monetary infrastructure[38]. However, there was no consensus on the purpose and mechanics of such infrastructure. Disagreement was symptomatic of the growing divergence of socio-economic views among European governments. As a result, the many different proposals tabled by the Commission, by national governments or by different interest groups either remained dead letter or (as was the case with the scheme for narrowing fluctuations known as the *snake*) ended up in failure.

This was the historical and socio-economic context in which the European Exchange Rate Mechanism (agreed in 1978, implemented in 1979) and Economic and Monetary Union (agreed in 1992, implemented in late 1997) were shaped.

The ERM, as later EMU, was premised on the assumption that the stability of prices was an absolute precondition for a solid socio-economic structure. Instead of placing monetary policy at the service of achieving politically set fiscal and macroeconomic objectives, governments should realise that price stability was a necessary condition for *any* sound economic policy. In other words, the primacy of stability was shorthand for the primacy of monetary policy (and in particular of the key objective of preserving the value of money as stock of value, i.e. preserving the value of capital) over fiscal policy (and in particular full employment). This implied reversing the wide postwar consensus around the primacy of fiscal over monetary policy (Germany having been the odd country out in that regard).

In formal terms, the ERM was a rather modest agreement, with a similar objective to that of other failed attempts at establishing a European monetary infrastructure: the fixation of thresholds (parity pegs)

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[38] The *re* prefix being justified because the European Payments System had been a European monetary infrastructure.

within which European currencies would fluctuate, thus preventing too wide oscillations. In substantive terms, however, joining the ERM, and above all, staying within the ERM, required accepting the primacy of 'stability'. This was so due to two structural implications of the ERM:

– Firstly, and despite formal proclamations to the contrary, the burden of adjustment was very asymmetrically distributed. It was states with 'weak currencies' that were actually required to intervene through market purchases or policy changes to push their currency back within the established pegs. Thus, the ERM *entrenched* the policy shift favouring stability over other socio-economic goals[39]. Moreover, the net result was a major reinforcement of the power of the Bundesbank. As the Deutsche Mark became the anchor currency of the ERM, the Bundesbank became the key actor in the shaping of monetary policy in the whole of Europe. Thus, not only national fiscal policy was subordinated to monetary policy, but all national monetary policies were subordinated to the only central bank whose independence was legally – though not constitutionally – enshrined, and which had recently proven to what extent it had the means to define the overall shape of policy (monetary *and* fiscal) even against a reluctant government[40].

– Secondly, states were de facto required to renounce the powers which allowed them to establish the terms according to which they became indebted, outstandingly the power to require the central bank to act as lender of last resort of the state, and the power to impose forced loans to the state on banks. While (contrary to what will be the case in EMU) there was no formal clause forbidding such practices, financial markets were very likely to exert downward pressure on the currency of any state applying such policies. Very especially given that the countries with 'strong currencies' (Germany and the Netherlands) had made a policy out of not making use of that possibilities. Public debt was thus symbolically and legally downgraded. This resulted in a new understanding and a new approach to the issue of public debt.

However, the ERM remained once and at the same time a too strong and a too weak disciplinary framework. On the one hand, the discipline

[39] D. MARSH, *The Euro: The Politics of the New Global Currency*, New Haven: Yale University Press, 2010, pp. 82 ss. See the transcription of the visit of Schmidt to the Bundesbank, English translation at *https://www.margaretthatcher.org/document/111554*.

[40] PAOLO BAFFI, 'The European Monetary System and Italian Participation', in PIERLUIGI CIOCCA (ed.), *Money and the Economy*, Palgrave MacMillan, 1987, pp. 263-275, especially p. 275.

that the ERM imposed upon national economic policy was perceived as being far too intense. The anchoring of national currencies to the Deutschmark via the ERM not only conditioned the national economic policy of all States, *rendering unavoidable the abandonment of the post-war socio-economic consensus*, but moreover subordinated all national economic policies to the monetary policy of one central bank, i.e. the Bundesbank. That was not only problematic in *democratic terms*, but also in *functional terms*, because the economic and social structures of European states were not necessarily homogeneous with the German socio-economic structure. The ERM resulted in a one-size monetary policy that was bound not to fit most other Member States.

On the other hand, states could (relatively) easily release themselves from the discipline stemming from the ERM. This was proved beyond doubt in 1992. After a period in which governments were keen to tighten the parity pegs, and avoided realignments of exchange rates, economic, financial and political circumstances forced the Italian and the British government to exit the ERM. In the short run, this decision was unavoidable but came with huge costs, including the amounts spent by their central banks in last-ditch attempts at keeping the currency within the peg. Still, both economies experienced a solid recovery from 1993 onwards.

Under such circumstances, full monetary integration was regarded by many European leaders (and scholars) as the only way to not only distribute monetary power away from the Bundesbank, but also of changing the way in which such power was exercised.

Monetary union there will be, but will only come at the fall of the Berlin Wall, and basically according to conditions that reflected the Bundesbank's views regarding the point and purpose of monetary policy, but certainly not the companion views regarding the preconditions for forging a viable monetary union among countries with very different socio-economic trajectories, structures and preferences. The result was the full disembedment of monetary power, its formal divorce from democratic politics. Something which was bound to have a major impact on the distributive conflict between capital and labour, favouring the former over tha latter.

States did not only formally relinquish the powers they had de facto renounced when joining the ERM, but also accepted the principled subordination of fiscal policy to the functionality of the new 'federal' but apolitical-by-design monetary policy. If the debt and deficit ceilings set in the Maastricht Treaty did in themselves curtail national discretion, the

Stability and Growth Pact of 1997 implied a further dent on the room of fiscal manoeuvre of states. The dysfunctional character of the new arrangements clearly came to the fore in 2003 and 2004, but instead of tackling heads on the structural flaws of the system, the Council preferred to muddle through with a cosmetic reform of the Pact, which gave credibility to the (flawed) belief that the later crises were not triggered by the structural flaws of EMU, but by the far too 'weak' implementation of the Pact.

The development of the European monetary infrastructure opened the way to the enervation, fragmentation and pulverisation of public power. The ERM, and even more so, EMU, aimed at the creation not only of a currency without a state, but of the currency of a *stateless* socio-economic order. The primacy of monetary policy over fiscal policy led quite logically to a radical change in the government of monetary policy. If the immediate postwar period had led to the nationalisation of central banks and to their subjection to political control (Germany being again the only – partial – exception), now central banks acquired a technocratic profile, and would enjoy a constitutionally sanctioned independence. This was intended to insure the stability of exchange rates first, of the currency itself later, and all through of the value of capital (most and foremost, of financial capital).

The triumph of this peculiar understanding of 'sound money' had major socio-economic implications. Firstly, all socio-economic objectives, including full employment and distributive justice, became subordinated to 'stability', fundamentally meaning ensuring the stock function of money, the integrity of capital. This had a structural weakening effect on the position of individual workers (resulting from the very real perspective of unemployment) and on the collective capacity of trade unions.

Secondly, monetary policy was de facto depoliticised. Under ERM, this was the result of the depoliticisation of the Bundesbank plus the by-design hegemonic influence of Bundesbank policy over all other national monetary policies. Under EMU, this was the product of the entrenching of central bank independence in the Treaties.

As a result, the hand of capital was not only reinforced, but institutions, decision-making processes and substantive norms entrenching its primacy were created.

Both transformations had a structural effect on the understanding of freedom of movement. The primacy of stability came hand in hand with the (re)characterisation of labour as a *means of production*, or what is the same, with the (re)definition of labour and industrial relations so as to ensure their functionality to a sound money and a sound economy. As full employment and distributive justice were pushed in the back seat, free movement of workers was slowly but steadily reinterpreted as labour mobility. In other words, what had come to be regarded as a fundamental subjective right, as a right *unlike* the other economic freedoms, started to be legally constructed as one such economic freedom.

B) Le marché*: the single market*

Rhetorically, the single market was characterised as the set of measures needed to *complete* the task set in the founding Treaties: the creation of an internal market. This allowed presenting the single market not only as a *replay* of the 'winning' policies and tactics that lead to the creation and consolidation of the European Communities, but also as a *consensual* objective, transcending the fundamental "left" and "right" cleavages.

However, as a matter of actual policy, the single market represented a radical break, not only with the *common market* as had been shaped, but above all, with the fundamental principle of the symmetry of economic and political integration. Indeed, the central point was no longer to render national economic borders permeable, but simply to eliminate them. Moreover, the single market was premised on the overcoming of the politically mediated character of integration. Private actors (as a matter of fact, big multinational corporations), not governments, were to be relied upon as the agents of integration. Integration that was thus to be by design *negative integration*, the result of private actors standing on the *economic rights and freedoms* acknowledged to them by the European Court of Justice against the national regulatory and social policies that were regarded as placing obstacles to the creation of a single economic space.

Two were the key legal steps in the fashioning of this transformation:

Firstly came the redefinition of free movement of goods as a legal category. The ruling of the CJEU in *Cassis de Dijon*[41] crystallised the understanding that some actors within the European Commission had been favouring[42]. Any national norm, even if not discriminatory, was to be declared invalid if it placed obstacles to free movement of goods. As a result,

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[41] ECLI:EU:C:1979:42.

[42] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42.

free movement of goods would stop being the operationalisation of the principle of non-discrimination, and would become a *substantive standard*, the actual content of which to be determined by the Court itself.

Secondly came the generalisation of this new conception of economic freedom to all other economic freedoms (i.e. from free movement of goods to freedom of establishment, freedom to provide services, free movement of capital and, last but not least, free movement of workers)[43]. The Single European Act, and even more so, the Maastricht Treaty, seemed to have been regarded by the Court as a clear political signal backing such move, which required trumping the literal and systematic interpretation of European primary law with a teleological interpretation of the Treaties not dissimilar to that underpinning the 'foundational' rulings of the Court.

This jurisprudential shift radically increased the set of national norms open to be contested by EEC right-holders on account of the breaching of their rights.

C) *Away from politics: forced acceptance of national regulatory standards*

The third major change regarded the government of the integration process.

Two would be the main steps in this transformation. Firstly, Cassis de Dijon would be so constructed as to open up a new path of integration *alternative* to symmetric intergovernmentalism. Instead of politically mediated *positive common norms*, integration could proceed through the case by case removal of national laws in breach of the *new* economic freedoms. This unleashed a process of pulverisation of national powers[44]. Secondly, the Single European Act established a new division of decision-making procedures, distinguish a (less demanding) processes applying to market-making norms, and the (far more demanding) 'old' process, requiring unanimous agreement in the Council, which would be applied to market-correcting norms.

Firstly, the Commission drew from the Cassis de Dijon ruling the conclusion that integration could proceeded not only through political decision-making and mediation, but also through what it labelled as 'mu-

[43] C-76/90, *Säger*, ECLI:EU:C:1991:331, C-55/94 *Gebhard*, ECLI:EU:C:1995:411, C-415/93 *Bosman*, ECLI:EU:C:1995:463, and after the entry into force of Directive 88/361, in C-163/94, *Sanz de Lera*, ECLI:EU:C:1995:451.

[44] *Communication* from the *Commission* concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ("*Cassis de Dijon*"), DO C 256 de 3.10.1980, pp. 2-3.

tual' recognition. Despite the normative labelling, what was understood by mutual recognition was the combination of the immediate acceptance of all regulatory choices made by Member States by all other Member States, and the transformation of private litigants (not infrequently, multinational companies) into the agents that would decide, through litigation, which regulatory choice would prevail in the Community as a whole. Going back to *Cassis*. The static implication of the ruling was that German authorities recognised French regulatory standards. But if German authorities had to accept the selling of foreign cassis that had a lower alcoholic content than that required by its own legislation, Germany would be most likely forced to change its own legislation to prevent (a part at least) of German producers relocating to France so as to be able to produce a cassis that remained price-competitive with the French thanks to a lower alcoholic content. To summarise, the Commission welcomed the (forced) mutual acceptance of normative frameworks implied in the ruling, as well as the disruptive dynamic it would generate. Whether such dynamics would end being a race to the bottom or a race to the top is highly relevant in substantive terms, but what is clear is that "mutual recognition" was not a recipe for normative stability. It was a pathway that led to the creative destruction of national legal systems, or in terms that came popular since then, in EU law acting as an "irritant" of national legal systems. In brief, in the 1980 Communication, the Commission basically came to see in *Cassis* what it had contributed to plant in it.

The new Delors Commission, and very particularly, Lord Cockfield, pushed for the expansion of "mutual acceptance" beyond goods and into services (and indirectly, capital). The Single Market paper imports from (then) rather marginal scholarship the concept of "regulatory competition" into Commission policy. Here we find in one single document the narrative of European integration being "rescued" by means of "reviving" the original plan of completing an "internal market" and then projection of the "market" logic to the very legal foundations of the "internal market".

> "Goods and people moving within the Community should not find obstacles inside the different Member States as opposed to meeting them at the border. This does not mean that there should be the same rules everywhere, but that goods as well as citizens and companies should be able to move freely within the Community. Subject to certain important constraints (see paragraph 65 below), the general principle should be approved that, if a product is lawfully manufactured and marked in one Member State, there is no reason why it should not be sold freely throughout the Community. Indeed, the objectives of national legislation, such as

> the protection of human health and life and of the environment, are more often than not identical. It follows that the rules and controls developed to achieve those objectives, although they may take different forms, essentially come down to the same thing, and so should normally be accorded recognition in all Member States, not forgetting the possibilities of cooperation between national authorities. What is true for goods, is also true for services and for people. If a Community citizens or a company meets the requirements for its activity in one member State, there should be no valid reason why those citizens or companies should not exercise their economic activities also in other parts of the Community"[45].

Secondly, the Single European Act (re)introduced qualified majority voting in the Council. Despite the rather tortuous literal tenor of the amended drafting of the Single European Act, successive rounds of Treaty amendment resulted not only in the widening of the policies regarding which decisions could be taken by qualified majority voting, but also the granting in such cases of "co-decision" powers to the European Parliament (expected to vote in most cases by simple majority).

However, it should be emphasised that it was not intended in the Single European Act, or for that matter at any later stage, that qualified majority voting would become the standard decision-making rule. There was, and there remains, a set of policies where unanimity in the Council is still required. This entails that alongside qualified majority voting came (implicit) rules dividing law-making and decision-making labour between different decision-making processes. In very broad terms, the "new" decision-making process (qualified majority) were to be applicable when taking decisions concerning the realisation of the "single market" programme (market-making policies). On the other hand, unanimity in the Council was and is still required when "positive" measures rectifying the distributive consequences of the functioning including socio-economic policies that rectified the pattern of distribution of economic burdens and benefits resulting from the operation of markets (market-correcting policies).

The move to qualified majority voting, as has been highlighted among others by Weiler, results in a key, if not the key, piece of the belt transmitting indirect national democratic legitimacy into supranational law being removed. The "loss" in indirect democratic legitimacy was said to be more than compensated by the emergence of the European Parlia-

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[45] 'Completing the Internal Market', COM (85) 310 final, disponible en *http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf*, paragraphs 57 and 58.

ment as co-decider. Still, the move to qualified majority deeply transformed the relationship between European law and Member States, which could not be imposed supranational laws that they had rejected[46]. Less noticed has been the fact that this move resulted in an artificial splitting of issues along the division of labour between decision-making procedures. As just pointed, the move to qualified majority voting only applied to some, not to all issues. Simplifying a lot (but not too much) qualified majority voting applied to market-making, while unanimity was still required for market-correction measures. As a result, the move to qualified majority voting facilitated the adoption of measures reinforcing the new understanding of economic freedoms favoured by the court, while hampering as a matter of fact legislation aiming at reregulating economic activity at the supranational level. Successive enlargements would only amplify this bias[47]. Moreover, the artificial splitting of issues ended up being projected to the way in which socio-economic questions were regarded, emphasising for example the dichotomous understanding of the relationship between the "economic" and the "social" sides of the socio-economic structure, a dichotomy that would percolate also to the national level.

3. *Radically redefining free movement*

A) *The new dramatis personae of free movement*

Decisive changes were operated in the breadth of the right to personal freedom of movement in the eighties. The European Court of Justice redefined *who was the European entitled to the protection of Community law when crossing* borders. In particular, the rights of tourists, entrepreneurs and capitalists to both personal freedom of movement and to the means to fully realise it (extending to and supporting free movement of capital) were affirmed.

Clear signals of a fundamental change can be observed in the rulings in *Luisi and Carbone*[48] and in *Cowan*[49]. The Court breaks away with the interpretation according to which European law would grant an active right to freedom of establishment to entrepreneurs, but not a passive

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[46] Weiler, above, n. 14, at 68-80, 232.

[47] The higher the number of Member States, and the more diverse the socio-economic structures of the Member States, the more difficult it has become to take unanimous decisions.

[48] Joined cases 286/82 and 26/83, *Luisi* & *Carbone*, ECLI:EU:C:1984:35.

[49] C-186/87, *Cowan*, ECLI:EU:C:1989:47.

right to receive services to consumers. This implied de facto making of all Europeans that crossed national borders holders of one of the European economic freedoms. In other words, the personal status of whoever crosses a border comes to be defined by the *economic freedom to receive services*. At first sight, the rulings seem to have an emancipatory effect. Luisi and Carbone are allowed to leave Italy with the resources they claim to need to receive medical treatment, something that the (draconian) limits imposed by the Italian state rendered impossible. By the same token, Cowan is declared entitled to a compensation after being mugged in the Paris underground.

However, this shift in the case law implies not only a major change in the scope and perimeter of the community of insurance, but also a deep turn in terms of the content and texture of the right. The (passive) right to freedom of establishment becomes one of the battering rams equipped with which it is possible to trigger the review of European validity of all national norms that can be deemed to place obstacles to the free movement of persons, independently of whether they want to establish themselves in another Member State or are merely transitorily passing through a Member State.

A freedom of movement thus redefined in the image and semblance of those who have no enduring compromise over time and space with the political community becomes a legal title corrosive of the collective goods that underpin the political and insurance communities.

This tension was first projected onto national tax laws, including personal income tax laws. From the eighties we can observe a constant use of the *set of economic freedoms* as the means to trigger a review of national tax norms, redefined as obstacles to the exercise of economic freedoms. Rather frequently, it was multinational corporations that challenged national tax laws on the basis of the latter breaching the right to freedom of establishment or to the free movement of capitals. But in other cases, it was individuals (although in far from few cases, employed by multinational companies) who challenged the same laws in the name of the personal freedom of movement, whose substantive content would be defined by economic freedoms. In other areas, the Court proceeded much more cautiously. It would only be in the 2000s that rulings such as those in *Viking*, *Laval* and *Ruffert* would affirm the primacy of economic freedoms over the subjective and collective rights of workers[50].

[50] C-438/05, *Viking*, ECLI:EU:C:2007:772; C-341/05, *Laval*, ECLI:EU:C:2007:809; C-346/06, *Ruffert*, ECLI:EU:C:2008:189.

B) *A terrible misunderstanding: European citizenship*

From the perspective considered in this chapter, the case law of the European Court of Justice on European citizenship has had implications rather more complex than those generally attributed to it. The formal promise of *freedom* and *protection* run the risk of becoming purely semantic. In the name of making effective *the equal freedom of all Europeans*, the Court undermined the subjective and collective rights of Europeans, as well as the collective goods that render possible *the material equality* of citizens.

In that regard, it should be added that the promise of a Europe without borders was deeply ambivalent. Not only because of the material impossibility of maintaining a community of social insurance without criteria to determine who are and who are not members of such community, but also due to the fact that the elimination of borders as political and economic buffers results in the growth of inequalities across states and across individuals. The illusion of the transcendence of *formal borders* facilitates the exercise of raw force when not violence, and thus the emergence of *informal and invisible borders*, including socio-economic borders defined by income, wealth, social class and education.

V. *'Tutti i nodi vengono al pettine': Social retrenchment and the identification of the mover with the 'economically active'*

The manifold crises that have hit the European Union and its Member States since 2008 have accelerated and radicalised the second transformation of European law. This has resulted in a rather brutal clarification of the *actual substantive content and implications* of the European law on personal freedom of movement.

1. *The preservation of the value of capital entrenched at the expense of the rights of workers, taxpayers and citizens*

The paramount value assigned in European law to the preservation of the stock value of money, that is, of financial assets, has emerged strengthened from the financial and fiscal crises. In both cases, governments where confronted with urgent decisions on how massive losses had to be allocated, as the high mountains of 'fictitious' capital produced during the last twenty years collapsed; that is, as what were (wrongly) sold as financial products with 'contingent risks' prove to be worthless.

The punctual decisions taken, and the structural reforms adopted, implied a rather clear-cut pattern of distribution of the losses.

On what concerns the financial crisis, the value of private financial assets was largely preserved by a combination of measures nationalising the financial investments that either had already resulted in major losses or were likely to do so in the future, and direct or indirect state aid to financial institutions. The massive costs that this entailed for exchequers were not distributed through progressive taxation, but through a mix of (more or less) regressive taxes (hikes in consumer taxes, user fees and so on), welfare benefit cuts and reduced levels of provision of public services.

The Eurozone periphery states came dangerously close to the fiscal brink, asphyxiated by the structural weakening of their tax systems (a process propelled by access to tax revenue stemming from the credit bubble of the first decade of Monetary Union), by the asymmetric division of labour between Member States of the Eurozone when it came to the nationalisation of cross-border financial risks (to be absorbed by the states where the debtors were established) and by the sudden reversal of capital movements. Again, the integral value of public debt was preserved (with the sole real exception of Cyprus). The cost of doing so was met by means of the so-called austerity policies, which consisted (again) in wage reductions (both in the public and private sector), welfare retrenchment, higher (regressive) taxes and lesser public services.

We can thus draw the conclusion that the major 'test' of the crises has more than confirmed the force assigned to the principle of preservation of the value of capital in European law. In this respect, the emergence of the principle of financial stability[51] as a key yardstick of the validity of national norms, despite the fact that it was not formally part of the primary law of the European Union until the rather 'on the hoof' reform of Article 136 TFEU in 2011, is rather telling. Quite obviously, the immediate implication is that any other fundamental constitutional position, including the whole set of socio-economic rights, has to be set aside if not doing so would endanger the objective of keeping the value of capital. It should be rather obvious that, contrary to institutional rhetoric, public action so guided implies a massive strengthening of state intervention, albeit programmed to achieve objectives very different (if not antagonistic) to those proper of the Democratic and Social State.

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[51] See C-370/12, *Pringle*, ECLI:EU:C:2012:756; C-62/14, *Gauweiler*, ECLI:EU:C:2015:400; C-8 to 10/15, *Ledra*, ECLI:EU:C:2016:701, par. 69, 71 and 72.

The personal status of Europeans as workers and citizens has emerged deeply *devalued*¸ if not *debased*, as equality and liberty have been further reduced to pure forms, deprived of the substantive backing that can only come from the provision and maintenance of collective goods. Indeed, the normative promises underpinning the enshrinement of the status of European citizen in the Treaties simply have not held. Neither European law in general nor European citizenship in particular have provided workers, citizens and taxpayers with constitutional instruments with which to force a thorough democratic debate around the way in which the losses resulting from the financial and fiscal crises would be allocated. The European Parliament reduced itself to irrelevance, the European Commission not only experienced a process of internal fragmentation, but became auxiliary to the emerging asymmetric inter-governmentalism of the Council, while the European Court of Justice chose not to hear claims based on socio-economic and political rights, and only protected the rights of Europeans as consumers. In brief, European law was of no avail to European citizens and workers who ended up at the wrong end of austerity policies and internal devaluations.

2. *The new bonding of freedom of movement: enter the 'economically active'*

It could be argued though that when everything else failed, Europeans could still make use their right to freedom of movement to seek new opportunities in other Member States. Indeed, it is a fact that the Eurozone crises, much as was the case with the various doses of shock policies in Eastern Europe before, had resulted in massive flows of population, mostly of young persons. Is this not the ultimate proof that freedom of movement can indeed become a form of social policy alternative to the *passé* welfare state?

Certainly not, and for two major reasons.

The first is that characterising the exoduses of population, first in Eastern Europe, now in Southern Europe, as a paradigmatic example of how freedom of movement stabilises polities in crises implies not only conceptualising freedom of movement as a purely formal right, but also projecting this formalistic understanding over the constitutional order as a whole.

There is no doubt that young Greeks searching for jobs in Germany find themselves in a far better position than Syrian refugees trying to reach the same Germany. It would be silly to deny that the status of European citizen does not make things better. But from there to say that all these young Greeks are making use of their *freedom* when seeking for jobs in Germany implies a logical and normative jump. Freedom exercised under what is hard to deny is economic duress in many if not most cases is a pure formal freedom: in actual, material terms, there is no freedom being exercised at all. It may be that given the realm of possibilities, this was by far the best option. But if the best option is still one that has not only major personal and collective costs, and above all, is one that the person feels is compelled to take, it is simply odd to keep on insisting on the *emancipatory* potential of freedom of movement. Especially given that the *structural shift* in terms of the overall European socio-economic model implies that the types of jobs on offer, and the limited economic security they provide, limit the actual chances of realising their private and public autonomy. In brief, it is perfectly possible to say that, given how things are, European citizens are better off having the right to seek employment in other Member States, because this is better than nothing. But we should at any rate drop the normative ambitions in which free movement tends to be wrapped. When socio-economic rights, including the right to freedom of movement, are transformed into formal rights, it is unavoidably the case that the degree of actual freedom resulting from their exercise is unevenly distributed: only those with the economic, material and cultural resources will draw actual freedom from the exercise of these rights. The growing inequality *within* European societies is reflected in the *unequal pattern of enjoyment* of freedom of movement. For the happy few, it has become an even bigger source of personal freedom. For the restless many, it has become the lesser evil, a passport to escape from unemployment but which leads them not only into precarious employment but also to cultural and social alienation, at least for a far from short period.

The second, crucial from a constitutional perspective, is that the inflows of youth people coming from the Eastern periphery first, and the Southern periphery now, have fostered a trend towards an explicit break with the homogeneous allocation of freedom of movement and of European citizenship.

In the case law of the European Court of Justice, but also in legislative proposals, we can discern a form of citizenship conditionality, or what is the same, the emergence of new limits to the enjoyment of the right to freedom of movement to persons meeting certain criteria, in particular, being 'economically active'. This entails that those who are not economically active can, in their turn, be expelled. These, and no others, are the key implications of the leading cases *Dano* and *Alimanovic*[52].

That a *qualifying criterion* is fleshed out is far from surprising. Indeed, it was unavoidable. As was pointed, the abolition of borders is only compatible with democracy if it comes hand in hand not only with formal equality, but also with institutional structures, decision-making processes and substantive norms that guarantee a baseline equality within the new borderless area. If, as has been the case in European integration, you pretend to abolish formal borders expecting that this would lead to more or less spontaneous socio-economic convergence, you are bound to end up having fostered a process of socio-economic divergence, which would create a strong pressure in favour of reintroducing, more or less explicitly, borders.

What is highly problematic is the actual content of the bonding criterion ('the economically active'). This necessarily entails making even more fragile and precarious the position of the weakest among the weak: the 'economically inactive'. Those are now subject as nationals to the structural undermining of the social state under the combined pressure of the single currency and the single market, while as Europeans are denied even the chance of trying their luck in another Member State without risking being expelled as 'burdens'. This denial of the right of establishment (which depending on the practice of national authorities, can extend to the right to short term hospitality) may de facto imply their losing their status as direct subjects of European law, given that without moving, they may not enter the realm of application of European law. There is thus a major difference between the implications of the choice of 'worker' as bonding concept in fifties and sixties (as pointed, this

[52] C-33/13, *Dano*, ECLI:EU:C:2014:2358; C-67/14, *Alimanovic*, ECLI:EU:C:2015:597. It is important to notice that a similar trend can be noticed at the legislative level. On the one hand, we can observe the same concept of 'economically active' person popping up in the proposed 'new settlement' of the United Kingdom negotiated *before* Brexit, largely reflecting the practice followed by a good number of Member States. On the other hand, the trend towards a homogeneous personal status for all third country nationals has been reversed. We may notice the proliferation of different third country national statuses, with a varying breadth and scope, and with very different sets of rights and obligations. It is hard to avoid the conclusion that graduation is largely dependent on a criterion that is substantially connected to the concept of 'economically active', as rights and duties depend on the extent to which third country nationals are expected to 'contribute' to the European economy. It has indeed become part of the jargon of European institutions to speak of 'high value' migrants, referring to those with highly valued and demanded skills. The assumption being that there are also those with 'low value', for example seasonal workers.

bonding concept strengthened the protection of the weak parties) with the choice of 'economically active' as bonding concept.

Conclusions

In this chapter I have engaged in a sustained criticism of the present practice of the European right to freedom of movement.

I started by challenging the widespread but simplistic assumption according to which freedom of movement is unconditionally good. While freedom of movement is a fundamental means for the realisation of public and private autonomy, it should be kept in mind that is only a means. Both the effective exercise of the right to freedom of movement itself, as well as the creation and maintenance of the collective goods which constitute the infrastructure of public and private autonomy, require a careful *calibration* of the right to freedom of movement. These are among the reasons why Democratic and Social States need to establish normative and physical borders, strong enough to prevent the hollowing out the terms of social cooperation, and permeable enough as to ensure that the state remains open and cooperative, and very especially, discharges its obligations vis-á-vis non-members. This accounts for the complex differentiation of personal statuses, corresponding to the different relevant spheres of membership proposed in Section I.

I moved then to challenge the *historical narrative* that underpins European legal and political scholarship, and that characterises the present practice of freedom of movement as the unfolding of an immutable ideal of freedom enshrined in the Treaties. I set the evolution of the European law on personal freedom of movement in its social, economic and political context. I distinguished three key stages: (1) the ambivalent formulation of free movement in the founding Treaties, oscillating between an economic freedom facilitating labour mobility and a subjective fundamental right protecting individuals; (2) the first European transformation, configuring the right to freedom of movement as a subjective fundamental right complementing and supplementing national socio-economic rights; (3) the third European transformation, reconceptualising freedom of movement as an economic freedom, which empowered persons (de facto, legal persons) to challenge public powers to regulate, redistribute resources and steer the economy as a whole, powers which in their turn were key in the provision of the fundamental collective goods underpinning the Democratic and Social State.

I concluded by showing that the way in which the European Union and its Member States have tried to *govern* the many crises that have hit them since 2008 have not so much altered the course of European integration, as radicalised and accelerated the forces at work during the second transformation. The retrenchment of welfare policies and the harsh devaluation of work through which the losses resulting from the financial and fiscal crises were absorbed confirmed the paramount value assigned to the preservation of the stock value of money in European law. The crises did not lead the Union to change track, but rather to hold even tighter to socio-economic model built upon "sound money". Rigid adherence to the protection of capital requires full flexibility on the side of socio-economic rights to absorb the ontological economic instability of capitalistic economies and societies. By the same token, the emergence of a new "bonding" concept, "the economically inactive" does not represent a break with the case law of the nineties and early 2000s, but is a necessary consequence of such case law. It renders explicit the divorce between the formal and the material enjoyment of the right by means of explicitly excluding the weakest of the weak, the 'economically inactive' from the scope of free movement, and indirectly, of European law.

The radical criticism of the present practice of free movement should not lead to the advocacy of the 'closure' of borders, even less to a 'closed society' (which is actually not too distant from present practice). What is required is the *actual implementation* of the normative vision of the Democratic and Social Rechtsstaat, which is that of a *managed openness*. While elements of the European practice of the fifties and sixties could be relevant in implementing such a strategy, it is equally important to be aware of the deep flaws of European policy then, including its colonial, imperialistic and maschilistic elements. Still, it is important to keep in mind that the illusion of a borderless world engenders the worst of all possible worlds, a world in which the shape of borders, instead of being democratically discussed, is decided on the hoof of an emergency, where, as always, economic, political and cultural violence is bound to have the upper hand.

To put it differently, it was the very denial that this was necessary that created the conditions under which the new colonial, imperialistic and maschilistic was bound to be shaped by power relations, undermining a good deal of the normative achievements brought by European integration. The result is that what was actually a set of norms that protected workers vis à vis the economic power of capitalists has been substituted by norms that enforce an order where the weakest are bound to be losers.

M. EUGENIA BARTOLONI

LIBERA CIRCOLAZIONE DEI CITTADINI UE E PRINCIPIO DI 'SOLIDARIETÀ' EUROPEA: CRONACA DI UNA MORTE ANNUNCIATA

1. *Premessa*

In tempi recenti, la Corte di giustizia dell'Unione europea è stata costantemente chiamata a coniugare due esigenze non facilmente conciliabili: da una parte, quella di assicurare al cittadino dell'Unione economicamente inattivo o in cerca di occupazione, che si avvale del diritto di circolare e soggiornare liberamente nel territorio di un altro Stato membro, la parità di trattamento rispetto ai cittadini nazionali quanto all'accesso ai diritti sociali; dall'altra, quella di preservare interessi e prerogative che gli Stati membri conservano in materia di sostenibilità dei rispettivi sistemi di *welfare*[1]. Gli argomenti utilizzati e le soluzioni, in parte inedite, adottate nelle sentenze che si andranno ad esaminare forniscono l'opportunità di riflettere in merito al ruolo assunto dalla dimensione 'sociale' della cittadinanza europea e al difficile bilanciamento fra la regola

[1] V. Corte di giustizia, sentenze dell'11 novembre 2014, causa C-333/13, *Dano*, ECLI:EU:C:2014:2358; del 15 settembre 2015, causa C-67/14, *Alimanovic*, ECLI:EU: C:2015:597; del 25 febbraio 2016, causa C-299/14, *García-Nieto*, ECLI:EU:C:2016:114; del 14 giugno 2016, causa C-308/14, *Commissione c. Regno Unito*, ECLI:EU:C:2016:436.

d'eguaglianza di cui beneficia il cittadino europeo in mobilità e gli interessi dello Stato[2].

È noto che la cittadinanza europea non solo garantisce il godimento di vari diritti, tra i quali assumono preminenza il diritto di circolare e soggiornare liberamente nel territorio degli altri Stati membri, ma soprattutto reca con sé il riconoscimento di prerogative, quali il trattamento nazionale rispetto alla situazione dei cittadini dello Stato ospitante, che non sono semplicemente necessarie per la piena realizzazione dello *status* di cittadino europeo, ma sono connaturate all'idea stessa di cittadinanza europea e alla portata costituzionale che essa ha acquisito nel tempo. D'altra parte, esigenze di "completa parità di trattamento"[3] sono idonee ad interferire con gli interessi legittimi degli Stati membri allorché il cittadino europeo che invoca il principio di non discriminazione sia in cerca di occupazione o, addirittura, economicamente inattivo: in questi casi, l'obbligo per gli Stati di garantire la parità di trattamento per prestazioni di carattere assistenziale può incidere sui rispettivi sistemi nazionali di *welfare*.

In un contesto siffatto, il sistema di accesso dei cittadini europei alla assistenza sociale degli Stati membri manifesta in modo emblematico la tensione esistente tra i meccanismi di protezione dei sistemi di *welfare* nazionali e la portata transnazionale dei diritti e delle prestazioni connesse alla cittadinanza europea.

La Corte ha tentato di temperare queste differenti esigenze autorizzando gli Stati ad esigere che l'accesso ai propri regimi di *welfare* da parte del cittadino che non svolga (o non svolga ancora) un'attività utile

[2] V., nell'ampia letteratura, H. VERSCHUEREN, "EU Free Movement and Member States' Solidarity Systems: Searching for a Balance", in E. GUILD, P. MINDERHOUD (eds), *The First Decade of EU Migration and Asylum Law*, Martinus Nijhoff Publishers, Leiden, Boston, 2012, pp. 47-74; F. DE WITTE, "Transnational Solidarity in the Mediation of Conflicts of Justice in Europe", in *European Law Journal*, 2012, pp. 694-710; Editorial Comments, "The Free Movement of Persons in the European Union: Salvaging the Dream while Explaining the Nightmare", in *Common Market Law Review*, 2014, pp. 729-739; S. GIUBBONI, "European Citizenship and Social Rights in Times of Crisis", in *German Law Journal*, (*Special Issue - EU Citizenship: Twenty Years On*), 2014, pp. 935-964; K. GROENENDIJK, "Access for Migrants to Social Assistance: Closing the Frontiers or Reducing Citizenship?", in E. GUILD, S. CARRERA, K. EISELE (eds), *Social Benefits and Migration. A Contested Relationship and Policy Challenge in the EU*, Centre for European Policy Studies - CEPS, Brussels, 2013, pp. 1-21; K. LEANERTS, "European Union Citizenship, National Welfare Systems and Social Solidarity", in *Jurisprudencija/Jurisprudence*, 2011, pp. 397-422.

[3] V., per questa espressione, Corte di giustizia, sentenze del 2 febbraio 1989, causa 186/87, *Cowan*, ECLI:EU:C:1989:47, punto 10; del 24 novembre 1998, causa C-274/96, *Bickel e Franz*, ECLI:EU:C:1998:563, punto 14.

per il mercato interno si fondi su un minimo sostrato d'integrazione sociale[4] che si concretizza nella presenza, a seconda dei casi, di un requisito territoriale[5], di un certo grado di integrazione nella società[6] o, più in generale, di un nesso di collegamento con lo Stato ospitante[7]. La Corte ha in tal modo tentato di attenuare la tensione di fondo – che inevitabilmente riaffiora tutte le volte in cui una libertà di circolazione non funzionale (o non strettamente funzionale) alle esigenze del mercato finisca per impegnare le finanze pubbliche dello Stato – attraverso una sorta di operazione di bilanciamento tra 'principio di solidarietà europea' e 'principio di solidarietà sociale nazionale'[8].

Sennonché, non diversamente da quanto avviene nel contesto della libera prestazione dei servizi nel mercato interno, una tale operazione di ponderazione degli interessi in gioco è apparsa sistematicamente sbilanciata a favore della libertà individuale di circolazione del cittadino europeo economicamente inattivo. In tal modo, le condizioni di 'autosufficienza economica' e, più in generale, le deroghe alla parità di trattamento, centrali nella direttiva 2004/38/CE[9] ai fini della protezione dei sistemi nazionali di *welfare*, sono assurte, in conseguenza del bilanciamento effettuato dalla Corte, a condizioni poco più che formali le quali possono essere agevolmente soddisfatte, o eluse, da qualunque cittadino dell'Unione in mobilità.

Con le sentenze che si andranno ad esaminare, la Corte, svigorendo un decennio di sviluppi giurisprudenziali e portando a pieno compimento una tendenza inaugurata a fine 2013 con la sentenza *Brey*[10] ha re-attribuito centralità alle condizioni di 'autosufficienza economica' e, più in ge-

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[4] V., al riguardo, S. AMADEO, "Il principio di eguaglianza e la cittadinanza dell'Unione: il trattamento del cittadino europeo 'inattivo'", in *Il Diritto dell'Unione europea*, 2011, p. 59, spec. p. 68 ss.

[5] V., ad es., Corte di giustizia, sentenza del 7 settembre 2004, causa C-456/02, *Trojani*, ECLI:EU:C:2004:488, punto 43.

[6] Corte di giustizia, sentenze del 15 marzo 2005, causa C-209/03, *Bidar*, ECLI:EU:C:2005:169, punto 57; del 1 ottobre 2009, causa C-103/08, *Gottwald*, ECLI:EU:C:2009:597, punto 35.

[7] Corte di giustizia, sentenze dell'11 luglio 2002, causa C-224/98, *D'Hoop*, ECLI:EU:C:2002:432, punto 38; del 4 giugno 2009, cause riunite C-22/08 e C-23/08, *Vatsouras e Koupatantze*, ECLI:EU:C:2009:344, punto 38.

[8] V., per queste definizioni, S. GIUBBONI, "Cittadinanza, lavoro e diritti sociali nella crisi europea", in *Rivista del Diritto della Sicurezza Sociale*, 2013, p. 491 ss., spec. p. 501.

[9] Del Parlamento europeo e del Consiglio, del 29 aprile 2004, relativa al diritto dei cittadini dell'Unione e dei loro familiari di circolare e di soggiornare liberamente nel territorio degli Stati membri, in GU L 158 del 30 aprile 2004, p. 77.

[10] Corte di giustizia, sentenza del 19 settembre 2013, causa C-140/12, ECLI:EU:C:2013:565.

nerale, alle deroghe alla parità di trattamento, a discapito di una valutazione globale degli interessi in gioco[11]. In tal modo, le ben note condizioni previste nell'art. 7 della direttiva 2004/38/CE[12] – in applicazione delle quali, in particolare, il diritto di soggiorno del cittadino europeo inattivo è subordinato alla disponibilità di "risorse economiche sufficienti, affinché non divenga un onere a carico dell'assistenza sociale dello Stato membro ospitante" – nonché le ipotesi di deroga alla parità di trattamento previste dall'art. 24, par. 2, nei confronti di cittadini inattivi "durante i primi tre mesi di soggiorno o, se del caso, durante il periodo più lungo"[13] di ricerca di un impiego hanno riacquistato piena rilevanza nel giudizio della Corte. Ed è chiaro che l'applicazione di tali condizioni – le quali sono chiaramente ispirate all'idea che l'esercizio del diritto di soggiorno dei cittadini dell'Unione e la corrispondente parità di trattamento possono essere subordinati "agli interessi legittimi degli Stati membri, nella fattispecie la tutela delle loro finanze pubbliche"[14] – ri-ancora la dimensione sociale della libera circolazione alla logica del funzionamento del mercato interno[15]. I cittadini che non svolgano (o non svolgano ancora) un'attività di natura economica possono beneficiare nello Stato membro ospitante del diritto di soggiorno, e del corrispondente principio di parità di trattamento, soltanto se sono economicamente autosufficienti[16].

2. *La sentenza sul caso* Dano*: il cittadino economicamente inattivo e le condizioni di 'autosufficienza economica' come presupposto per beneficiare della parità di trattamento*

Nella sentenza sul caso *Dano*[17], la Corte era chiamata a stabilire se, ed eventualmente a quali condizioni, il cittadino economicamente inat-

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[11] Cfr. E. SPAVENTA, *Earned Citizenship: Understanding Union Citizenship Through its Scope*, in D. KOCHENOV (ed.), *Citizenship and Federalism: The Role of Rights*, CUP, Cambridge, 2016, pp. 204-225.

[12] Cit.

[13] Art. 24, par. 2, della direttiva 2004/38, cit.

[14] Corte di giustizia, sentenza del 19 settembre 2013, causa C-140/12, *Brey*, cit., punto 55.

[15] Cfr. S. GIUBBONI, "Free Movement of Persons and European Solidarity Revisited", in *Perspectives on Federalism*, 2015, pp. 1-18, disponibile al sito *http://www.on-federalism.eu/attachments/221_download.pdf*, il quale parla di "spectacular retreat from… transnational solidarity" (p. 2).

[16] V. M. DOUGAN, "The Bubble that Bursts: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens", in M. ADAMS, H. DE WAELE, J. MEEUSEN, G. STRAETMANS (eds), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice*, Hart Publishing, Oxford and Portland, Oregon, 2013, pp. 127-154.

tivo possa avvalersi della parità di trattamento nell'ambito di un soggiorno della durata di oltre tre mesi. Più precisamente, si trattava di stabilire se una normativa nazionale la quale escluda, del tutto o in parte, i cittadini di altri Stati membri non economicamente attivi dal beneficio di talune "prestazioni speciali in denaro di carattere non contributivo" – le quali sono invece riconosciute ai cittadini dello Stato membro ospitante che si trovano nella medesima situazione – sia incompatibile con il diritto dell'Unione, in particolare con le norme del Trattato che stabiliscono nei confronti dei cittadini che si avvalgono del diritto di circolare liberamente il divieto di essere discriminati in base alla nazionalità[18].

La Corte, dopo aver rammentato che l'ordinamento dell'Unione garantisce il diritto di circolazione "secondo le condizioni e i limiti definiti dai trattati e dalle misure adottate in applicazione degli stessi"[19], ha quindi ricordato che il principio di non discriminazione, sancito in termini generali dall'articolo 18 TFUE, è precisato dall'articolo 24 della direttiva 2004/38/CE con riguardo ai cittadini dell'Unione che, come la ricorrente nel procedimento principale, esercitano la loro libertà di circolare e di soggiornare nel territorio degli altri Stati membri[20]. Ai sensi dell'art. 24, par. 1, della direttiva – ha precisato la Corte – "un cittadino dell'Unione, per quanto riguarda l'accesso a prestazioni sociali come quelle oggetto del procedimento principale, può richiedere la parità di trattamento rispetto ai cittadini dello Stato membro ospitante solo se il suo soggiorno sul territorio dello Stato membro ospitante rispetta i requisiti di cui alla direttiva 2004/38"[21]. Poiché per un soggiorno della durata di oltre tre mesi, "il beneficio del diritto di soggiorno è subordinato alle condizioni di cui all'articolo 7, paragrafo 1, della direttiva 2004/38"[22], tra le quali "figura l'obbligo, per il cittadino dell'Unione economicamente non attivo, di disporre, per se stesso e per i propri familiari, di risorse economiche sufficienti"[23], per valutare se i cittadini dell'Unione economicamente non attivi possano rivendicare un trattamento pari a quello dei cittadini di tale Stato membro per quanto riguarda il diritto alle prestazioni sociali, "occorre pertanto esaminare se il soggiorno di

[17] Cit.
[18] V. art. 18 e art. 20 TFUE.
[19] Punto 60.
[20] V. punto 61.
[21] Punto 69.
[22] Punto 71.
[23] Punto 73.

detti cittadini rispetti i requisiti di cui all'articolo 7, paragrafo 1, lettera *b*), della direttiva 2004/38"[24].

Con un *iter* argomentativo estremamente lineare, la Corte ha dunque collegato la parità di trattamento al 'soggiorno legale' ai sensi dell'art. 7 della direttiva[25]. Nel fare ciò, non solo ha associato, probabilmente per la prima volta, il concetto di 'residenza' – nozione utilizzata nell'art. 24 della direttiva – a quello, differente, di 'soggiorno legale' – nozione questa presente invece nell'art. 7[26] – ma ha anche subordinato il diritto a beneficiare della parità di trattamento al possesso di condizioni di autosufficienza economica, al fine di "evitare che i cittadini dell'Unione economicamente inattivi utilizzino il sistema di protezione sociale dello Stato membro ospitante per finanziare il proprio sostentamento"[27].

La rottura con la precedente giurisprudenza appare palese: riemerge con nettezza il retaggio marcatamente mercantilista della libera circolazione che la Corte, in precedenza, aveva tentato di arginare. Con questa sentenza, vengono in tal modo re-introdotti due diversi statuti di cittadinanza, profondamente differenti tra di loro: da un lato, quello dei soggetti economicamente attivi, cui si riconosce un pieno titolo di accesso ai sistemi di protezione sociale degli Stati membri, sul presupposto del loro contributo allo sviluppo economico del paese ospitante; dall'altro, quello dei cittadini che, non esercitando una libertà economica, sono per contro esclusi, in principio, dalla possibilità di accesso *cross-border* ai circuiti di solidarietà sociale nazionale[28].

3. (*Segue*) *I criteri utilizzati per determinare la sussistenza di una situazione di autosufficienza economica*

Oltre a quello appena individuato, la sentenza presenta un ulteriore profilo critico. Se il cittadino dell'Unione può invocare la parità di trat-

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[24] *Ibidem*.

[25] Cfr. D. THYM, "The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens", in *Common Market Law Review*, 2015, pp. 17-50.

[26] V., sul punto, S. GIUBBONI, "Un certo grado di solidarietà. Libera circolazione delle persone e accesso al *welfare* nella giurisprudenza della Corte di giustizia CE", in *Rivista del Diritto della Sicurezza Sociale*, 2008, p. 19 ss., spec. p. 29.

[27] Punto 76.

[28] Cfr., sul punto, H. VERSCHUEREN, "Free Movement of EU Citizens: Including the Poor?", in *Maastricht Journal of European and Comparative Law*, 2015, pp. 10-34.

tamento nella misura in cui può vantare, ai sensi dell'art. 7 della direttiva, "risorse economiche sufficienti, affinché non divenga un onere a carico dell'assistenza sociale dello Stato membro ospitante durante il periodo di soggiorno", assume estrema rilevanza l'individuazione dei criteri per determinare quando si concretizzi la situazione predetta. Il centro di gravità dell'indagine può, in linea di principio, vertere sulla sussistenza di 'risorse economiche sufficienti' – in questo senso sembra deporre l'art. 8, par. 4, della direttiva che richiede una valutazione individuale della situazione personale del cittadino dell'Unione – oppure sull''onere a carico dell'assistenza sociale dello Stato' – questa interpretazione sembra invece avvalorata dall'articolo 14, par. 3, che vieta esplicitamente l'allontanamento qualora il cittadino dell'Unione faccia ricorso al sistema di assistenza sociale dello Stato membro ospitante – o, cumulativamente, su entrambi gli elementi.

Nella sentenza *Dano*, il *test* della Corte sembra essere essenzialmente imperniato sulla situazione economico-personale del richiedente. Nell'affermare che gli Stati possono negare la concessione di benefici sociali a cittadini economicamente non attivi che non dispongano "delle risorse sufficienti per poter rivendicare il beneficio del diritto di soggiorno"[29], la Corte indica chiaramente che la parità di trattamento è condizionata dal possesso di risorse sufficienti. Queste ultime, in particolare, devono essere tali "per far fronte ai [rispettivi] bisogni"[30]. La Corte delinea, in tal modo, il *test* da eseguire: "[o]ccorre pertanto effettuare un esame concreto della situazione economica di ogni interessato, senza tener conto delle prestazioni sociali richieste, per valutare se questi soddisfi il requisito di disporre di risorse sufficienti per poter beneficiare del diritto di soggiorno ai sensi dell'articolo 7, paragrafo 1, lettera *b*), della direttiva 2004/38"[31].

Questi passaggi sono rilevanti sotto due profili: innanzitutto, la Corte stabilisce esplicitamente che il diritto di soggiorno è condizionato alla sussistenza di risorse sufficienti per far fronte ai rispettivi bisogni di ciascun cittadino; in secondo luogo, nell'indicare che il *test* ha ad oggetto "un esame concreto della situazione economica di ogni interessato", la Corte esclude, pur implicitamente, che l'indagine sia svolta sulla verifica dell'onere statale.

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[29] Punto 78.
[30] Punto 79.
[31] Punto 80.

Quest'ultimo aspetto appare particolarmente significativo in quanto la Corte sembra abbandonare la linea argomentativa utilizzata nella sentenza *Brey*[32]. In quella pronuncia, la Corte aveva indicato che, al fine di valutare se una persona sia titolare del diritto di soggiorno, occorresse procedere ad "una valutazione globale dell'onere" che la concessione di eventuali prestazioni di carattere sociale possano comportare "per il sistema nazionale di assistenza sociale nel suo complesso"[33]. Ancorché le autorità nazionali competenti abbiano il dovere di effettuare tale valutazione tenendo conto di un insieme di fattori, tra i quali le "circostanze individuali che caratterizzano la situazione dell'interessato", la valutazione si imperniava essenzialmente sull'onere che la concessione di una prestazione sociale possa rappresentare per l'insieme dei regimi di assistenza sociale di tale Stato membro[34]. Ed è chiaro che una valutazione fondata sull'onere globale per le finanze pubbliche dello Stato ospitante lascia inevitabilmente in secondo piano le circostanze personali che caratterizzano la situazione dell'interessato. Se queste sono idonee ad incidere in maniera necessariamente limitata sull'onere globale statale, quest'ultimo, in quanto tale – cioè come carico finanziario che incombe sullo Stato nel suo complesso – sarà valutato tenendo in considerazione dell'insieme delle prestazioni sociali erogate dai vari regimi di assistenza istituiti da autorità pubbliche a livello nazionale, regionale o locale[35].

Nella sentenza *Dano*, dunque, la Corte, nell'abbandonare il criterio imperniato sull'onere complessivo che grava sullo Stato, abbraccia un *test* sostanzialmente diverso rispetto a quello indicato nella sentenza *Brey*. Non appare trascurabile questo cambio di rotta e altrettanto le conseguenze che ne derivano.

Se il 'centro di gravità' del *test* è dato, come nella sentenza *Brey*, dalla portata dell'onere per il complessivo sistema nazionale di assistenza sociale, sarebbe incongruo pensare che la mera richiesta di una prestazione possa essere sufficiente per dimostrare che il cittadino dell'Unione rappresenti un onere eccessivo per il sistema assistenziale dello Stato membro ospitante. Tuttavia, se il *test* è incentrato, come nella sentenza

[32] Cit.

[33] Punto 64.

[34] V. punti 72 e 77.

[35] Come la Corte esplicitamente ammette, al fine di tale valutazione "può essere pertinente [...] determinare la percentuale dei beneficiari [della stessa] prestazione che hanno lo status di cittadini dell'Unione" (punto 78); cfr., inoltre, H. VERSCHUEREN, "Free Movement or Benefit Tourism: the Unreasonable Burden of *Brey*", in *European Journal of Migration and Law*, 2014, p. 147, spec. p. 171 ss.

Dano, in maniera pressoché esclusiva, sulla sussistenza di risorse economiche sufficienti, è difficile evitare l'impressione che la mera richiesta di prestazioni sociali non rappresenti, invece, un indizio della inadeguatezza della situazione patrimoniale del cittadino dell'Unione, almeno nella misura in cui essa abbia ad oggetto, come nel caso di specie, prestazioni assicurative di base, prestazioni di sussistenza, l'assegno sociale, nonché la partecipazione alle spese di alloggio e di riscaldamento.

In questa linea di pensiero, allora, potrebbe sostenersi che ogni richiesta di accesso a forme di aiuto sociale nello Stato di soggiorno costituisca un indice del fatto che il cittadino europeo non goda di risorse economiche sufficienti e, dunque, non soddisfi i presupposti per un soggiorno legale. Ne deriva la conseguenza, per certi versi paradossale, che il sistema nazionale di *welfare* si apre, e diventa in tal modo accessibile, soltanto per coloro che, in linea di principio, non hanno l'esigenza di beneficiare di prestazioni di carattere sociale.

4. *Il cittadino in cerca di occupazione nella sentenza* Alimanovic*: l'art. 24 della direttiva 2004/38 quale parametro esclusivo per valutare la conformità delle misure statali*

Nel caso *Alimanovic*[36] si trattava di stabilire se una normativa nazionale la quale escluda i cittadini di altri Stati membri aventi lo *status* di persone in cerca di lavoro dal beneficio di talune prestazioni – le quali sono invece riconosciute ai cittadini dello Stato membro ospitante che si trovano nella medesima situazione – sia incompatibile con le norme che stabiliscono nei confronti dei cittadini che si avvalgono del diritto di circolare liberamente il divieto di essere discriminati in base alla nazionalità[37]. Si riproponeva, dunque, una questione assai simile a quella affrontata nel caso *Dano*.

Nel caso specifico, l'esame che la Corte ha dovuto affrontare si è presentato piuttosto articolato, non privo di risvolti problematici. Essa è stata innanzitutto chiamata a determinare la natura delle prestazioni in causa. Posto che sia l'art. 18 TFUE (letto in combinato disposto con

[36] Cit.

[37] Le disposizioni esplicitamente richiamate sono, rispettivamente, gli articoli 18 e 45, par. 2, TFUE e l'articolo 24, par. 2, della direttiva 2004/38 del Parlamento europeo e del Consiglio, del 29 aprile 2004, relativa al diritto dei cittadini dell'Unione e dei loro familiari di circolare e di soggiornare liberamente nel territorio degli Stati membri, in GU L 158 del 30 aprile 2004, p. 77.

l'art. 24 della direttiva 2004/38/CE)[38], che l'art. 45, par. 2, TFUE[39] sanciscono il principio di non discriminazione, al fine di sapere se determinate prestazioni di carattere assistenziale rientrino nella sfera applicativa dell'uno o dell'altro, la Corte ha ritenuto necessario procedere alla loro preliminare qualificazione. Solo in questo modo è possibile "individuare la regola dell'Unione con riferimento alla quale dev'essere valutata [la] compatibilità" delle prestazioni in questione. Queste ultime – qualificate come "prestazioni speciali in denaro di carattere non contributivo"[40] – sono infatti idonee a ricadere nella nozione di "prestazioni d'assistenza sociale" (ai sensi dell'articolo 24, paragrafo 2, della direttiva 2004/38[41]) o, di converso, in quella di "misure volte ad agevolare la ricerca di un impiego" (ai sensi dell'art. 45 TFUE), a seconda della finalità principale che si propongono di realizzare.

La Corte, applicando una sorta di *gravity test*, ha riconosciuto che "la funzione preponderante delle prestazioni di cui trattasi è proprio quella di garantire i mezzi minimi di sussistenza necessari a condurre un'esistenza conforme alla dignità umana". Ne ha tratto la conclusione che misure di questo genere sono qualificabili come "prestazioni d'assistenza sociale"[42], escludendo contestualmente la loro natura di presta-

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[38] L'art. 18 TFUE, al suo primo paragrafo, stabilisce che "[n]el campo di applicazione dei trattati, e senza pregiudizio delle disposizioni particolari dagli stessi previste, è vietata ogni discriminazione effettuata in base alla nazionalità". Peraltro, nella sentenza sul caso *Dano* (cit.) la Corte, al punto 61, ha ricordato che il principio di non discriminazione, sancito in termini generali dall'articolo 18 TFUE, è precisato dall'articolo 24 della direttiva 2004/38/CE con riguardo ai cittadini dell'Unione che esercitano la loro libertà di circolare e di soggiornare nel territorio degli altri Stati membri. Ai sensi dell'art. 24, par. 1, della direttiva – ha precisato la Corte – "un cittadino dell'Unione, per quanto riguarda l'accesso a prestazioni sociali […], può richiedere la parità di trattamento rispetto ai cittadini dello Stato membro ospitante solo se il suo soggiorno sul territorio dello Stato membro ospitante rispetta i requisiti di cui alla direttiva 2004/38" (punto 69, *Dano*, cit.). Ai sensi del suo secondo paragrafo, che introduce una deroga al principio della parità di trattamento, "lo Stato membro ospitante non è tenuto ad attribuire il diritto a prestazioni d'assistenza sociale […] durante il periodo più lungo previsto all'articolo 14, paragrafo 4, lettera *b*)". A sua volta, l'art. 14, par. 4, lettera *b*) della direttiva 2004/38 fa riferimento alla situazione dei cittadini dell'Unione che "siano entrati nel territorio dello Stato membro ospitante per cercare un posto di lavoro".

[39] L'art. 45, par. 2, TFUE sancisce che la libera circolazione dei lavoratori "implica l'abolizione di qualsiasi discriminazione, fondata sulla nazionalità, tra i lavoratori degli Stati membri, per quanto riguarda l'impiego, la retribuzione e le altre condizioni di lavoro".

[40] V. il punto 43 della sentenza.

[41] Cit.

[42] In applicazione di quanto statuito nella sentenza *Dano*, la Corte ha ricordato che la nozione di "prestazioni di assistenza sociale" "fa riferimento all'insieme dei regimi di assistenza istituiti da autorità pubbliche a livello nazionale, regionale o locale, cui può ricorrere un soggetto che non disponga delle risorse economiche sufficienti a far fronte ai bisogni ele-

zioni destinate a facilitare l'accesso all'impiego nel mercato del lavoro di uno Stato membro[43]. Sulla base di questa conclusione, la Corte è stata dunque chiamata a verificare se il diniego da parte dello Stato ospitante dell'aiuto sociale richiesto fosse compatibile con l'art. 24 della direttiva 2004/38 ed, indirettamente, con l'art. 18 TFUE.

L'operazione di preventiva qualificazione delle prestazioni richieste, con la conseguente definizione della sfera normativa rilevante, ha consentito alla Corte di individuare nell'art. 24 della direttiva 2004/38 l'unico parametro in relazione al quale valutare la compatibilità del rifiuto da parte dello Stato ospitante. Questa preliminare delimitazione di campo ha necessariamente avuto l'effetto di predefinire lo schema concettuale nel quale la Corte ha mosso i successivi passi. Tale profilo non appare trascurabile se si considera che, sulla base dell'art. 45, par. 2, TFUE, le ricorrenti, in veste di "persone in cerca di lavoro"[44], avrebbero potuto beneficiare di una parità di trattamento assoluta. La regola d'uguaglianza contenuta nell'art. 45, par. 2, nel garantire "l'abolizione di qualsiasi discriminazione, fondata sulla nazionalità, [...], per quanto riguarda l'impiego, la retribuzione e le altre condizioni di lavoro", è declinata in termini che non sembrano ammettere eccezioni. Non appare allora azzardato ipotizzare che, in applicazione di questo parametro, una normativa statale, come quella in questione, sarebbe stata considerata non conforme al diritto dell'Unione.

Sennonché, la Corte, attraverso il ricorso all'art. 24 della direttiva 2004/38, quale parametro esclusivo per valutare la conformità della disciplina statale, ha preferito percorrere una strada diversa, impervia sotto molti profili ed incerta negli esiti. La difficoltà principale è derivata dalla natura complessa ed articolata della norma e dal difficile coordinamento

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mentari propri e a quelli della sua famiglia e che rischia, per questo, di diventare, durante il suo soggiorno, un onere per le finanze pubbliche dello Stato membro ospitante che potrebbe produrre conseguenze sul livello globale dell'aiuto che può essere concesso da tale Stato" (punto 44).

[43] Punto 46. Alla luce della sentenza *Vatsouras* e *Koupatantze*, cit., la Corte ha indicato che "[l]e prestazioni di natura finanziaria che, a prescindere dalla qualificazione che ne dà la legislazione nazionale, siano destinate a facilitare l'accesso al mercato del lavoro, non possono essere considerate «prestazioni d'assistenza sociale», ai sensi dell'art. 24, n. 2, della direttiva 2004/38" (punto 45).

[44] Da tempo, la giurisprudenza della Corte ha stabilito che "i cittadini degli Stati membri alla ricerca di un lavoro in un altro Stato membro, [...], possono avvalersi dell'art. 39, n. 2 CE (ora art. 45, par. 2, TFUE), al fine di beneficiare di una prestazione di natura finanziaria destinata a facilitare l'accesso al mercato del lavoro" (sentenza *Vatsouras* e *Koupatantze*, cit., punto 40).

delle previsioni contenute nei suoi due paragrafi. Quanto al primo, esso assicura al cittadino europeo che si avvale della libera circolazione un generale diritto di accedere al sistema di protezione sociale dello Stato membro ospitante su basi di completa parità di trattamento con i cittadini di quest'ultimo, a condizione, come è stato precisato recentemente nella sentenza *Dano*, che "il suo soggiorno sul territorio dello Stato membro ospitante rispett[i] i requisiti di cui alla direttiva 2004/38"[45]. Quanto al secondo paragrafo, conferendo agli Stati la facoltà di non attribuire le "prestazioni d'assistenza sociale" in relazione ad alcune ipotesi, tra le quali vi rientra la situazione del cittadino che ricerca un impiego[46], prevede una deroga al principio di parità di trattamento.

5. (*Segue*) ….*e la tutela molto incerta che ne deriva*

In relazione al primo paragrafo, poco agevole, innanzitutto, si è presentata l'indagine circa la sussistenza di un soggiorno legale al fine di verificare la titolarità del diritto alla parità di trattamento[47]. Ad avviso della Corte, "solo due disposizioni della direttiva 2004/38 sono idonee a conferire a persone in cerca di lavoro che si trovino nella situazione della sig.ra Alimanovic e di sua figlia Sonita un diritto di soggiorno nello Stato membro ospitante in forza di tale direttiva, vale a dire gli articoli 7, paragrafo 3, lettera *c*), e 14, paragrafo 4, lettera *b*)"[48].

A tal riguardo, la prima delle due disposizioni consente al lavoratore che si trovi in uno stato di disoccupazione involontaria e che soddisfi altri requisiti tassativamente indicati[49] di conservare "la qualità di lavora-

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[45] Sentenza *Dano*, cit., punto 69.

[46] V., *supra*, la nota n. 37.

[47] Richiamando la sentenza sul caso *Dano*, cit., la Corte ha ribadito che la parità di trattamento è intimamente collegata ad una situazione di 'soggiorno legale' ai sensi della direttiva. "Riconoscere, infatti, che persone che non beneficiano di un diritto di soggiorno in forza della direttiva 2004/38 possano rivendicare il diritto a prestazioni sociali alle stesse condizioni applicabili ai cittadini nazionali si porrebbe in contrasto con un obiettivo di tale direttiva, enunciato al suo considerando 10, che è quello di evitare che i cittadini di altri Stati membri diventino un onere eccessivo per il sistema di assistenza sociale dello Stato membro ospitante" (punto 50).

[48] Punto 52.

[49] L'articolo 7, paragrafo 3, lettera *c*), della direttiva 2004/38 dispone che il lavoratore si debba trovare in uno "stato di disoccupazione involontaria debitamente comprovata al termine di un contratto di lavoro di durata determinata inferiore ad un anno" o si è venuto a trovare "in tale stato durante i primi dodici mesi [e] si è registrato presso l'ufficio di collocamento competente al fine di trovare un lavoro".

tore per un periodo che non può essere inferiore a sei mesi"[50]. Se un cittadino soddisfa dunque siffatte condizioni, è automaticamente titolare di un soggiorno legale e "durante tale stesso periodo" "può, pertanto, avvalersi del principio di parità di trattamento, sancito dall'articolo 24, paragrafo 1, di detta direttiva"[51]. Nel caso in questione, tuttavia, "non vi è dubbio che la sig.ra Alimanovic e sua figlia Sonita, le quali hanno conservato lo status di lavoratrici per almeno sei mesi dopo la fine del loro ultimo impiego, non disponevano più di detto status nel momento in cui il beneficio delle prestazioni di cui trattasi è stato loro negato"[52]. La Corte ha dunque escluso che le ricorrenti, non soddisfacendo il requisito di carattere temporale, potessero invocare un diritto di soggiorno, e la conseguente parità di trattamento, sulla base dell'art. 7, par. 3, lett. *c*) della direttiva.

L'indagine si è allora incentrata sull'art. 14, paragrafo 4, lettera *b*) il quale si limita a prevedere che i cittadini dell'Unione che "siano entrati nel territorio dello Stato membro ospitante per cercare un posto di lavoro [...] non poss[a]no essere allontanati fintantoché possano dimostrare di essere alla ricerca di un posto di lavoro e di avere buone possibilità di trovarlo". Ad avviso della Corte, anche ammettendo che le ricorrenti possano invocare un soggiorno legale sulla base di questa disposizione e avvalersi, di conseguenza, della parità di trattamento nel lasso temporale da questa "coperto", lo Stato membro ospitante può comunque "invocare la deroga dell'articolo 24, paragrafo 2, della medesima direttiva, per non accordare a detto cittadino la prestazione di assistenza sociale richiesta"[53]. Infatti, la situazione del cittadino in cerca di occupazione rientra, come si è già accennato, tra quelle oggetto della deroga prevista dal secondo paragrafo dell'art. 24. Lo Stato membro ospitante può pertanto "negare al cittadino dell'Unione che goda di un diritto di soggiorno unicamente sulla base [dell'art. 14 paragrafo 4, lettera *b*)] qualsiasi prestazione di assistenza sociale"[54]. La Corte ne ha dedotto che le ricorrenti, anche sulla base di quest'ultima disposizione, non possano invocare la parità di trattamento.

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[50] Art. 7, paragrafo 3, lettera *c*) della direttiva 2004/38.

[51] Punto 53. I "cittadini dell'Unione che hanno conservato il proprio status di lavoratori sulla base dell'articolo 7, paragrafo 3, lettera *c*), della direttiva 2004/38 hanno diritto a prestazioni di assistenza sociale, quali le prestazioni oggetto di causa, per il periodo di almeno sei mesi di cui al punto precedente" (punto 54).

[52] Punto 55.

[53] Punto 57.

[54] Punto 58.

Con una argomentazione tanto complessa quanto ricca di risvolti problematici, la Corte, di passaggio in passaggio, è dunque giunta alla conclusione che i cittadini dell'Unione, come le ricorrenti nella causa in questione, i quali sono alla ricerca di un'occupazione, incorrono in una serie di preclusioni che li rendono, in definitiva, privi di tutela: sono esclusi dalla regola d'uguaglianza stabilita all'art. 45, par. 2, TFUE in quanto le prestazioni oggetto di rifiuto, avendo la funzione preponderante di "di garantire i mezzi minimi di sussistenza necessari a condurre un'esistenza conforme alla dignità umana"[55], non possono essere considerate misure destinate a facilitare l'accesso al mercato del lavoro ai sensi dell'art. 45, par. 2, TFUE; sono esclusi dalla qualifica di lavoratori ai sensi dell'art. 7, par. 3, lett. *c*) in quanto, pur trovandosi in uno stato di disoccupazione involontaria che consentirebbe loro di conservare la qualità di lavoratore, non soddisfano il criterio temporale ivi indicato; infine, sono esclusi dalla sfera applicativa dell'art. 24, par. 1, della direttiva, quindi dalla regola d'uguaglianza in esso contenuta, in quanto, avendo lo *status* di cittadini "alla ricerca di un posto di lavoro", rientrano tra quelle situazioni alle quali si applica la deroga disposta al paragrafo secondo dell'art. 24[56].

A fronte di questi risultati incongruenti, non appare irragionevole ipotizzare che una interpretazione più flessibile delle varie norme dell'Unione prese in riferimento avrebbe evitato il rigido automatismo delle conseguenze venutesi a determinare. Ad esempio, quanto alla natura delle prestazioni richieste, la Corte, nell'applicare il criterio relativo alla "funzione preponderante" da queste perseguito, ha considerato che le "prestazioni speciali in denaro di carattere non contributivo" fossero, nel caso in questione, esclusivamente destinate a garantire un'assistenza sociale. Poiché misure del genere hanno anche l'intrinseca finalità di facilitare l'accesso al mercato del lavoro, la Corte avrebbe forse potuto valorizzare questa ulteriore componente, enfatizzando la duplice finalità – quella assistenziale e quella di inserimento nel mercato del lavoro – da

[55] Punto 45.

[56] Tra le ipotesi di deroga, ai sensi dell'art. 24 della direttiva 2004/38, rientra anche quella relativa alla circolazione del cittadino economicamente inattivo nei primi tre mesi di soggiorno (v., *supra*, nota n. 37). La Corte, nella sentenza sul caso *García-Nieto* (del 25 febbraio 2016, causa C-299/14, cit.), ha applicato lo schema di ragionamento utilizzato in *Alimanovic*. Ha infatti indicato che "lo Stato membro ospitante può avvalersi della deroga di cui all'articolo 24, paragrafo 2, della direttiva 2004/38 per negare a tale cittadino la concessione della prestazione d'assistenza sociale richiesta" (punto 43), posto che il ricorrente, soddisfacendo i presupposti per un soggiorno inferiore ai tre mesi "può fondare un diritto di soggiorno sull'articolo 6, paragrafo 1, della direttiva 2004/38 (punto 41).

queste perseguita. In tal modo, il parametro per valutare il diniego da parte dello Stato sarebbe stato, oltre all’art. 24 della direttiva, altresì l’art. 45, par. 2, del Trattato. Anche per quanto riguarda l’art. 7, par. 3, lett. *b*) della direttiva si sarebbe potuto accogliere un’interpretazione meno restrittiva. Se il lavoratore che si trova in stato di disoccupazione involontaria conserva la qualità di lavoratore “per un periodo che non può essere inferiore a sei mesi”, la Corte avrebbe potuto indicare allo Stato membro di procedere, nel valutare il lasso temporale che consente al cittadino di conservare il suo *status* di lavoratore, “ad una valutazione globale”, che tenga in considerazione “le circostanze individuali che caratterizzano la situazione dell’interessato”[57]. Senza comportare alcun sovvertimento all’impianto normativo dell’art. 7, par. 3, lett. *b*), questo temperamento interpretativo avrebbe avuto il pregio di evitare l’effetto automatico della perdita della qualità di lavoratore, con la conseguente esclusione dal beneficio delle prestazioni d’assistenza sociale, collegato esclusivamente allo scadere del termine dei sei mesi.

6. (*Segue*) *Una tutela più intensa per il cittadino economicamente inattivo?*

Oltre a quelli appena individuati, la sentenza presenta un ulteriore profilo critico, forse quello maggiormente problematico per le conseguenze che determina. Nell’intento, verosimilmente, di delineare il funzionamento del meccanismo derogatorio stabilito al par. 2 dell’art. 24 della direttiva, la Corte ha affermato che, in relazione ad un cittadino in cerca di occupazione, “lo Stato membro ospitante può negare [...] qualsiasi prestazione di assistenza sociale”[58]. Infatti, “sebbene la direttiva 2004/38 richiede che lo Stato membro prenda in conto la situazione individuale della persona interessata [...] prima di stabilire che tale persona costituisce un onere eccessivo per il sistema di assistenza sociale nell’ambito del suo soggiorno, tuttavia tale esame individuale non è necessario in una fattispecie quale quella di cui al procedimento principale”[59].

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[57] Nella sentenza sul caso *Brey* (del 19 settembre 2013, causa C-140/12, cit.), pur in un contesto parzialmente diverso, la Corte ha stabilito che le autorità nazionali competenti al fine di valutare se una persona sia titolare del diritto di soggiorno hanno il dovere di effettuare tale valutazione tenendo conto di un insieme di fattori, tra i quali le “circostanze individuali che caratterizzano la situazione dell’interessato” (punti 72 e 77).

[58] Punto 58.

[59] Punto 59. Questo stesso argomento è riproposto nella sentenza *García-Nieto* (del 25 febbraio 2016, causa C-299/14, cit.), al punto 46.

Un cittadino che si avvale della libera circolazione – in quanto alla ricerca di un'occupazione – è dunque automaticamente escluso dall'attribuzione di prestazioni sociali a prescindere dall'esame della sua situazione personale, cioè a prescindere dalla circostanza che rappresenti o meno un onere per il sistema di *welfare* dello Stato che lo ospita.

Questa conclusione è senz'altro coerente con la formulazione letterale della deroga contenuta al secondo paragrafo dell'art. 24, la quale accorda allo Stato la possibilità di escludere in modo automatico il cittadino in cerca di occupazione dal godimento di prestazioni sociali[60]. Essa, tuttavia, appare poco conciliabile con il complessivo impianto normativo della direttiva se si considera, se non altro, la particolare disciplina che questa riserva al cittadino economicamente inattivo che benefici di un diritto di soggiorno superiore ai tre mesi (cioè il cittadino che non è neanche alla ricerca di un'occupazione). Questi, pur non svolgendo alcuna attività di natura economica, può sempre beneficiare nello Stato membro ospitante del diritto di soggiorno, e del corrispondente principio di parità di trattamento, a condizione che dimostri di essere economicamente autosufficiente[61]. Nella sentenza *Dano*, la Corte, come visto, ha subordinato il diritto a beneficiare della parità di trattamento al possesso di risorse economiche sufficienti, al fine di "evitare che i cittadini dell'Unione economicamente inattivi utilizzino il sistema di protezione sociale dello Stato membro ospitante per finanziare il proprio sostentamento"[62].

Le incongruenze della soluzione della Corte sono dunque palesi: un cittadino, pur economicamente inattivo, può accedere a prestazioni di carattere sociale su un piano di piena parità con i cittadini dello Stato ospitante allorché provi di non rappresentare un onere eccessivo per il sistema nazionale di *welfare*; un *work-seeker* è invece automaticamente escluso dal beneficio di misure assistenziali anche nell'ipotesi in cui possa dimostrare il soddisfacimento delle condizioni di autosufficienza economica. Un esame individuale della sua situazione non è infatti richiesto.

La stortura appare evidente, se non altro alla luce di quella giurisprudenza che ha individuato nel "minimo sostrato d'integrazione so-

[60] "[L]o Stato membro ospitante non è tenuto ad attribuire il diritto a prestazioni d'assistenza sociale durante il periodo più lungo previsto all'art. 14, par. 4, lett. *b*)", cioè nel periodo in cui un cittadino è in cerca di occupazione.

[61] Ai sensi della sentenza sul caso *García-Nieto* (del 25 febbraio 2016, causa C-299/14, cit.), il cittadino economicamente inattivo, il cui soggiorno è inferiore ai tre mesi, è invece automaticamente escluso – analogamente al cittadino in cerca di occupazione – dall'attribuzione di prestazioni sociali a prescindere dall'esame della sua situazione personale (punto 46 della sentenza).

[62] Punto 76, sentenza *Dano*, cit.

ciale" il criterio per rendere i regimi nazionali di *welfare* accessibili anche per quei cittadini che non svolgano direttamente un'attività utile per il mercato interno[63]. Alla luce di questo filone giurisprudenziale, un cittadino che si avvalga della libera circolazione al fine di cercare un'occupazione dovrebbe presentare, almeno in principio, un grado di integrazione nella società, o quantomeno un nesso di collegamento con lo Stato ospitante, sicuramente più intenso rispetto a quello che presenta un cittadino che esercita il suo diritto a circolare in maniera del tutto svincolata dalle esigenze di mercato.

7. *Il difficile coordinamento tra l'ambito d'applicazione della direttiva 38/2004/CE e quello del regolamento 883/2004 nelle sentenze sui casi* Dano *e* Commissione c. Regno Unito

Un ultimo profilo, non meno significativo, che la recente giurisprudenza tocca, riguarda il difficile coordinamento tra la più volte citata direttiva 38/2004/CE ed il regolamento (CE) 883/2004 relativo al coordinamento dei sistemi di sicurezza sociale[64]. Mentre la direttiva, come visto, intende evitare che la libertà di circolazione possa essere utilizzata in modo strumentale all'ottenimento di prestazioni di assistenza sociale più vantaggiose in altri Stati membri – volendo quindi disincentivare tutte quelle migrazioni interne fondate sulla volontà di acquisire vantaggi 'sociali' attraverso spostamenti da uno Stato membro all'altro – il regolamento tende a garantire la libera circolazione ai lavoratori e ai cittadini economicamente inattivi, adottando norme appropriate in materia di sicurezza sociale[65]. Si pone dunque il problema di coordinare due strumenti normativi che, pur perseguendo scopi non sempre conciliabili, sono idonei a presentare uno stesso ambito d'applicazione.

Nella sentenza sul caso *Dano*[66], infatti, dal momento che le prestazioni richieste dalla ricorrente sono state contestualmente qualificate sia come 'prestazioni speciali in denaro a carattere non contributivo' ai sensi

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[63] V., *supra*, par. 1.

[64] Regolamento 883/2004 del Parlamento europeo e del Consiglio, del 29 aprile 2004, in GU L 166 del 30 aprile 2004, p. 1.

[65] Cfr. R. CORNELISSEN, "EU Regulations on the Coordination of Social Security Systems and Special Non-Contributory Benefits: A Source of Never-Ending Controversy", in E. GUILD, S. CARRERA, K. EISELE (eds), *Social Benefits and Migration. A Contested Relationship and Policy Challenge in the EU*, Centre for European Policy Studies - CEPS, Brussels, 2013, pp. 82-110.

[66] Cit.

dell'art. 70 del regolamento[67], che come 'prestazioni d'assistenza sociale' ai sensi dell'art. 24 della direttiva[68], la Corte è stata chiamata a verificare se il diniego da parte dello Stato ospitante dell'aiuto sociale richiesto fosse compatibile, oltre che con la direttiva, anche con il regolamento. In relazione alla direttiva, come si è visto, la Corte non ha esitato a subordinare il diritto a beneficiare della parità di trattamento al soggiorno regolare e, dunque, al possesso di condizioni di autosufficienza economica, escludendo, di conseguenza, che la condotta dello Stato potesse essere illegittima[69].

Più delicata si è presentata l'indagine circa la conformità del diniego della prestazione richiesta al regolamento 883/2008. Quest'ultimo nell'indicare, al par. 4 dell'art. 70, che le prestazioni speciali in denaro a carattere non contributivo "sono erogate esclusivamente nello Stato membro in cui gli interessati risiedono e ai sensi della sua legislazione", ha l'obiettivo di assicurare che queste particolari prestazioni non siano esportabili, ma siano soggette a un criterio di residenza nello Stato membro ospitante il quale si fa carico delle relative spese. Il requisito della residenza – che altro non è che "il luogo in cui una persona risiede abitualmente"[70] – assurge dunque a criterio per determinare l'ambito d'applicazione *ratione personae* di siffatte prestazioni[71]. Se così, un cittadino che risieda abitualmente in uno Stato membro diverso da quello d'origine dovrebbe, ai sensi del regolamento, poter beneficiare della parità di trattamento pur se non soddisfi i presupposti di un 'soggiorno legale' ai sensi dell'art. 7 della direttiva.

È dunque evidente che i differenti criteri utilizzati nella direttiva e nel regolamento – i quali fanno riferimento rispettivamente al 'soggiorno legale' e alla 'residenza abituale'– determinano inevitabilmente ambiti d'applicazione *ratione personae* diversi, ai quali corrispondono discipline necessariamente non omogenee. La medesima condotta statale di diniego di una certa prestazione potrebbe, in tal modo, essere legittima se rapportata alla direttiva, ma incompatibile con il diritto dell'Unione se raffrontata al regolamento.

La Corte, chiamata a confrontarsi con questo problema, ha, attraverso un *iter* argomentativo assai discutibile, adattato la sfera applicativa

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[67] V. punto 47 della sentenza *Dano*.

[68] V. punto 63 della sentenza *Dano*.

[69] V., *supra*, par. 2.

[70] Art. 1, lett. *j*, del regolamento.

[71] V, al riguardo, H. VERSCHUEREN, "Free Movement or Benefit Tourism: the Unreasonable Burden of *Brey*", cit., p. 161.

del regolamento a quella della direttiva, introducendo al riguardo requisiti assenti nell'impianto originario del regolamento. Nell'affermare che le prestazioni oggetto della richiesta "sono concesse [ai sensi del paragrafo 4 dell'art. 70 del regolamento], esclusivamente nello Stato membro di residenza dell'interessato e conformemente alla normativa dello stesso", la Corte ne ha dedotto che "nulla osta a che la concessione di tali prestazioni a cittadini dell'Unione economicamente inattivi sia subordinata al requisito che essi soddisfino le condizioni per disporre di un diritto di soggiorno nello Stato membro ospitante ai sensi della direttiva 2004/38"[72].

La Corte, nell'interpretare in maniera artificiosa il richiamo che l'art. 70 compie nei confronti della 'normativa statale', ha dunque subordinato la concessione delle prestazioni *de quibus* alla realizzazione delle condizioni indicate nella direttiva. In altre parole, la Corte ha creato una fattispecie giuridica complessa nell'ambito della quale i presupposti di applicazione della direttiva sono contestualmente idonei a costituire le condizioni per l'applicazione del regolamento. Così facendo, la Corte, se è riuscita nella difficile impresa di coordinare due atti, altrimenti privi di coerenza quanto alla loro sfera applicativa, ha tuttavia trasformato il requisito della 'residenza abituale' in un requisito ben diverso. Non può allora sfuggire che, se lo scopo dell'art. 70 è di "impedire che le persone che ricadono nell'ambito di applicazione del regolamento n. 883/2004 restino senza tutela in materia previdenziale per mancanza di una legislazione che sia loro applicabile"[73], questo è invece il rischio che si potrebbe prospettare se gli Stati dovessero aggiungere requisiti ulteriori a quello dato dalla residenza abituale. In tal caso, il cittadino dell'Unione potrebbe non essere più considerato alla stregua di un residente abituale in un primo Stato membro e non soddisfare, contestualmente, i presupposti per essere titolare, in un altro Stato membro, di un soggiorno legale ai sensi dell'art. 7 della direttiva[74].

La conclusione raggiunta in *Dano* appare confermata, e addirittura rafforzata, nella sentenza sul caso *Commissione c. Regno Unito*[75]. Nell'ambito di un ricorso per infrazione avverso il Regno Unito, la Corte era chiamata a stabilire, in particolare, se nell'imporre "al richiedente le prestazioni sociali di cui trattasi di soddisfare il criterio del diritto di sog-

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[72] Punto 83.

[73] Punto 40, sentenza *Brey*, cit.

[74] V. H. Verschueren, "Free Movement or Benefit Tourism: the Unreasonable Burden of *Brey*", cit., p. 169.

[75] Sentenza del 14 giugno 2016, causa C-308/14, cit.

giorno per essere trattato come un residente abituale in tale Stato membro, il Regno Unito [avesse] aggiunto una condizione che non figura nel regolamento n. 883/2004"[76]. Si trattava, dunque, di stabilire se l'integrazione del requisito del soggiorno legale, assente nell'impianto normativo del regolamento al fine di poter beneficiare di certe prestazioni sociali, fosse o meno legittima[77]. La questione prospettata era pertanto simile a quella oggetto di discussione nel caso *Dano*.

Sul presupposto che la previsione secondo cui l'erogazione delle prestazioni di sicurezza sociale sono soggette "alla legislazione dello Stato membro di residenza"[78] sia una "norma di conflitto diretta a determinare la normativa nazionale applicabile"[79], la Corte ne ha dedotto che "detta disposizione in quanto tale non ha lo scopo di stabilire le condizioni sostanziali per l'esistenza del diritto alle prestazioni di sicurezza sociale"[80]. Gli Stati membri, di conseguenza, manterrebbero inalterato il loro potere di determinare siffatte condizioni[81]. Sulla base di queste premesse, "nulla, in linea di principio, osta a che la concessione di prestazioni sociali a cittadini dell'Unione economicamente inattivi sia subordinata al requisito che essi soddisfino le condizioni per disporre di un diritto di soggiorno legale nello Stato membro ospitante"[82]. La Corte dunque, nell'abbracciare la stessa conclusione raggiunta nel caso *Dano*, con un'argomentazione più articolata, ma altrettanto poco convincente,

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[76] Punto 28.

[77] Si tratta di prestazioni di sicurezza sociale, ai sensi dell'articolo 3, paragrafo 1, lettera *j*), del regolamento n. 883/2004, le quali sono concesse subordinatamente alla condizione che il richiedente "risieda abitualmente" nel territorio dello Stato membro ospitante, ai sensi dell'articolo 11, paragrafo 3, lettera *e*), in combinato disposto con l'articolo 1, lettera j), di tale medesimo regolamento.

[78] Art. 11, paragrafo 3, lettera *e*).

[79] Punto 63. "L'articolo 11, paragrafo 3, lettera *e*), del regolamento n. 883/2004 persegue non soltanto lo scopo di evitare l'applicazione simultanea di diverse normative nazionali a una determinata situazione e le complicazioni che possono derivarne, ma anche di impedire che le persone che ricadono nell'ambito di applicazione di tale regolamento restino senza tutela in materia di sicurezza sociale per mancanza di una normativa che sia loro applicabile" (punto 64).

[80] Punto 65.

[81] "Spetta in linea di principio alla normativa di ciascuno Stato membro determinare tali condizioni" (punto 65). "Non è quindi possibile dedurre dall'articolo 11, paragrafo 3, lettera *e*), del regolamento n. 883/2004, letto in combinato disposto con l'articolo 1, lettera *j*), del medesimo regolamento, che il diritto dell'Unione osti a una disposizione nazionale che subordina il diritto a prestazioni sociali, come le prestazioni sociali di cui trattasi, al fatto, per il richiedente, di disporre di un diritto di soggiorno legale nello Stato membro interessato" (punto 66).

[82] Punto 68.

ha implicitamente riaffermato che lo Stato membro è abilitato ad incidere sulla sfera applicativa del regolamento. Affermare che il "criterio del diritto di soggiorno" non è atto a snaturare il regolamento, bensì "costituisce parte integrante delle condizioni per la concessione delle prestazioni sociali di cui trattasi"[83], altro non significa che assoggettare la sfera applicativa del regolamento a requisiti estranei ed ulteriori rispetto all'originaria previsione.

Il risultato distorto cui conduce questa conclusione appare evidente se si rammenta l'obiettivo perseguito dal regolamento 883/2004. Se, come è plausibile ritenere, scopo del regolamento è impedire che i soggetti in esso contemplati, cioè i cittadini abitualmente residenti in uno Stato membro, siano privati di protezione in materia di sicurezza sociale per via della mancanza di una normativa che sarebbe loro applicabile, questo risultato potrebbe essere conseguito soltanto se al legislatore nazionale fosse sottratto il potere di determinare la portata e le condizioni di applicazione della propria normativa nazionale in materia[84]. Di converso, abilitando il legislatore nazionale a prevedere condizioni sostanziali suppletive al criterio della residenza, vi sarebbe il rischio di privare il richiedente di una normativa applicabile: quest'ultimo, pur residente nello Stato ospitante, sarebbe sottratto all'operatività del regolamento in assenza di un soggiorno legale; sarebbe, nel contempo, privato di tutela in altri Stati membri, compreso quello di cittadinanza, perché privo del requisito della residenza abituale[85].

Ancora più discutibile è, peraltro, la conclusione raggiunta in relazione alla seconda censura mossa dalla Commissione al Regno Unito. Chiamata a stabilire se "l'introduzione del criterio del diritto di soggiorno nella normativa nazionale comport[i] … una discriminazione diretta, o per lo meno indiretta, vietata dall'articolo 4 del regolamento n. 883/2004"[86], la Corte è stata inevitabilmente condotta su un terreno insidioso, nel quale le conseguenze paradossali derivanti dall'innesto della condizione del soggiorno legale in un tessuto normativo profondamente differente da quello della direttiva 2004/38 emergono in tutta la loro problematicità. Nella direttiva, il soggiorno legale è un criterio utilizzato dal legislatore dell'Unione al fine di sottrarre agli Stati il potere di imporre condizioni unilateralmente determinate nella disciplina della libertà di

[83] Punto 69.
[84] V., al punto 32, quanto sostenuto dalla Commissione.
[85] V., al riguardo, la replica della Commissione al punto 45.
[86] Punto 74.

circolazione; nel regolamento, invece, il soggiorno legale è una condizione aggiuntiva che il legislatore nazionale può eventualmente contemplare nell'esercizio del potere discrezionale che la Corte gli riconosce nell'organizzare il proprio regime di sicurezza nazionale. La differente funzione che il soggiorno legale svolge nell'ambito del regolamento impone di sapere, a differenza che per la direttiva, se il criterio autonomamente determinato dallo Stato determini una discriminazione, diretta o indiretta, nella concessione delle prestazioni sociali di cui trattasi.

Ebbene, proprio sotto questo profilo emerge la difficoltà della Corte nel valutare una condizione che è connaturata alla direttiva, ma è del tutto estranea al regolamento. Qualificare il criterio del soggiorno legale come discriminazione diretta avrebbe la conseguenza di riconoscerne il carattere *ipso iure* illegittimo, impedendo di invocare deroghe[87]. Se la Corte avesse percorso questa strada difficilmente avrebbe potuto negare che il soggiorno legale, producendo l'effetto di sfavorire esclusivamente i cittadini di altri Stati dal beneficio delle prestazioni di sicurezza sociale, è un criterio che determina una discriminazione diretta. In questa prospettiva, la legittimità che la Corte in principio riconosce al soggiorno legale in quanto condizione sostanziale per accedere alle prestazioni sociali sarebbe stata, all'atto pratico, vanificata dall'effetto discriminatorio *diretto* prodotto sui cittadini di altri Stati membri.

Non stupisce, dunque, che la Corte abbia preferito intraprendere un differente percorso, classificando il soggiorno legale come discriminazione indiretta[88]. Le discriminazioni indirette, a differenza di quelle dirette, infatti, ammettono anche giustificazioni, potendo gli effetti discriminatori essere bilanciati alla luce di interessi statali antagonisti. La Corte, dunque, ha preliminarmente affermato che "una disposizione di diritto nazionale dev'essere giudicata indirettamente discriminatoria quando, per sua stessa natura, tenda ad incidere più sui cittadini di altri Stati membri che su quelli nazionali e, di conseguenza, rischi di essere sfavorevole in modo particolare ai primi"[89]. Da questa premessa ne ha concluso che la normativa che prevede il diritto di soggiorno nel Regno Unito "crea una disparità di trattamento tra i cittadini britannici e i cit-

[87] Le discriminazioni dirette, costituendo una sorta di "hard-core restrictions" (v., per questa, definizione S. AMADEO, "Art. 18 TFUE", in A. TIZZANO (a cura di), *Trattati dell'Unione europea*, Milano, 2014, p, 463, in part. p. 477) non tollerano deroghe, salvo quelle ammesse dalle norme particolari del TFUE per motivi di ordine pubblico, sicurezza e sanità pubblica.

[88] Punto 76.

[89] Punto 77.

tadini degli altri Stati membri, dato che una siffatta condizione di residenza è più facilmente soddisfatta dai cittadini nazionali, i quali risiedono abitualmente per lo più nel Regno Unito, che dai cittadini di altri Stati membri, i quali risiedono per contro, in linea generale, in uno Stato membro diverso dal Regno Unito"[90].

All'apparenza lineare, questa linea argomentativa appare fondata su un equivoco. Affermare che il diritto di soggiorno determina una discriminazione indiretta in quanto tale condizione "è più facilmente soddisfatta dai cittadini nazionali, i quali risiedono abitualmente per lo più nel Regno Unito, che dai cittadini di altri Stati membri"[91] significa presumere l'equivalenza di due concetti – quello di soggiorno legale e quello di residenza abituale – profondamente diversi. A ben guardare, infatti, il criterio del diritto di soggiorno si applica, per definizione, soltanto ai cittadini di Stati membri diversi, posto che i cittadini del Regno Unito, per accedere alle prestazioni sociali, non necessitano di provare che il relativo soggiorno sia legale[92]. Delle due, allora, una: se il diritto di soggiorno si impone esclusivamente ai cittadini di Stati membri diversi dal Regno Unito, allora siffatto criterio determina una discriminazione che non può che essere diretta; se vi è disparità di trattamento in conseguenza del fatto che i "cittadini nazionali […] risiedono abitualmente per lo più nel Regno Unito", mentre i "cittadini di altri Stati membri, […] risiedono per contro, in linea generale, in uno Stato membro diverso dal Regno Unito"[93], la discriminazione è – sì – indiretta, ma è determinata dalla condizione di residenza e non, piuttosto, da quella del soggiorno legale.

L'equivoco in cui è incorsa la Corte, con la conseguente qualificazione del soggiorno legale alla stregua di una discriminazione indiretta, ha dunque aperto la strada alla valutazione della legittimità del criterio, altrimenti preclusa in caso di discriminazione diretta.

In applicazione del consueto *test* volto ad accertare la congruità fra misure adottate ed effetti restrittivi, la Corte, dopo aver riscontrato, che "la necessità di proteggere le finanze dello Stato membro ospitante giustifica in linea di principio la possibilità di controllare la regolarità del soggiorno al momento della concessione di una prestazione sociale in particolare alle persone provenienti da altri Stati membri ed economica-

[90] Punto 78.

[91] *Ibidem*.

[92] In particolare, v. C. O'Brien, "A Failed Faustian Pact: Case C-308/14 Commission v UK and the Sacrifice of EU Citizenship", in *Quaderni costituzionali*, 2016, p. 824.

[93] Punto 78.

mente inattive"[94], ha valutato la proporzionalità dello stesso. Anche sotto questo profilo, sia la soluzione abbracciata che l'iter argomentativo percorso non appaiono affatto convincenti.

Nell'intento, verosimilmente, di assicurare un coordinamento tra la direttiva ed il regolamento in merito all'interpretazione del criterio del soggiorno legale, la Corte ha indicato che "[p]er quanto riguarda la proporzionalità del criterio del diritto di soggiorno si deve constatare che, [...], la verifica da parte delle autorità nazionali, [...], del fatto che il richiedente non si trovi irregolarmente nel territorio deve essere considerata una fattispecie di controllo della regolarità del soggiorno dei cittadini dell'Unione, conformemente all'articolo 14, paragrafo 2, secondo comma, della direttiva 2004/38, e deve di conseguenza soddisfare i requisiti di quest'ultima"[95]. Dietro l'apparente linearità di questa argomentazione, si cela un altro equivoco. La Corte non ha sottoposto a sindacato di proporzionalità il requisito del soggiorno legale in sé, ma piuttosto le modalità utilizzate dalle autorità nazionali per accertarne il soddisfacimento nel caso concreto. Nell'affermare, in uno dei paragrafi successivi della sentenza, che la Commissione "non ha fornito elementi che dimostrino che tale *controllo* non risponde alle condizioni di proporzionalità"[96], la Corte sembrerebbe confermare lo slittamento di prospettiva in cui è incappata: indirizzando il sindacato di proporzionalità esclusivamente sulle modalità attraverso cui viene effettuato il controllo del soggiorno legale si dà implicitamente per scontato che quest'ultimo sia un criterio che risponde, *in re ipsa*, ai requisiti di proporzionalità. Così facendo, nell'escludere che "il controllo del rispetto delle condizioni fissate dalla direttiva 2004/38 per l'esistenza del diritto di soggiorno [sia] effettuato sistematicamente e [sia] di conseguenza contrario alle disposizioni dell'articolo 14, paragrafo 2"[97] della direttiva, perviene alla conclusione che il criterio del soggiorno legale "non costituisce una discriminazione vietata ai sensi dell'articolo 4 del regolamento n. 883/2004"[98]. Il criterio del soggiorno legale è dunque fatto salvo, senza essere sottoposto ad alcun controllo di proporzionalità.

In conclusione, le soluzioni assai controverse abbracciate in *Dano* e in *Commissione c. Regno Unito* fanno senz'altro discutere. Tuttavia, se le

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[94] Punto 80.
[95] Punto 81.
[96] Punto 85.
[97] Punto 84.
[98] Punto 86.

forzature di ordine giuridico imposte dalla Corte di giustizia dall’esigenza di coordinare due strumenti funzionalmente diversi – quali la direttiva 2004/38 e il regolamento 883/2004 – sollevano molti dubbi, ciò che lascia davvero sbalorditi è che quelle soluzioni siano state non solo avallate, ma anche formalizzate, nella recente proposta di emendamento del regolamento 883/2004[99], nella quale è inserito un nuovo considerando (5-a) che recita: “[N]ell’applicare il principio della parità di trattamento previsto dal presente regolamento deve essere rispettata la giurisprudenza della Corte. La Corte ha interpretato tale principio e la relazione tra il presente regolamento e la direttiva 2004/38/CE nelle sentenze nelle recenti cause C-140/12 (Brey), C-333/13 (Dano), C-67/144 (Alimanovic), C-299/14 (Garcia-Nieto), C-308/14 (Commissione c. Regno Unito)”.

8. *Considerazioni conclusive*

È difficile non ravvisare in questa complessiva, pur se al momento limitata, evoluzione giurisprudenziale un indizio del processo di mutamento dello stesso paradigma normativo della solidarietà sociale europea. Se lo *status* di cittadinanza europea – soprattutto attraverso la valorizzazione che la Corte ne ha saputo dare in passato – ha, senza ombra di dubbio, avuto il merito di universalizzare la logica dell’integrazione sociale, fino ad allora saldamente incardinata ad una visione prettamente mercantilistica, le pronunce esaminate – che fanno seguito ad altre dello stesso tenore – nell’affermare la centralità del requisito dell’‘autosufficienza economica’ – quale condizione della libertà di movimento delle persone all’interno dell’Unione – ripropongono di quella solidarietà sociale europea una concezione legata al funzionamento del mercato interno[100].

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[99] Proposta di Regolamento del Parlamento Europeo e del Consiglio che modifica il regolamento (CE) n. 883/2004 relativo al coordinamento dei sistemi di sicurezza sociale e il regolamento (CE) n. 987/2009 che stabilisce le modalità di applicazione del regolamento (CE) n. 883/2004 (Testo rilevante ai fini del SEE e per la Svizzera) - Orientamento generale (26 giugno 2018, 10295/18, fascicolo interistituzionale: 2013/0397 (COD), in *http://data.consilium.europa.eu/doc/document/ST-10295-2018-INIT/IT/pdf*). V., *infra*, il contributo di M. MORSA.

[100] V. H. VERSCHUEREN, “Preventing Benefit Tourism in the EU: A Narrow or a Broad Interpretation of the Possibilities Offered by the ECJ in Dano?”, in *Common Market Law Review*, 2015, pp. 363-390; N.N. SHUIBHNE, “Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship”, in *Common Market Law Review*, 2015, pp. 889-938; H. VERSCHUEREN, “Free Movement of EU Citizens: Including the Poor?”, cit., pp. 10-34.

Se l'accesso ai sistemi di *welfare* degli Stati membri anche da parte dei cittadini economicamente inattivi ha dunque rappresentato un elemento costitutivo della cittadinanza dell'Unione, quale statuto d'integrazione sociale centrato sul principio della parità di trattamento, ora, questo accesso torna ad essere funzionale alla piena effettività del mercato comune e, di conseguenza, precluso a coloro che, essendo economicamente non autosufficienti, non concorrano ad alimentarne le dinamiche.

In conclusione, l'impressione, difficile da dissipare, è che, da uno statuto di integrazione sociale tendenzialmente protettivo ed inclusivo, che favorisce la libera circolazione del cittadino europeo in quanto tale e ne garantisce un trattamento non discriminatorio, si sarebbe tornati (o si starebbe tornando) ad un modello di solidarietà sociale selettivo.

FRANCESCO COSTAMAGNA*

REGULATORY COMPETITION IN THE SOCIAL DOMAIN AND THE REVISION OF THE POSTED WORKERS DIRECTIVE

1. *Introduction*

Regulatory competition in the social domain has been regarded as a threat for the legitimacy and the acceptability of the European integration process since its early days. For instance, one of the conditions for the gradual realization of the free circulation of workers was, in the words of the Spaak Report of 1956, the granting to the Commission of the power to «decide on the necessary protection measures in order to avoid an inflow of labor which would be dangerous for the standard of living or employment of workers in certain specified industries»[1]. In that context, differences in the employment protection between Member States was considered as a factor that could distort competition within

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[1] Information Service High Authority of the European Community for Coal and Steel, *The Brussels Report on the General Common Market*, 1956, 19.

the internal market. At that time, the introduction of the principle of non discrimination with regard to pay and working conditions was mainly conceived as an antidote against this risk. As emphasised by the Court in a judgment of 1973, the principle «has the effect of not only allowing in each State equal access to employment to the nationals of other Member States, but also, in accordance with the aim of Article 177 of the Treaty, [...] guaranteeing to the State's own nationals that they shall not suffer the unfavourable consequences which could result from the offer or acceptance by nationals of other Member States of conditions of employment or remuneration less advantageous than those obtaining under national law, since such acceptance is prohibited»[2]. The same logic also informed the explicit commitment to equal pay between men and women included in the Treaty of Rome[3] to allay the concerns of certain Member States – France, in particular –, fearing that their ambitious legislation protecting gender equality might disadvantage their undertakings *vis-à-vis* their competitors[4].

The visibility of the problem increased in the second half of the 1980s and in the 1990s, when EU institutions mobilized to complete the internal market[5]. The removal of the barriers to the free circulation of capitals, goods and services increased undertakings' freedom in choosing where to locate their activity. Moreover, the principles of mutual recognition and market access, two central tenets of the Court of Justice's case law on the internal market, limited Member States' capacity to impose their own standards. Therefore, the differences in the levels of social protection became one of the main factors determining Member States' relative competitiveness in a race that no longer concerned only undertakings, but also regulatory systems[6]. The existence of these differences was

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[2] ECJ, 4 April 1974, C-167/73, *Commission v. France*, para. 45.

[3] Article 119 Treaty on the European Economic Community (now Article 157 TFEU).

[4] C. BARNARD, *EU Employment Law*, Oxford, 2013, 36. See also ECJ, 8 April 1976, 43/75, *Defrenne II*, paras. 9-10.

[5] In 1985 the Commission adopted a White Paper (European Commission, *Completing the Internal Market. White Paper from the Commission to the European Council*, 14 June 1985, COM(85) 310 final) that gave a strong push toward the completion of the internal market. See C.D. EHLERMANN, *The "1992 Project": Stages, Structures, Results and Prospects*, in *Michigan Journal of International Law*, 11, 1990, 1103. The author pointedly observed that «[t]he '1992 Project' has radically changed the European Community. It has given the 'common market' new impetus and has lifted the Community out of the deep crisis in which it was bogged down in the first half of the 1980's».

[6] F. DE WITTE, *The Architecture of EU's Social Market Economy*, in P. KOUTRAKOS, J. SNELL (eds), *Research Handbook on the Law of the EU's Internal Market*, Cheltenham-Northampton, 2016, 124.

a corollary of the choice to leave social policy in the realm of Member States' exclusive competences[7]. In that regard, early hopes about the possibility that the creation of a common market could automatically foster convergence toward higher social standards proved to be over optimistic.

The debate reignited after the 2004 eastward enlargement of the European Union and a number of judicial decisions where the EU Court of Justice (CJEU) adopted a "total market thinking" approach[8]. "Losing" States reacted by claiming that the promotion of free movement at the expenses of their capacity of exercise regulatory functions in the social sphere could contribute to a dangerous "race-to-the-bottom" with regard to workers' rights and spur on heinous forms of regulatory competition. Conversely, "winner" States hailed the attempt by the CJEU to rein in protectionist regulatory policies that undercut their competitive advantage, by limiting their capacity to fully exploit their lower labour costs.

What is still unclear is how far national authorities can go in confronting regulatory competition in the social domain: whether they have to accept it as an inevitable consequence of the internal market or whether they can consider it as an abuse and, thus, take action against it. The chapter addresses this question by dealing with the case of posted workers, which is now the most controversial aspect of the debate on this form of regulatory competition, despite it being just one of the possible ways in which undertakings established in countries with lower labour costs can exploit their competitive advantage. More in detail, the chapter focuses on the debate concerning regulatory competition in the light of the revision of the Posted Workers Directive ('PWD'). To this end, the analysis proceeds as follows. First, it looks at the relationship between regulatory competition and posting of workers, by reviewing the original content of the PWD and by critically analysing the case-law of the Court. The second part of the analysis focuses on the revised PWD by taking into consideration the Commission's Proposal, Member States' positions and role of the European Parliament in the quest for a better balance between the "economic" and the "social" in this context.

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[7] C. Barnard, *Fifty Years of Avoiding Social Dumping? The EU's Economic and Not So Economic Constitution*, in M. Dougan, S. Currie (eds), *Fifty Years of the European Treaties. Looking Back and Thinking Forward*, Oxford and Portland, 2009, 314-315. See generally S. Giubboni, *Social Rights and Market Freedoms*, Cambridge, 2006.

[8] E. Christodoulidis, *The European Court of Justice and "Total Market Thinking"*, in *German Law Journal*, 10, 2013, 2005-2020. See also C. Joerges, F. Rödl, *Informal Politics, Formalized Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in* Viking *and* Laval, in *European Law Journal*, 15, 2009, 1-19.

2. *Regulatory competition in the social domain and the Posted Workers Directive*

2.1. *Regulatory competition and posting of workers in a nutshell*

Posting is a peculiar form of cross-border labour mobility that is currently perceived as one of the main vehicles for labour cost competition in the EU. Some commentators challenge this perception, pointing to the limited practical impact of this form of labour mobility if viewed from a more general perspective[9]. In particular, they point to the fact that data, although couched in considerable uncertainty, seem to show that posting is actually quite limited from a quantitative point of view, affecting just 1% of the total number of employees in the EU. Furthermore, labour cost differentials, although certainly very important, are not the only driver in this context[10]. More than 35% of all postings takes place in high-value chains and concerns a highly-skilled workforce. In these cases, labour standards' differentials are not an issue and certainly not the reason why undertakings post their workers in another member State[11].

However, this picture is too static and unable to grasp with the complexity of the phenomenon at stake. First, over the last few years posting of workers has increased quite markedly, becoming the fastest growing form of cross-border labour mobility in the EU. According to the Commission, from 2010 to 2014 the average annual rate of increase has been 9.6%[12]. The crisis has certainly contributed much to the trend, exacerbating wage differentials between Member States and turning countries that used to be net receivers of posted workers into net senders.

Second, data need to be disaggregated to have a better understanding of the situation, since the impact of posting varies considerably across sectors. Construction is the most important target sector, due to

[9] F. De Wispelaere, J. Pacolet, *An Ad Hoc Statistical Analysis on Short Term Mobility - Economic Value of Posting of Workers. The Impact of Intra-EU-Cross-Border Services, with Special Attention to the Construction Sector* (Research Commissioned by the DG EMPL), Leuven, 2016, 17.

[10] See generally, E. Voss, M. Faioli, J.-P. Lhernould, F. Iudicone, *Posting of Workers Directive - Current Situation and Challenges*, Study for the EMPL Committee, 2016, 14-20.

[11] With specific regard to the Belgian situation, see N. Mussche, V. Corluy, I. Marx, *How Posting Shapes a Hybrid Single European Labour Market*, in *European Journal of Industrial Relations*, 2017, 7-8.

[12] European Commission, *Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. Impact Assessment*, 8.3.2016, SWD(2016) 52 final, 67.

its labour-intensive and price-sensitive nature and due to the fact that delocalization is not an option in this context[13]. In some countries, such as Sweden, Finland and Austria, construction posted workers represent over half of the total number of the workers received in a single year[14]. Furthermore, the European Builders Confederation estimated that between 2011 and 2014 around 15,000 construction workers in Belgium (8% of the total) lost their job due to «unfair competition showed by a constant increase of posted workers»[15].

Lastly, the effects of posting have symbolic and political implications that go well beyond their economic relevance. Indeed, EU law forces the receiving State to tolerate the presence on its own territory of workers that carry out their activity without respecting all the terms and conditions applied to national workers. In some cases, the differences between local workers and posted ones are quite substantial and, thus, highly problematic from a political point of view. This is the case of wage differences that, in some countries and in some sectors, can be around 50%[16]. Moreover, the EU regulatory framework left much room for abusive practices by undertakings wishing to evade employment or social security legislation. This is especially true in the case of posting through temporary employment agencies: there are reports of agencies that have been set up in locations that are convenient in terms of social security costs with the sole purpose of sourcing workers in more expensive countries[17].

2.2. *The Posted Workers Directive: the attempt to insulate national labour regimes from the market*

Posted workers are workers that, in the context of the trans-border provision of services, temporarily carry out their activity in the territory of a Member State different from the one in which they normally work. Unlike other forms of intra-EU labour mobility, posting is covered by the provisions on the free movement of services and not by those on the free

[13] R. ZAHN, *Revision of the Posted Workers' Directive: Equality at Last?*, in *Cambridge Yearbook of European Legal Studies*, 19, 2017, 198.

[14] European Commission, *Impact Assessment*, cit., 55-66.

[15] European Builders Confederation, *Posting of workers: European Small Construction Entrepreneurs Welcome Revision*, 8 March 2016 available at *http://www.ebc-construction.eu/fileadmin/Pubblications/Press_releases/2016/2016_03_08_EBC_on_EC_PWD_revision_EN.pdf*.

[16] VOSS *et al.*, cit., 37.

[17] ZAHN, cit., 197.

movement of workers[18]. This means that posted workers do not benefit from the full application of the principle of non-discrimination with regard to pay and working conditions. Indeed, the imposition of equality of treatment with national workers is a restriction to the free movement of services, making less attractive their provision by undertakings established in another Member States[19]. The Court made clear that this does not prohibit Member States from «extending their legislation, or collective labour agreements […] to any person who is employed, even temporarily, within their territory»[20]. Nonetheless, they can do so only in so far as they meet overriding requirements in the public interest and they do not go beyond what it is necessary to achieve such objective. Therefore, with regard to posted workers non-discrimination and the application of labour law in accordance with the territoriality principle are treated as exceptions and not the rule.

What the Court failed to do is identifying which rules receiving Member States could impose upon posting undertakings. EU institutions sought to fill the gap with the enactment of the PWD[21], which was adopted after a lengthy and heated debate between Member States more likely to export labour and those more likely to be on the receiving end[22]. The PWD reflected, thus, the compromise between these two groups of States, trying to find a point of equilibrium between competing interests: on the one side, the promotion of the free circulation of services and, on the other, the preservation of receiving States' capacity to impose their own labour standards. The latter has been mostly considered being coterminous with the protection of posted workers' rights, assuming that safeguarding national regulatory systems' integrity would invariably go in their favour. However, as pointedly observed by Davies, the interests of these workers are more ambiguous, since «they stand to benefit from the host State's higher standards, but only if their employers continue to ob-

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[18] E. VERSCHUEREN, *The European Internal Market and the Competition Between Workers*, in *European Labour Law Journal*, 6, 2015, 136.

[19] Extensively, on the interpretation of the notion of 'restriction' by the Court see S. DEAKIN, *Regulatory Competition in Europe After* Laval, Centre for Business Research, University of Cambridge, Working Paper No. 364, 2008, 2-6.

[20] ECJ, 27 March 1990, C-113/89, *Rush Portuguesa*, para. 18.

[21] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 *concerning the posting of workers in the framework of the provision of services*, OJ L 18 of 21.1.1997, 1-6.

[22] J. DRUCKER, I. DUPRE, *The Posting of Workers Directive and Employment Regulation in the European Construction Industry*, in *European Journal of Industrial Relations*, 4, 1998, 311-312.

tain the contracts which make the secondments necessary»[23]. The preservation of receiving States' regulatory autonomy pursues objectives that go beyond posted workers' rights, such as, as duly recognized in the Preamble of the Directive, contributing to a «climate of fair competition».

The drafters of the PWD struck a balance that was quite favourable to receiving Member States. It is quite telling in that regard that two of the then most likely exporters of posted of workers, the UK and Portugal, respectively ended up voting against the Directive and abstaining from the vote. Despite encased in an internal market shell, the PWD had a strong social content, aiming at insulating national labour regimes from the pressure generated by the process of economic integration[24].

As for the shell, the act was adopted on the basis of Articles 57 and 66 EEC, i.e. provisions that guarantees the free provision of services. Furthermore, several paragraphs of its Preamble reiterated the need of removing the obstacles to the free circulation of services, while paying far less attention to the advancement of conflicting social objectives.

Conversely, the substantive content of the PWD was very much attentive to the preservation of receiving States' regulatory autonomy, even at the expense of the free movement of services. First, Article 3(1) set a list of seven basic labour standards that Member States must ensure apply to posted workers. The items of the list are: working hours, holidays, supply of workers by agencies, health and safety, protection of pregnant workers, children and young people, equality between men and women and – the most relevant one – minimum rates of pay. The PWD did not aim to harmonize national labour legislations, leaving the task of defining the content of these standards to national authorities and social partners. The PWD only set some limits with regard to the instruments that Member States can use to define the standards. Article 3(1) established that these terms and conditions had to be laid down either by «law, regulation or administrative provision» or by «collective agreements or arbitration awards which have been declared universally applicable». According to Article 3(8), the latter, at least with regard to the construction sector, were «collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned». The formula would seemingly allow Member States to «substitute for the test of obligation the test of applicability in

[23] P. DAVIES, *Posted Workers: Single Market or Protection of National Labour Law Systems?*, in *Common Market Law Review*, 34, 1997, 574.

[24] DE WITTE, *cit.*, 127-128.

fact or even that of the representative status of the parties which negotiated the agreement»[25].

Secondly and, to some extent, more importantly, the EU legislator conceived the PWD as setting just a minimum floor, allowing Member States to go beyond it. On the one hand, Article 3(7) stipulated that PWD's provisions «shall not prevent application of terms and conditions of employment which are more favourable to workers». On the other hand, Article 3(10) enabled the receiving State to apply to posted workers rules governing matters that were not included in the list of Article 3(1), provided that these rules are «public policy provisions» and they do not discriminate against service providers coming from other Member States.

2.3. *Posting of workers in the case-law of the Court: upsetting the balance*

The balance struck by the legislator was seen as a threat to the freedom to provide services. The Court, in a series of judgments often dubbed as the "Laval quartet"[26], sought to respond to these concerns, by re-orienting the normative framework on posting toward the pursuit of market-related objectives. Structurally, the shift transformed what had been conceived as a tool aimed at curbing regulatory competition in the social domain into a tool fostering it. To put it differently, it converted the PWD from «an ornament of the social policy of the Community»[27] into an instrument constraining national authorities' autonomy in the exercise of their social competences.

Operationally, the transformation of the PWD materialized in two main steps. The first was the reversal of the idea that the PWD only codified a minimum level of protection of posted workers' rights, leaving intact the possibility for receiving States to go beyond it. In *Laval*, the Court adopted a *contra legem* interpretation of Article 3(7), by stating that it «cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory

[25] DAVIES, cit., 580.

[26] A. KOUKIADAKI, *The Far-Reaching Implications of the Laval Quartet: The Case of the UK Living Wage*, in *Industrial Law Journal*, 43, 2015, 91-121. These cases prompted an intense debate that has been reviewed by C. BARNARD, *The Calm After the Storm: Time to Reflect on EU (Labour) Law Scholarship Following the Decisions in* Viking *and* Laval, in A. BOGG, C. COSTELLO, A.C.L. DAVIES (eds), *Research Handbook on EU Labour Law*, Cheltenham-Northampton, 2016, 337-362.

[27] DAVIES, *cit.*, 602.

rules for minimum protection»[28]. Likewise, in *Commission v. Luxembourg* the Court adopted a narrow interpretation of the public policy clause contained in Article 3(10), limiting the possibility to invoke it in order to go beyond the list of minimum standards set by the PWD only when tere is a serious threat to a fundamental interest of society[29].

The second step concerned the instruments that Member States can use to impose their own labour standards upon posting undertakings. In particular, the Court adopted a restrictive interpretation of the notion of universally applicable collective agreements, ruling out the possibility to extend to posted workers terms and conditions contained in agreements that are generally binding agreements only *de facto*. The Court adopted this stance in a string of judgments concerning the interplay between posting and public procurement. These cases touched upon a very sensitive issue, such as the possibility for Member States to use public procurement as a tool to advance non-economic objectives[30]. This possibility is expressly provided for by EU public procurement law. Both Article 26 of Directive 2004/18/EC[31] and, albeit in a slightly different way, Article 70 of Directive 2014/24/EU[32] allow national institutions to lay down special conditions governing the performance of the contract that concern social and employment-related considerations. In this context, the application of the requirements set forth in the PWD, read jointly with Treaty provisions of the free provision of services, act as a constraint on Member States' autonomy.

The first of this line of judgments was *Rüffert*, a case concerning the compatibility with EU law of the law of Lower Saxony on the award of public contracts (*Landesvergabegesetz*), which provided that contracts for building services could be awarded only to tenderers that undertake to pay their employees at least the remuneration prescribed by the 'Build-

[28] ECJ, 18 December 2007, C-341/05 *Laval*, para. 80.

[29] ECJ, 19 June 2008, C-319/06, *Commission v. Luxembourg*, paras. 23-71.

[30] See R. Caranta, *The Changes to the Public Contract Directives and the Story They Tell About How EU Law Works*, in *Common Market Law Review*, 2015, 394-409; S. Montaldo, *La dimensione sociale degli appalti pubblici nel diritto dell'Unione europea*, in *Politiche sociali*, 2015, 347-360; S. Arrowsmith, P. Kunzlik, *Public Procurement and Horizontal Policies in EC Law: General Principles* in S. Arrowsmith, P. Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law. New Directives and New Directions*, Cambridge, 2009, 12-15.

[31] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 *on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*, OJ L 134 of 30.4.2004, 114-240.

[32] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 *on public procurement and repealing Directive 2004/18/EC*, OJ L 94 of 28.3.2014, 65-242.

ings and public works' collective agreement. The Court answered in the negative, holding that minimum wages are not enforceable in the context of trans-border provision of services when laid down through collective agreements that, despite having *de facto* a general scope of application, have not been declared universally applicable[33]. The restrictive reading of this clause rested on a one-sided conception of the objective of the PWD, which, according to the Court, is primarily meant to «bring about the freedom to provide services» and not also to ensure «a climate of fair competition and [...] respect for the rights of workers». By making form prevail over substance, the Court allowed – or even forced – national political authorities to intrude into spaces that had been left to the autonomy of social partners. Despite this was enough to settle the case, the Court went further[34], finding that the law at stake contrasted with Article 56 TFUE, read in the light of the PWD. Imposing a minimum wage requirement only to those performing a public contract, in the eyes of the Court amounts to an unjustifiable restriction to the free circulation of services, due to its selective character[35]. The reference to this form of discrimination finds no basis in EU law and severely limits Member States' capacity to act as socially-responsible buyers, by making sure that public moneys are spent on contractors that abide by standards higher than those prevailing in private sector transactions or, at least, in a way that does not foster regulatory competition within their territory[36].

Quite remarkably, the Court adopted the same restrictive approach also in situations where the PWD was not even applicable. This is the case of *Bundesdruckerei*, a judgment concerning, once again, the inclusion of a minimum wage clause in a call for tender issued by the City of Dortmund for the digitalisation of documents and the conversion of data for the urban planning service of the city[37]. One of the participants purported to have the service performed in Poland by a subcontractor established in that country and, thus, challenged the compatibility of the clause with EU law. The Court started by excluding the applicability of the PWD, by pointedly observing that Polish workers were going to per-

[33] ECJ, 3 April 2008, C-346/06, *Rüffert*, para. 27. For a comment of the judgment see S. BORRELLI, *Social Clauses in Public Contracts, the Posted Workers Directive and Article 49 EC: the Rüffert Case*, in *Transfer: European Review of Labour and Research*, 2, 2008, 358-362.

[34] C. KILPATRICK, *Internal Market Architecture and the Accommodation of Labour Rights: As Good as It Gets?*, EUI Working Paper LAW 2011/04, 14.

[35] *Rüffert*, cit., paras. 36-40.

[36] VERSCHUEREN, cit., 149.

[37] ECJ, 7 November 2011, C-549/13 *Bundesdruckerei*.

form the service from their home country without being posted in the German territory[38]. This notwithstanding, the argumentative path followed by the Court coincides with the *Rüffert*'s one. In particular, the judgment confirmed that imposing a minimum wage on contractors and subcontractors established in another Member State represent a restriction under Article 56 TFUE[39]. Furthermore, it reiterated the argument elaborated in *Rüffert* according to which this restriction cannot be considered as a measure necessary to advance the position of workers and to avoid social dumping, as the requirement only apply in the context of public contracts and not to the benefit of employees working in the private sector[40]. Lastly, the Court added that the measure is disproportionate in so far as it seeks to extend a level of retribution that may be reasonable in Germany to a country where minimum wage rates and the cost of living are sensibly lower. This attempt, observed the Court, «prevents subcontractors established in the Member State from deriving a competitive advantage from the differences between respective rates of pay»[41]. The latest remark, even though referred to *Bundesdruckerei*'s specific factual situation, suggests that wage competition went from being an unintended consequence of the internal market that States have the right to limit and resist to a built-in feature that States have to tolerate.

3. *Curbing Regulatory Competition in the Social Domain by Amending the PWD?*

3.1. *The genesis of a controversial act*

The pro-market approach adopted by the Court, the growing relevance of the phenomenon, the increase of proven cases of malpractice and abuses, coupled with a mounting hostility against free movement of workers more in general contributed to increase the demands of revision of the posting of workers' regulatory framework.

In 2012, the Commission issued a proposal for a Directive focusing on the enforcement of the PWD. The Enforcement Directive[42], adopted

[38] *Ibid.*, para. 27.
[39] *Ibid.*, para. 30.
[40] *Ibid.*, para. 32.
[41] Para. 34.
[42] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 *on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administra-*

in 2014, aims at establishing a common framework of competent authorities and liaison offices so to ensure a more uniform implementation of the PWD and reduce the space for abusive practices[43]. More in detail, it sets out the procedure and substantive elements to be taken into account in order to identify "genuine posting"[44], it requires Member States to make sure that terms and conditions of employment applicable to posted workers are clearly available[45] and it enhances the cooperation between national authorities with regard to the application and enforcement PWD[46]. Furthermore, it identifies which information receiving Member States can request from service providers to ensure effective monitoring of compliance with the PWD[47]. Lastly, it introduces subcontracting liability, by allowing Member States to ensure «that in subcontracting chains the contractor of which the employer (service provider) covered by Article 1(3) of Directive 96/71/EC is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker»[48].

Despite touching upon several controversial issues, the Enforcement Directive does not – and was not intended to – directly confront the key question lying at the core of the whole debate, i.e. the balance between the "economic" and the "social" within the posting of workers' regulatory framework. In June 2015, a group of "higher wage" countries wrote a letter to Commissioner Thyssen calling for a review of the PWD «in a context of preventing social dumping and abuse of the free movement of services» and striving to rebalance the conflicting interests at stake[49]. Few months later, "lower wages" countries reacted by rejecting the claim that there was an urgent need to revise the PWD, especially in a moment in which it was unclear what would be the effect of the Enforcement Directive. Moreover, these countries also warned against the negative implications that a revision of the PWD could have on the functioning of the internal market[50].

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tive cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L 159 of 28.5.2014, 11-31.

[43] Article 3.

[44] Article 4.

[45] Article 5.

[46] Articles 6-8.

[47] Articles 9-10.

[48] Article 12.

[49] Available at *https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/brieven/2015/06/19/brief-aan-eurocommissaris-thyssen-over-de-detacheringsrichtlijn/letter-like-minded-ministers-posting-of-workers-def.pdf*.

[50] Available at *http://arbetsratt.juridicum.su.se/euarb/15-03/nio_medlemsstater_utstationeriongsdirektivet_augusti_2015.pdf*.

In March 2016 the Commission adopted a Proposal for a revision – and not just a "targeted review" as originally envisaged – of the PWD[51]. According to the Commission, the PWD was out of touch with the current economic reality and, in particular, with the growth in wage differentials that further incentivizes the use of posting as an instrument for unfair competition. Therefore, it was necessary to revise the rules on the terms and conditions applicable to posted workers and, in particular, to make sure that the same work at the same place is remunerated in the same manner[52]. At least at first sight, the Proposal was very much responsive to the concerns expressed by high-wage countries, seeking to reduce the possibility to use labour costs' differentials as competitive factors in the context of posting. The Proposal caused much controversy, revealing the depth of the fault between high-wage and low-wage countries. This is very much evident if one considers the reaction of national parliaments participating to the legislative process. Whereas the French Parliament lamented the fact that the Proposal was not bold enough in promoting the principle of equal pay for posted workers, ten national parliaments[53] of Central and Eastern European States[54] issued reasoned opinions in the context of subsidiarity control mechanism under Protocol No. 2, triggering a yellow card against the Commission[55]. These opinions were quite comprehensive, touching upon issues that go beyond just the violation of the principle of subsidiarity. In particular, almost all these parliaments expressed concerns as to the negative effects that the Revised PWD could have on the competitiveness of lower-wage countries and, thus, on their undertakings' ability to have access to lucrative mar-

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[51] EUROPEAN COMMISSION, *No Time for Business as Usual. Commission Work Programme 2016*, 26 November 2015, COM(205) 610 final, 8.

[52] *Commissioner Thyssen presents Commission's Social Package: First outline of the European Pillar of Social Rights and reform of the Posting of Workers Directive*, 8 March 2016. Available at *http://europa.eu/rapid/press-release_SPEECH-16-682_en.htm*.

[53] More precisely, also the Danish Parliament issued a reasoned opinion, but it raised arguments not in line with those of the other parliaments, In particular, it focused on the perceived intrusion of the Proposed Directive into domains that should be Member States' exclusive preserve.

[54] Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia. Specifically on the Latvian position, see Z. RASNAČA, *Identifying the (dis)placement of 'new' Member State Social Interests in the Posting of Workers: the Case of Latvia*, in *European Constitutional Law Review*, 14, 2018, 131-153.

[55] See specifically D. JANCIC, *EU Law's Grand Scheme on National Parliaments: The Third Yellow Card on Posted Workers and the Way Forward*, in D. JANCIC (ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?*, Oxford, 2017, 299-312.

kets. Unlike in the case of the Monti II Regulation[56], the Commission offered an unwavering response, deciding to maintain the Proposal without even amending it[57]. Few days later, in his State of the Union, President Juncker reiterated that «workers should get the same pay for the same work in the same place. This is a question of social justice. And this is why the Commission stands behind our proposal on the Posting of Workers Directive. The internal market is not a place where Eastern European workers can be exploited or subjected to lower social standards. Europe is not the Wild West, but a social market economy»[58].

Despite the Commission's dedication, the proposed reforms sparked much controversy among Member States, as well as within the European Parliament. It was only after 23 months of negotiations, in February 2018, that negotiators on behalf of the European Parliament, the Council and the Commission reached a common understanding on a possible agreement. The final text was then approved by the European Parliament on 29 May 2018 and by the Council on 21 June 2018[59].

3.2. *Still an exclusively internal market act? The legal basis of the Revised PWD*

A first tricky issue with regard to the attempt of imbuing with greater social sensitivity the posted workers' regulatory framework was the identification of the legal basis of the Revised PWD. The Commission chose the safest route, basing its proposal on Articles 53 and 62 TFEU, which correspond to the original Articles 57 and 66 TEEC.

Conversely, the European Parliament proposed to add also Article

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[56] European Commission, *Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services*, 21.3.2012, COM(2012) 130 final. The Commission decided to withdraw the proposal after 19 parliamentary chambers expressed their discontent with it. See F. Fabbrini, K. Granat, *"Yellow Card but no Foul": The Role of National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike*, in *Common Market Law Review*, 50, 2013, 115-143.

[57] European Commission, *Communication on the Proposal for a Directive Amending the Posting of Workers Directive, with Regard to the Principle of Subsidiarity, in Accordance with Protocol No. 2*, 20 July 2016, COM(2016) 505 final.

[58] European Commission, *State of the Union Address 2016: Towards a better Europe - a Europe that protects, empowers and defends*, 14 September 2016.

[59] Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 *amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, OJ L 173 of 9.7.2018, 16-24.

153(1), (a) and (b), TFEU in conjunction with Article 153(2) TFEU[60]. According to the proponents, these provisions allow the Parliament and the Council to adopt directives aiming at improving the working environment and conditions and, therefore, they would represent a possible foundation for the adoption of the act at stake. In their view, adding this legal basis would contribute to uphold the credibility of the commitment toward rebalancing the protection of workers' rights and the free movement of services in the context of posting. Indeed, as repeatedly stressed by the CJEU, the choice to adopt a dual legal basis can be justified if «the act simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other»[61]. Conversely, the choice to have just one legal basis is correct when the act pursues different objectives, but one of them is the predominant one. Therefore, the Parliament's proposal to enlarge the legal basis of the act seemed perfectly congruent with the idea that the Revised PWD should not just be an internal market act with a strong social content, but a legal instrument that pursues the two set of objectives on an entirely equal footing[62].

The European Parliament's proposal has been rejected and the Revised PWD is exclusively based on Articles 53(1) and 62 TFEU. The choice reaffirms the predominantly internal market character of the act, relegating the safeguard of competing objectives to a second-tier status. This may offer to the CJEU a strong interpretative tool to defend its stubborn pro-market stance when it comes to apply the provision of the Revised PWD. Moreover, Article 153 TFEU could have formed a basis for those parts of the Revised PWD that seek to "encourage cooperation between Member States" in the attempt to reduce the space for circumventions, fraud and abuses. In particular, Article 4(2) of the Revised PWD requires Member States to «make provision for cooperation between the public authorities […] responsible for monitoring the terms and conditions of employment», empowering the Commission to «take

60 European Parliament, *Report on the Proposal for a Directive of the European Parliament and of the Council Amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 Concerning the Posting of Workers in the Framework of the Provision of Services*, 19 October 2017, A8-0319/2017, amendment 1.

61 ECJ, 10 January 2006, C-178/03, *European Commission v. European Parliament and Council*, para. 43.

62 European Parliament, *Opinion of the Committee on Legal Affairs on the Legal Basis*, 15 June 2017.

appropriate measures» when the sending State fails to provide timely information to the receiving State.

3.3. *Equal pay for equal work: objective or chimera?*

The main objective of the revision of the PWD was curbing the use of posting as a vehicle that undertaking can use to exploit the wage differences existing between Member States. In this regard, one of the most debated aspects of the revision is the shift from "minimum rates of pay" to "remuneration" in Article 3(1)(c) PWD. This change should contribute to create a level playing field, reducing the pay gap between posted workers and local ones[63]. Admittedly, the notion of "remuneration" is broader that just "minimum rates of pay" and should allow receiving States to require posting undertakings to pay their workers not just the minimum but a salary comprising a richer set of elements. This is the case, for instance, of seniority allowances, allowances for dirty work or 13th or 14th month bonuses[64]. The shift builds on the *Sähköalojen ammattiliitto* judgment, where the CJEU had already adopted a broader interpretation of the notion of minimum wage, so to include a daily allowance and the compensation for daily travelling time[65]. Quite interestingly, the judgment put much emphasis on the need to avoid that the calculation of the minimum wage could become a matter of choice for an «employer who post employees with the sole aim of offering lower labour costs than those of local workers»[66].

The shift toward the notion of "remuneration" is complemented by two other elements of novelty that are worth to be considered. First, the revised version of Article 3 PWD makes clear that the notion of remuneration is to be defined by «national law and/or practice of the Member State to whose territory the worker is posted», in accordance with the settled case-law of the CJEU. Quite remarkably, the Commission's Proposal omitted any such reference. Moreover, the final version of the Revised PWD amended Recital 12 of the Commission's Proposal. This recital acknowledged that «[i]t is within Member States' competence to set rules on remuneration in accordance with their laws and practice», but it added that these rules «must be justified by the need to protect

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[63] European Commission, *Impact Assessment*, cit., 13.

[64] *Ibid.*, 24.

[65] ECJ, 12 February 2015, C-396/13, *Sähköalojen ammattiliitto ry contro Elektrobudowa Spolka Akcyjna*, paras. 46-57.

[66] *Ibid.*, para. 41.

posted workers and must not disproportionately restrict the cross-border provision of services». The reference to the proportionality test could enable the Court to meddle with the decisions adopted at national level with regard to the calculation of the remuneration, potentially forcing national authorities to justify their choices in this regard. As advocated by the European Parliament, the EU legislators deleted the second sentence, making clear instead that «[t]he setting of wages is a matter for the Member State and the social partners alone. Particular care should be taken not to undermine national systems of wage setting and the freedom of the parties involved»[67]. The only limits to national authorities' autonomy are procedural, concerning the legal instruments to be used and the need to make their choices transparent, by publishing the relevant information on a single official national website. Article 3(1), last paragraph, establishes that the failure to publish on the website the terms and conditions of employment is to be «taken into account […] in determining penalties in the event of infringements […], to the extent necessary to endure the proportionality thereof».

Second – and, to some extent, more importantly – the Revised PWD expands the set of legal instruments that Member States can resort to in order to identify the constituent elements of the remuneration to be paid to posted workers. As seen above, this a highly controversial issue, due to the restrictive approach adopted by the CJEU in the *Rüffert* line of judgments. In response to that, the new Article 3(8) of the Revised PWD allows national authorities to require posting undertakings to respect the terms and conditions of employment, including remuneration, established in collective agreements that have not been declared universally applicable, even in the presence of a system to do so. In particular, these requirements can be laid down in agreements that are «generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned» and/or that «have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory»[68]. Moreover, unlike in the previous version of the PWD, the requirement to apply collectively agreed standards would no longer operate only in the construction industry, but in all sectors.

At least on paper, the reform, which has been vigorously pursued by the European Parliament[69] with a strong backing by trade unions, is a

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[67] Recital 17.

[68] Davies, cit., 580.

[69] European Parliament, *Report*, cit., amendment 33.

step toward the realization of the promise of equal pay for equal work[70], potentially reducing the gap between local workers and posted ones. However, the real impact of the reform needs to be evaluated in the light of the subsequent subparagraphs of the provision at stake. The first of these subparagraphs subordinates the applicability of these collectively agreed standards to the condition that such application does not go beyond ensuring equality of treatment between national and posting undertakings «which are in a similar position». This is to avoid that the imposition of terms and conditions contained in agreements not officially declared as having universal application can produce inequality, by forcing posting undertakings to abide by requirements that are not binding on national enterprises. For greater certainty, the next subparagraph defines the notion of «equality of treatment», stating that it is deemed to exist when national undertakings are subject, «in the place in question or in the sector concerned», to the same obligations as the posting undertaking and such obligations are to be fulfilled «to the same effects». The impact of these provisions on the presumption of universality established in the first part of paragraph 8 will depend on how some of its key terms will be interpreted by national authorities and, ultimately, by the CJEU. For instance, it is unclear whether to be considered in a similar position as a national operator, the posting undertaking will have to demonstrate the existence of an actual competitive relationship between the two or whether a less demanding standard will prevail. The wording used in the definition of equality of treatment seems to suggest that the latter option is the most likely one.

3.4. *Beyond just equal pay: social contributions and the temporariness of posting*

The public debate on the social implications of posting and the reform of the PWD focused almost exclusively on the need to reduce the pay differences between local workers and posted ones. Yet, there are other cost differentials that are equally, or even more, impactful in this regard. According to recent studies, savings from differences in social security levies can be as high as 30% in certain situations[71]. Under the cur-

[70] ZAHN, cit., 199-200.

[71] VOSS *et al.*, cit., 38. See also F. DE WISPELAERE, J. PACOLET, *Posting of Workers: Impact of Social Security Coordination and Income Taxation Law on Welfare States*, KU Leuven Working Paper, November 2015.

[72] ECJ, 3 February 1982, 62-63/81, *SECO*, para. 7.

rent rules, posting undertakings are free to exploit these differences, since they pay social charges in accordance with the home country principle. Indeed, as duly spelled out in the *Seco* judgment of 1982, the application of the host country principle to «employers established in another Member State who are already liable under the legislation of that State for similar contributions in respect of the same workers and the same periods of employment» would constitute a form of covert discrimination, forcing those undertakings to bear a burden that is heavier than that of local competitors[72]. Moreover, Article 12 Regulation 883/2004 makes clear that the posted worker continues to be subject to the social legislation of the sending Member State. The revision of the PWD left this arrangement untouched.

The Revised PWD deals with other connected issues, by better clarifying the definition of certain conditions and, in some cases, trying to align it with the rules on social security coordination.

A key issue in this regard is the temporariness of posting. The whole regulatory framework and, more in detail, the application of the home country principle with regard to the payment of social contributions presuppose that posting is a temporary phenomenon. However, in its original version the PWD did not define the duration of posting. The Commission's Proposal sought to fill the gap, by establishing a 24 months time-limit. When the duration exceeds this limit, «the Member State to whose territory a worker is posted shall be deemed to be the country in which his or her work is habitually carried out»[73]. According to the Rome I Regulation[74], this means that the workers shall be covered by the rules of protection imposed by the receiving State, unless another choice of law has been made by the parties. The Commission's Impact Assessment clarified that this proposal aims at aligning the PWD with Regulation No. 883/2004 and, thus, «eliminating a source of inconsistency in the EU regulatory framework»[75]. According to Article 12 Regulation No. 883/2004, a worker posted in the territory of another Member State ceases to be subjected to the social security legislation of his/her home country when the activity exceeds 24 months. The Commission's Proposal even sought to anticipate the moment in which equal treatment

[73] EUROPEAN COMMISSION, *Proposal*, cit., article 1(1).

[74] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 *on the law applicable to contractual obligations (Rome I)*, OJ L 177, 4.7.2008, 109-119.

[75] EUROPEAN COMMISSION, *Impact Assessment*, cit., 25.

started to apply: if it is clear that posting will last more than 2 years since the beginning of the activity, the receiving Member State can impose its own labour legislation since day one.

The proposed time-limit gave rise to an heated debate among Member States: some of them – France, in particular – together with other stakeholders[76] voiced their dissatisfaction for a limit that they considered far too lenient, forcefully asking to cut it at least by half. The Commission's Proposal itself admitted that long-term posting is a marginal occurrence and that, in this context, posting exceeding 24 months is extremely rare. In fact, the average duration is less than 4 months[77]. The final version of the Revised PWD incorporates the 12-months limit[78]. When posting exceed this threshold, the receiving State is entitled to require the concerned undertaking to guarantee workers all the terms and conditions – and not just those listed in Article 3(1) – laid down in its own laws, regulations, administrative provisions and collective agreements that are universally applicable *de iure* or *de facto*[79].

The choice of a shorter time-limit perpetuates the misalignment between the PWD and the rules on social security coordination. However, the main problem does not lie with the overall harmony of the legal system, but with the enforcement of these rules. One of the most controversial issues is the risk that undertakings can try to evade the time-limit, by replacing the posted worker just before its expiry. To avoid this risk, the Revised PWD establishes that, in case of replacement of a posted worker by another worker performing «the same task at the same place» the duration of posting is to be calculated by cumulating the individual periods. For greater certainty, the provision adds that the sameness of task and place has to be determined by looking at the nature of the service provided, the work performed and the address of the workplace[80].

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76 VOSS *et al.*, cit., 49.

77 *Ibid.*, 39.

78 The limit can be extended to 18 months by the receiving State, upon request by the service provider.

79 The provision excludes the applicability of the rules on «procedures, formalities and conditions of the conclusion and termination of the employment contract» and «supplementary occupational retirement schemes».

80 Art. 12 Regulation (EC) No. 883/2004 excludes from the possibility of being subject to the social legislation of his/her home Country those posted workers that are sent in another Member States «to replace another person». The provision aims to avoid the risk that undertakings could circumvent the 24-months limit by simply replacing the concerned worker. In *Alpenrind*, the Court made clear that the exclusion operates also in those cases when the same worker is posted by two different employers (see ECJ, C-527/15, 6 September 2018, *Alpenrind*, para. 99).

3.5. *Preventing, monitoring and punishing abusive practices*

Loopholes and ambiguities characterizing the posting regulatory framework resulted in abusive practices, enabling posting undertakings to circumvent some of the rules set therein. The use of sub-contracting and agency employment, often coupled with an abusive recourse to bogus self-employment arrangements, stand out in this regard.

The Commission's Impact Assessment duly emphasised the situation of particular vulnerability which posted workers in the context of sub-contracting chains could find themselves trapped in[81]. A substantial body of empirical research shows that subcontracting, often with the involvement of employment agencies, is indeed a vehicle for abusive practices in many sectors. These agencies are often letter-box companies established in countries with low labour costs not carrying out any substantial economic activity therein, but having the sole aim of posting workers abroad so to minimise their outlays. There are several examples of this practice in the transport sector: for instance, in 2011 some Belgian and Dutch undertakings were offered the possibility to transfer their workforce to companies established in Cyprus and Liechtenstein through which they could hire back their staff[82]. Likewise, a study for the European Commission reported the case of a Belgian food processing company that dismissed its Belgian employees before signing a contract with a Dutch employment agency that posted to the undertaking many German-Polish workers. Polish workers were paid 10 euros/hour less that the Belgian counterparts[83]. In Italy, temporary agencies established in Romania have been recently quite active in advertising their offer of cheap labour to be recruited through the so-called "Romanian contracts". Leaflets were quite outspoken in offering savings of up to 40% of labour costs and the absence of labour and social contributions to be paid to the Italian social security system[84].

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[81] EUROPEAN COMMISSION, *Impact Assessment*, cit., 14-15. See generally Y. JORENS, S. PETERS, M. HOUWEZIJL, *Study on the Protection of Workers' Rights in Subcontracting Processes in the European Union. Final Report*, Study for the European Commission, June 2012.

[82] See J. CREMERS, *Letter-Box Companies and Abuse of the Posting Rules: How the Primacy of Economic Freedoms and Weak Enforcement Give Rise to Social Dumping*, ETUI Policy Brief 4/2014, 3-4.

[83] A. VAN HOEK, M. HOUWEZIJL, *Comparative Study on the Legal Aspects of the Posting of Workers in the Framework of the Provision of Services in the European Union*, Study for the European Commission, March 2011, 58.

[84] S. ARCHAIN, *The Transnational Supply of Workforce within the European Union. Issues of Equal Treatment for Migrant Workers*, in *L'Altro Diritto*, 2017.

Reducing these forms of abuse was the main objective of the Enforcement Directive, adopted in 2014. Also the Revised PWD touches upon these issues, dealing, in particular, with posting by temporary work agencies and the exercise of monitoring, control and enforcement duties thereon.

As for the first aspect, Article 3(1b) Revised PWD obliges Member States to make sure that workers posted by temporary agencies are treated equally as national workers, in accordance with Article 5 Directive 2008/104/EC[85]. This provision requires user undertakings to guarantee to temporary agency workers the basic working and employment conditions applied to their own workers. Under the Article 3(9) of the original PWD this was just an option for Member States, leaving open the possibility that workers could be treated differently according whether the employment agency is established in the same State as the user company or not. The revision represents, thus, yet another welcome attempt to bring the PWD in line with other pieces of legislation, addressing a further element of ambiguity and uncertainty. However, the practical impact of the proposed change can be more limited than expected. As duly observed in the Impact Assessment, most of the Member States having a relevant share of workers posted through temporary agencies have already opted to make equal treatment between national agency workers and cross-border ones an obligation and not just a faculty[86].

Article 5 Revised PWD deals with the monitoring, control and enforcement of the obligations imposed by this Directive and the Enforcement Directive. The provision reiterates that the duty to ensure the respect of such obligations falls upon both the sending and the receiving States. Moreover, Member States must lay down penalties to be applied in case of non-compliance and these penalties have to be «effective, proportionate and effective».

Some interpretative problems may arise with regard to the last paragraph of Article 5. The provision deals with those cases where national authorities ascertain that an undertaking «is improperly or fraudulently creating the impression that the situation of a worker falls within the scope of this Directive», after having carried out an assessment on the basis of Article 4 Enforcement Directive. The latter sets forth a series of

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[85] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 *on temporary agency work*, OJ L 327 of 5.12.2008, 9-14.

[86] EUROPEAN COMMISSION, *Impact Assessment*, cit., Annex VI.

elements that competent national authorities have to take into account in order to identify genuine posting and avoid abuse and circumvention. These elements are instrumental to determine whether the posting undertaking carries out a substantial economic activity in the State of establishment and whether the worker is actually posted to carry out a temporary activity. Article 5 Revised PWD provides that the Member State that has established that the posting undertaking is behaving improperly or fraudulently is to ensure that «the worker benefits from relevant law and practice». In the case in which the Member State carrying out the assessment under Article 4 Enforcement Directive is the receiving one, the provision can be read as empowering the competent authorities to require the posting undertaking to comply with all the rules of the national labour system. If this reading is correct, the provision at hand would enable the authorities of the receiving State to act unilaterally in cases of abusive recourse to posting. This would break with the approach followed in drafting other rules governing posting. For instance, the Implementing Regulation on the coordination of social security systems[87] provides that the receiving State cannot but accept the documents, such as A1 or E101 certificates, issued by the competent authorities of the sending State. It is only for the latter authorities to withdraw or declare invalid such documents if necessary. If doubts arise on the validity or accuracy of the documents, the receiving State must ask sending State's competent institution to reconsider the grounds for issuing the certificate. Should the two institutions disagree on the matter, the case has to be brought to the Administrative Commission, which «shall endeavour to reconcile the points of view». In any case, the Regulation does not entrust the authorities of the receiving State with the power to unilaterally disregard a certificate, even if substantial evidence demonstrates its fraudulent origins.

The prohibition of unilateral rejection of the certificates issued by the sending State has been partially relaxed by the CJEU in the *Altun* judgment. Here, the CJEU found that the principle of sincere cooperation imposes upon the issuing State the duty to carry out a diligent investigation on the validity of the certificate when so requested by the authorities of another Member State. Otherwise «a national court may, in the context of proceedings brought against persons suspected of having

[87] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 *laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems*, OJ L 284 of 30.10.2009, 1-42.

used posted workers ostensibly covered by such certificates, disregard those certificates if, on the basis of that evidence and with due regard to the safeguards inherent in the right to a fair trial which must be granted to those persons, it finds the existence of such fraud»[88]. Few months later the CJEU reiterated that the possibility for receiving State's courts to disregard A1 documents is an exceptional occurrence. Indeed, national courts can so decide only in cases of fraud and abuse of rights and it is not enough that the Administrative Commission, seized with the matter, has already held that that certificate was incorrectly issued and should be withdrawn[89].

Lamentably, the final version of the Revised Directive dropped the proposal of the Commission to include a provision enabling Member States to ban from subcontracting chains posting undertakings that failed to guarantee «certain terms and conditions of employment covering remuneration»[90]. The condition built upon the *RegioPost* ruling, where the Court made clear that national authorities can include a minimum wage clause in a public contract and they can make the clause compulsory also for subcontractors[91]. The Revised PWD relegates the question of subcontracting chains in one of its final articles, establishing that this issue will be one of those that the Commission has to take into consideration in its report on the implementation of the Directive, to be submitted five years after its entry into force. Undoubtedly, this represents a major step back in the process toward ensuring a level playing field and a higher level of protection to posted workers, especially in the light of the conspicuous body of evidence showing the inability of the current legal framework to properly deal with the abusive recourse to sub-contracting in the context of posting.

4. *Conclusion*

The cleavage between high-wage and low-wage Member States is one of the most profound fault lines running through the European integration process[92]. "Losing" States claim that the promotion of free move-

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[88] ECJ, 6 February 2018, C-359/16, *Altun*, paras 39-61.

[89] *Alpenrind*, cit., paras. 46-47 and 64.

[90] European Commission, *Proposal*, cit., article 1(2)(b).

[91] ECJ, 17 November 2015, C-115/14, *RegioPost*. See F. Costamagna, *Minimum Wage in EU Law Between Public Procurement and Posted Workers: Anything New Under the Sun After the* RegioPost *Case?*, in *European Law Review*, 1, 2017, 101-111.

[92] M. Ferrera, *Solidarity in Europe After the Crisis*, in *Constellations*, 21, 2014, 222-238.

ment at the expenses of their capacity of exercising regulatory functions in the social sphere can contribute to a dangerous race-to-the-bottom with regard to workers' rights and spur on heinous forms of regulatory competition between Member States. However, as in many other cases, unfairness is in the eyes of the beholder. As observed by Barnard, «what is social dumping for the losers (richer Northern European states) is economic opportunity for the winners (poorer Eastern European states) who take advantage of their lower labour costs to gain a foothold on these new markets»[93]. Yet, it can be hardly denied that fostering unbridled intra-EU regulatory competition might be a dangerous path, contributing to erode inter-individual and inter-State solidarity within the EU. Moreover, as admitted by the Commission in its Green Paper on Social Policy of 1993, «"negative" competitiveness between Member States would lead to social dumping, to the undermining of the consensus making process [...] and to danger for the acceptability of the Union»[94].

This explain why the revision of the PWD attracted considerable attention, despite posting is not the sole – and, possibly, not even the most impactful – vehicle for regulatory competition. The Proposal tabled by the Commission in March 2016 stirred much controversy and a highly polarized debate. 11 national parliaments issued reasoned opinions declaring themselves against the proposal of the European Commission and more than 500 amendments has been discussed in front of the European Parliament. It then took more than 23 months of negotiations to reach an understanding on a possible agreement.

The revision of the PWD was an exercise of reactive law-making. On the one hand, it sought to react to a mutated economic landscape, which incentivizes the recourse to posting as a way to hire cheap labour, circumventing the limits posed by national labour laws. According to the proponents, the revision was all the more urgent in the light of the inability of the current legal framework to respond to the new challenges. On the other hand, the revision aimed at rebalancing the relationship between the promotion of free movement of services and the safeguard of social objectives in the context of posting, reacting to the one-sided approach adopted by the Court.

The Revised PWD is more favourable to the position of receiving Member States and it offers greater protection to posted workers' rights

[93] BARNARD, *Fifty Years*, cit., 311.

[94] EUROPEAN COMMISSION, *Green Paper on Social Policy. Options for the Union*, 17 November 1993, COM(1993) 551 final, 46.

than the original version of the PWD and also of the Commission's Proposal. The act makes some steps in the right direction, seeking to reduce the pay gap between local workers and posted ones and narrowing down the space for abusive practices. However, it is far from certain whether such revision will prove enough to avoid, or at least significantly reduce, the recourse to posting as a tool for unfair regulatory competition. This will largely depends on how some of the key elements of novelty of the Revised PWD will be interpreted by the CJEU and implemented by national authorities. Moreover, the final deal includes some compromises, such as, for instance, the exclusion from the scope of application of the Revised PWD of the international road haulage industry and, even more problematically, of a stricter regulation of the use of subcontracting chains.

GIOVANNI ORLANDINI

IL DUMPING SALARIALE NELL'UNIONE EUROPEA: NUOVI SCENARI E VECCHIE PROBLEMATICHE

1. *Il distacco transnazionale dei lavoratori nell'UE*

Il processo d'integrazione economica europea ha determinato profonde trasformazioni nei sistemi di diritto del lavoro e di relazioni industriali nazionali. L'originaria scelta di mantenere in capo agli Stati membri la riserva di competenza sugli ambiti che più caratterizzano tali sistemi[1], si è rivelata essa stessa causa dei loro processi di trasformazione, avendo esposto quegli ambiti a dinamiche di *race to the bottom* propri di un mercato aperto e in libera concorrenza. L'apertura ad est dell'Unione europea e le crescenti pressioni competitive prodotte dalla crisi economica e finanziaria hanno poi amplificato la concorrenza deregolativa che il completamento del mercato interno di per sé produce negli Stati membri.

Terreno elettivo nel quale tali dinamiche hanno preso corpo è costituito dal distacco dei lavoratori operato nell'ambito di prestazioni transnazionali di servizi. Il mercato unico favorisce infatti il *dumping* salariale da parte di imprese che sfruttano l'esistenza di fortissimi squilibri sul piano del costo del lavoro: basti ricordare che il salario minimo mensile in Lussemburgo è oltre 2000 euro, in Germania e Francia circa 1500, mentre in molti paesi dell'est è inferiore a 500 euro (in Romania

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[1] Come noto, l'art. 153, par. 5 del TFUE riserva agli Stati membri la competenza esclusiva in materia di retribuzioni, diritto di associazione, sciopero e serrata.

[2] Eurofound (2019), *Minimun wages in 2019 - Annual review*, Dublin.

446 e in Bulgaria 286)[2]. Tali squilibri come noto sono all'origine delle c.d. delocalizzazioni, che all'interno dell'Unione europea sono legittimate dalle norme del Trattato sul funzionamento dell'UE (TFUE) poste a tutela delle libertà economiche fondamentali; in particolare, della libertà di stabilimento (art. 49 TFUE) e della libertà di prestazione dei servizi (art. 56 TFUE). Ed è proprio esercitando quest'ultima libertà economica che un'impresa stabilita in uno Stato membro può distaccare lavoratori in un altro Stato membro, ovvero può inviarli a svolgervi temporaneamente prestazioni di lavoro.

La materia del distacco è regolata sul piano dell'ordinamento dell'UE dalla direttiva 96/71/CE, la cui funzione sarebbe proprio quella di conciliare le esigenze delle imprese di prestare attività di servizi transazionali senza subire ostacoli con quelle dei lavoratori a non soffrire gli effetti deregolativi del *dumping*. Ma l'accentuarsi degli squilibri macro-economici all'interno dell'Unione sopra richiamati ha reso questo strumento normativo sempre più inadeguato a perseguire tale obiettivo.

Nel 2014 è stata adottata una nuova direttiva (la c.d. direttiva *enforcement* n. 2014/67/UE) che però non ha modificato il contenuto della direttiva 96/71, essendo finalizzata piuttosto a garantirne la corretta applicazione attraverso il rafforzamento dell'attività di controllo sulle imprese, onde evitare l'utilizzo abusivo e fraudolento del distacco[3]. Il 9 marzo 2016 la Commissione ha quindi presentato una proposta di revisione della direttiva 96/71[4], con l'intento di dettare regole più favorevoli per gli Stati che subiscono il *dumping* sociale in ragione dei più alti standard di tutela garantiti dal loro sistema di diritto del lavoro. Dopo un lungo e travagliato *iter* legislativo, è infine stata adottata la direttiva n. 2018/957[5], il cui testo è segnato da significative modifiche rispetto alla versione originaria della proposta. La nuova versione della direttiva distacchi è stata comunque pressoché unanimemente salutata come un importante, se

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[3] Dubbi sull'adeguatezza delle disposizioni della direttiva *enforcement* rispetto agli obiettivi che essa si prefigge, sono stati espressi da più parti in dottrina (per tutti, ed in termini più critici, F. MULLER, *Face aux abus et contournements, la directive d'exécution de la directive détachement est-elle à la hauter?*, in *DS*, 2014, p. 788 ss.).

[4] Commissione Europea, Proposta di direttiva del Parlamento europeo e del Consiglio dell'8 marzo 2016 recante modifica della direttiva 96/71/CE del Parlamento europeo e del Consiglio, del 16 dicembre 1996, relativa al distacco dei lavoratori nell'ambito di una prestazione di servizi (COM(2016)128 finale).

[5] Direttiva (UE) del Parlamento europeo e del Consiglio n. 2018/957 del 28 giugno 2018 recante modifica della direttiva 96/71/CE relativa al distacco dei lavoratori nell'ambito di una prestazione di servizi.

non decisivo, passo verso un mercato unico meno esposto a dinamiche di *dumping* salariale. E non c'è dubbio che essa contenga novità significative, che vanno in questo senso[6]. Tuttavia, come si cercherà di chiarire nelle pagine che seguono, il problema della concorrenza al ribasso giocata sul costo del lavoro resta in buona parte ancora oggi irrisolto, specie per sistemi sindacali che mantengono un forte carattere volontaristico, come quello italiano[7].

Per capire perché la disciplina del distacco transnazionale non permetta di contrastare efficacemente il *dumping* salariale è necessario leggerla alla luce dei principi generali sui quali si fonda il funzionamento del mercato unico; principi che la Corte di giustizia ricava direttamente dal TFUE e che, quindi, sono insuperabili ed ineludibili anche per il legislatore europeo.

In base a questi principi, sin dalla sentenza *Rush Portuguesa* del 1990[8], la Corte ha chiarito che il lavoratore distaccato in uno Stato membro da un'impresa stabilita in un altro Stato membro non può rivendicare i diritti garantiti dal principio della libertà di circolazione dei lavoratori (*ex* art. 45 TFUE), ovvero non è garantito dalla parità di trattamento rispetto ai lavoratori dello Stato ospitante; questo perché è l'impresa che lo distacca a poter invocare la libertà di prestare servizi ai sensi dell'art. 56 TFUE[9]. Dal momento che il distacco transazionale si

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[6] Per l'analisi puntuale della nuova direttiva si rinvia al saggio di Costamagna in questo volume.

[7] Nel presente testo si affronta il tema del *dumping* relativo alla retribuzione e non si affronta la questione del *dumping* "previdenziale", cioè prodotto dalle profonde differenze di oneri di contribuzione proprie dei diversi Stati membri; differenze che, in vero, incidono ancora di più sul costo del lavoro dei lavoratori distaccati, anche perché le regole di coordinamento dei sistemi di sicurezza sociale nazionale prevedono che questi restino iscritti nel regime del paese d'origine per 24 mesi (art. 12, par. 1 del regolamento CE n. 883/04).

[8] Corte Giust., 27.3.1990, causa C-113/89, *Rush Portuguesa Lda*. Il caso riguardava dei lavoratori portoghesi inviati in Francia per eseguire lavori di costruzione di una linea ferroviaria in base ad un contratto di subappalto; questi lavoratori secondo la Corte non potevano rientrare nel regime transitorio relativo alla libera circolazione di manodopera previsto all'epoca per il Portogallo, in quanto destinati a tornare "*nel loro paese d'origine dopo aver svolto il loro compito, senza mai accedere al mercato del lavoro dello Stato membro ospitante*" (punto 15 della sentenza).

[9] Questo vale per i lavoratori distaccati per eseguire un appalto transnazionale (privato o pubblico), perché per i lavoratori distaccati da Agenzie di somministrazione stabilite in altri Stati membri, il diritto dell'UE ammette la parità di trattamento retributivo rispetto ai lavoratori nazionali (art. 3, par. 9, direttiva 96/71); ciò in ragione del fatto che i lavoratori somministrati da un'agenzia – al contrario dei lavoratori dipendenti di una impresa appaltatrice – entrano a far parte a tutti gli effetti del mercato del lavoro dello Stato ospitante (come riconosciuto nella sentenza Corte Giust., 10.2.2011, causa C-307/09 e C-309/09, *Vicoplus*).

iscrive nell'ambito di applicazione della libertà di prestazione dei servizi, la parità di trattamento tra lavoratori distaccati e lavoratori nazionali configura infatti un ostacolo all'esercizio di questa libertà, qualora determini un aggravio del costo del lavoro a causa dei maggiori oneri previsti dalla legislazione e dai contratti collettivi dello Stato dove il distacco è eseguito[10].

Sempre in base ai principi del mercato unico, lo Stato ospitante può imporre alle imprese straniere il rispetto delle norme di diritto del lavoro interno solo se ciò è giustificato da prevalenti ragioni di interesse pubblico ("*overriding reasons of public interest*") e purché ciò avvenga nel rispetto del principio di non discriminazione e del principio di proporzionalità[11].

Dunque la possibilità di contrastare efficacemente il *dumping* nell'ordinamento dell'UE è condizionata sia dal principio di non discriminazione, per il quale alle imprese straniere non possono essere imposti obblighi che non gravano su quelle nazionali; sia dal modo con cui si configura e si legge il principio di proporzionalità, per il quale limiti alle libertà economiche sono ammissibili solo adottando le misure strettamente necessarie per perseguire legittime finalità di interesse generale[12].

Il principio di proporzionalità offre però un criterio di giudizio tutt'altro che certo e prevedibile e la sua applicazione nel diritto dell'UE può portare agli esiti più vari che dipendono dalla discrezionalità dell'interprete (cioè la Corte di giustizia) e dalle scelte politiche del legislatore europeo, che quel principio traduce in norme di diritto derivato[13].

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[10] È a partire dalla sentenza Corte Giust., 25.7.1992, causa C-76/90, *Säger*, che la libertà di prestare servizi è interpretata dalla Corte in maniera da garantire alle imprese con sede in altri Stati membri non solo la rimozione di misure che configurano trattamenti più sfavorevoli rispetto alle imprese nazionali, ma anche "*la soppressione di qualsiasi restrizione, anche qualora essa si applichi indistintamente ai prestatori nazionali ed a quelli degli altri Stati membri, allorché essa sia tale da vietare o da ostacolare in altro modo le attività del prestatore stabilito in un altro Stato membro ove fornisce legittimamente servizi analoghi*" (punto 12); in merito vd. C. BARNARD (2016), *The Substantive Law of the EU*, Oxford, capitolo 8.

[11] Corte Giust. CE, 23.11.1999, causa C-369/96 e C-376/96, *Arblade*, punto 36.

[12] Secondo una formula ormai consolidata nella giurisprudenza della Corte di Giustizia "*I provvedimenti nazionali che possono ostacolare o scoraggiare l'esercizio delle libertà fondamentali garantite dal Trattato devono soddisfare quattro condizioni: essi devono applicarsi in modo non discriminatorio, essere giustificati da motivi imperativi di interesse pubblico, essere idonei a garantire il conseguimento dello scopo perseguito e non andare oltre quanto necessario per il raggiungimento di questo*" (Corte Giust., 23.5.1996, causa C-5/94, *Gebhard*, punto 37)

[13] Sul principio di proporzionalità, come declinato nell'ordinamento dell'UE, vd. l'ormai classico studio di T. TRIDIMAS (2013), *General Principles of EU*, Oxford, diffusamente nei capitoli 3 e 5.

2. *La nozione di tariffe minime salariali nella giurisprudenza della Corte di giustizia e nella versione riveduta della direttiva 96/71*

Nell'esercizio della propria discrezionalità politica, il legislatore europeo del 1996 ha "tradotto" il principio di proporzionalità nelle disposizioni della direttiva 96/71; in particolare nell'art. 3, paragrafo 1, disposizione nella quale vengono elencate le norme nazionali di protezione minima (*hard core of minimum protection)* che l'impresa straniera deve rispettare nello Stato ospitante, tra le quali sono incluse le "*tariffe minime salariali* (TMS), *comprese le maggiorazioni per straordinario*"[14]. Nozione quest'ultima dalla quale evidentemente è sino ad oggi dipesa la possibilità per le imprese di attuare il *dumping* salariale nello Stato dove operano il distacco.

A riprova dell'intrinseca elasticità del principio di proporzionalità, la Corte di giustizia nel corso degli anni ha modificato il suo approccio in merito al significato da attribuire alla nozione di TMS.

Nelle sentenze *Laval*[15] e *Rüffert*[16] la Corte infatti sembrava aver negato la possibilità di includere nelle TMS elementi della retribuzione superiori alla retribuzione base fissata a livello nazionale dal contratto collettivo o, eventualmente, dalla legge. Tuttavia, nella successiva sentenza *ESA* del 12 febbraio 2015[17] (relativa ad un distacco di lavoratori polacchi in Finlandia) – pur senza smentire esplicitamente la sentenza *Laval* – la stessa Corte ha riconosciuto una più ampia libertà agli Stati nell'identificare gli elementi costitutivi del salario minimo ed ha valorizzato il fatto che la stessa direttiva, per determinare la retribuzione da applicare ai lavoratori distaccati, rinvia alla legislazione e alla prassi nazionale dello Stato ospitante[18].

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[14] Al contrario della retribuzione, le altre materie elencate dall'art. 3, par. 1 sono oggetto di direttive di armonizzazione adottate dai sensi dell'art. 153, par. 1 TFUE: "*periodi massimi e minimi di riposo, durata minima delle ferie, condizioni di cessione temporanea del lavoratore, salute e sicurezza, tutela di donne e minori e divieto di discriminazione*".

[15] Corte Giust., 18.12.2007, causa C-341/05, *Laval*, spec. punto 70.

[16] Corte Giust., 3.4.2008, causa C-346/06, *Rüffert.*

[17] Corte Giust., 12.2.2015, causa C-396/13, *Sähköalojen ammattiliitto ry c. Elektrobudowa Spolka Akcyjna (ESA).*

[18] L'art. 3, par. 1 della direttiva 96/71 prevedeva infatti (già nella sua versione originaria, con formula confermata dalla direttiva 2018/957) che "*Ai fini della presente direttiva, la nozione di tariffa minima salariale* […] *è definita dalla legislazione e/o dalle prassi nazionali dello Stato membro nel cui territorio il lavoratore è distaccato*"; questo rinvio non preclude tuttavia alla Corte di giustizia la valutazione sulla definizione di TMS, perché "*tale definizione, come risulta dalla legislazione o dai pertinenti contratti collettivi nazionali o dall'interpretazione che ne danno i giudici nazionali, non può avere l'effetto di ostacolare la libera prestazione dei servizi tra gli Stati membri*" (Corte Giust., 7.11.2013, causa C-522/12, *Isbir*, punto 37).

La Corte ha così ammesso che uno Stato possa imporre una determinata struttura contrattuale alle imprese straniere che distaccano lavoratori sul suo territorio; cioè diversi livelli salariali come previsti dagli inquadramenti dei contratti collettivi di settore, e non un unico minimo standard salariale a livello nazionale. La nozione di TMS poi non identifica le sole componenti di base della retribuzione (in Italia, i c.d. minimi tabellari previsti dal contratto nazionale di categoria), ma vi possono rientrare altre voci funzionali a garantire la*"protezione sociale del lavoratore"*. Quindi nel caso di specie, la Corte ha riconosciuto come legittimamente riconducibili a tale nozione un'indennità giornaliera per distacco, un' indennità per tragitto giornaliero, oltre alla gratifica per ferie (*holiday pay*).

D'altra parte non rientrano nel computo delle TMS i rimborsi per l'alloggio, il viaggio e i pasti né in generale le "*maggiorazioni e i supplementi* [corrisposte al lavoratore distaccato da proprio datore] *a compensazione di un surplus di lavoro o per ore di lavoro in condizioni particolari*"[19]. Ne consegue che questi elementi retributivi non possono essere presi in considerazione e computati nella comparazione tra salario effettivamente erogato al lavoratore distaccato dal proprio datore e salario dovuto in base alla normativa dello Stato ospitante. Il che permette di contrastare diffuse prassi di decurtazione della retribuzione dei lavoratori stranieri (operate appunto attraverso l'imputazione a diverso titolo delle voci retributive), nell'apparente rispetto dei minimi salariali spettanti ai lavoratori nazionali.

Proprio in questa giurisprudenza il legislatore europeo del 2018 ha trovato solide basi per ampliare la nozione di retribuzione da corrispondere ai lavoratori distaccati. Il nuovo testo della direttiva 96/71, come riformato dalla direttiva 2018/957, riflette infatti le aperture della Corte di giustizia che si è appena elencato. L'originario riferimento alle "*tariffe minimi salariali*" è adesso sostituito dal più ampio concetto di "*retribuzione*", che ricomprende "*tutti gli elementi*" che la costituiscono, "*resi obbligatori*" dalla legge o dalla contrattazione collettiva del paese ospitante. All'elenco delle materia di cui all'art. 3, par. 1 della direttiva 96/71 si aggiunge poi la voce delle "*indennità o rimborso a copertura delle spese di viaggio, vitto e alloggio per i lavoratori lontani da casa per motivi professionali*"; mentre nel paragrafo 7 del medesimo art. 3 si introduce una sorta di presunzione a favore del lavoratore nel computo delle voci retributive corrispostegli, imponendo l'imputazione a titolo di rimborso

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[19] In questo senso, vd. già le sentenze Corte Giust., 14.4.2005, causa C-341/02, *Commissione c. Repubblica Federale di Germania* e *Isbir*, ult. cit.

spese delle indennità specifiche di distacco effettivamente erogate dal proprio datore, qualora non risulti il contrario dalle condizioni di lavoro e di occupazione applicabili al rapporto di lavoro.

Il nuovo quadro normativo, letto alla luce della giurisprudenza della Corte, sembrerebbe dunque garantire agli Stati la possibilità di difendersi dal *dumping* salariale, permettendo l'applicazione ai lavoratori distaccati di standard salariali sostanzialmente equivalenti a quelli rispettati dalle imprese nazionali. In realtà non è così. Non solo perché i giudici di Lussemburgo ricordano che la libertà degli Stati nell'identificare le componenti della retribuzione non è assoluta, ma sempre sottoposta al giudizio di proporzionalità[20]. Ma soprattutto perché ciò che è legittimo per la Finlandia, non lo è necessariamente per gli altri paesi dell'Unione.

La diversità dei sistemi di relazioni sindacali nazionali è all'origine dei nodi giuridici dalla soluzione dei quali dipende la possibilità o meno di arginare il *dumping* salariale all'interno dell'UE. Per affrontare questi nodi giuridici è necessario (di nuovo) confrontarsi con i principi di non discriminazione e proporzionalità.

3. *I sistemi nazionali di contrattazione alla prova dei principi di non discriminazione e di proporzionalità: il caso italiano*

I problemi principali di applicazione della direttiva 96/71 si presentano in quei paesi che (come l'Italia e al contrario della Finlandia) non conoscono meccanismi per garantire l'efficacia *erga omnes* dei contratti collettivi, e ciò in ragione della necessità di garantirne l'omogenea applicazione tra lavoratori nazionali e stranieri distaccati. Se infatti un contratto collettivo di un determinato settore non ha efficacia generale per le imprese nazionali, il principio di non discriminazione impedisce di estenderlo obbligatoriamente alle imprese straniere, che quindi in linea di principio dovrebbero restare vincolate alla sola legge.

Per risolvere questo problema la direttiva 96/71 prevede che uno Stato possa applicare ai lavoratori distaccati non solo i contratti collettivi che siano stati dichiarati di applicazione generale in base alla normativa

[20] Corte Giust., C-396/13, *ESA*, punto 34; anche nella direttiva 2018/957 il legislatore europeo, nel prevedere al nuovo art. 3, par. 1-*bis*, che dopo 12 mesi (prorogabili a 18) di presenza sul territorio di un altro Stato membro, al lavoratore distaccato spettino "*tutte le condizioni di lavoro e di occupazione applicabili*" in quello Stato, ricorda come si debba comunque tener conto della giurisprudenza consolidata per la quale "*restrizioni alla libera prestazione dei servizi sono possibili solo se sono giustificate da motivi imperativi di interesse generale e se sono proporzionate e necessarie*" (considerando 10).

nazionale (art. 3, par. 1), ma anche i contratti collettivi che "di fatto" siano comunque applicati da tutte le imprese nazionali (secondo le modalità previste dall'art. 3, par. 8, sostanzialmente confermato dalla direttiva 2018/957[21]). Tuttavia la prova che tale condizione sia rispettata è assai difficile (quasi una *probatio diabolica*) e certo, in molti ordinamenti, ciò è causa di una grande incertezza nella determinazione della retribuzione.

L'Italia è un ottimo esempio di come un sistema di relazioni industriali a basso tasso di istituzionalizzazione renda praticamente impossibile attuare in maniera adeguata la direttiva, cioè in modo tale da sfruttarne i margini che essa concede per contrastare il *dumping* salariale. La difficoltà di identificare il contratto collettivo di diritto comune applicabile ai lavoratori distaccati senza entrare i conflitto con il principio di non discriminazione, si traduce infatti nell'ordinamento italiano nella sostanziale impossibilità di recepire l'invito del legislatore europeo di determinare "*tutti gli elementi della retribuzione resi obbligatori* [dai] *contratti collettivi*", come prescrive l'attuale formulazione dell'art. 3, par. 1 della direttiva 96/71. A questa oggettiva difficoltà il legislatore nazionale risponde poi in un modo maldestro, che rende ancora più confuso il quadro normativo interno.

L'art. 4, comma 1 del d.lgs. 136/16 (che nel recepire la direttiva 2014/67 ha anche sostituito il precedente d.lgs. 72/00 di recepimento della direttiva 96/71), prescrive genericamente che al lavoratore straniero distaccato in Italia debbano essere garantite le "*medesime condizioni di lavoro e di occupazione previste per i lavoratori che effettuano prestazioni lavorative subordinate analoghe nel luogo in cui si svolge il distacco*", limitandosi poi a precisare che dette "*condizioni di lavoro e di occupazione*", siano da identificare in quelle relative alle materie elencate dall'art. 3, par. 1 della direttiva 96/71 e "*disciplinate da disposizioni normative e dai contratti collettivi di cui all'art. 51 del d.lgs. n. 81 del 2015*".

Opinabile appare in primo luogo la scelta di riprodurre anche nell'ambito del distacco transnazionale il riferimento ai criteri selettivi det-

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[21] L'art. 3, par. 8, direttiva 96/71 permette agli Stati membri di imporre alle imprese straniere il rispetto anche di contratti collettivi non dichiarati di applicazione generale, avvalendosi "*dei contratti collettivi che sono in genere applicabili a tutte le imprese simili nell'ambito di applicazione territoriale e nella categoria professionale o industriale interessate e/o dei contratti collettivi conclusi dalle organizzazioni delle parti sociali più rappresentative sul piano nazionale e che sono applicati in tutto il territorio nazionale* […] *a condizione che la loro applicazione alle imprese* [straniere] *assicuri la parità di trattamento* [….] *fra tali imprese e imprese* [nazionali] *che si trovano in una situazione analoga*".

tati dall'art. 51 del d.lgs. n. 81/15. La norma in questione serve a identificare i contratti collettivi capaci di integrare le disposizioni di legge che regolano le varie tipologie di lavoro flessibile regolate dallo stesso d.lgs. n. 81/15, ma non appare funzionale a perseguire l'obiettivo posto dall'art. 3, par. 8, della direttiva 96/71; vale a dire a permettere di identificare le clausole dei contratti collettivi che, sul territorio italiano, vincolano parimenti imprese nazionali e imprese straniere nelle materie elencate dall'art. 3, par. 1 della direttiva. Il legislatore europeo richiama infatti il contratto collettivo del settore ("*categoria professionale o industriale*") cui appartiene l'impresa straniera, al fine di identificare quello ad essa applicabile nel luogo dove si svolge il distacco; il che risponde alla *ratio* della direttiva, intesa a regolare la concorrenza tra imprese che operano nel medesimo ambito del mercato interno dei servizi. È da escludere quindi una lettura del d.lgs. n. 136/16 (pur legittimata dalla lettera del suo art. 4) per la quale ai lavoratori distaccati sarebbero da applicare le stesse condizioni contrattuali dei lavoratori comparabili dipendenti dall'appaltante-distaccatario stabilito in Italia[22]. Se questo è vero, il riferimento al livello aziendale di contrattazione contenuto nell'art. 51 del d.lgs. n. 81/15 appare fuorviante, visto che al più l'azienda straniera può essere tenuta ad applicare un contratto aziendale che abbia stipulato con i sindacati locali nazionali allo specifico fine di regolare il distacco.

Quanto al generico rinvio *per relationem* ai contratti collettivi nazionali firmati da associazioni sindacali comparativamente più rappresentative sul piano nazionale, esso non è sufficiente a superare il vaglio di compatibilità con i vincoli posti dal diritto dell'UE; oltre a configurare, se preso alla lettera, problemi di tenuta sul piano costituzionale per potenziale contrasto con l'art. 39 Cost. Da ciò la necessità di adottarne un'interpretazione che ne garantisca la legittimità sia per il diritto interno sia per quello euro-unitario.

Aderendo a tale interpretazione conforme, l'obbligo di applicare il contratto collettivo andrebbe limitato alla sola parte economica del CCNL capace di acquisire efficacia generale grazie alla nota giurisprudenza fondata sull'art. 36 Cost. (con l'eventuale aggiunta delle clausole integrative di disposizioni di legge, laddove queste siano da intendere di

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[22] Così sembrava invece interpretare il d.lgs. n. 72 del 2000 parte della dottrina (cfr. G.G. BALANDI, *La direttiva comunitaria sul distacco dei lavorator: un passo in avanti verso il diritto comunitario del lavoro*, in *Quaderni dir. lav. e relazioni ind.*, n. 20, 1998, p. 124; P. CHIECO, *Lavoratore comparabile e modello sociale nella legislazione sulla flessibilità del contratto e dell'impresa*, in *Riv. giur. lav.*, 2002, I, p. 796).

generale vincolatività); ciò appunto al fine di evitare l'imposizione alle imprese straniere di obblighi dai quali quelle nazionali possono sottrarsi. A rendere comunque problematica l'identificazione del salario da corrispondere ai lavoratori distaccati, è però la non univocità della stessa giurisprudenza tesa a garantire l'estensione del CCNL *ex* art. 36 Cost.[23]. La questione dell'esatta identificazione della retribuzione da corrispondere ai lavoratori stranieri distaccati in Italia resta dunque aperta e di difficile soluzione[24]; ciò almeno fino a quando il legislatore non deciderà di dare attuazione all'art. 39 Cost., rendendo di generale applicazione il CCNL[25].

Di questi problemi non sembra aver tenuto pienamente conto neppure l'Ispettorato Nazionale del Lavoro (INL) nella circolare n. 1/2017 del 9 gennaio 2017, pur nel lodevole tentativo di individuare le voci che concorrono a determinare i "*trattamenti retributivi minimi*" cui rinvia l'art. 2, lett. *e*), del d.lgs. n. 136/16. L'INL vi include non solo la paga base, ma anche l'elemento distinto della retribuzione (voce retributiva collegata, come la paga base, alla qualifica contrattuale); le indennità legate all'anzianità di servizio (se collegate all'inquadramento contrattuale in gruppi retributivi e/o alla natura del lavoro svolto); i superminimi (individuali o per gruppi di lavoratori se collegati all'inquadramento con-

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[23] Sugli oscillanti orientamenti della Cassazione in merito alla determinazione delle voci che compongono l'equa retribuzione ai sensi dell'art. 36 Cost., per tutti, G. RICCI, *La retribuzione costituzionalmente adeguata e il dibattito sul diritto al salario minimo*, in *Lav. dir.*, 2011, 4, p. 635 ss.

[24] M. PALLINI, *Gli appalti transnazionali*: *la disciplina italiana al vaglio di conformità con il diritto europeo*, in *Riv. giur. lav.*, 2017, I, p. 485 ss da ultimo, avanza dubbi sulla stessa possibilità di giustificare l'obbligo per le imprese straniere di rispettare gli standard salariali fissati dal CCNL firmato dalle OO.SS. più rappresentative, sia perché dalla giurisprudenza fondata sull'art. 36 Cost. non si ricava un simile obbligo nei confronti di un'impresa che applichi un diverso CCNL, sia perché non mancano decisioni che ammettono scostamenti dai minimi salariali, in ragione delle particolari condizioni di mercato in cui l'impresa si trova ad operare; per tacere dell'assenza di criteri certi per valutare la rappresentatività delle parti stipulanti. Queste osservazioni, condivisibili in astratto, si scontrano in concreto con l'obbligo posto dall'art. 3, par. 1, lett. *c*) della Direttiva 96/71 di identificare gli standard minimi salariali da applicare ai lavoratori stranieri; obbligo che può legittimare un'applicazione non rigida del principio della parità di trattamento, necessaria per renderlo attuabile in un sistema di relazioni industriali patologicamente sregolato come quello italiano.

[25] Potrebbe aprire nuovi scenari la sentenza della Corte costituzionale 26 marzo 2015, n. 51 con la quale è stata fatta salva la costituzionalità dell'art. 7, 4° comma del d.l. n. 248/07 (conv. in legge n. 31/08) che determina il salario minimo da applicare ai soci lavoratori rinviando ai "*trattamenti economici complessivi*" fissati dal CCNL firmato dalle OO.SS. comparativamente più rappresentative della categoria. Se un simile modello di rinvio mobile alla parte economica del CCNL venisse esteso ad altre categorie, si ridurrebbero le esistenti incertezze in merito alla determinazione dei minimi salariali che, per quanto qui interessa, rendono problematica l'attuazione della Direttiva 96/71 nell'ordinamento italiano.

trattuale in gruppi retributivi e/o alla natura del lavoro svolto); le retribuzioni corrispettive per prestazioni di lavoro straordinario, notturno e festivo; le indennità di distacco (se compensative del disagio dovuto all'allontanamento dei lavoratori dal loro ambiente abituale) e di trasferta. Si tratta di un elenco di voci che riflette in parte quelle applicate ai lavoratori distaccati in Finlandia nel caso *ESA*; ma è quanto meno dubbio che tutte rientrino nella nozione di retribuzione costituzionalmente necessaria *ex* art. 36 Cost.[26]. Basti osservare come siano richiamati anche i c.d. superminimi, che vengono corrisposti a livello aziendale; da ciò il dubbio che l'INL prenda come riferimento i contratti collettivi applicati dall'appaltante situato in Italia e non, come si deve, quelli del settore di appartenenza dell'impresa straniera.

3.1. (*Segue*) *Gli altri nodi giuridici irrisolti*

L'obiettivo della parità di trattamento retributivo tra lavoratori stranieri e nazionali appare comunque difficile da raggiungere anche in ordinamenti più regolati del nostro, in primo luogo perché la direttiva 96/71 si riferisce alla retribuzione definita a livello nazionale (o dalla legge o dai contratti collettivi di settore), lasciando fuori le componenti fissate dalla contrattazione decentrata (territoriale o, come detto, aziendale). Anzi, proprio la contrattazione decentrata rischia di rendere problematica l'applicazione degli stessi minimi fissati a livello nazionale (anche se da contratti collettivi di efficacia generale), nel caso in cui sia ammessa la loro derogabilità. Come ha chiarito la Corte di Giustizia nella sentenza *Portugaia* del 2002 applicando il principio di non discriminazione al sistema di contrattazione collettiva tedesco, imporre il rispetto dei minimi salariali fissati a livello nazionale o territoriale ad un'impresa straniera, quando le imprese nazionali possono stabilire livelli inferiori di retribuzione sul piano aziendale, costituisce senz'altro un'ingiustificata restrizione della libera prestazione dei servizi[27].

Sempre l'ordinamento tedesco è stato oggetto di una serie di decisioni della Corte di giustizia che hanno evidenziato ulteriori profili di cri-

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[26] Nel richiamare la precedente risposta all'interpello n. 33/2010 del Ministero del lavoro, l'INL omette significativamente di richiamarne la parte nella quale si precisa che il trattamento minimo salariale da corrispondere ai lavoratori distaccati è quello fissato "*nei contratti collettivi di lavoro stipulati nei diversi settori produttivi dalle organizzazioni sindacali comparativamente più rappresentative a livello nazionale, nel rispetto del principio di proporzionalità della retribuzione sancito dall'art. 36 Cost.*".

[27] Corte Giust., 24.1.2002, causa C-164/99, *Portugaia Construções Ld*[a], punto 35.

ticità della disciplina del distacco transnazionale, in relazione alla sua adeguatezza rispetto alle dinamiche di *dumping* salariale. E, di nuovo, anche con riguardo a tali profili, la direttiva 2018/957 fornisce solo in parte risposte risolutive.

Una risposta del legislatore del 2018 alla sentenza *Rüffert* è da cogliere nell'integrazione dell'art. 3, par. 8, grazie alla quale è adesso concesso di avvalersi dei contratti collettivi non dichiarati di efficacia generale anche agli Stati che conoscono l'*erga omnes*, qualora i meccanismi che lo garantiscono non siano stati utilizzati[28]. La modifica interessa in particolare proprio il sistema tedesco, nel quale la percentuale di contratti collettivi dichiarati di efficacia generale è ormai minoritaria rispetto ai contratti di diritto comune e permette di superare l'interpretazione restrittiva del principio di proporzionalità che, appunto nella sentenza *Rüffert*, aveva portato la Corte a censurare l'utilizzo della clausola di equo trattamento nell'ambito degli appalti pubblici, previsto dalla normativa della Bassa Sassonia[29].

Resta però aperto l'ulteriore problema – anch'esso riflesso del principio di proporzionalità – degli effetti che, nell'applicazione della direttiva 96/71, può determinare l'esistenza del salario minimo legale. La questione riguarda la possibilità che nel salario minimo legale vada identificata la "retribuzione" applicabile ai lavoratori distaccati ai sensi dell'art., 3, par. 1 della direttiva 96/71, dovendosi ritenere "sproporzionata" l'imposizione dei salari previsti dai contratti collettivi, se di livello superiore. Questa conclusione è deducibile dai principi enunciati nelle sentenze *Laval* e *Rüffert* e non è smentita né dalla sentenza *ESA* (perché in Finlandia non solo i contratti hanno efficacia generale, ma non c'è un salario minimo legale) né dalla successiva sentenza *Regiopost*[30] (sempre relativa ad una legge di un Land tedesco) dove la Corte di Giustizia ha sì giustificato l'obbligo di rispettare i minimi salariali imposto agli aggiudicatari

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[28] Nel nuovo art. 3, par. 8 si legge infatti che gli Stati possono avvalersi di contratti non dotati di efficacia *erga omnes* "*in mancanza,* o a completamento, *di un sistema di dichiarazione generale di contratti collettivi*".

[29] Il caso riguardava una legge di un Land tedesco che imponeva alle imprese aggiudicatarie di un appalto pubblico l'applicazione del contratto collettivo territoriale privo di efficacia generale; per la Corte di giustizia ciò contrasta con l'art. 3, par. 8 della direttiva 96/71 in quanto "*dal tenore stesso di questa disposizione risulta che essa è applicabile solamente in mancanza di un sistema di dichiarazione di applicazione generale di contratti collettivi, il che non si verifica nella fattispecie nella Repubblica federale di Germania*" (Corte Giust., C-346/06, *Rüffert*, punto 27).

[30] Corte Giust., 17.11.2015, causa C-115/14, *RegioPost GmbH c. Stadt Landau der Pfalz.*

di appalti pubblici, legittimando così in linea di principio l'utilizzo delle clausole sociali di equo trattamento; ma ciò solo se detti minimi sono fissati dalla legge e non da contratti collettivi privi di efficacia generale ed a condizione che nessuna disposizione nazionale preveda un salario di livello inferiore[31].

Proprio il caso *Regiopost* conferma piuttosto come la disciplina specifica degli appalti pubblici non sia immune dai limiti all'applicabilità dei contratti collettivi posti dalla direttiva 96/71. Per sua natura, infatti, la *lex specialis* della gara d'appalto ha una dimensione intrinsecamente transnazionale, dettando regole applicabili a qualsiasi concorrente con sede sul territorio dell'Unione. Per questo motivo, la definizione degli standard salariali attraverso le clausole sociali di equo trattamento è sempre condizionata dai limiti invocabili in caso di distacco transnazionale sin qui evidenziati[32]. Il che, di nuovo, solleva rilevanti e irrisolti problemi di compatibilità con il diritto dell'UE della disciplina italiana in materia di appalti pubblici contenuta nel c.d. codice dei contratti pubblici, che configura in termini stringenti l'obbligo di applicare ai lavoratori impiegati in appalti e concessioni pubbliche "*il contratto collettivo nazionale e territoriale in vigore per il settore e per la zona nella quale si eseguono i lavori stipulato dalle associazioni comparativamente più rappresentative sul piano nazionale*" (art. 30, d.lgs. 50/16)[33].

D'altra parte le clausole sociali di equo trattamento non si giustificano in alcun modo se l'appalto è destinato ad essere eseguito fuori dai confini nazionali. L'ha chiarito sempre la Corte di giustizia nella sentenza *Bundesdruckerei*, rilevando come impedire "*ai subappaltatori stabiliti in*

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[31] La sentenza *Regiopost* ha riguardato una controversia sorta in relazione ad una legge del Land della Renania-Palatinato, che fissava i minimi salariali per tutti i lavoratori impiegati in appalti pubblici prima dell'entrata in vigore in Germania della legge federale dell'11 agosto 2014 sul salario minimo legale (fissato in 8,50 euro per tutti i lavoratori tedeschi). La Corte, nel decidere la causa, ha precisato che nel caso di specie (a differenza che nel caso *Rüffert*), da una parte la retribuzione "*è fissata da una norma di legge* [...] *applicabile in linea di principio, in maniera generale all'aggiudicazione di qualsiasi appalto pubblico* [...]*, indipendentemente dal settore interessato*"; dall'altra "*tale disposizione di legge conferisce una protezione sociale minima, giacché all'epoca dei fatti nel procedimento principale* [...] *nessun*[a] *normativa nazionale imponeva* [...] *un salario minimo inferiore*" (punti 75 e 76 della sentenza).

[32] Come chiarisce la Corte nella sentenza *Regiopost* (punti 51 e 66), qualsiasi appalto "*super*[i] *manifestamente la pertinente soglia di applicazione della direttiva* [2004/18 relativa agli appalti pubblici] *presenta un interesse transfrontaliero certo*"; il che porta la Corte a valutare la questione alla luce sia dell'art. 56 TFUE sia dell'"*art. 26 della direttiva 2004/18 in combinato disposto con la direttiva 96/71*".

[33] In merito alla disciplina delle clausole di equo trattamento ed al problematico rapporto tra disciplina nazionale e vincoli posti dal mercato unico europeo, vd. ampiamente D. Izzi, *Lavoro negli appalti e dumping salariale*, Giappichelli, 2018, p. 67 ss.

un [altro] *Stato membro di trarre un vantaggio concorrenziale dalle differenze esistenti tre le rispettive tariffe salariali, va oltre quanto è necessario per assicurare il raggiungimento dell'obiettivo della protezione dei lavoratori*"[34]. Un'affermazione che mostra inequivocabilmente come, in linea di principio, il *dumping* salariale reso possibile dagli squilibri strutturali tra i sistemi socio-economici coesistenti all'interno dell'UE sia non solo legittimo, ma sia da considerare funzionale al processo d'integrazione del mercato interno e, in quanto tale, non contrastabile dagli Stati; salvo – e, appunto, nei limiti previsti dalla direttiva 96/71 – nel caso di distacco transnazionale di lavoratori.

4. *Gli scenari futuri, tra contraddizione interne al processo d'integrazione e nuovi spazi per l'azione sindacale*

Le problematiche sin qui elencate si è visto non essere adeguatamente affrontate dal nuovo testo della direttiva 96/71 come riformato dalla direttiva 2018/957, che pur contiene importanti segnali di progresso proprio in merito al *dumping* salariale. E ciò nonostante siano state in buona parte accolte le proposte della Confederazione Europea dei Sindacati (CES), impegnata durante l'*iter* legislativo nel rivendicare i più ampi spazi di libertà agli Stati nella definizione degli standard retributivi da applicare ai lavoratori distaccati e nel restituire alla direttiva 96/71 il carattere di direttiva sui minimi (e non sui massimi) di tutela. Neppure il sindacato europeo ha fatto i conti fino in fondo con l'irrisolto problema del rispetto del principio di non discriminazione nei sistemi privi di contratti collettivi di generale applicazione; problema che avrebbe forse potuto essere risolto solo ammettendo esplicitamente la possibilità di far ricorso a contratti collettivi di settore e territoriale rispettati dalla maggior parte delle imprese nazionali (ad es. almeno l'80%), oppure identificando la retribuzione applicabile ai lavoratori distaccati anche nel salario medio applicato dalle imprese in un determinato settore o territorio.

Quanto alle conseguenze del decentramento contrattuale, è evidente come sotto questo profilo si manifesti una contraddizione tra l'evoluzione delle regole sul distacco e le politiche promosse dalle istituzioni dell'UE nell'ambito della *governance* economica. Non basta infatti muoversi sul piano del diritto dell'UE, modificando la direttiva sul distacco

[34] Corte Giust. 11.9.2014, causa C-549/13, *Bundesdruckerei GmbH c. Stadt Dortmund*, punto 34.

se poi a livello nazionale vengono destrutturati i sistemi di contrattazione collettiva, permettendo così il *dumping* anche all'interno di confini nazionali. Un'efficace strategia di difesa dal *dumping* salariale sul piano sovranazionale (lo riconosce chiaramente la stessa Corte di Giustizia) passa in primo luogo dalla difesa del ruolo del contratto collettivo a livello nazionale, perseguita attraverso una legislazione di sostegno dello stesso che ne garantisca l'omogenea applicazione da parte di tutte le imprese operanti in un settore economico.

In preda ad una sorta di apparente schizofrenia, le istituzioni europee invece da una parte segnalano agli Stati membri che per difendersi dal *dumping* salariale senza violare il principio di non discriminazione è necessario avere una struttura contrattuale centralizzata e contratti collettivi *erga omnes*; dall'altra, nell'ambito della *governance* economica, invitano gli stessi Stati a decentralizzare la contrattazione collettiva, indebolendo e, in alcuni casi, perfino superando il contratto collettivo (nazionale) di settore[35]. Ovvero, a discostarsi dal modello di contrattazione, che – secondo la Corte e la stessa Commissione – rende possibile un'efficace difesa dal *dumping* salariale evitando la concorrenza al ribasso tra ordinamenti.

A ben vedere però la "schizofrenia" delle istituzioni europee è, appunto, solo apparente. La contraddizione tra i *dicta* dei giudici di Lussemburgo e le ricette dettate per far fronte alla crisi e promuovere la crescita si risolve infatti se si considera la piena compatibilità con le regole del mercato interno di un sistema di relazioni industriali nel quale, al progressivo indebolimento della funzione tariffaria del contratto nazionale, si accompagna la fissazione per legge dei minimi salariali di generale applicazione[36]; un modello verso il quale, non a caso, si sta decisamente orientando la Germania, dove l'introduzione del salario legale ha certificato la crisi forse irreversibile del contratto di settore[37].

In un quadro di progressivo e diffuso decentramento dei sistemi di contrattazione, diventa allora ancor più rilevante l'impatto della "dottrina *Laval*", ovvero dei principi enunciati dalla Corte di giustizia nella celebre sentenza del dicembre 2007, per i quali è negato il diritto dei sindacati

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[35] Per un'analisi critica delle politiche contrattuali e salariali promosse dalle istituzioni dell'UE durante la crisi, per tutti vd. G. VAN GYES, T. THORSTEN SCHULTEN (2015), *Wage Bargaining under the New European Economic Governance*, Brussels.

[36] Sull'effetto della combinazione tra disciplina del distacco transnazionale e *governance* economica, molto efficacemente, M. ROCCA (2015), *Posting of Workers and Collective Labour Law: There and Back Again*, Cambridge, p. 307 ss.

[37] L. BACCARO, C. HOWELL, *Trajectories of Neoliberal Transformation. European Industrial Relation Since the 1970s* (spec. *Softening Institution: the Liberalization of German Industrial Relations*), Cambridge, 2017, p. 97 ss.

dello Stato ospitante di contrattare liberamente con l'impresa straniera le condizioni di lavoro, perché ogni pressione operata attraverso il conflitto sindacale sarebbe lesiva della sua libertà economica[38]. Principi che sanciscono l'impossibilità di ottenere un'effettiva parità di trattamento attraverso la stipula di contratti aziendali con l'impresa distaccante.

Su questo piano però il legislatore europeo mostra segni di più deciso scollamento dagli orientamenti della Corte, posto che questa, comunque, nel decennio che ci separa dal quartetto *Laval* non si è più confrontata con la questione degli spazi di agibilità dell'azione sindacale nell'ambito del mercato interno. Nella nuova versione della direttiva si riconosce che il suo recepimento non debba pregiudicare "*in alcun modo*" l'esercizio dei diritti fondamentali, compreso lo sciopero e "*neppure il diritto di negoziare, concludere ed eseguire accordi collettivi, o di intraprendere azioni collettive in conformità della normativa e/o delle prassi nazionali*" ("nuovo" art. 1 *bis* della direttiva 96/71). In questo modo si rafforza, collocandola nel dispositivo della direttiva, la clausola già presente nel considerando 22 della versione originaria della direttiva 96/71, dove si legge che "*la presente direttiva lascia impregiudicato il diritto vigente degli Stati membri in materia di azioni collettive per la difesa degli interessi di categoria*"; clausola che evidentemente non ha condizionato la Corte nel decidere il caso *Laval*, ma che diventa più difficile da ignorare nella nuova formulazione.

Segnali di ripensamento delle istituzioni dell'UE sotto questo profilo sono per la verità già emersi nella direttiva "*enforcement*" n. 2014/67, il cui art. 9, par. 1, lett. *f*) impone all'impresa distaccante di individuare una "*persona di contatto*" col potere di "negoziare" con i sindacati dello Stato ospitante. Da questa disposizione si ricava che il legislatore europeo riconosce il diritto dei sindacati nazionali di contrattare nell'interesse dei lavoratori stranieri distaccati; e quindi, implicitamente, anche di scioperare, visto che il diritto di sciopero è il necessario corollario della libertà di associazione e di contrattazione (come riconosciuto ormai anche dalla Corte europea dei diritti dell'uomo[39]).

Difficile prevedere se quest'evoluzione della legislazione dell'UE sia sufficiente per considerare definitivamente superata la "dottrina *Laval*".

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[38] Sulla celebre sentenza *Laval*, che insieme alla sentenza *Viking* (Corte Giust., 11.12.2007, causa C-438/05), ha subordinato l'esercizio del diritto di sciopero al rispetto delle libertà economiche fondamentali tutelate dal diritto dell'UE, la letteratura è sterminata; per tutti vd. M. FREEDLAND, J. PRASSL (2015), *Viking, Laval and Beyond*, Oxford.

[39] Corte. eur. dir. uomo, 12.11.2008, *Demir e Baykara c. Turchia* e C. eur. dir. uomo, 21.4.2009, *Enerij Japi-Yol Sen c. Turchia*, nelle quali è stato riconosciuto che il diritto alla con-

Per garantire la piena agibilità dell'azione sindacale sul piano transnazionale occorrerebbe riconoscere espressamente che i lavoratori ed i sindacati nazionali hanno il diritto di contrattare collettivamente e di scioperare nei confronti delle imprese straniere senza che queste possano utilizzare le norme relative alle libertà economiche fondamentali a difesa dei loro interessi. Ciò non implicherebbe la messa in discussione del funzionamento del mercato interno, né il cedimento a pulsioni "protezionistiche"; ma richiederebbe solo di interpretare diversamente (e più correttamente) le norme sulle quali il mercato si fonda. La possibilità per le imprese di invocare la libertà di prestazione dei servizi nei confronti del sindacato – cioè per limitare l'esercizio dell'autonomia collettiva – non è infatti prevista dal Trattato, ma è frutto della discutibile interpretazione "estensiva" dell'art. 56 TFUE, per la quale questa norma avrebbe un'"efficacia diretta orizzontale"; cioè sarebbe appunto invocabile anche nei rapporti tra soggetti privati e non soltanto per rimuovere norme o provvedimenti adottati dai pubblici poteri dello Stato[40]. Una simile interpretazione, adottata dalla Corte, non solo è incompatibile con il rispetto degli standard internazionali in materia di sciopero (come riconosciuto dal Comitato europeo dei diritti sociali, interpretando l'art. 6, par. 4 della Carta sociale europea[41]), ma si pone anche in contraddizione con la volontà di rafforzare la contrattazione collettiva sul piano transnazionale, che la stessa Commissione manifesta da anni[42].

Solidamente radicato nelle fonti internazionali, il diritto al conflitto, anche nella sua dimensione transnazionale, sembra dunque resistere alle pressioni deregolative che hanno così fortemente minato il ruolo della

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trattazione collettiva e di sciopero sono espressione del diritto di associazione sancito dall'art. 11 della Convenzione europea dei diritti dell'uomo.

[40] In merito, F. Dorssemont, G. Orlandini (2014), *Market rules and the right to strike: a different approach*, in M. Rigaux, J. Buelens, A. Latinne (eds), *From Labour to Social Competition Law?*, Cambridge-Anwerp-Portland, p. 67 ss.

[41] Il Comitato europeo dei diritti sociali (l'organismo competente a valutare il rispetto della Carta sociale europea da parte degli Stati aderenti) ha riconosciuto che la legge adottata dalla Svezia per adeguarsi alla sentenza *Laval* è in contrasto con gli standard richiesti dall'art. 6.4 della Carta, che riconosce il diritto di sciopero (European Committee of Social Rights, 3.6.2013, collective complaint No. 85/2012, *Swedish Trade Union Confederation and Swedish Confederation of Professional Employees v. Sweden*); e a conclusioni analoghe è giunto anche il comitato di esperti dell'OIL (ILO Report of the Committee of Experts on the Application of Conventions and Recommendations, 2010, 99th session of the International Labour Conference, Report III (Part 1A), 208-209).

[42] European Commission, *Transnational company agreements: realising the potential of social dialogue*, SWD(2012)264; EC, *The role of transnational company agreements in the context of increasing international integration*, SEC(2008)2155.

contrattazione nazionale negli Stati membri. Esso anzi sembra trovare nuova legittimazione nelle fonti del diritto euro-unitario, dopo esser stato accolto tra i valori fondanti dell'Unione grazie alla Carta dei diritti dell'UE (art. 28). Lo stesso processo di decentramento dei sistemi di contrattazione finisce così per aprire nuovi spazi per l'esercizio dell'azione collettiva in funzione anti-*dumping*. Spetta evidentemente ai sindacati dei singoli Stati membri sfruttare questi spazi per costruire inediti percorsi di solidarietà tra lavoratori europei e recuperare sul piano transnazionale il peso che le stesse dinamiche dell'integrazione hanno contribuito a far loro perdere all'interno dei confini nazionali.

MARC MORSA[1]

THE FAILURE OF NEGOTIATIONS ON EUROPEAN REGULATIONS FOR THE COORDINATION OF SOCIAL SECURITY SYSTEMS: THE END OF EUROPEAN SOLIDARITY? THE REASONS FOR FAILURE IN AN ENDEAVOUR THAT STARTED WELL

1. *Introduction*

After two and a half years of negotiations, eight trilogues, a provisional political agreement, which was reached under the Romanian Presidency on 19 March 2019 and subsequently rejected by a blocking minority in the Council, on 18 April 2019, the European Parliament decided to postpone the work on the dossier to the next legislature, with

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291 votes in favour, 284 against and six abstentions. The future Finnish and Croatian Presidencies of the EU Council, along with the next European Parliament, may decide to reopen the dossier. Until the European Commission has withdrawn the text, discussions can continue.

The 'mobility package'[2] has been integrated into the European Commission's work programmes for the years 2015 and 2016. It intends to pursue a balanced approach between, on the one hand, promoting the mobility of workers on the labour market and, on the other hand, supporting Member States in their efforts to combat fraud, abuse and social dumping through a better coordination of social security systems via a targeted revision of the so-called Directive 96/71, 'Posting of Workers Directive'[3] and a strengthening of the European Employment Services Network (EURES)[4]. These three components constitute the content of the 'mobility package'[5]. However, following the agreement reached between the Council and the United Kingdom on 19 February 2016 (the anti-Brexit agreement), the component dealing with social security coordination had to be extracted from the 'labour mobility package' legislative proposal. Following the outcome of the referendum on the United Kingdom's membership of the European Union, which took place on 23 June 2016, the European Commission published its legislative proposal to revise the European Security Systems Coordination Regulations on December 13 2016[6].

The legislative process was long and fraught with difficulties. The legislative proposal was discussed in the Council during the Maltese,

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[2] The so called «Mobility package» a master piece of the Junker Commission in the social policy area.

[3] On 8 March 2016, the European Commission presented a legislative proposal (COM (2016) 0128 final) for a targeted revision of the 1996 Posting of Workers Directive (96/71/EC).

[4] On 17 January 2014, the European Commission presented a proposal (COM (2014) 06 final) for a Regulation of the European Parliament and of the Council on a European Network of Employment Services (EURES).

[5] M. Morsa, La proposition de la Commission européenne portant révision des règlements européens de coordination n^{os} 883/2004 et 987/2009: une approche équilibrée permettant de lutter contre la fraude sociale et le *dumping* social?», in the legal review *J.T.T.*, 2017/25, p. 397-410.

[6] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, COM(2016) 815 final.

Estonian and Bulgarian Presidencies. The EPSCO Council has finalised its negotiating position (general approach) as of June 21 2018[7]. At the EPSCO Council, five member states voted against and three other states abstained. The report from Parliament was delayed, since it was presented by the rapporteur (G. Balas) and adopted in the Committee on Employment and Social Affairs of the European Parliament on 20 November 2018 and it will only be adopted in the plenary session of the Parliament on 11 December 2018. Therefore, this left (too) little time for inter-institutional dialogue (trilogues) to succeed, since the position of the Parliament on most of the chapters that were subject to revision was in total contradiction with the negotiating position of the Council. Nevertheless, the trilogues under the Romanian chairmanship have worked hard to alleviate differences of opinion with the European Parliament. Thus, the Romanian presidency proposed a compromise proposal in the form of a provisional agreement, but the latter was rejected by COREPER on 29 March 2019, by eight votes against and three abstentions. The Parliament subsequently tried to finalise its first reading, but this was unsuccessful since it was decided, on April 18, 2019, to postpone the work on the dossier to the next legislature, by 291 votes in favour, 284 against and six abstentions.

But what are the causes of this failure? In fact, during the inter-institutional dialogue, opposition mainly crystallised around two chapters, which were devoted to unemployment insurance and the determination of the applicable legislation respectively; there was opposition between the Council and the European Parliament, but also a significant gap between two groups of Member States, that of Visegrád, which brought together four Central European countries (Hungary, Poland, the Czech Republic and Slovakia) and another comprising a large number of the other Member States in the Union.

2. *Act I: the proposal to revise the European Commission's coordination regulations: everything began well!*

The revision proposal, which was published on 13 December 2016 by the European Commission[8], was presented by Commissioner Thyssen as a concrete expression of a balanced approach between promoting the

[7] Doc. 10295/18.
[8] COM(2016) 815 final.

free movement of persons on one hand (including the reduction or removal of barriers), and, on the other, the right of Member States to combat social abuse and fraud. In addition, a new transversal principle highlighted in this reform proposal aims to ensure a fair and equitable distribution of the financial burden between the Member States.

2.1. *Access of (economically) non-active citizens to social benefits*[9]

The application of Directive 2004/38 /EC to Coordinating Regulation No. 883/2004 and 987/2009 has been clarified by the case law from the ECJ[10] in Brey[11], Dano[12], Alimanovic[13], Garcia-Netio[14] and Commission v. the United Kingdom[15]. As a result of this case law, the freedom of movement of non-active individuals is thus considerably limited, because of the loss of the benefits they previously received in their country of origin (which they have left) and the refusal of benefits in the host country. For some authors, this jurisprudence would sound the death knell for European citizenship[16]. Indeed, the social dimension of the Lisbon Treaty[17], along with the jurisprudence of the Court of Justice from the 2000s, has clearly brought out the social aspect of European Union citizenship, by emphasising social inclusion within the European Union and the protective rights that individuals receive, whatever they may be[18].

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[9] M. Morsa, «Les migrations internes à l'Union européenne sont-elles motivées par un accès à des prestations sociales?», *JTT*, 2014, p. 254. See H. Verschueren, «Free movement or benefit tourism: the unreasonable burden of *Brey*», *European journal of migration and law*, 2014, pp. 147 and J. Paju, *The European Union and Social Security Law*, Hart Publishing, 2017, p.123 ff.

[10] For an anlysis of this jurisprudence of the ECJ see M. Morsa, La proposition de la Commission européenne portant révision des règlements européens de coordination n^{os} 883/2004 et 987/2009: une approche équilibrée permettant de lutter contre la fraude sociale et le *dumping* social?», in the legal review *J.T.T.*, 2017/25, p. 399-400.

[11] ECJ, case C-140/12, EU:C:2013:565.

[12] ECJ, case C-333/13, EU:C:2014:2358.

[13] ECJ, case C-67/14, EU:C:2015:597.

[14] ECJ, case C-299/14, EU:C:2016:114.

[15] ECJ, case C-308/14, EU:C:2016:436.

[16] E. Aubin, Professor of Public Law, Faculty of Law and Social Sciences of the University of Poitiers.

[17] M. Schmitt, «La dimension sociale du Traité de Lisbonne», *Dr. soc.*, 2010, p. 682.

[18] S. Maillard, *L'émergence de la citoyenneté sociale européenne*, *Dr. soc.*, 2009, p. 88; C. Marzo, «Vers une citoyenneté sociale européenne?», *Dr. soc.*, 2007, p. 218; M. Bonnechère, «Citoyenneté européenne et Europe sociale», *Europe*, 2002, comm. n° 9. Jaan Paju, *The European Union and Social Security Law,* Hart Publishing, 2017, p.123 and ff.

In its proposal to revise the coordination regulations of 13 December 2016, the Commission, on the basis of the case law of the ECJ mentioned above – in the interest of transparency, but also of legal certainty for both socially insured individuals and social security institutions – clarified that the Member States may decide not to grant certain social security benefits to mobile citizens who are economically inactive. This means that people who do not work or are not looking for a job, only have a legal right of residence in accordance with the 2004/38 Stay Directive when they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State. On the basis of this case law, Member States may choose to limit the equal treatment of special non-contributory cash benefits as if they were social assistance under the umbrella of Directive 2004/38, and other social security benefits claimed by economically inactive citizens, to the extent permitted by this Directive; this case law, which is not currently reflected in the regulations, implies that economically inactive citizens' access to benefits in the host Member State may be conditioned by the fact that the citizen has a legal right to stay in that Member State. The Commission considers that the monitoring of the regularity of the right of residence should be conducted in accordance with the requirements of Directive 2004/38/EC. To this end, it is necessary to clearly distinguish (economically) non-active citizens from job seekers, whose right of residence is conferred directly by Article 45 TFEU. To improve legal clarity for citizens and institutions, this case law needs to be codified. For the purposes of this provision, except as it pertains to access to social assistance benefits within the meaning of Directive 2004/38/EC, the mobile job seeker, in accordance with Article 45 TFEU[19], is entitled to "a right of residence in the host Member State when looking for a job and is not a 'an (economically) non-active mobile citizen of the European Union'". However, in its proposal for revision, the European Commission states that, when they verify that the person concerned has comprehensive sickness insurance cover, in accordance with the requirement of Directive 2004/38/EC, Member States should ensure that non-active mobile citizens of the European Union can meet this requirement.

[19] ECJ, *Antonissen*, case C-282/89, EU:C:1991:80. See also: ECJ *Alimanovic*, case C-67/14, EU:C:2015:597, para 57.

In order to transpose this case law from the ECJ, the European Commission has decided to codify only Commission v. the United Kingdom[20], merely listing the other judgments delivered by the Court in the recital to its proposal.

2.2. *The posting of workers*[21]

The European Commission does not intend to change the substantive legal requirements for the posting of workers, or to challenge the legal binding effect of the A1 form established by the European Court of Justice[22], but plans to refine certain elements. Nevertheless, the amendments are numerous and, for the most part, tend to deepen the cooperation processes between institutions and social inspection services engaged in the fight against social security fraud and abuse. They strengthen the administrative rules that are applicable to the coordination of social security with regard to the exchange of information and the verification of the social security status of workers, in order to prevent any practice that may be unfair or any abuse[23].

The Commission intends to specify the rules for determining the applicable legislation and to clarify the relationship between Regulations No. 883/2004 and 987/2009 and Directive 96/71/EC of the European Parliament and the Council, dated 16 December 1996, which concerns the posting of workers in the framework of the provision of services[24]. To that end, the legislative proposal intends to amend Article 12 of Regulation No. 883/2004, in order to make it clear that the concept of a 'posted worker' shall be given the same meaning as in the Directive 96/71/EC. Furthermore, the Commission states that this clarification does not change the personal scope of Article 12 of Regulation No. 883/2004, but only aligns the notions used in those legal texts. In addition, the European

[20] ECJ, case C-308/14, EU:C:2016:436.

[21] We will not deal with the amendments proposed by the European Commission to Article 11 (5) of Regulation 883/2004 which, in essence, aim to ensure alignment of the texts, in particular following the definition of 'benefits' provided for in Annex III to the old Council Regulation (EEC) No 3922/91 of 16 December, 1991.

[22] See, to that effect, judgment of 30 March 2000, *Banks and Others*, C-178/97, EU:C:2000:169, paragraph 40; Case C-202/97 *Fitzwilliam Executive Search v Bestuur van het LandelijkInstituut Sociale Verzekeringen*, ECLI:EU:C:2000:75, paragraph 53.

[23] Such as bogus self-employment.

[24] *J.O.* L 18 du 21 janvier 1997, p. 1. Voy. M. MORSA, «Le travail détaché dans l'Union européenne: enjeux juridiques et économiques», *in Migrations et protection sociale*, n° 94. Le travail détaché face au droit européen - Perspectives de droit social et de droit fiscal 1re édition 2019, A. FRANKART, F. DORSSEMONT, M. MORSA.

Commission proposes to extend the replacement ban to self-employed persons. This amendment clarifies and reinforces the existing prohibition on replacement and prevents abuses on the part of certain companies, who set up a rotating system of posted workers from countries where social security contributions are lower than in the country of employment. Moreover, by including a new Article 76a in Regulation No. 883/2004, the Commission is empowered to adopt implementing acts in accordance with Article 291 TFEU[25], with a view to specifying the procedures to be followed, in order to ensure uniform conditions for the application of the special rules contained in Articles 12 and 13 of Regulation No. 883/2004 (posting and pluriactivity). The Commission intends to fill a legal gap by including a definition of the concept of 'fraud' in Regulation No. 987/2009, which is understood as 'any intentional act or omission to act, in order to obtain or receive social security benefits or to avoid to pay social security contributions, contrary to the law of a Member State '[26]. In addition, the European Commission proposes a specific legal basis (Art. 2, Reg. 987/2009) that allows the exchange of data, in order to detect fraud and errors in the application of coordination regulations, including in the form of data matching. Lastly, the Commission reinforces the procedure for dialogue and conciliation, in the context of the settlement of disputes relating to the validity of the A1 forms, on one hand by providing for shorter deadlines modelled on those of Directive 2014/67/EU[27]

[25] A. TÜRK, «Law-making after Lisbon», in A. BIONDI, P. EECKHOUT (eds), *EU Law after Lisbon* (Oxford University Press, 2011); J. BAST, «New Categories of Acts After the Lisbon Reform: Dynamics of Parliamentarization in EU Law», (2012) *Common Market Law Review* 885; P. CRAIG, «Delegated Acts, Implementing Acts and the New Comitology Regulation» (2011) *European Law Review 671.*

[26] This definition was established on the basis of the definition used in the (EC) communication entitled 'Free movement of Union citizens and their family members: five actions to make a difference', COM (2013) 837 final. It is perceived that this definition will be able to deploy its full potential in the context of the implementation of Article 5 of Regulation 987/2009, which establishes the legal validity of documents and other supporting documents.

[27] Directive of the European Parliament and the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') Article 6) – OJ 28 May 2914, L 159/11. The legislative proposal provides for that the institution issuing such a document is required to check the reason for issuing the document and, if necessary, to correct or withdraw the document within twenty-five working days. In the case of a fraud committed by the applicant, the withdrawal of such a document must have retroactive effect. In addition, the institution issuing the document must transmit to the requesting institution all the available supporting documents on which it based its decision within 25 working days, or even two working days in cases where urgency can be ascertained.

and, on the other hand, by stating that, in the event of case of fraud established by the competent institution or the social inspectorate in the state of employment, the withdrawal of A1 takes retroactive effect. Finally, the Commission intends to 'consolidate' the case law of the ECJ[28], as it pertains to the obligation incumbent on the institution issuing the A1 to carry out a thorough verification of the legal conditions of posting before issuing such documents.

2.3. *Coordination rules relating to family benefits*

Some states have criticised the existing coordination system because, in their opinion, the objective of family benefits must remain the compensation of family expenses, and not become a substantial source of income, because of differences in the cost of living between one state and another. Thus, these Member States (Austria, Germany, Ireland and Denmark) claim that, for children living in another Member State, the family benefits received should be indexed to the standard of living. The majority of states did not share this view and the Commission does not intend to change the current rules regarding the export of family benefits. The country where the parents work is still responsible for the payment of benefits. On the other hand, in view of societal evolution[29], the Commission intends to remove financial obstacles to taking parental leave by both parents during the same period, in order to actively promote the sharing of parental responsibilities. To this end, the Commission proposes to amend the current coordination rules, so that child-raising allowances are considered individual and personal rights, rather than a right to a benefit for the family as a whole.

2.4. *Long-term care benefits*

Faced with the ever-growing needs of Europe's ageing population, people with disabilities and family careers, the European Commission has found that long-term care benefits need to be more effectively coordinated. Indeed, Regulation No. 883/2004 devotes only one provision to long-term care benefits, in order to prevent benefits from overlapping if

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[28] ECJ, case C-202/97, EU:C:2000:75, para 51, or *Herbosch Kiere*, case C-2/05, EU:C:2006:69, para 22 and ECJ, 5 October 2012, *Format Urzadzenia i Montaze Przemyslowe sp. z o.o. c. Zaklad Ubezpieczen Spolecznych*, case C-115-11 EU:C:2012:606.

[29] J. De Coninck, *Reply to an ad hoc request for comparative analysis: salary-related child raising benefits*, FreSsco network (Free Movement of workers and Social security coordination), E.C, 2015, p. 9 (annex XXV of impact assessment report).

they are provided in cash in one State and in-kind in another. Regulation no. 883/2004 does not contain any special rules on long-term care benefits (Article 34, Regulation no. 883/2004[30])[31]. In addition, these benefits are not mentioned in the material scope covered by Regulation No. 883/2004[32] and this leads to legal uncertainty for both the institutions and the individuals claiming the benefits. To this end, the Commission proposes to add a specific chapter to coordinate these benefits in (EC) Regulation No. 883/2004, along with a definition[33] and a list of the benefits to be adopted and updated by the Administrative Commission. In addition, the Commission proposal does not change the substance of the coordination rules that are applicable to these benefits.

2.5. *Coordination rules relating to unemployment benefits*

The Commission proposes new methods of coordinating unemployment benefits in cross-border situations. These arrangements concern the aggregation of insurance periods for the acquisition or retention of a right to unemployment benefits, the export of unemployment benefits and the determination of the Member State responsible for the payment of unemployment benefits to border workers and other workers in cross-border situations. The revision of the chapter on unemployment benefits reflects the European Commission's political commitment to labour mobility, with a view to helping to reduce labour and skill shortages and to help restore economic growth and competitiveness. Specifically, the

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[30] Article 31 of Regulation No 987/2009 sets out the rules of procedure for the implementation of Article 34 of Regulation No 883/2004.

[31] R. CORNELISSEN, «Les axes de la réforme et les principes généraux du règlement n° 883/2004», *Revue de droit sanitaire et social (R.D.S.S.)*, n° 1, 2010, p. 9.

[32] ECJ, 5 March 1998, *Molenaar*, case C-160/96, ECLI:EU:C:1998:84; ECJ, 21 February 2006, *Hosse*, case C-286/03, ECLI:EU:C:2006:125; ECJ, *Gaumin-Cerri*, case C-502/01, ECLI:EU:C:2004:413; ECJ, *Gouvernement de la Communauté française et Gouvernement wallon*, aff. C-212/06, ECLI:EU:C:2008:178. The long term care benefits are considered by the case law as sickness benefits, to which the provisions of the relevant chapter of the (EC) Regulations apply.

[33] This definition takes into account the analysis carried out by the trESS network (Coordination of long-term care benefits-current situation and future prospects (coordination of benefits for long-term care - current situation) perspectives, 2011), incorporates the case-law of the Court of Justice and is consistent with the UN Convention on the Rights of Persons with Disabilities, which defines long-term care as any benefit in kind, cash or mixed of both granted to persons who, for a prolonged period of time, because of old age, disability, sickness or disability, require considerable assistance from one or more other persons to perform the essential daily activities, including in favor of their personal autonomy, which means, in particular, the benefits granted to the person who provides this assistance or for that person. This is a very (too?) Broad definition!

Commission proposes that the minimum duration for the export of unemployment benefits be extended from three to six months for job seekers, while providing for the possibility of exporting the benefit until the end of their entitlement. Furthermore, this option will be combined with an enhanced cooperation mechanism, in order to support job-seekers in their search for work, thus increasing their chances for reintegration into the labour market. This will increase their chances of finding a job and contribute to the fight against unemployment and skill mismatches across the Union. As regards the coordination of unemployment benefits for frontier workers, and other workers in cross-border situations, the preferred option is to attribute the responsibility for the payment of unemployment benefits to the Member State of last employment, in cases where the frontier worker worked there for at least 12 months, and the Member State of residence in all other cases. As a result, the reimbursement procedure detailed in the U4 decision of the Administrative Commission, which is currently very complex, will be abolished. This amendment reflects the principle that the Member State that collected the contributions should pay the benefits. Finally, with regard to the aggregation of benefits, the revision proposal seeks to require a minimum qualifying period of three months insurance in the Member State of most recent activity before a right to aggregate past periods of insurance arises (while requiring the Member State of previous activity to provide benefits when this condition is not fulfilled).

3. *Act II: The position of the Council, or the alchemy of a subtle balance between different fields of political action*

3.1. *Rules regarding the coordination of unemployment benefits*

On *unemployment benefits*, the draft amending regulation updates rules on aggregation, exportability and the coordination of unemployment benefits for frontier and cross-border workers as follow:

– It allows for member states to extend the period jobseekers are allowed to export their unemployment benefits up to the end of the period of their entitlement to benefits, instead of the current limit of 6 months.

– It encourages a closer tie between the labour market of the member state responsible for providing unemployment benefits and the unemployed person by allowing member states to require someone to work for at least one month on their territory before aggregating the previous periods they worked prior to claiming unemployment benefits. Otherwise the member state in which that person worked earlier, if they worked there for *at least one month* becomes responsible for aggregation.

– It establishes a closer link between the labour market of the member state responsible for providing unemployment benefits and the unemployed person by switching the member state responsible for paying unemployment benefits from the member state of residence to the member state of last employment if the person worked there for at least 3 months.

3.2. *Long-term care benefits*

As regard the *long-term care benefits* the draft amending regulation reflects the impact of the aging society and the increasing role long term-care benefits play in national social security systems. In order to increase legal certainty, it clarifies the rules under which long-term care benefits can be coordinated. A stable regime for long-term care benefits coordination will contribute to facilitating the mobility of those in need of long-term care and persons caring for them. Unlike the Commission, the Council considers that these benefits should not be dealt with in a separate chapter and should be included in the sickness chapter, while admitting (in agreement with the Commission) that these benefits could be coordinated under another chapter if it is more favourable for the insured persons (Annex XII).

3.3. *Coordination rules relating to family benefits*

Changes regarding *family benefits* aim to promote shared child raising responsibilities and remove potential financial disincentives for parents who reduce their working hours to take care of their child during the same period. The proposal distinguishes between family benefits in cash intended to replace income not earned due to child-raising and all other family benefits. In order to take into account the judgement of the Court of Justice of the European Union in the Case C-347/12 *Wiering*[34], for the

[34] ECJ, Wiering, 4 May 2014, C-347/12, ECLI:EU:C:2014:300; J. Emeric, *Prestations familiales dues au travailleur migrant*, La Semaine Juridique - Social 2014 n° 38 p. 37-38; J.-C. Fillon, *L'actualité de la jurisprudence européenne et internationale. Les allocations parentales d'éducation exclues du calcul de l'allocation différentielle*, Revue de jurisprudence sociale 2014 p. 563-564, M. Morsa, *Le calcul du complément différentiel aux allocations familiales dû pour les enfants d'un travailleur frontalier: distinction des allocations familiales selon leur nature pour le calcul du complément différentiel - observations sous l'arrêt Wiering*, *Journal des Tribunaux du travail*, 2015, volume n° 1229, p. 421-426.

purpose of the calculation of the differential supplement, there are two categories of family benefits of the same kind: family benefits in cash primarily intended to replace income not earned due to child-raising, and all other family benefits. The Council proposed to consolidate this case law while limiting it to the two categories of benefits mentioned above; the Wiering judgment authorising a multi-category approach is impracticable for the competent institutions (mapping of all existing family benefits, extensive exchange of information between the Member States, etc.).

3.4. *The posting of workers*

Already in its partial general approach of 23 October 2017[35], the Employment, Social Policy, Health and Consumer Affairs Council (EPSCO) abandoned the explicit reference to Directive 96/71, which the European Commission had introduced in its original legislative proposal in Article 12 (1) of Regulation No. 883/2004[36]. However, in order to avoid any confusion with respect to Directive 96/71, the words 'this employer sends' replace 'this employer posted' in the current wording of Article 12 (1) of Regulation No/ 883/2004. It is a simple semantic change, which entails no substantive changes[37]. In addition, the Council confirms the Commission's intention to extend the prohibition of replacement provided for employees (Article 12, (1), Regulation no. 833/04)[38] to self-employed workers (Article 12 (2) Regulation no. 883/04). However, the Council qualifies the scope of this general prohibition of replacement, by consolidating a practice permitted by the Practical Guide on Applicable Legislation authorising the replacement of a (self) posted worker by another person (this 'other person' must, in turn, comply with the legal conditions of (self) posting) in certain exceptional circumstances[39], thus conferring a legally binding character to this practice (new Art. 12a, R no. 883/04). The Council also confirms that the Commission shall be empowered to adopt implementing acts but speci-

[35] Secretariat General of the Council, 13645/1/17 Rev 1, Partial General Approach, 26 October, 2017.

[36] This reference is not mentioned in Article 12 (2) of Regulation 883/2004 since Directive 96/71 does not apply to the self-employed.

[37] E.g.: an self-employed worker will be likely to be 'sent', but not "posted", since it is not covered by (EC) Directive 96/71.

[38] The aim is to avoid the abuse of bogus self-employment in order to circumvent the application of the coordination rules.

[39] E.g.: when a posted worker for a period of twenty-four months becomes seriously ill after ten months and must be replaced by another.

fies certain aspects of the examination procedure (Art. 76a and 76-*ter*, (2), Regulation no. 883/04). Like the Commission, the Council confirms the need to define the concept of 'fraud' in the context of implementing coordination regulations (Article 1 (2) (e) (a), Regulation no. 987/09), although, this concept has limited use, since it is only relevant at the level of Article 19a (2) of Regulation No. 987/2009, allowing the withdrawal of a document 'without delay'.

In addition (and as proposed by the E.C.) the proposed changes aim to ensure legal clarity and combat cross-border social security fraud by introducing:

– a period of prior affiliation[40] and a time period[41] between consecutive postings, as being at least 3 months[42] and at least 2 months respectively (art. 14, Regulation 987/09)

– clear criteria for determining the location of the registered office or place of business of the employer of a posted worker (art., § 5*a*, Regul. 987/2009). These changes proposed by the Council are quite different from the Commission's original text, which proposed a response to the phenomenon of 'letterbox' companies. In order for the legislation of the employer's registered office or place of business to be designated as applicable in situations of simultaneous activity (Article 13 of Regulation no. 883/04), this proposal required that this registered office or place of business should pursue substantial activity. This additional condition, however, was unacceptable for many countries, which considered it harmful for their international transport companies. The compromise adopted by the Council pursues the same goal, but this time, by offering a set of criteria to better locate the registered office or place of business of a company or the base of operations. These criteria come from the Planzer case law[43] and were already partially mentioned in the practical guide on the determination of the legislation applicable[44].

– The possibility for retroactive withdrawal or rectification of a document in case of fraud or error.

[40] The affiliation legislation remains, as is currently the case, the legislation of the Member State of establishment of the employer.

[41] This principle comes from the Decision A2 (art. 3, b) of the Administrative Commission but fixed at 1 month and, furthermore, totally devoid of any legally binding nature.

[42] This principle comes from the Decision A2 (art. 1, (4)) of the Administrative Commission but fixed at 1 month and, in addition, totally devoid of any legally binding nature.

[43] ECJ, *Planzer* case. C-73/06, ECLI:EU:C:2007:397.

[44] Practical guide on the determination of the legislation applicable to workers in the European Union drawn up by the Administrative Commission, Part II, point 7.

However, one of the clearest advances proposed by the Council in its general position is the definition of a specific and accelerated procedure (Art. 19a, Regulation no. 987/09) within the context of questioning the validity of A1 documents. Thus, the Council proposes to split the current Article 5 of Regulation no. 987/09 into two parts: the first part in Article 5[45] reproduces the general procedure, the provisions of which apply not only to documents certifying the applicable legislation, but also to other documents necessary for the implementation of the coordination rules for social security systems, such as, for example, the European Health Insurance Card (EHIC), while a procedure specifically dedicated to disputes relating to the validity of A1 documents (determination of the applicable legislation) will be defined under a new article 19a in Regulation no. 987/09.

Finally, if the Council confirms the will of the Commission to promote cooperation between the competent institutions and the labour inspectorates at the national level, it also aims to reflect the reluctance of some Member States whose internal law does not allow such cooperation (Art. 85a, Regulation no. 883/2004.

3.5. *Access of (economically) non-active citizens to social benefits*

On *access to benefits for economically inactive persons*, the draft amending regulation aims to ensure legal clarity by referring to relevant recent case law only in the recitals. During the October 23 2017 meeting of the EPSCO Council, held under the Estonian chairmanship, a partial general approach was agreed on this chapter. In essence, the latter endorsed the general opinion that had emerged that 'the best way forward was not to proceed with any codification'. For this reason, it was decided not to revise Article 4 of Regulation no. 883/2004, which enshrines the fundamental principle of equal treatment. However, in our opinion, the Member States are obliged to apply the judgments delivered by the Court of Justice. Consequently – notwithstanding the difficulties inherent to such codification – such a situation will reinforce the legal uncertainty in the Member States, as well as for insured persons. Many discussions are taking place regarding equal treatment and the definition of economically inactive people. Indeed, uncertainties persist for stays of between three months and five years, when Article 7 of the Directive ap-

[45] A paragraph 1a is inserted in Article 5 of Reg. 987/09 which imposes a new requirement of formal quality of documents, through the notion of "mandatory fields".

plies. This position of the EPSCO Council will be included in its negotiating position (general approach) dated 21 June 2018.

The Council's general position on a number of issues has made significant progress in combatting cross-border social security fraud, by deepening some of the Commission's proposals and making others more functional for the institutions who are responsible for implementing the coordination regulations or monitoring their correct implementation.

4. *Act III, or the reasons for failure*

At the start of the process the co-legislators agreed to focus on Unemployment Benefits and Applicable Legislation at the trilogues and try to resolve as much as possible on Equal Treatment, Long-Term Care Benefits, Family Benefits and Miscellaneous at the technical level. Tensions around applicable legislation and unemployment immediately crystallised the inter-institutional opposition to no longer leave them as is and led to the failure of negotiations, leading to the adoption of regulations amending Regulations on the coordination of social security systems.

4.1. *The posting of workers*

In the chapter on posting of workers, the Parliament's main goal is to put in place stricter rules, specifically concerning posting situations, as well as to ensure a tight control over administrative cooperation. Points of contention include:

– Prior affiliation and interruption periods: While regarding employed persons the co-legislators' positions are not that far apart, for the Parliament it is important that employed and self-employed are treated equally, in order to prevent involuntary self-employment.

– Prior notification: The Parliament insists on a mandatory prior notification to be sent to the competent institution of the Member State of activity. The Parliament clarified that it does not insist for the notification to be accepted by the Member State of activity, as well as that this notification does not necessarily have to be submitted in an official form. Beyond the additional administrative burden for companies and competent institutions, this prior notification implicitly meant considering A1 as a constituent element of the posting, which was totally unacceptable for the Visegrád group of member states. In addition, the Parliament wanted to combine this principle of prior notification with two derogations: on the one hand, for business trips (with poorly defined boundaries) and, on the other, for the Reporters of European media organisations group who are posted to another Member State. These derogations, which are the result of compromises between different groups in the European Parliament, were not justified and were inconsistent with the underlying objective of the principle of prior notification sought by Parliament.

– Maximum duration of being subject to the sending Member State's social security system: The Parliament would like to see this period aligned with the maximum duration of posting in the Posting of Workers Directive (directive 2018/957[46]), which is 18 months. The majority of the Council was opposed to this alignment, which was not justified in light of the numerous differences that existed between the two instruments (coordination Regulations versus the posting of workers directive).

– Deposit and daily fee: The Parliament insists that without these financial penalties, it is not legitimately ensured that institutions respond to requests in a timely manner. The Parliament's attention has been drawn to the EESSI and to the soon to be set-up European Labour Authority. As regards the payment of a deposit in the form of social security contributions in the State of employment, inextricable legal and technical difficulties precluded the implementation of such a system (contrary to the principle that the legislation of a single Member State applies in matters of social security is designed, creating obstacles to the freedom to provide services, the difficulty of restitution where it appears that the posting was legally decided, etc.).

– Pursuit of activities in two or more Member States: The Parliament would like to see the competent Member State identified primarily based on which Member State the worker has the largest portion of working time.

4.2. *Coordination rules relating to unemployment benefits*

European Parliament negotiators, including rapporteur Guillaume Balas (S&D/France), and the EU Council, which was under the Romanian Presidency, met for the first time on 15 January 2019 to start discussions on the revision of the European regulations on the coordination of

[46] Directive n° 2018/957 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, O.J. L 173/16 of 9 July 2018.

social security systems. The co-legislators agreed to treat the chapter as a "package", consisting of three topics: Aggregation, Export and Frontier Workers. The most difficult topic is Frontier Workers. The Parliament signalled that it would be willing to show flexibility on the *lex loci laboris* principle, but only if it can be ensured that frontier workers are thoroughly protected and face no administrative difficulties in accessing their benefits. While the Council favoured a closer tie between the labour market of the member state responsible for providing unemployment benefits and the unemployed person by allowing member states to require someone to work for at least one month on their territory before aggregating the previous periods they worked prior to claiming unemployment benefits[47], the European Parliament considers that a single day is sufficient! This Parliament proposal has been fiercely contested by many member states, including Belgium, for whom the European Parliament's proposal was the main reason for the breakdown. In addition, with regard to the duration of the export, the European Parliament returns to the Commission's proposal for a period of six months of export, with a possible extension until the end of the entitlement, while the Council wanted to limit the duration of the export to three months (with a possible extension until the end of entitlement). Another source of tension between the Council and Parliament concerns the situation of frontier workers; for these, the European Parliament wants the worker to have an immediate choice between the last Member State in which they were active or the Member State of residence, with reimbursement to the Member State of residence of four months out of the eight.

The EP's proposals on the chapter on unemployment have certainly been the source of the most conflict between the Council and Parliament. There are many reasons for this, such as the difficulty of drawing a clear line of demarcation between frontier workers and other cross-border workers. The issue of totalisation with minimum periods poses problems for the people concerned. In addition, the position of the Parliament is not in line with the case law of the ECJ, which found that: «*Article 67(1) of Regulation No. 1408/71 of the Council of 14 June 1971, regarding the application of social security schemes to employed individuals and their families moving within the Community, does not make the ag-*

[47] Failing that, the Member State in which the person previously worked shall become competent for the purposes of aggregating the periods, provided that the person concerned has worked there for at least one month.

gregation, by the competent institution of a Member State, of periods of employment completed in another Member State subject to the condition that such periods be treated as periods of insurance for the same branch of social security by the legislation under which they were completed»[48].

4.3. *Coordination rules relating to family benefits*

The Parliament showed sympathy to the Council's two-basket approach and agreed to codify the Wiering judgement (C-347/12), as suggested by the Council. One of the most consensual chapters during the inter-institutional dialogue under the Romanian Presidency.

4.4. *Long-term care benefits*

Like the Council, the European Parliament does not support the fact that these long-term care benefits are coordinated under a separate chapter, and has therefore shown support for the same approach as the Council. The co-legislators have diverging approaches towards the scope of the revision of this chapter. The Parliament would like to enlarge the scope of application, while the Presidency defends maintaining the existing scope, as presented in the General Approach, as much as possible. In addition, the Parliament wanted the list of these benefits to be defined and updated by the Administrative Commission and the social partners. Moreover, while the Council saw no possibility of granting long-term care benefits during a temporary stay in another Member State, the European Parliament considered that the 'S2 procedure'[49] was also applicable to such benefits. Nevertheless, the differences of opinion between the Council and the Parliament gradually faded during the trilogues.

4.5. *Access of (economically) non-active citizens to social benefits*

While neither of the co-legislators would like to see the codification of the case law of the Court of Justice, the two approaches differ on two main points in the recitals: 1) Whether to list or not the relevant case law; 2) Whether to refer to, and if so how, to economically inactive citizens' right to access to sickness insurance. Parliament shared the same approach in the end, except that it called for an operational recital on the access of (economically) non-active people to health care.

[48] ECJ, Warmerdam-Steggerda, C-388/87, ECLI:EU:C:1989:196.

[49] Procedure allowing a person to prove that he is entitled to receive planned medical treatment in another of these Member States.

5. *Conclusions*

On 29 March 2019, the Committee of Permanent Representatives of the EU (COREPER) rejected the provisional political agreement reached in the trilogue (between the Council and the European Parliament) of 19 March by the European Parliament and the Romanian Presidency of the Council of the EU[50]. Eight Member States, including Belgium, voted against it and the provisional agreement did not obtain a qualified majority.

The provisional agreement – which was the result of the hard work of the Romanian presidency – included the introduction of mandatory prior notification before (self) posting, the extension of the minimum duration from 3 to 6 months for the export of unemployment benefits for mobile workers, and up to 15 months for cross-border workers if the Member State where employment occurs, which is liable to pay benefits, so permits. The Romanian Presidency and the negotiator for the European Parliament, Guillaume Balas (S&D/France), have tried to identify a potential solution for a possible compromise. On the other hand, the last plenary session in the European Parliament took place in mid-April, so the official adoption of a hypothetical compromise cannot take place during this legislature.

This dossier also constituted a split in the European Parliament (EP), as shown by the events of the last plenary session in Strasbourg. Rapporteur Guillaume Balas (S&D, France) and the left-groups have called for the provisional agreement to be voted on by the EP during this legislature, with a view to concluding/consolidating Parliament's position on the first reading. In this way, they aimed to lay a solid foundation for eventually resuming negotiations at the beginning of the next legislature. After the topic was first put on the agenda of the last plenary session, the rapporteur, Balas, and the left-groups again pushed to submit the dossier to the agenda at the opening of the session. Taking advantage of the limited numbers present in the hemisphere (only 304 deputies!), they succeeded with a difference of only three votes (151 for, 148 against and five abstentions). The debate, therefore, was unfortunately held in an almost empty room, which is surprising enough for a dossier that caused so much trouble. Nevertheless, the debate revealed a deep division, not

[50] Interinstitutional File: 2016/0397(COD) 15642/16 + ADD 1-ADD 8.

only between the groups but also between MEPs within the same group. The apotheosis took place on the last day of the session, at the time of the vote. The RCC faction asked that the vote be postponed to the next legislature. This request was approved by 291 votes in favour, 284 against and six abstentions. It was striking that the EPP and the ALDE had, in the meantime, closed ranks and joined the camp on the right to withdraw the vote from the agenda. It must be said that a number of Member States (for example, the Netherlands) have been heavily lobbying and that their MEPs – no matter their party allegiance – have followed the PV vote signatures.

The future Finnish and Croatian Presidencies of the EU Council, along with the next European Parliament, may decide to reopen the dossier. Until the European Commission has withdrawn the text, discussions can continue. Employment and Social Affairs Committee (EMPL) agreed to resume inter-institutional negotiations (trilogues) with the EU Council where they had ended last March. The coordinators instructed the chair of the EMPL committee, Slovak Lucia Nicholsonová (ECR), to write to the chair of the Conference of Committee Chairs (CPC), Antonio Tajani, asking him to invite the Conference of Chairs to decide to continue the discussion on the matter and resume the trilogues at the point where they had failed. In addition, they asked for provision to be made for the "flexibility" necessary for the European Parliament negotiating team to agree jointly with the EU Council on the stage at which negotiations should be resumed.

SILVIA BORELLI

"WHICH WAY I OUGHT TO GO FROM HERE?" THE EUROPEAN LABOUR AUTHORITY IN THE INTERNAL MARKET REGULATION

"Would you tell me, please, which way I ought to go from here?"
"That depends a good deal on where you want to get to"
"I don't much care where"
"Then it doesn't matter which way you go".

LEWIS CARROLL, *Alice in Wonderland*

1. *The ELA's origin*

On 13 September 2017, the former President of the European Commission, Jean-Claude Juncker announced, in his speech on the State of the Union, the creation of a European Labour Authority (ELA), for ensuring fairness in the single market. He introduced the Authority as «a new European inspection and enforcement body» aimed at assuring «that all EU rules on labour mobility are enforced in a fair, simple and effective way». After Juncker's speech, a public consultation was quickly launched (27.11.2017-8.1.2018) and stakeholders' opinions were collected. On 13 March 2018, the Commission published its proposal for a Regulation establishing a Labour Authority (COM(2018)131). The trilogue was opened on the 26 of February 2019 and was particularly short, as on the 16 of April 2019 the agreement reached in the trilogue was approved by the European Parliament.

The speed in which the ELA Regulation (Regulation (EU) 2019/1149) was adopted proves the widespread consensus on the creation of ELA: at least on paper, none of the Member States could vote against a body aimed to strengthen the enforcement of EU rules. Similarly, no enterprise or business organisation could lobby against fair labour mobility in the internal market. Besides the good intentions, it is however important to verify what happens when it comes to facts. Can ELA really fulfil its ambitious objectives, «to contribute to ensuring fair labour mobility across the Union and assist Member States and the Commission in the coordination of social security systems within the Union» (Article 2 of ELA Regulation)?

In this short note, the main challenges that ELA will face are addressed. In particular, functional and structural problems that can hamper ELA's functioning will be examined, considering the tasks that it shall perform, the staff and the budget of the Authority, and its role in the internal market.

2. *The ELA's tasks and structure*

Article 2 of Regulation (EU) 2019/1149 specifies ELA's tasks: on one side, it shall «facilitate access to information on rights and obligations regarding labour mobility across the Union as well as to relevant services»; on the other side, it shall «facilitate and enhance cooperation between Member States in the enforcement of relevant Union law across the Union» and «in tackling undeclared work». Moreover, ELA shall «mediate and facilitate a solution in cases of cross-border disputes between Member States».

Therefore, ELA has a double target: improving the availability, quality and accessibility of information on labour mobility, on one side; ensuring the effective enforcement of EU rules, on the other side. Considering the limited staff and budget of the Authority[1], it will be of paramount importance to clarify, in the ELA annual work programme, how these two main objectives will be concretely performed (Article 24 of ELA Regulation). In fact, 144 people will be working at the Authority by 2024. These will consist of 84 Temporary Agents and Contract Agents (staff members of the Authority), plus 60 Seconded National Experts (staff of the public sector in Member States, seconded to the Authority), including the National Liaison Officers (NLOs).

The role of the NLOs is crucial since they shall facilitate the cooperation and exchange of information, and the support and coordination

[1] Up to 2024, ELA's financial resources will be 49,5 million € (cf. Article 25 of ELA Regulation).

of inspections[2]. Moreover, they will act as national contact points for questions from their Member States and relating to their Member States, either by answering those questions directly or by liaising with their national administrations (Article 32 of the ELA Regulation). As suggested by the Advisory Group on ELA, each Member State should sign a domestic inter-institutional agreement to define the way of working with the National Liaison Officer, and the contact points within the single national authorities to which she has to relate. Moreover, national social partners should be involved in the institutional body that will deal with the NLO, so as to reflect the tripartite composition of the ELA management board and to commit national social partners in the enforcement of the EU rules.

ELA's effective functioning depends thus on if, how and to what extent Member States provide their NLO with appropriate support arrangements, i.e. if and how Member States respect their duty of sincere cooperation (Article 4 § 3 TUE). And this is currently one of the main problems in the EU (see below).

It should be also considered that ELA integrates several existing bodies (the European Platform to enhance cooperation in tackling undeclared work; the Committee of Experts on Posting of Workers; the Technical Committee on the Free Movement of Workers; the European Coordination Office of EURES). Each of these bodies currently has its own regulation, its tasks and its work programme. During the transitional phase, it will be thus very important to integrate these already existing functions into ELA's objectives. However, in order not to overwhelm the Authority, it would be necessary to avoid any overlap among the offices and bodies that will handle the different topics.

Another main challenge will be the cooperation with other Agencies that deal with labour and social issues (such as the European Centre for the Development of Vocational Training, the European Agency for Safety and Health at Work, the European Foundation for the Improvement of Living and Working Conditions, and the European Training Foundation), as well as Agencies that fight against organised crime and trafficking in human beings (such as the European Union Agency for Law Enforcement Cooperation - Europol - and the European Union Agency for Criminal Justice Cooperation - Eurojust) (Article 14 of ELA

[2] As suggested by the Advisory Group on ELA, the National Liaison Officers should have primarily a back-office coordinating role (e.g. establishing contacts, ex-ante contacts between offices, ensuring complete documentation, data exchange).

Regulation). It will be, for example, important to establish an information exchange mechanism among these Authorities. Furthermore, the already existing practices and tools set up by Eurojust and Europol can serve an inspirational input for establishing the operational service offer of ELA.

ELA shall also collaborate with the Administrative Commission for the Coordination of Social Security Systems, the Advisory Committee for the Coordination of Social Security Systems, the Advisory Committee on the Free Movement of Workers, the Single Digital Gateway, Your Europe and Your Europe Advice information and services, and the SOLVIT network. In so far as is necessary in order to achieve its objectives, ELA may also cooperate with the competent authorities of third countries and with international organisations (Article 42 of ELA Regulation).

3. *ELA and National Labour Inspectors*

In its Staff Working Document accompanying the ELA proposal (SWD(2018)58, p. 13), the Commission has pointed out the cross-country differences in staff and resources on national enforcement authorities and their lack of knowledge in dealing with cross-border cases[3]. In fact, transnational fraud and abuse require specialised knowledge (on European and International law) and linguistic abilities that national inspectors often do not have. Moreover, instruments to support administrative cooperation on cross border mobility issues are still limited; in particular, bilateral agreements are few and very heterogeneous.

To solve these problems, ELA «shall support Member States with capacity building aimed at promoting the consistent enforcement of the Union law», e.g. through training programmes, staff exchanges or guidance for inspections in cases with a cross-border dimension (Article 11 of ELA Regulation). ELA can also support national risk assessment mecha-

[3] See also van Hoek A. - Houwerzijl M., *Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, Brussels, 2011, p. 154 ff.; Heyes J. - Hastings T., *The Practices of Enforcement Bodies in Detecting and Preventing Bogus Self-Employment*, Underclared Work Platform, 2017, p. 56; Kall K. - Lillie N., *Protection of Posted Workers in the European Union: Findings and Policy Recommendations based on existing research*, PROMO briefing paper, 2017, p. 27; Čaněk M. - Kall K. - Lillie N. - Wallace A. - Haidinger B., *Transnational Cooperation among Labour Regulation Enforcement Agencies in Europe: Challenges and Opportunities Related to the Posting of Workers*, Technical Report, 2018, p. 10.

nisms so as to better target inspections[4]. In order to encourage the stipulation of new bilateral agreements, the Advisory Group on ELA has also recommended that ELA should lay down possible templates that national authorities can use. Furthermore, to facilitate the cooperation among Member States, ELA shall provide logistical and technical support (including translation and interpretation services), and shall promote the use of data exchange mechanisms, including the *Internal Market Information System* (IMI), the *Electronic Exchange of Social Security Information* (EESSI) and the *European Register of Road Transport Undertakings* (ERRU) (Article 7 of ELA Regulation)[5]. However, ELA is not in charge of the direct management of these IT tools, and neither can it modify the legislation applicable to them. Therefore, many shortcomings of the IMI system will remain[6]. Moreover, in front of a State that delays sending information, sends incomplete information, or refuses to cooperate, the Authority will only be able to report such conduct to the Commission which, so far, has never proceeded against countries that do not comply with the duty of sincere cooperation in this field.

In its proposal for a European Labour Authority, the Commission has also rejected to establish mandatory requirements on information ex-

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[4] The Advisory Group on ELA has recommended ELA to: map the existing data sources produced by the Member States in different contexts with a primary focus on comparing risk assessment tools to target labour inspections; explore possibilities to share data that can facilitate analysis, risk assessment and common inspection work; aim at public accessibility of its data to the extent possible, including to social partners.

[5] Vos E., *The proposed European Labour Authority: Profile and Governance*, EP Briefing, 2018, p. 8.

[6] Many researches have underlined the need to improve the IMI system, denouncing: the incomprehensiveness of the information provided; the fact that some information is kept by authorities that are not IMI members; the fact that information is provided without proper investigation/evaluation; rules on protection of privacy and confidentiality that prohibit information exchange (cf. Articles 13-17 Regulation 1024/2012 on administrative cooperation through the Internal Market Information System; see also ECJ, 1.10.2015, C-201/14, *Bara*); rules on penal secrecy that hamper information exchange; the lack of legal value for information gathered from foreign authorities and shared via IMI; the lack of an alert mechanism in case of letterbox companies or human trafficking; the lack of interaction with other information exchange tools; its limited material scope (*Commission Staff Working Document. Impact assessment accompanying the Proposal for a Regulation establishing a European Labour Authority*, SWD(2018)68, p. 11; AA.VV., *Transnational posting of workers within the EU. Guidelines for administrative cooperation and mutual assistance in the light of Directive 2014/67/EU*, 2018, in *http://www.adapt.it/enacting/2_1_7_Enacting%20Guidelines%20for%20Administrative%20Cooperation.pdf*, p. 40-44; Čaněk M. - Kall K. - Lillie N. - Wallace A. - Haidinger B., *Transnational Cooperation among Labour Regulation Enforcement Agencies in Europe: Challenges and Opportunities Related to the Posting of Workers*, cit., p. 15 ff.).

change (SWD(2018)68, p. 27). Consequently, neither an *ex officio* obligation to inform the concerned Member States and ELA in case of suspected irregularities, nor other forms of automatic exchange of information among national authorities have been introduced[7].

It will also be very difficult for ELA to promote data sharing between Member States «to facilitate the access to data in real time and detection of fraud» (Article 7 § 4 of ELA Regulation). Even if ELA «may suggest possible improvements in the use of those mechanisms and databases», it has no competences in regulating the existing data sharing systems (as the *Business Registers Interconnection System*)[8]. Moreover, the functioning of the existing data sharing systems and the development of new ones depend on the Member States' will; and the difficulties in implementing the existing data sharing systems clearly prove their weak commitment.

The problems in tackling transnational fraud and abuse are also increased by the shortages in labour inspectorates' staff and resources. Some researches have underlined the negative impact that the rules on economic governance imposing cuts on public expenditure have on the appropriateness and the effectiveness of controls, reducing the number of Labour Inspectors and their operational tools[9]. Moreover, in many

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[7] Cf. Article 7 § 4 Directive 2014/67 (Enforcement Posting of Workers Directive) that obliges Member States to communicate, on their own initiative, any relevant information, where there are facts that indicate possible irregularities.

Cf. Articles 29, § 3 and 32 Directive 2006/123 on services in the internal market: the former establishes a duty for the Member State to inform all other Member States and the Commission in case a provider could cause serious damage to the health or safety of persons or to the environment; the latter regulates an alert mechanism in case a service activity that could cause serious damage to the health or safety of persons or to the environment.

Cf. Article 16, § 1 and 26 Regulation 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws: the former obliges competent authorities and the Commission to inform each other in case of reasonable suspicion that a widespread infringement is taking place; the latter establishes a duty to notify the Commission and other competent authorities of any reasonable suspicion that an infringement that may affect consumers' interests in other Member States is taking place.

Cf. Articles 8, 8a, 8aa and 9 Directive 2011/16 on the automatic and spontaneous exchange of information in the field of taxation and Article 13 Regulation 2010/904 on the automatic and spontaneous exchange of information in the field of VAT.

[8] Trade unions have also demanded the creation of a digital European Social Security Card, where social security records are traced (GIUBBONI S., *The new European Labour Authority and social security coordination. Some preliminary remarks*, in *Riv. dir. sic. soc.*, 2018, p. 529).

[9] Article 10 of the Directive 2014/67 requires Member States to ensure «that appropriate and effective checks and monitoring mechanisms provided in accordance with national law and practice are put in place and that the authorities designated under national law carry

countries, the competences to tackle labour and social fraud and abuse are fragmented among different authorities (e.g. fiscal, labour, social security inspectors; road police) that often do not cooperate[10].

It should as well be noted that, in many States, national inspectors are evaluated according to the results of their controls. For this reason, transnational cases are often problematic: on one side, national labour inspectors can be required to collaborate with authorities of a different country, without having a direct interest in the inspection (e.g. in a case of letterbox company, the Home State authority does not have any direct advantage in denouncing it); on the other side, cross-border inspections are usually longer than internal ones and are under the risk to remain empty-handed, because the enquired enterprises have disappeared. Recent decisions of the Court of Justice have also had a negative impact on national inspections, undermining the outcomes of multiannual enquires (see ECJ, 27.4.2017, C-620/15, *A-Rosa Flussschiff*; 6.9.2018, C-527/16, *Alpenrind*).

In order to promote cross-border cooperation, the ELA Regulation lays down rules on concerted and joint inspections (see below), specifying that it shall be possible to use the information collected during concerted or joint inspections «as evidence in legal proceedings in the Member States concerned, in accordance with the law or practice of that Member State» (Article 9 § 7). However, nothing obliges Member States to recognise legal value to the findings resulting from concerted and joint investigations. ELA should also recommend Member States to provide a positive evaluation, according to the national system of evaluation in the

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out effective and adequate inspections on their territory in order to control and monitor compliance with the provisions and rules laid down in Directive 96/71/EC».

[10] CREMERS J., *The enhanced inspection of collective agreed working condition*s, Undeclared Work Platform, 2017. In the EU regulation on posting, there are no rules to grant labour inspectors the investigation and enforcement powers necessary for its application, as in other fields (cf. Article 9, § 3 and 4 Reg. 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws; Articles 9, 9a, 9b, 9c and 9d Decision 2002/187/JHA on Eurojust). Recently, a duty for the requested authority to obtain the information from other authorities in the Member State has been introduced (Article 4, § 2 Directive 96/71 as modified by the Directive 2018/957). However, a duty for the requested authority to undertake the necessary investigations or to take any other appropriate measures in order to gather the required information is still missing (cf. Article 11, § 2 Regulation 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws; Article 29, § 2 Directive 2006/123 on services in the internal market; Article 6 § 1 Directive 2011/16 on administrative cooperation in field of taxation; Article 7 § 1 Regulation 2010/904 on administrative cooperation in the field of VAT).

public administration, to national inspectors that participate to joint investigations or other forms of cross-border cooperation, or investigate on transnational cases. However, again, it depends on the State's will.

Moreover, the ELA Regulation does not establish the possibility, for a national authority, to demand to competent authorities of other Member States to take all necessary enforcement measures to bring about the cessation or prohibition of an infringement, including precautionary measures, as it happens in other fields[11]. Neither the ELA Regulation rules on the power, for the inspectors participating to the joint inspection, to investigate and to adopt the necessary enforcement measures[12]. Moreover, the Regulation on the coordination of social security systems does not establish the principle of automatic payment of social security benefits, according to which these benefits are due to workers, even when the employer has not regularly paid the contributions due to the social security institutions (cf. Article 2116 of the Italian Civil Code). This means that, in many cases of transnational fraud and abuse, workers remain empty-handed. And this hardly complies with the fundamental right to an effective remedy, guaranteed by Article 47 CFREU that, according to the ECJ, «is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such» (ECJ, 17.4.2018, C-414/16, *Egenberger*, § 78; on the right to an effective remedy see also Article 11 of the Enforcement Posting of Workers Directive).

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[11] Cf. Articles 9, 19 and 21 Regulation 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws; Articles 9, 9a, 9b, 9c and 9d Decision 2002/187/JHA on Eurojust.

[12] Cf. Article 12 Reg. 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws; Article 16 Directive 2010/24 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures; Articles 22 and 23 Regulation 655/2014 on a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters. A Preservation Order can be issued when «there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult» (Article 7 § 1 Regulation 655/2014). The creditor may also request the competent court to request that the authority of the Member State of enforcement obtain the information necessary to allow the bank(s) and the debtor's account(s) to be identified (Article 14 § 1). The Preservation Order «shall be enforced in accordance with the procedures applicable to the enforcement of equivalent national orders in the Member State of enforcement» (Article 23 § 1). Regulation 655/2014 does not apply to social security and «claims against a debtor in relation to whom bankruptcy proceedings, proceedings for the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions, or analogous proceedings have been opened» (Article 2).

4. *Collaboration vs. Competition*

As clarified in Agustín Menéndez's essay, currently internal market regulation boosts the *regime competition* among Member States[13]. In particular, ECJ case law has allowed the incorporation of letterbox companies (ECJ, 9.3.1999, C-212/97, *Centros*; 25.10.2017, C-106/16, *Polbud*) that can then provide their services in the internal market, benefiting from the prohibition of measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty (ECJ, 30.11.1995, C-55/94, *Gebhard*, § 37). In 2014, the European legislator has clarified that Article 56 TFEU cannot be applied to workers posted from a letterbox company. Moreover, posting of workers regulation applies only in case of temporary posting (Article 4 Directive 2014/67). However, the Host State can verify if the posting company performs a real economic activity in the Home State and if the posting is temporary, only cooperating with the Home State.

This is one of the many antinomies of the internal market regulation[14]: on the one hand, the *regime competition* between the Member States is encouraged; on the other hand, transnational cooperation is invoked to prevent economic freedoms from being misused. But why should the States winning the *regime competition* collaborate with others, thus losing their comparative advantage? And above all, why should the States winning the *regime competition* in the area of freedom of movement collaborate with other States which, by imposing the rules of monetary union and economic governance, obtain a comparative advantage in the export of their goods? And again, why should States forced to reduce their public spending use the scarce resources available (e.g. the few labour inspectors) to investigate violations (often very complex) from which they would not get anything?[15]

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[13] Giubboni S. - Orlandini G., *Mobilità del lavoro e dumping sociale in Europa, oggi*, in *Giorn. dir. lav. rel. ind.*, 2018, p. 907; Vasquez F., *Entre concurrence et coopération: Europe sociale ou protection par les États?*, in *Revisiter les solidarités en Europe*, Actes du Colloque, 18 et 19 juin 2018, Chaire État social et mondialisation: analyse juridique des solidarités, Professeur Alain Supiot, p. 73; Rodière P., *Quelles refondations sociales en perspective?*, in *Revisiter les solidarités en Europe*, Actes du Colloque, 18 et 19 juin 2018, Chaire État social et mondialisation: analyse juridique des solidarités, Professeur Alain Supiot, p. 173.

[134] Christodoulidis E., *Social Rights Constitutionalism: An Antagonistic Endorsement*, in *Journal of Law and Society*, vol. 44, n. 1, 2017, p. 134.

[15] Borelli S., *La direttiva 2018/957 sul distacco dei lavoratori: ancora un passo in avanti verso il diritto comunitario del lavoro?*, in *Lavoratori e cittadini. Dialoghi sul diritto sociale*, Il Mulino, 2019; Sørensen K.E., *The fight against letterbox companies in the Internal Market*, in *Comm. mark. law rev.*, 2015, p. 113.

Moreover, the EU regulation on the coordination of national social security systems is currently «incapable of sufficiently persuading Member States to cooperate with due diligence, as there are no satisfactory responses when they refrain from doing so»[16]. Indeed, the State that issues the A1 PD[17] receives social contributions until it withdraws it (i.e. the A1 PD is binding for the Host State: see Article 5 Regulation 987/2009); if it is required to withdraw the A1 PD, the State has to investigate in order not to receive social contributions anymore; and Member States are aware that, in case of violation of the duty to cooperate, no infringement procedures have so far been started. Many studies have pointed out the ineffectiveness of these rules, especially if compared to other fields, such as taxation[18]. However, it should be noticed that cross-border cooperation among Member States works well in the context of taxation law because the problem of double (or multiple) taxation does exist[19]. Instead, the EU regulation on coordination of national social security systems, applying the principle of a single applicable legislation, has eliminated (or reduced) the problem of double social contribution.

In order to facilitate cooperation between Member States, ELA can coordinate and support concerted and joint inspections[20]. Social partners

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[16] JORENS Y. - LHERNOULD J.P., *Procedures related to the granting of Portable Document A1: an overview of country practices*, FreSsco, 2014, p. 39. On the issuing of A1 PD see GIUBBONI S., *The new European Labour Authority and social security coordination. Some preliminary remarks*, cit., p. 525.

[17] An A1 PD (portable document) is a document that proves the worker's registration to the social security system in the Home State.

[18] *Transnational posting of workers within the EU. Guidelines for administrative cooperation and mutual assistance in the light of Directive 2014/67/EU*, cit., p. 29; FERNANDES S., *What Is Our Ambition For The European Labour Authority?*, Jacques Delors Institute, Policy Paper No. 219, 2018, p. 5-7; JORENS Y. - LHERNOULD J.P., *Procedures related to the granting of Portable Document A1: an overview of country practices*, cit., p. 38; VAN HOEK A. - HOUWERZIJL M., *Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, cit., p. 161 ff.; GIUBBONI S. - IUDICONE F. - MANCINI M. - FAIOLI M., *Coordination of Social Security Systems in Europe*, study for the European Parliament's Committee on Employment and Social Affairs, 2017, p. 67ff.

[19] SPIEGEL B. (ed.) - DAXKOBLER K. - STRBAN G. - VAN DER MAI A.P., *Analytical report 2014. The relationship between social security coordination and taxation law*, FreSsco, 2015, p. 20; TRAVERSA E., *A Hunters Game: How Policy can change to spot and sink Letterbox-type Practices*, ETUC Project on Letterbox Companies, Part III, 2016, p. 94.

[20] «Concerted inspections are inspections carried out in two or more Member States simultaneously regarding related cases, with each national authority operating in its own territory, and supported, where appropriate, by the staff of the Authority». «Joint inspections are inspections carried out in a Member State with the participation of the national authorities of one or more other Member States, and supported, where appropriate, by the staff of the Authority» (Article 8 § 2 of ELA Regulation).

at national level may bring cases to the attention of the Authority (Article 8 § 2 of ELA Regulation). ELA's role is mainly one of back-office coordination of operations, since it shall provide conceptual, logistical and technical support, legal expertise, translation and interpretation services (Article 9 of ELA Regulation). The Advisory Group on ELA has also recommended ELA to produce «draft manuals, working arrangements and model agreements for concerned and joint inspections»; ELA should also provide a «certain follow-up system to inspections, including a report template, the exchange of data, and a monitoring system for the execution of possible penalties».

ELA's competences are however subject to several limits. First, ELA cannot launch a concerted or a joint inspection on its own initiative, but it can only « suggest to the authorities of the Member States concerned that they carry out a concerted or joint inspection» (Article 8 § 1 of ELA Regulation). If, in the course of concerted or joint inspections, or in the course of its activities, ELA «becomes aware of suspected irregularities in the application of Union law», it may report to the Member State concerned and to the Commission[21]. Moreover, «in the event that one or more Member States decide not to participate in the concerted or joint inspection, the national authorities of the other Member States shall carry out such an inspection only in the participating Member States» (Article 8 § 3 of ELA Regulation)[22]. The State that has refused a concerted or joint inspection shall inform the Authority and the other States «of the reasons for its decision and possibly about the measures it plans to take to solve the case» and the outcomes of such measures; the Authority may also suggest to the State that refuses concerted and joint inspections to «carry out its own inspection on a voluntary basis» (Article 8 § 4 of ELA Regulation). Twice a year, the Authority shall report to the Management Board, in which European social partners are represented, information on concerted and joint inspections, including their refusals by Member States (Article 9 § 8 of ELA Regulation).

However, the Authority does not have any sanctioning power, since the Commission only can start an infringement procedure against a State.

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[21] Differently, the European Banking Authority, has the power to investigate on the violation of EU law on its own initiative or upon the request of qualified actors (cf. Article 17 of Regulation 1093/2010 establishing a European Supervisory Authority (European Banking Authority) (Cremers J., *The European Labour Authority and Enhanced Enforcement*, EP Briefing, 2018).

[22] Differently, Regulation 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws establishes a limited set of reasons for declining to take part in coordinated actions (Article 18).

Neither is the possibility for national authorities to report to ELA on infringements of the duty of cooperation by a Member State explicitly regulated (this possibility is regulated by Article 28, § 8 Directive 2006/123 on services in the internal market). As already mentioned, the Commission has so far not shown to be prompt to act against States that violate their general duty to sincere cooperation and the specific duties established by the Enforcement Directive on posting of workers (Directive 2014/67) and the Regulation on the coordination of social security systems. Moreover, in the Commission's *Report on the application and implementation of Directive 2014/67/EU* (COM(2019)426), there is neither a concrete analysis on the fulfilment of the States' obligations to cooperate, nor an evaluation on the effectiveness and adequateness of national inspections.

Following the ECJ decision in *Altun* (6.2.2018, C-359/16), the State's refusal to cooperate could be relevant to apply the principle of prohibition of fraud and abuse of rights[23]. According to the ECJ, the court of the Member State to which the workers have been posted can disregard the A1 certificates (i.e. the certificates that declare the application of the Home State's social security law)[24] when the Host State institution puts before the institution that issued these certificates concrete evidence suggesting that these certificates were obtained fraudulently, and the latter institution fails to withdraw them. In this case, therefore, the Host State institution can demand the employer to pay social contribution according to its national law.

The problem is that often, in order to gather evidence, the collaboration of the State of origin is necessary. In the *Altun* case, it was clear that the Bulgarian companies were letterboxes and that the Belgian company, instead of directly hiring its workers, contracted out its construction work to Bulgarian companies that posted workers in Belgium. In many cases, however, in order to understand what has really happened, it is necessary to have access to the information that results from the business register, the bank account(s) and the financial declarations of the

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[23] RODIÈRE P., *Le droit européen du détachement des travailleurs: fraudes ou inapplicabilité?*, in *Dr. soc.*, 2016, p. 598; MÜLLER F., *Effectivité des droits des salariés détachés: quelle contribution à la lutte contre la concurrence sociale déloyale?*, in *Dr. soc.*, 2016, p. 630 and *La révision des règles en matière de détachement: l'heure des choix en droit du travail et droit de la sécurité sociale*, in *Rev. trim. dr. eur.*, 2018, p. 75.

[24] The procedure for issuing and withdrawing the A1 form guarantees the principle of a single applicable legislation. As stated by the ECJ, this procedure responds more to the need to facilitate the transnational provision of services than to the need to guarantee workers' right to move freely within the Union (ECJ, 10.2.2000, C-202/97, *FTS*).

companies involved; it is also necessary to collect testimonies from customers, suppliers and workers, and to check the social security contributions paid.

It should also be considered that not all labour inspectorates have the same operational capacity as the Belgian ones and can afford transnational investigations such as the one conducted in the *Altun* case. And, as already said, the constraints on public expenditure have a negative impact on the effectiveness of the controls, limiting the resources available for this purpose. Moreover, transnational investigations are lengthy and emphasise the risk of remaining empty-handed, due to the impossibility to implement precautionary measures without the collaboration of the Home State.

The ECJ should take into consideration the State's refusal to cooperate in fighting transnational fraud and abuse also in the evaluation of the sanctions imposed by the Host State. In fact, difficulties in investigating on transnational fraud and abuse should justify higher sanctions; otherwise, the former could reduce the dissuasiveness of the latter. However, the recent ECJ case law on the proportionality of sanctions is not at all encouraging on this point (see ECJ, 13.11.2018, C-33/17, *Čepelnik*; 12.9.2019, joined cases C-64/18, C-140/18, C-146/18 and C-148/18, *Maksimovic*). Similarly, the difficulties in cooperating with the Home State should be taken into consideration in the evaluation of the measures implemented by the Host State to control the business model of the posting enterprise (for a different perspective see the Opinion of the Advocate general in *Dobersberger*, 29.7.2019, C-16/18).

Another possible way to remedy to States' violations of the duty of sincere cooperation could be the mediation procedure provided by Article 13 of the ELA Regulation. However, ELA can adopt only non-binding opinions (Article 13 § 1 of ELA Regulation). Moreover, the participation of the Member States in the mediation is voluntary (Article 13 § 7 of ELA Regulation). Therefore, the shortcomings presented by the conciliation procedure run by the Administrative Committee for the coordination of social security systems will probably occur also for ELA mediation.

Once again, it is clear that the effective functioning of ELA depends mainly on which way the EU integration will go, i.e. in which way the antinomy between States' cooperation and States' competition will be solved, having in mind that European integration should be a « process of creating an ever closer union among the peoples of Europe» (Article 1 TUE).

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2. AA.VV., *Studi in onore di Luigi Costato* (2014), 3 voll.
3. A. ANNONI - A. THIENE (a cura di), *Minori e privacy. La tutela dei dati personali dei bambini e degli adolescenti alla luce del Regolamento (UE) 2016/679. Atti del convegno rovigo 22 novembre 2018* (2019), pp. VIII-152.
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