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Social Europe in times of crises: what lessons can be gleaned from the past?

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Abstract

This paper aims to ask whether the social dimension of the European Union still exists in a period of two crises (the pandemic and the war in Ukraine), which have strongly been hitting the economies and societies all over the world. To understand the EU's reaction to both the emergencies it is necessary to trace the path of EU labour law from the beginning: the story of the European Union in the social field is a story of progressive enforcement of its competencies but also of continuous stops and goes form the political point of view.

Keywords: War, Pandemic, Social Field, Evolution of EU labour law.

1. Starting from current events: the social reaction of the European Union to the war in Ukraine

This paper aims to ask whether the social dimension of the European Union still exists in a period of double crisis, which has strongly been hitting the economies and societies all over the world. While a few months ago, there was *only* a pandemic, now there is *also* the war in Ukraine, and this is the starting point because the social dimension of Europe is also present in this circumstance. Nevertheless, it is not possible to understand the EU's reaction to both emergencies without tracing the path of EU labour law from the beginning: as it will be evident the story of the European Union in the social field is a story of progressive enforcement of its competencies but also of continuous stops and goes form the political point of view. Therefore, this is a story to be told even though shortly to comprehend the EU's attitude towards the war in Ukraine and the pandemic.

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The war was the unfortunate occasion on which the Union first used Directive 2001/55 on minimum standards for giving temporary protection in the event of displaced persons (estimates indicate that a figure between 2.5 and 6.5 million displaced by the armed conflict, from 1.2 to 3.2 million of whom could ask for international protection). Perhaps few people know it contains a 'social soul'. In fact, according to Article 12 of the directive, "the Member States shall authorise… persons enjoying temporary protection to engage in employed or self-employed activities, subject to rules applicable to the profession, as well as in activities such as educational opportunities for adults, vocational training, and practical workplace experience". In addition, "the general law in force in the Member States applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply". A Council decision of March 2, 2022 implemented the directive by applying temporary protection to three categories of people: Ukrainian citizens residing in Ukraine on February 24, 2022; third-country nationals or stateless persons legally residing in Ukraine; family members of the two previous categories.

That would have been an unexpected result a few years ago due to an emergency of exceptional gravity but not entirely surprising. The Union passed that directive more than twenty years ago in the aftermath of the war in the former Yugoslavia.

If we stopped at this point, one could say that Europe is comparable to a grey afternoon but a little less grey than the pandemic. If the war in Ukraine and the pandemic are at the same level in gravity, from a social point of view, the European Union's reaction seems more intense than that experienced during the pandemic. Maybe that could be defined as a ray of sunshine on a grey afternoon. I will return to this at the end of the paper.

2. The "other" emergency: the pandemic and labour law.

Seeing the glass as half full, one must remember the other emergency, the pandemic, to which social Europe has responded with much less speed than to the conflict, at least on a purely social level, understood in a broad sense, which also includes health protection. Article 222, par. 1 TFEU provides for a *solidarity clause* under which the European Union is obliged to support any Member State which is the victim of a terrorist attack or natural disaster, should the State request it.[1] However, the Member States never invoked the rule, not even during the pandemic. The reasons for not using the tool can be manifold. The main one is perhaps that the States still believe that they can also manage emergencies autonomously. Therefore, it is a field for the Union to intervene in social matters, which for now has remained only a potential action.

Furthermore, the Union intervened in the free movement of persons obviously in the opposite direction to what it is currently doing for the war in Ukraine, using the exceptions provided for the first time by Article 45 TFEU for public health reasons. In fact, with the

[1] In fact, the Article provides that "the Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States to … assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster".

Communication of March 16, 2020, the Commission recommended temporarily restricting non-essential travel from third countries to the European Union and suggested to the Member States concerned to discourage the journey of their citizens and long-term residents outside the EU.[2] Restrictive measures inevitably also affected workers, although it is helpful to report a Communication from the Commission of March 2020,[3] which attempted to reduce the effects of the pandemic on the freedom of movement of workers in critical professions.[4] Furthermore, the same source urges the Member States to establish rapid procedures for crossing borders with a regular flow of cross-border and posted workers, suggesting some possible solutions.[5] The *rationale* of the provisions mentioned above is evident. On the one hand, it was necessary to guarantee the movement on the territory of the Union for those workers linked to the health emergency, and, on the other, it was appropriate to facilitate as much as possible movement for the cross-border workers. They faced daily activity from one Member State to another.

Instead, again during health emergencies, the European Union, in the field of free competition, has focused attention on the needs of businesses by tempering the rigour in matters of state aid and therefore support for businesses.[6] In addition, on the internal market matters, a communication from the European Competition Network was issued[7] that suggested maintaining strict principles in the field of competition law even in a phase in which companies and the economy, in general, were in a state of profound crisis. The EU authorities could intervene if abnormal increases in the prices of necessities (such as protective masks and disinfectant devices) had occurred or if some companies had taken advantage of the situation to conclude anticompetitive agreements or abuse a dominant

[2] Both acts were passed by the European Council on 18 March 2020.

[3] Communication from the Commission 30 March 2020 - Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak 2020/C 102 I/03.

[4] Point 2 of the 2020 Communication contains the list of these workers: Health professionals including paramedical professionals; Personal care workers in health services, including care workers for children, persons with disabilities and the elderly; Scientists in health-related industries; Workers in pharmaceutical and medical devices industry; Workers involved in the supply of goods, in particular for the supply chain of medicines, medical supplies, medical devices and personal protective equipment, including in their installation and maintenance; Information and Communications Technology Professionals; Information and Communications Technicians and other technicians for essential maintenance of the equipment; Engineering professionals such as energy technicians, engineers and electrical engineering technicians; Persons working on critical or otherwise essential infrastructures; Science and engineering associate professionals; Protective services workers; Firefighters/Police Officers/Prison Guards/Security Guards/ Civil Protection Personnel; Food manufacturing and processing and related trades and maintenance workers; Food and related products machine operators (includes food production operator); Transport workers; Fishermen; Staff of public institutions, including international organisations, in critical function.

[5] According to point 3 of the 2020 Communication, "this may be done for instance and where appropriate, by means of dedicated lanes at the border for such workers or with specific stickers recognised by the neighbouring Member States to facilitate their access to the territory of the Member State of employment".

[6] Through the restrictive agreements on competition, provided for by Article 101 TFEU. On these profiles *see* Arena A., *Emergenza e libertà fondamentali nel mercato unico*, in Staiano S. (ed.), *Nel ventesimo anno del Terzo Millennio. Sistemi politici, istituzioni economiche e produzione del diritto al cospetto della pandemia da Covid-19*, Editoriale scientifica, Napoli, 2020, 357 ff.

[7] The so-called *European Competition Network* or "ECN", an informal group that brings together the various national *antitrust authorities* of the European Union and the European Commission.

position.[8] As can be seen, even in a pandemic phase, the needs of businesses were considered, if not prevalent, at least equal to those of public health.

One must focus on a temporary measure on the unemployment risk side. The reference is to the so-called SURE (*Support to mitigate Unemployment Risks in an Emergency)* governed by Regulation (EU) 2020/672 of May 19, 2020, which is a tool to allow the Union to provide financial assistance in the form of loans to the affected Member States.[9] This tool's foundation is in Article 122, para. 2, TFEU, according to which "where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned". Therefore, SURE has been made available to the Member States that need to use significant financial means to combat the economic and social consequences of the pandemic and guarantees additional financial assistance, thus complementing the national measures and grants usually paid for these purposes under the European social fund. Specifically, this instrument acts as a second line of defence to finance working time reduction schemes, helping the Member States to preserve jobs and, in so doing, protect employed and self-employed workers from the risk of unemployment and loss of income.

Moreover, there is also the NRP (National Recovery and Resilience Plan), an Italian measure requested by the Union because the Next Generation EU programme provides enormous resources to relieve the Union's economy from the pandemic. This plan aims to incentivise and stimulate a fair and just transition towards a sustainable economy and fight against inequalities: gender equality, protection and enhancement of young people and overcoming territorial gaps. Regarding specifically labour law, one part of the plan primarily aims to: increase the employment rate, facilitate work transitions, and provide people with adequate training; reduce the *mismatch* of skills; increase the quantity and quality of continuing education programs for the employed and unemployed. To this end, two reforms are provided: one of the Active Labour and Training Policies and another to combat undeclared work. In addition to the reforms, five different investment measures are envisaged: the strengthening of the Employment Centres; incentives for the creation of female businesses; the design of a gender equality certification system; the strengthening of the dual system; and the strengthening of the universal civil service. It is necessary to wait and see if and how Italy will use these resources from the European Union.

[8] Furthermore, the authorities have expressed certain openness, providing for the possibility of exemption for the necessary and temporary agreements concluded between companies and aimed at supporting the supply and fair distribution of goods during the state of crisis linked to the Covid-19 pandemic that otherwise would be prohibited on the basis of competition law. It can be read in this communication that indeed, national antitrust authorities will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply.

[9] On SURE see, among others, Giubboni S., *In uno spirito si solidarietà tra gi Stati Membri…. Noterella polemica sulla proposta di direttiva a spirit of solidarity between the Member States… Noterella polemica sulla proposta della Commissione d'una cosiddetta Cassa integrazione europea*, in *Rivista di Diritto della Sicurezza Sociale*, 2020, 421 ff.; Riccobono A., *Un "salto di specie" per l'UE: la solidarietà europea alla prova della crisi pandemica*, in Garilli A. (ed.), *Dall'emergenza al rilancio. Lavoro e diritti sociali alla prova della pandemia*, Giappichelli, Torino, 2020, 201-204.

3. The three phases of social Europe. In particular, the Charter of Fundamental Rights of the European Union and the "chiaroscuro" technique.

It is now appropriate to leave current events aside and take a step back, going to the origins of social Europe and emphasising the point that a long way has been travelled since 1957 when the Treaty of Rome was launched.

On closer inspection, one can identify three phases.

The *Phase of Functionalisation to Market Needs* (1957-1985) began with creating the European Economic Community, heir to the Economic Community of Coal and Steel. At that time, the protection of workers was functional to the market's needs, as witnessed by the examples of the provisions on equal pay for men and women and the free movement of workers, regulated respectively by Article 141 TEC (now 157 TFEU) and by Regulation 1612/1968, as interpreted by the case-law of the Court of Justice, which has developed a concept of the employee for unrestricted movement. After all, the EEC could not tolerate unequal treatment of wages based on sex in some Member States because this would have constituted an undue advantage for companies located in those States. Moreover, to ensure the free movement of employees, it was necessary to develop a concept of subordination that was quite different from national notions because for the functioning of the market was important that the activity was not as marginal and ancillary as to be economically irrelevant.

The *Phase of Social Policies* (1986-1999) began with the Single European Act of 1986 and continued with the Maastricht Treaty (1991-1992) and the Treaty of Amsterdam (1997-1999), which amended the social provisions of the Treaty establishing the European Economic Community (TEC). These treaties have resulted in a progressive increase in the Union's competencies in social policies and labour law, exercised in various fields (from prohibitions on discrimination to equal treatment, from collective redundancies to European Works Councils, from parental leave to atypical work). The other side of the coin of this phase was the so-called British opting out, i.e. that country's decision not to temporarily apply the social provisions contained in the new treaties, which marked the beginning of the multi-speed or multi-faceted European Community.

The *Phase of the Constitutionalisation of Social Rights* is also characterised by using the 'chiaroscuro' technique. This phase began in 2000 in Nice with the signing of a new Treaty, which consolidated the Union's competencies in social matters, and with the proclamation of the Charter of Fundamental Rights of the European Union (the so-called Nice Charter), which, although only of political value at the time, brought together in a single document a series of workers' rights and principles. However, the process towards the constitutionalisation of social rights suffered a significant setback with the European Constitutional Treaty, signed in 2004 but 'scuttled' by ratification referendums in some countries. The Charter of Fundamental Rights, which that Treaty should have considered an integral part of that Treaty, was at the centre of the debate. The Lisbon Treaty then revived the fate of social Europe in 2007-2009. Such a Treaty systematised the Union's arrangements

in this field and recognised the status of the Charter of Fundamental Rights as a primary source of rights.[10]

4. The face of social Europe in the 2010s becomes pale: Brexit and the global economic-financial crisis.

Further problems for social Europe arose in the 2010s: the global economic-financial crisis and Brexit.

To cope with the economic crisis, the European Commission in those years intervened in social matters and, above all, in wages through recommendations issued as part of the integrated coordination of employment policies addressed to some Member States. Moreover, these recommendations operated in an area - that of wages - traditionally the elective field of regulation of the social partners, not only in Italy.[11] In many cases, these were rather vague recommendations, calling for moderation in wage increases (Bulgaria, Finland and Italy) or minimum wages (mainly France and Slovenia).[12] The Union addressed more precise recommendations to other countries (Italy and Spain), such as reforming the systems for determining wages. On the other hand, the EU directed strong criticism at those countries (Belgium, Luxembourg, Malta and Cyprus) which provided automatic revaluation mechanisms, which needed to be profoundly reformed if not eliminated. Lithuania, Portugal, Romania and, albeit more informally, Spain had to freeze minimum wage levels, while in 2012, the Troika effectively imposed a 22% cut in the minimum wage on Greece.

Regarding Brexit, as everyone knows, the UK left the European Union due to a *referendum* in which 52% of British voters voted to leave the Union while 48% voted to stay. The British government formally announced the country's withdrawal in March 2017, starting the withdrawal negotiations, which ended on January 31, 2020. However, maybe not everyone remembers that Labour Law weighed heavily in the British decision. As mentioned, the Euro-scepticism across the Channel towards social norms originated from afar (the Treaty of Amsterdam and Charter of Nice) and was confirmed in the years preceding Brexit, when the United Kingdom was at the forefront of the European Commission's push towards some more flexible labour rights and towards *deregulation.*[13]

[10] In fact, this Protocol established that nothing in Title IV of the Charter, entitled Solidarity, including most of the labour law provisions, creates justiciable rights applicable to the aforementioned Member States, except in so far as those countries have provided for such rights in their national laws, thus weakening the application of those rights.

[11] On the effects of the economic crisis on collective bargaining in Europe, see Dorssemont F., *Collective action against austerity measure,* in Bruun N., Loercher K., Schoemann I. (eds.), *The Economic and Financial Crisis and Collective Labor Law in Europe,* Hart Publishing, Oxford, 2014, 153-170.

[12] *See* Schulten T., Müller T., *A new European Interventionism? The impact of the New European Economic Governance on Wages and Collective Bargaining,* 2013, please refer to the following link: www.epsu.org/IMG/pdf/EU_intervention_on_CB_Schulten_Mueller_final_version.pdf , 7. The European Union has asked Sweden for an expansion of the low-wage sector, while Germany to keep wage increases in line with productivity growth. *See* also Leonardi S., *Salario minimo e ruolo del sindacato: il quadro europeo fra legge e contrattazione*, in *Lavoro e Diritto*, 2014, 185 ff.

[13] Kenner J., *Il potenziale impatto della Brexit sul Diritto del lavoro europeo e britannico*, in *Diritti Lavori Mercati*, 2017, 5 ff.

5. The hopes of the Charter, the revisited social dialogue and the pending "accounts": far from sunset?

The so-called "Five Presidents Report" of 2015 on the completion of the Economic and Monetary Union underlined the importance of promoting a social market economy aimed at full employment and social progress and gave rise to the proposal put forward in 2016 (and therefore in the same period in which Brexit began), of a European Pillar of Social Rights,[14] to be applied only in the Euro area.

The European Pillar of Social Rights was solemnly proclaimed on November 17 2017, by the European Parliament, the Commission and the Council. The Pillar had the merit of trying to revive the social dimension of Europe, even though provisions contained therein were not legally binding. Such a revival has had its fruit in the approval of new reforms (e.g. the revision of the legislation on transnational posting through Directive 2018/957, Directive 2019/1158 on the reconciliation of life and work times), in the unexpected submission of some proposals for directives, such as that on improving working conditions in platform work of December 2021 and, above all, the proposal on adequate minimum wages in the European Union of October 2020. The last-mentioned proposal is quite shocking given the apparent lack of competence of the Union in matters of remuneration (Article 153.5 TFEU), an attempt at regulation that acts as a counterpoint to the innumerable examples of supranational interference in that area during the period of the global economic crisis which was discussed a little while ago.

The re-launch of social Europe can only pass, however, also through a protagonist that I have not named so far, i.e. the Court of Justice, which indeed, in the past, has not always stood out for its attention to social issues (see the judgments of the so-called *Laval Quartet*) despite having also lived its golden years more or less 25 years ago, especially in the field of anti-discrimination law. The Court is responsible for the interpretation of European standards at any level. And the Court has recently made a substantial contribution to at least two profiles.

The first profile is the Charter of Fundamental Rights. So far, the judges have kept firm the point of its limited scope of application but have repeatedly used the principles and rights contained therein to interpret the rules contained in the European sources of lower rank and national provisions implementing those sources. The example of Article 31 and its relations with supranational and internal legislation on working time is emblematic, as is the innovative interpretation of "non-working time" work.

The second profile is more specific but no less critical. A few months ago, the Court of Justice confirmed a judgment of the EU General Court (the *Epsu cases)* explicitly defining for the first time the role of the European social partners in "making" Union law and recognising the European Commission's broad discretion in deciding whether or not to incorporate into the directive a collective agreement signed by European business associations and trade unions. The role of the social partners in the European social dialogue has been reduced compared to the past if one considers that before those rulings, the idea was that the

[14] Kenner J., nt. (13), 7.

Commission had to submit a proposal for a directive to give collective agreements the universal effect of the secondary sources.[15]

The social partners no longer seem to play a role in making Union law. However, they seem to have a different role in that procedure which is more similar to that carried out in the domestic legal systems of most of the Member States where, in the context of a trilateral social dialogue (involving the government, trade unions and employers' associations), the government has the power to decide whether or not to implement the contents of the agreements signed in some statutory provisions or bills.

Ultimately, the Commission's similar discretion in presenting the proposal for a directive can be seen as a positive aspect, as the social partners, particularly the employers' associations, have sometimes been afraid of entering into collective agreements which could acquire the status of binding norms and for this reason they have decided to withdraw from the negotiation, as happened in the case of temporary agency work. Therefore, the presence of the Commission's discretion could also facilitate social dialogue. The social partners act in collective bargaining where the aim is to promote the interests of the signatory parties and, ultimately, the collective interests. This aim is the traditional field of action for the social partners where they feel freer to play their natural roles.

I want to approach the conclusion of this contribution with the words of Jeff Kenner, an authoritative British scholar. In the aftermath of Brexit, he wondered whether the European Union, having freed itself of the 'ballast' of the United Kingdom, would be able to re-launch Social Europe[16]. Based on what I have said, I could respond positively to Kenner's question since the European Union in recent years has many more lights than shadows in social matters, which at least would lead me to affirm that social Europe is far from waning to continue using the metaphors mentioned above.

Of course, it seems to be crucial to have to wait for some developments: first of all, the outputs of the proposals for directives on working conditions in platform work and on adequate wages, which, albeit slowly, are making progress (the latter proposal has been passed by the Council but not yet by Parliament) and the results of the NRP, upon which many are betting a lot on to get out of the pandemic.

Finally, the Union's social response to the war in Ukraine is another positive signal for starting a new phase of social cohesion in the European Union. However, the duration and intensity of the conflict cannot fail to be irrelevant since it does not seem likely to me to think seriously about re-launching social Europe in the presence of an emergency of this magnitude. In short, while the war lasts, the priorities of the Union's institutions are inevitable of another kind.

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[15] For further details *see* Ales E., Delfino M., *The European social dialogue under siege?*, in *Diritti Lavori Mercati International*, 2022, 21 ff. (www.ddllmm.eu/dlm-int/). *See* also Ales E., *EU Collective Labour Law: if any, how?*, in Ter Haar B, Kun A. (eds.), *EU Collective Labour Law*, Edward Elgar, Cheltenham, 2021, 26 ff.; Delfino M., *The reinterpretation of the principle of horizontal subsidiarity*, Working Paper CSDLE "Massimo D'Antona".INT, 152/2020 (www.lex.unict.it); Dorssemont F., Lörcher K. Schmitt M., *On the Duty to Implement European Framework Agreements: Lessons to be Learned from the Hairdressers Case*, in *Industrial Law Journal*, 2019, 1 ff.

[16] It is possible to use the powers deriving from the Treaties to strengthen supranational labour law and, if so, these powers could be exercised more freely or, conversely, a line of excessive prudence will be followed to avoid divergence of regulation from the UK. Ultimately, will the British absence produce more coherence or bring out the hitherto hidden divisions between the Member States?

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