The European Social Union as a "union of national welfare states": a legal perspective

By Fancesco Costamagna

In launching the debate on the European Social Union (ESU), Frank Vandenbroucke and Maurizio Ferrera have identified some of its main prospective features. In my view, the fact that the ESU is not intended to be a European Welfare State, but a union of national welfare states, together with the idea according to which the ESU is set to become the institutional counterpart to the Economic and Monetary Union (EMU) are the key ones. **Against this background, this comment argues that these two features provide a strong normative orientation to the efforts aiming at creating the ESU, shaping its content and its function**. The analysis deals with these features, focusing, in particular, on their legal implications.

Vandenbroucke and Ferrera offer a clear identification of the benefits potentially deriving from the introduction of the ESU. First of all, they both emphasise that the use of this notion would bring about more clarity from both a conceptual and an analytical point of view, avoiding the ambiguity and contradictions inherent in the use of other terms, such as 'Social Europe'. Second, Ferrera highlights that the establishment of ESU would contribute to "rebalancing the EU toward those social values which are enshrined in the Treaties". Thirdly, the ESU would contribute to re-legitimizing the integration process in the eyes of its citizens, by "restoring 'togetherness' and thus diffuse support".

Operatively, the proposal is imbued with a good dose of political realism, claiming that the ESU should be created by assembling a number of already-existent building blocks, without the need to modify the Treaties in order to confer new competencies **to the EU**. Needless to say, this increases both the credibility and feasibility of the proposal, especially in the current difficult phase of the European integration process. Ferrera proposes a tentative, albeit already well-defined, list of ingredients that form part of the ESU.

If, as convincingly argued by Vandenbroucke, the ESU is to be a union of national welfare states, one of the ingredients is bound to play a central role within the meta-space created at supranational level. It is the case of national social spaces, which can be defined as the ensemble of national welfare systems and labour market policies characterized by distinct endowments of schemes and institutions, as well as by different logics and backgrounds. Due to the lack of legal competences, financial resources and democratic credentials at supranational level for elaborating a substantive social policy, they are – and they are set to remain for a long time – the only appropriate *loci* for ideating and carrying out meaningful

redistributive activities to “combat social exclusion and discrimination, […] promote social justice” and “social cohesion”, as provided for by Article 3 TEU. Therefore, the different ingredients of the ESU should combine so as to create what Hemerijck calls a “holding environment”, i.e. a space contributing to protect the integrity of national social spaces and to make sure that they can perform their core functions, such as promoting dignity, autonomy and social justice.

The subordination of the ‘social’ to the ‘economic’ in the context of the EMU

In the light of the above, it is quite obvious why the ESU has been primarily perceived as a counterpart to the EMU. Indeed, since its inception, it was clear that the creation of the EMU would involve a huge transfer of power from the national to the EU level negatively affecting social policies, which could end up being “the very likely victim of EMU”. **As duly observed in the Delors Report of 1989, the creation of the EMU could be expected to increase economic interdependence and, thus, “reduce the room for independent policy manoeuvre and amplify the cross-border effects of developments originating in each member country”**. One cannot but regret that these prescient remarks did not lead, as envisaged in the Report itself, to the adoption of “countervailing policies” at supranational level in order to compensate Member States’ loss of the monetary levers with which to address financial imbalances.

Far from representing a cornerstone of what used to be called the ‘European social model’, the protection of social rights is now seen as a cost that needs to be compensated

With the eruption of the Eurozone crisis and the ensuing reform of the economic governance mechanisms, the above-mentioned risk fully materialized. The new architecture entrusts EU institutions with an unprecedented capacity to set policy objectives and exercise supervision and guidance on social issues – such as pensions, wages and dismissals procedures – that fall squarely within Member States’ exclusive competence. **The main problem is that the exercise of these powers is functional to the stabilization of the EMU and not to**

the pursuit of core social objectives. In this context, the ‘social’ has been transformed into an adjustment variable, to be treated either as a cost to be reduced in order to balance Member States’ budgets or as a factor that should contribute to increasing their external competitiveness. For instance, the 2016 Supplements to the MoU for Greece contained a prescription urging Greek authorities to “compensate for the cost of the Council of State ruling (equivalent to 2 percent of GDP) on some aspects of the previous pension reforms”. This condition referred to a 2015 decision by the Greek Supreme Court finding that the 2012 pension cuts breached the Greek Constitution and the European Convention of Human Rights (‘ECHR’) for depriving pensioners of their right to a decent life. This is a very troubling example of the depth of the transformation of the European constitutional constellation: **far from representing a cornerstone of what used to be called the ‘European social model’, the protection of social rights is now seen as a cost that needs to be compensated**.

This transformation has been achieved, in the case of the Semester, by creating of a hybrid framework that brings under the same umbrella different strands of EU policy coordination and surveillance and that allows the Commission to gain leverage in sectors covered by soft coordination processes while relying on the threat of hard sanctions. **The creation of a hybrid meta-coordination framework, yoking together hard and soft law processes, allegedly aimed at increasing consistency among instruments that have different legal bases and rely upon distinct enforcement mechanisms**. Subsequent developments ended up putting hard law mechanisms at the service of soft coordinative governance tools, strengthening the capacity of supranational institutions of making national authorities comply with recommendations touching upon subject matters, such as pensions and wage-setting mechanisms, that fall within national competences. The choice to put coercion at the service of flexible arrangements is problematic under many accounts. **Country Specific Recommendations are not just “broad guidelines” as provided for by Article 121 TFEU since they are very specific in identifying the measures to be adopted and the results to be achieved**. **Rather than broad guidelines, many of the recommendations look like narrow paths not allowing for any deviation from what EU institutions** – and the Commission, in particular – **consider as the ‘right way’ toward salvation**. For instance, in 2015 Ireland was recommended to “[t]ake measures to increase the cost-effectiveness of the healthcare system, including by reducing spending on patented medicines and gradually implementing adequate prescription practices. Roll out activity-based funding throughout the public hospital system”.

These recommendations leave non-compliance as a possible way out. Yet, this option is not

readily available to all Member States. Despite nominally retaining a non-binding character, these recommendations demand a level of compliance that is higher than what may be inferred from Article 288 TFEU. **The latter establishes that recommendations “shall have no binding force”. This notwithstanding, hard-law processes, such as the SGP, can be used to put pressure on national authorities so as to make them adopt the recommended reforms**. The Commission has been very explicit on this point, by making clear that “[i]t is primarily in Member States’ own interests to implement the reforms that will help them recover from the crisis and create the foundations for sustainable growth. […] As a last resort, there is the prospect of sanctions if Member States repeatedly fail to take action on public finances or macroeconomic imbalances (under the Excessive Deficit Procedure and the Excessive Imbalance Procedure, respectively)”. Yet, due to its power-based nature, the effectiveness of the mechanism depends on the vulnerability of the State to this threat. The higher the risk of being put under an EDP or an EIP the harder the nature of supranational recommendations and, accordingly, the less the possibilities for the concerned Member to deviate from the recommended path.

If the ESU is to be a union of prospering national social spaces, there is the need to put an end to the systematic prioritization of EMU-related objectives over social ones.

In the case of bailout packages, the transformation materialized through an escape from EU law, its logic and guarantees, enabling the Commission and the creditor States to fully exploit the asymmetry of power that underpins the relationship between those parties that control the financial resources and the Member State that badly needs those resources to avoid default. **The rules governing the definition, approval and monitoring of the conditions attached to financial assistance packages have a “mixed legal parentage” that combines international agreements, EU legal acts and other documents, such as Memoranda of Understanding (‘MoU’), whose legal nature is contested and that some consider as not even creating legally binding commitments**. The dominant view has been that these provisions fall outside the EU legal framework. It is against this background that the Court has rejected all the claims brought by private applicants seeking the annulment of acts addressed to a Member State in the context

of a financial assistance programme. Moreover, the alleged disconnection between bailout measures and the EU legal framework lies at the basis of the decisions of the Court rejecting the requests for preliminary rulings submitted by national courts and, in that context, excluding the applicability of the EU Charter on Fundamental Rights (‘the Charter’) to austerity measures.

The ESU as a counterpart to the EMU

If the ESU is to be a union of prospering national social spaces, there is the need to put an end to the systematic prioritization of EMU-related objectives over social ones. Making sure that economic governance mechanisms operate in accordance with Treaty provisions granting equal status to economic and social objectives (see Article 3 TEU and Article 9 TFEU) and with the Charter on Fundamental Rights could be a first step in the right direction, albeit not surely a panacea.

In the case of financial assistance packages, **this can be achieved by bringing the elaboration, implementation and monitoring of structural adjustment programmes fully under EU law. The Commission has already sought to proceed along this path by proposing to replace the ESM with a European Monetary Fund** to be established through the adoption of an EU regulation. The Court had already spelled out the consequences of such a move, possibly making it even less palatable for certain Member States. In the *Florescu* judgment (C-258/14, 13 June 2017), dealing with a bailout package based on Article 143 TFEU, it declared its competence to rule on the compatibility between Romanian austerity measures and EU law provisions protecting fundamental rights. To this end, it found that the MoU is reviewable under Article 267 TFEU, since it is mandatory and “constitutes an act of an EU institution”. At the very latest, this should vest the Court with the power to ensure that structural adjustment programmes are fully consistent with the Treaty and the Charter, so to abandon the socially-suffocating conditionality requirements contemplated so far.

***Ex post* control is certainly important, but it is urgent to make sure that structural adjustment packages comply with EU law since the moment in which they are negotiated and drafted**. Article 7 of Regulation (EU) No. 472/2013 is quite timid in this regard, establishing that, when a Member State requests financial assistance, the draft macroeconomic adjustment programme has to take “into account the practice and institutions for wage formation and the national reform programme of the Member State concerned”, as well as to “fully observe Article 152 TFEU and Article 28 of the Charter”. Even

though they would apply in any case, it may be advisable to make clear that these programmes have to comply with the whole set of social provisions contained in the Treaties and in the Charter. Operationally, this should feed into a social impact assessment, as strongly advocated by Juncker since the beginning of the mandate of the current Commission. The problem is that, as demonstrated by the impact assessment carried out with regard to the Greek MoU of 2015, so far this instrument has been mostly used to praise the reforms adopted, rather than to critically engage with their social sustainability.

Finding a way out is more problematic with regard to the Semester. Over the years, there have been many attempts to ‘socialize’ it, with regard to both, its organizational and its substantive components. Undeniably, some results have been achieved, as demonstrated by the growing number of recommendations that treat social issues not just as factors that should contribute to the attainment of EMU core objectives. However, it is doubtful whether this evolution actually marks the end of the prioritisation of economic objectives over social ones within the Semester. Indeed, the more ‘socially-oriented’ recommendations are still marginal if compared with those adhering to the ‘traditional’ approach. This is hardly surprising, considering that the Semester has been created to ensure the smooth functioning of the EMU and that, consequently, in this context, social objectives are bound to play second fiddle.

Another step toward the establishment of a social counterpart to the EMU could be the creation of a centralised fiscal capacity to finance EU level automatic stabilizers. Indeed, these transfers can help to ease the pressure on social policy, emancipating it from its role of sole – or main – adjustment variable within the EMU.

It is still unclear whether the European Pillar of Social Rights (EPSR) will make any meaningful difference in this regard. As it is well known, the document, setting out 20 key principles and rights regarding equal opportunities and access to the labour market, fair working conditions and social protection and inclusion, is not legally binding. As pointedly observed by Ferrera, this does not mean that it is irrelevant. In particular, according to the Annual Growth Survey 2018, the Pillar should “serve as a point of reference for the further

implementation of the European Semester”, being “a compass for renewed convergence towards better working and living conditions”. **At least in the context of the Semester, so far it has only led to the adoption of a new set of indicators that should contribute to better monitoring of Member States’ social performance**. This seems to be far too timid to correct the distortions generated by a mechanism that is structurally biased towards the prioritization of EMU-related objectives over competing ones, such as the promotion of social rights.

Another step toward the establishment of a social counterpart to the EMU could be the creation of a centralised fiscal capacity to finance EU level automatic stabilizers. Indeed, these transfers can help to ease the pressure on social policy, emancipating it from its role of sole – or main – adjustment variable within the EMU. Both Ferrera and Matsaganis emphasise that the introduction of **automatic stabilizers could be an important vehicle for the re-legitimization of the whole integration process. Yet, their creation raises a number of legal issues** with regard to both the payment side and the financing one, as well demonstrated by the highly polarised debate surrounding the establishment of a common unemployment insurance scheme. An in-depth analysis of the debate lies well beyond the scope of this brief comment. However, it is worth recalling that **in 2013 Communication on the strengthening of the EMU social dimension, the Commission argued that the creation of this scheme necessarily required a Treaty change, since there was no provision conferring to the EU the competence to take such a step**. While some commentators concurred with the Commission, others dissented, at least with regard to the possibility to institute an ‘equivalent’ unemployment insurance scheme. This version of the scheme does not envisage the possibility of direct payments to eligible persons, but it provides for the transfer of funds to national budgets when the short-term unemployment rate exceeds a certain threshold. According to some legal scholars, the equivalent version of the scheme – “less ambitious, though still useful” to use the words of Matsaganis – does find a viable legal basis within the existing Treaties and, more specifically, in Article 352 TFUE.

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