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The Burden of Intra-EU Mobility on National Welfare Systems: Between Myth and Reality. Some Introductory Remarks

by Francesco Costamagna and Stefano Giubboni

The Burden of Intra-EU Mobility on National Welfare Systems: Between Myth and Reality. Some Introductory Remarks - The article sets the scene for the range of matters analysed in the Focal Issue, identifying drivers and patterns of the restrictive trend that affects the policy and legal framework of intra-EU mobility, as well as its consequences on the European integration process as a whole. The analysis casts a critical eye on the attempt by national governments and supranational institutions to restrict the access to social benefits by mobile EU citizens. The article maintains that this transformation is encroaching upon foundational elements of the European integration process and, while in the short run it can yield some electoral dividends, it is going to negatively affect its long-term prospects.

Keywords: mobility, welfare, burden, citizenship, workers

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1. Introduction

Free movement of persons has become one of the most cherished and most despised features of the European integration process. On the one side, the combined rights to free movement, residency and equal treatment are unique in the world with regard to both its scope and its political commitment to regional integration and solidarity (Geddes 2008). On the other side, these rights face now strong opposition, as they are increasingly perceived as encouraging social tourism and posing an unsustainable burden on national social security systems.

The possibility that free movement, associated with equal access to social protection for the movers, could represent a cost for national welfare systems is not a novel concern (Ferrera 2005). The debate over the budgetary impact of intra-EU mobility reignited after the EU's eastward enlargements of 2004 and 2007. The crisis further exacerbated it, fostering welfare nationalism on the back of mounting xenophobic and racist sentiments. The poisonous and largely uninformed Brexit debate over these issues represents a good point in case. The Leave Campaign obsessively reiterated the need to "curb the costs of uncontrolled migration", so to preserve the financial sustainability of the welfare system, without providing any meaningful data to back their claims and failing to clearly distinguish between intra-EU mobility and immigration from Third-Countries.

This introductory note sets the scene for the range of matters analysed by the Focal Issue, identifying the main drivers and patterns of the restrictive trend,

as well as its consequences on the European integration process. The analysis proceeds as follows. First, it provides an overview of the ascending phase of EU citizenship, focusing on the progressive opening of national social spaces to citizens of other Member States. Second, it examines the current “reactionary phase” (Spaventa 2016, 204), by going through and linking together the main findings of the four articles composing the Focal Issue. Lastly, it draws some conclusions focusing on the implications of the mounting wave of welfare nationalism on the EU and its prospects.

2. The ascending phase of EU social citizenship: the safeguard of national social systems’ financial sustainability as an exception

EU law has traditionally granted full rights to residence and not to be discriminated against in access to social benefits to workers, in their capacity as economic agents and actors of the European internal market. Conversely, economically inactive citizens have a right to reside in the territory of another Member State only insofar as they can demonstrate having sufficient resources for them and their families, plus comprehensive sickness insurance cover. The objective is to avoid them becoming “a burden on the social assistance system of the host State”.¹

The Court sought to fill this gap, trying to overcome the functionalistic logic and mercantile *ratio* traditionally underpinning the guarantee of social security rights to mobile workers (Hervey 1995; Nic Shuibne 2010; O’Brien 2013). This move was premised on the idea that citizenship of the EU confers in itself an autonomous entitlement to social rights. From this perspective, the status of being a citizen of the union actually had a fundamental, ‘founding’ status (Giubboni 2010, 181). Indeed, Treaty provisions on non-discrimination and free movement rights – now Article 18 and 21 TFEU – played a central role in this context, requiring a restrictive interpretation of the limits and conditions imposed by secondary rules (Giubboni 2007, 368). In particular, while accepting that Member States can ensure that the granting of assistance “does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by the State”,² the Court ruled out the possibility for national authorities to automatically exclude non self-sufficient citizens from having access to their welfare systems. Indeed, as already held in *Grzelczyk*, the institution of EU citizenship entailed the acceptance of “a certain degree of solidarity between nationals of a host Member State and nationals of other Member States”.³ Therefore, national authorities could not rely upon a blind application of the affluence test enshrined in Article 7 Directive 38/2004, by mechanically assuming that anyone seeking assistance was bound to become a burden and, consequently, could be denied the right to reside. Conversely, they

¹ Article 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*.

² CJEU, judgment of 15 March, case C-209/03, *Bidar*, para. 56.

³ CJEU, judgment of 20 September 2001, *Grzelczyk*, para. 44.

had to carry out a careful case-by-case assessment, by taking into consideration, for instance, whether the applicant was already integrated in the social fabric or his difficulties were only temporary.

Construing the safeguard of national social systems' sustainability as an exception to be narrowly interpreted represented the highest point in the judicial trajectory pointing toward the universalization of the logic of social integration, detaching it from the functioning of the internal market. At the same time, as pointedly observed by Panasci in this Focal Issue, this example of judicial activism was badly received by many Member States, which perceived it as an unduly attempt to create a space of social solidarity even against the express will of EU decision-makers.

3. Reversing the trend: the safeguard of national social systems' financial sustainability as the priority

Abandoning the expansive logic of EU citizenship in three steps

The crisis has put under severe pressure the conceptual construction built by the Court, altering the factual and political landscape. The dramatic economic situation of many Mediterranean countries, characterized by soaring unemployment and lack of job opportunities especially for young people, forced many to move towards Northern Member States, which, in turn, proved to be less and less inclined to host them (Lafleur and Stanek 2017).

In 2013, 4 Member States – UK, Austria, Germany and the Netherlands – formally asked the Commission to propose the amendment of Directive 38/2004/EC, in order to provide national authorities with more effective tools to combat a “type of immigration [that] burdens the host societies with considerable additional costs”.⁴ Some of them amended their legislation on social benefits, with the specific aim of making them less accessible to EU mobile citizens.

As shown in this Focal Issue by Absenger and Blank with regard to Germany, the ‘burden on public finance’ argument was the main driver behind the reform of the law regulating access to basic social benefits that took place at the end of 2016. Reliance upon this argument looks misplaced if one considers the data. Available empirical evidences shows that intra-EU mobility tends to have positive economic effects on receiving States (Sindbjerg Martinsen and Pons Rotger 2017). On average, EU citizens are well integrated in the labour market and contribute, by paying taxes and social contributions, to fund national social systems. This notwithstanding, as shown by Mullan with regard to the cases of Germany and Denmark, this argument has quickly become part of the dominant narrative, after being brought to the fore by far-right movements and, then, incorporated in the programmatic platforms of mainstream parties.

The Court contributed to consolidate the restrictive trend, casting an increasingly tolerant eye upon national measures restricting the access to social benefits by mobile EU citizens and, by these means, seeking to reassure Member

⁴ Available at http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf.

States concerned about social tourism. By so doing, it sacrificed the expansive logic of Union citizenship as a fundamental status of European citizens.

The retreat materialized in three main steps.

First, the emphasis shifted from the rights enshrined in Treaty provisions on EU citizenship to the limits set by secondary law rules, which become the fulcrum of the system and determine the scope of application of primary law rules, not the other way round as occurred in the past.

Second, the Court reversed the objective of Directive 38/2004 (Thym 2015a, 25). Indeed, in the past it held that the main aim of the act was “to facilitate and strengthen the exercise of the primary and individual right [...] to move and reside freely”.⁵ Conversely, in *Dano* it construed it as “seek[ing] to prevent economically inactive Union citizens from using the host Member State’s welfare system”.⁶ What used to be an exception – safeguarding national social spaces against the risks posed by intra-EU mobility – is now the main objective.

Third, the Court adopted a light test to determine whether the granting of social assistance to mobile citizens constitute an excessive burden for the host State’s finances. In particular, the Court dropped the proportionality appraisal, relieving national authorities from “carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned”.⁷ Admittedly, the combination of a systemic evaluation and an individual one (Thym 2015a, 28) places, if taken seriously, a heavy evidential burden upon national authorities. The *Dano* judgment backtracked from this interpretive approach, arguing that the only element to be considered is the financial situation of the person and not even mentioning the systemic impact of the decision to grant assistance.⁸ *Alimanovic* went a step further, explicitly ruling out the need of taking in consideration the individual situation of the person concerned, since the Directive, “establishing a gradual system as regards the retention of the status of ‘worker’ which seeks to safeguard the right of residence and access to social assistance, itself takes into consideration various factors characterising the individual situation of each applicant for social assistance”.⁹ This marks the departure from previous case law, allowing national authorities to automatically deny the right to reside and, thus, access to social benefits to all those persons failing to pass the affluence test. Furthermore, it makes the provision set out in Article 8, par. 4, of Directive 2004/38 irrelevant. Indeed, according to that provision, Member States cannot laydown a fixed amount regarded as indicating “sufficient resources”, but they should take into account the personal situation of the person concerned.

Beyond social assistance and beyond social tourism

⁵ CJEU, judgment of 19 September 2013, case C-140/12, *Brey*, para. 53.

⁶ CJEU, judgment of 11 November 2014, *Dano*, para. 74.

⁷ *Brey*, para. 64.

⁸ *Ivi*, para. 80.

⁹ CJEU, judgement of 15 September 2015, *Alimanovic*, para. 60.

Article 24 of Directive 2004/38 allows Member States not to extend the principle of equal treatment to those EU citizens not having a right of residence under the Directive only with regard to social assistance benefits. However, the Court has progressively expanded the scope of application of the “right-to-reside-under-Directive 2004/38” (Verschuere 2015) test by, first, adopting an increasingly broad reading of the notion of ‘social assistance’ and, then, projecting it into the social security field.

As for the first prong, the Court held that social assistance also encompasses ‘special non-contributory cash benefits’ (SNCBs), such as the pension’s compensatory supplement claimed by Mr. Brey. This means that States are entitled to make them available only to those being economic self-sufficient and, thus, having a right of residence under the Directive. By so doing, the Court imposes this requirement over the one, far less demanding, provided for by Article 70 of Regulation 883/2004 on social security coordination. Indeed, according the latter provision host States should grant SNCBs to those that habitually reside in their territory, an expression that refers only to the place where the claimant lives or has the main centre of his interests and not to his legal status. The Court followed the same interpretive line also in *Alimanovic*, where it held that a subsistence allowance for the long-term unemployed has to be regarded as ‘social assistance’ for the purposes of Directive 2004/38.¹⁰ It is worth noting that this conclusion contradicted the one reached in the *Vatsouras* judgment, adopted just few years earlier. There, the Court excluded that the same benefits, provided for under Book Two of the German Social Code, could be labelled as ‘social assistance’ to withheld them from job-seekers.¹¹

The reason for this shift and, more in general, for the extension of the affluence test to SNCBs is to be found in the new telos of Directive. Insofar as these benefits involve public largesse, being them paid under general taxation, they should fall in the notion of social assistance within the meaning of the Directive, whose primary aim is to prevent individuals that have not made any contribution to finance the national welfare system from becoming an unreasonable burden. And yet, the granting of what Panasci defines “a normative superstatus to the Directive” overturns the terms of the compromise between it and Regulation 883/2004 with regard to SNCBs. The compromise was premised upon, on the one side, the derogation from the principle of exportability and, on the other, the attribution of the responsibility for their payment to the Member State of residence (Cornelissen 2013).

More recently, the Court has gone one step further, allowing Member States to refuse to pay any social benefit, including purely social security ones, to EU citizens failing to pass the right-to-residence test under Directive 2004/38 for lack of financial resources. In *Commission v. UK*, a decision adopted just ten days before the Brexit referendum in a desperate attempt to defuse voters’ concern on migration issues, it held that EU law does not prevent national authorities from making access to purely social security benefits – such as child benefit and child

¹⁰ *Alimanovic*, para. 45.

¹¹ CJEU, judgment of 4 June 2009, joined cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*, para. 45.

tax credit – conditional upon the possess of a right to reside.¹² The main reason underpinning this approach is, once against, the willingness to entrust national authorities with the widest possible margin of manoeuvre when it comes to protecting their welfare systems against the risks posed by intra-EU mobility. Even if this entails the adoption of openly discriminatory measures that end up sacrificing “the last vestiges of EU citizenship to the altar of [...] nativist tendencies” (O’Brien 2017, 209). The Commission is now purporting to bring this evolution to a full circle, as it proposed to codify it in the amended version of Regulation 883/2004. According to the Proposal presented in December 2016, the new Article 4 will allow Member States to “require that the access of an economically inactive person residing in that Member State to its social security benefits be subject to the conditions of having a right to legal residence as set out in Directive 2004/38/EC”.¹³

Budgetary concerns are also the main driver behind the extension of the restrictive turn on welfare access *ratione personarum*, i.e. from economically inactive persons to other categories of mobile citizens. Indeed, what has been initially conceived as a way to respond to the threat posed by people moving “solely to obtain another Member States’ assistance” has gradually become the rule with regard to job-seekers and even certain categories of workers.

As demonstrated by *Alimanovic*, the Court is progressively assimilating the condition of first-time jobseekers to that of economically inactive persons, rather than, as done in the past, to workers (O’Brien 2016, 949). Accordingly, social benefits intended to facilitate access to the labour market are no longer covered by equality principle enshrined in Article 45 TFEU, but they fall in the far more restrictive regime of Directive 2004/38, which end up excluding from the support those that need it most. Also in this case, the Court seems to be very much in touch with the prevailing political climate, well exemplified by the Decision “concerning a New Settlement for the United Kingdom within the European Union”. Here jobseekers were treated under the heading of Article 21 TFEU, alongside with economically inactive persons, and not Article 45 TFEU. Furthermore, the Decision established that “Member States may reject claims for social assistance where EU citizens from other Member States do not enjoy a right of residence or are entitled to reside on their territory solely because of job-search. This includes claims by citizens from other Member States for benefits whose predominant function is to cover the minimum subsistence costs, even if such benefits are also intended to facilitate access to the labour market of the host Member States”.¹⁴

¹² CJEU, judgment of 14 June 2016, case C-308/14, *Commission v. United Kingdom*.

¹³ *Proposal for a Regulation of the European Parliament and 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*, 13 December 2016, COM (2016)815 final.

¹⁴ European Council Decision of the Heads of State or Government, meeting within the European Council, *concerning a new settlement for the United Kingdom within the European Union*, EUCO 1/16, 19 February 2016, Section D(1)(b).

A similar involution also took place with regard to frontier workers, i.e. individuals pursuing an economic activity in one Member State while living in another, where they return at least once a week. These workers have the same status of ‘ordinary’ ones under EU law, as explicitly provided for by Regulation 492/2011. However, recent judicial decisions have put under strain this commonality of rights. In particular, the Court accepted that Member States can subordinate the access to social benefits by frontier workers or their family members to conditions proving their level of integration in the State of employment.¹⁵ As pointedly observed by Montaldo, the application of these conditions “plays a permissive function in favour of the interest of Member States”, giving them a wide margin of discretion when it comes to determine the openness of their welfare systems. The main reason why the Court accepted to endow national authorities with such a wide margin of action is, once again, to enable them to protect the financial sustainability of their welfare systems. This is fully in line with the case law on economically inactive persons, disregarding the fact that frontier workers do contribute to financing the welfare system of the State of employment by paying taxes and social contributions there.

4. Conclusion

Protecting Member States’ public finances, rather than solidarity, is the fulcrum of the new framework on intra-EU mobility. National politicians and supranational institutions all contributed to transform an economic myth, i.e. that mobility poses an unsustainable burden on national coffers, into a political and legal reality.

This counter-reformation of EU mobility law started as a way to prevent free riding by unidentified social tourists, but it is now causing a tectonic shift in the law of free movement. Indeed, this involution questions the postulates of the freedom of movement of persons and workers in the EU. The restrictive turn betrays the promises of the European citizenship, brutally exposing its ontological inability to be an autonomous element of social integration. Indeed, the current framework is very much consistent with the “two citizenship” (Belorgey 1998) model, according to which there are first-class citizens and second class ones. What is troubling is that the new dividing line is not even the participation in the market, since “work is being displaced as the gateway to free movement rights” (O’Brien 2016, 973). The new framework seems to be in line with the logic of the Poor Laws (Groenendijk 2010), turning economically non-self sufficient citizens into illegal migrants at risk of being expelled or, at least, starved out (Thym 2015b, 6). This transformation is encroaching upon foundational elements of the European integration process and, while in the short run it can yield some electoral dividends, it is going to negatively affect its long-term prospects.

Moving from these premises, this Focal Issue of *Politiche Sociali/Social policies* critically examines the transformation of the European legal and policy framework for welfare access by EU mobile citizens. In particular, it focuses on

¹⁵ CJEU, judgment of 14 December 2016, case C-238/15, *Bragança Linares Verruga*, para. 69; judgment of 20 January 2013, case C-20/12, *Giersch*, paras. 78-80.

the role that the preservation of national systems' financial equilibrium plays in this context, by examining the political dynamics, the economic reasons and the legal foundations of the restrictive turn taken both at national and supranational level.

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