WorkYP Newsletter

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Towards the social citizenship we deserve

Dear Readers,

We are delighted to present the fifth issue of our Newsletter!

The WorkYP project is coming to an end. The main findings and a complete set of policy proposals will be presented at the **final Conference**, that will take place in **Brussels on 26th January 2023**. On our webpage you can find the conference programme.

In the meantime, the WorkYP Consortium has been working hard on the project's last deliverables. The present Newsletter will particularly focus on **deliverable 4.4 on European social citizenship**, produced by Ane Aranguiz with input from Mijke Houwerzijl at Tilburg University.

Deliverable 4.4 is a key output of WorkYP, which set as one of its objectives the reconceptualization of EU social citizenship. The fact that almost one in every tenth European worker is at risk of poverty challenges some of the core ideas of the EU integration project and puts a question mark over its added social value. Indeed, the EU has been built over the promise of an internal market, able to deliver economic and social prosperity. This seems incompatible with the existence of such high levels of in-work poverty, particularly amongst the most vulnerable groups of workers (VUP Groups). Against this background, the social contract between the EU and its citizens must be re-evaluated, so that a more robust conceptualisation of an EU social citizenship can be elaborated.

The citizenship of the Union and beyond

The idea of an EU citizenship is not new. Since the Treaty of Maastricht all the citizens of the EU Member States are also entitled to the citizenship of the Union, adding a layer to their national citizenship, pursuant to Article 20 TFEU[1]. Despite its merits, EU citizenship appears as incomplete, since it only offers full access to a limited set of rights when certain economic conditions are met or when citizens cross the border of their own Member State. Furthermore, of existing rights emanating from EU citizenship, only the right to free movement has an adhered social dimension, the rest of the social *acquis* not being linked to EU citizenship. Given that mobile, economically active citizens are a tiny minority of EU citizens, the question on the limits of an idea of citizenship that does not benefit all the citizens but only a few comes naturally. The question is aggravated by the fact that even for mobile citizens that are not economically active (or do not qualify as 'workers' because of the marginal character of their work) the social added value of EU citizenship is very limited. If the EU citizenship is called to enjoy a fundamental status, the above-described *status quo* is problematic. The fundamental status of citizenship demands a capacity to be integrative and refers to all the members of the political community holding the status of citizen.

To overcome the mentioned limitations, a reconceptualization of the EU citizenship is proposed. The idea is to add the s*ocial* to the citizenship of the Union. The method is to flesh out EU citizenship with a set of social rights for all EU citizens. This strategy would at the same time enhance the legitimacy and participatory dimensions of the EU. The concept of European social citizenship would thus become instrumental to the full implementation of the EPSR and beyond, as it calls for a robust *acquis* of social rights that can help to revamp the EU social model and solve its many problems, among which in-work poverty features high.

[1] Article 20(1) TFEU establishes the citizenship of the Union and states that 'Every person holding the nationality of a Member States is a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship'.

Why adding the social element strengthens the citizenship of the Union? This has to do with the very purpose of citizenship, which creates a status entailing full membership of the holder to a political and social community. Although the rights and obligations included in citizenship are open to debate, may change and may depend on historical occurrences, there is consensus that these must be equal to everyone with the same citizenship. Social rights are at the basis of any advanced idea of citizenship, since their function is to guarantee a minimum of economic wealth, social protection and a decent standard of living that make civil and political rights possible and meaningful. Therefore, social citizenship needs to apply equally to all members of the community, guaranteeing a certain level of equality and social rights that are necessary to ensure equal and dignified participation in society. This concept resonates with the ideas of indivisibility of human rights as recognised in the case law of the European Court of Human Rights.

Clearly, the idea of an EU social citizenship transcends national borders and the national dimension. It is closer to the idea of multi-level or 'nested' citizenship, referring to patterns of membership which manifest in a variety of levels (EU, national, regional and local). This understanding is able to accommodate the multiplicity of social memberships in current multi-level governance frameworks. The key of this model of citizenship (and its main challenge) is to determine how the different levels interact.

Social rights in the EU, the limitations of the existing social *acquis*

The idea of an EU social citizenship has three dimensions: legitimacy, rights and obligations, and participation.

The main argument for the *legitimacy* of the European social citizenships is to be found on the foundational aspirations of the Union: its values (Article 2 TUE) and objectives (Article 3 TUE). The values are key in establishing EU membership and understanding the common features of the EU as a common polity. They give legitimacy to the whole edifice of EU law. Undeniably, some of them have a social component, suggesting that the EU is *also* a social polity. The general objectives establish the legitimate grounds for EU action. Here important social objectives are found, including a mandate to combat social exclusion and discrimination. These objectives can be read in conjunction with more concrete social principles set in the Social Policy Title (Articles 151-156 TFUE) and the solidarity chapter of the CFREU (Articles 27-35). Furthermore, the social objectives set in Article 3(3) TEU are to be further strengthened by the so-called horizontal clause of Article 9 TFEU.

The *rights and obligations* that citizenship entails are the core content of citizenship. This is also the case with EU social citizenship. Social rights are particularly important, due to their enabling character: these are the rights that make possible a material equality of citizens, enabling them to exercise other (civil and political) rights. The question is whether the existing social dimension of the EU can substantiate the container of EU citizenship.

The *participatory dimension* of citizenship entails the possibility that citizens, as part of a community, have the power to influence and participate in the development of such community. Participation has an individual and a collective dimension. In the EU, the individual dimension consists of participation in the elections for the European Parliament. Hence the importance of the participation of the Parliament in the adoption of legislation in the social field. Some other, more innovative forms of political participation are represented by the European Citizens Initiative and a number of instrumental resources such as SOLVIT or Your Europe. Collective participation in the EU is present in the form of work councils and trade union representation. Even if not without important limitations, the social partners are given a role in the making of social policy through the original system regulated in Articles 153, 154 and 155 TFUE.

The EU intervenes in the domain of social and employment policies by supporting and complementing the Member States with a variety of instruments. These instruments conform what is called the social *acquis* of

the European Union. In a very brief description of this social *acquis* we have to mention, firstly, the instruments that conform the EU fundamental rights landscape. The first instrument to be adopted on fundamental rights at EU level was the Charter of Fundamental Social Rights of workers (1989), although this instrument remained non-legally binding. Subsequently, a Charter of Fundamental Rights was also adopted (2000) that became legally binging with the entry into force of the Treaty of Lisbon. Finally, Article 6 TEU completes the picture by referring to two other sources of fundamental rights in the EU that are relevant in the form of general principles of EU law: the ECHR and the national constitutional traditions. The last instrument to be adopted is the EPSR (2017), also with a no legally-binding nature.

The potential of the contents of the EU Charter of Fundamental Rights, that includes relevant labour and social rights is limited due to its narrow application as defined in Articles 51 and 52. Furthermore, fundamental rights can be – and indeed are, according to the ECJ case law- subordinated to the market freedoms of the EU. As for the EPSR it seems that, similarly to what happens in the 1990s with the Charter of Fundamental Social Rights of workers, is being instrumental to the development of new social initiatives. It also provides a sense of directions for institutions, particularly the policy maker and the legislator, and serves as a source of interpretation of social rights. The result of this limitations is that most of the normative social rights prescribed in the fundamental rights instruments remain, for different reasons, non-justiciable. However, the EPSR has potential to steer EU social citizenship: it represents a renewal of the social acquis, detaches specific rights from traditionally more general rights and is accompanied by interesting tools, such as the Social Scoreboard that can steer in the direction towards further action in the social field.

A second layer of the existing social *acquis* is a corpus of secondary EU labour law legislation, mostly in the form of Directives. However, this corpus remains underdeveloped for those groups of workers that are at a higher risk of in-work poverty, namely self-employed and those in non-standard forms of work (such as casual or platform workers). The only hard law measures that seem to apply to these groups are the 2019 Directives on transparent and predictable working conditions and on work-life balance. When it comes to low-wage workers and particularly atypical workers, the existing EU Directives have a practical impact on their labour standards and social protection, although there are a number of weaknesses and loopholes. The recently adopted Directive on minimum and adequate wages may have an important impact in some sectors and countries, in particular in what concerns low-wage workers. However, the provisions on adequacy in this instrument remain weak. In addition, there are no harmonising social rules outside the areas of labour law and equality. Out-of-work benefits are not part of the social *acquis*.

Finally, another important component are those instruments of social policy used or monitored by intergovernmental and multi-level governance structures, such as the Social Open Method of Coordination and the European Semester. However, so far these instruments have failed to advance towards their initial objective of integrating the social, economic and financial aspects of the EU, largely due to the supremacy of fiscal and macroeconomic policies over social policies. But this kind of structures are of the utmost importance to ensure a nested model of EU social citizenship, since they have the potential to contribute to the coordination of the different levels of a multi-level supranational citizenship. Other instruments such as the Social Scoreboard attached to the EPSR could serve this purpose in the field of social policies.

To sum up, social policy harmonization is still mostly market or mobility oriented, resulting in an underdeveloped social dimension that does not live up to the expectations of EU social citizenship. Although this model may have sufficed in previous stages of the EU project, it seems uncapable of accommodating current social demands. Only by strengthening the social features of EU citizenship can it be guaranteed a decent standard of living and a reduction of in-work poverty. This objective demands to reinforce the market correcting characteristics of the EU social *acquis* and ensure the respect for the social aspects in all the other EU policies. Social entitlements for all the citizens that could achieve the overall objective of guaranteeing a decent standard of living are the base of any social citizenship worth the name. The question is, can the EU

deliver such social entitlements? To answer this question the possibilities of the current constitutional framework of the EU need to be explored, without renouncing to more ambitious avenues, such as a reform of the Treaties.

Reinforcing the social *acquis* to fight in-work poverty. Towards the citizenship we deserve

Even if it comes with limitations, the existing constitutional framework offers a number of competences that could accommodate measures on working conditions, adequate minimum wages, social security and social protection with the aim to reinforce the EU social *acquis*. These possibilities are offered under citizenship (Article 21 TFEU), employment (Articles 148 and 149 TFEU), social policy (Articles 153 and 156 TFEU), economic, social and territorial cohesion (Article 175 TFEU) and the general bases of Articles 115 and 352 TFEU. Of course, beyond the matter of competence, that reflects the principle of conferral, the principles of subsidiarity and proportionality are also applicable. These three principles are key in defining the nested citizenship idea as they will determine when, how and to what extent should actions be taken at the EU level. This system presupposes that different levels —transnational, national and subnational— of social protection (broadly understood) coexist. For these to work, it requires that these levels interact and even promote some upward convergence. It is crucial, in such a system of nested or multiple citizenship that different levels are not self-contradicting so that a fully-fledge and constantly progressing social citizenship can be guaranteed by regional, national and supranational institutions.

With a focus on protecting the most vulnerable groups of workers in the labour market with the aim to tackle in-work poverty, a number of proposals to strengthen the social *acquis* are seen as the first steps towards the idea of EU social citizenship. These proposals aim at solving some of the detected problems in the WorkYP project, such as low wages and consequently low replacement rates in social security; obstacles in combining different incomes; no clear definition of adequacy (of wages or/and benefits); inactivity traps; no clear fit into the social security system; no take-up of entitlements; qualifying or waiting periods that are difficult to overcome for temporary of low-intensity workers; lack of unfair dismissal protection for some categories of workers; explicit exclusion of protection or benefits for certain categories of workers. The goal is to contain or even regress the casualization of work leading to temporariness and low work intensity that is the root of most of the described problems. The description of the proposals in this newsletter is per force brief and schematic.

The first action proposed is to introduce of strengthen the **protection against unfair dismissal** for all groups of workers in a future instrument on dismissal law that could require some minimum standards in a general way and with a broad personal scope of application. Protection against unfair dismissal would reinforce job security, that is important for a number of reasons: it guarantees incomes, offer certainty, protection in case of loss and permits accumulation of work benefits. To achieve this goal the introductions of deterrents for dismissal, even in times of need, as well as limits in the use of external flexibility are key. Dismissal protection is then a central element. This can be done by requiring valid and justified reasons to dismiss. This is furthermore contemplated in Article 30 of the CFR and principle 7 of the EPSR. However, there is no EU legislation on dismissal law in broad terms, despite the fact that Article 153(1) (d) TFEU grants the EU competences to adopt minimum standards in the field of termination of employment.

The **amendment of the existing atypical work directives** is also advisable. The current approach to atypical work is mostly grounded on guaranteeing equal treatment to atypical workers in comparison to full-time permanent workers. But there are a number of problems: the existence of derogations and the fact that equal treatment is limited to working conditions and does not extend to social security entitlements; it demands the existence of a real full-time/permanent comparable worker. However, the core problem is that the principle of equality fails to recognise that atypical and typical workers are not in the same position. The amendments proposed would seek to restrict the use of atypical work. In this sense it is recommended to

establish more explicit limits for the use of fixed-term contracts, preventing employers from using temporary contracts to cover permanent needs. Abuse in the use of temporary work is possible even when there are no successive contracts. Member states would need to justify when and where fixed-term contracts are accepted. These measures would be complemented with provisions on remedies in case of abuse. Similar amendments should be made to the Temporary Agency Work Directive, including appropiate measures to prevent abuse of the derogations of equal treatment and abuses of successive temporary agency contracts. Public procurement provisions prioritizing companies that offer direct and permanent contracts to their employees could be a further incentive to restrict the use of agency (and temporary) work. On part-time work, the directive should be amended to limit the use of part-time work to those instances in which part-time is truly for the benefit of workers. The possibility to exclude casual workers from the application of the directive must be lifted. Finally, a requirement to determine a minimum and maximum of hours should be introduced to create some predictable patterns of working time.

Beyond the proposed amendments in the directives, to compensate for the restrictions on the use of external flexibility, internal flexibility could be reinforced in case of economic shocks, supported by financing tools such as SURE. Mechanisms of internal flexibility such as those successfully used during the pandemic in several jurisdictions can be introduced.

Developing a **legal instrument on minimum standards of unemployment** would help to overcome the limitations of dismissal protection. It would also help to develop a coherent legal framework on social security. Adequate unemployment benefits are necessary to ensure a decent life in between jobs and also to break cycles of precarity. This proposal can benefit of the European Unemployment Reinsurance Scheme proposals. Linking these two would allow to expand the rights of the workforce while securing some funding for national social security systems. This legal instrument could be based both in Article 153 and 175 TFEU. A key point of this instrument would be to guarantee universal coverage (formal and effective) and adequacy.

Finally, an **amendment of the working time directive** is proposed. The idea is to tackle the limitations of the working time directive to render it fit to protect the labour realities of the most vulnerable workers. The directive does not provide for daily maximum hours and allows individual workers to opt out from the 48 hours weekly limit. It also does not establish how working time is calculated in case of dual employment. Under the current framework, the time that people on zero-hours contracts are waiting to be assigned for work is not considered working time. This has implications, for instance, in the calculation of reference periods and benefits. Derogations are also highly problematic. A possible amendment should limit derogations, that would need to be justified by law, necessary and proportionate. It also could consider to compensate casual workers from the uncertainty and risk of low-work intensity or overwork. Similarly, provisions could be introduced to include minimum hours to be compensated for on-call assignments, with wages equivalent to these minimum hours as compensation for the uncertainty of working hours. Finally, reliable and accessible systems to measure and record the daily working time of all workers must be established.

In addition to these measures, it would be necessary to **reinforce governance structures** with the aim of integrating already existing legal and policy frameworks to ensure coherence and consistence among them. To this end, the updating and strengthen of the **Social Protection Committee** and the **Economic and Social Committee** are proposed.

Of course, these are only some among endless possible pathways to reinforce the EU social *acquis*. These include the amendment of the Treaties, including a Social Progress Protocol in the Treaties. A revision of the social competences could also entitle the EU to adopt minimum standards in the field of combating social exclusion and the modernization of social security systems, or to address the lack of competence in the area

of taxation. Other ideas include the adoption of a minimum income directive or even the more ambitious instrument of a European Universal Basic Income.

The final goal is to entitle European citizens with protections that can ensure a decent standard of living, despite the fact that there is possibly no way back to the fully standard work world. This would contribute in turn to the end of in-work poverty and will substantiate the idea of EU social citizenship, bringing us cone step closer to the vision of a European Union polity.

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