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Global Benefits Vision

Knowledge & Wisdom for Global Employee Benefits Professionals

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Extending a P/C captive to employee benefits

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Marine Charbonnier, Thierry Mestach

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a P/C captive to employee benefits
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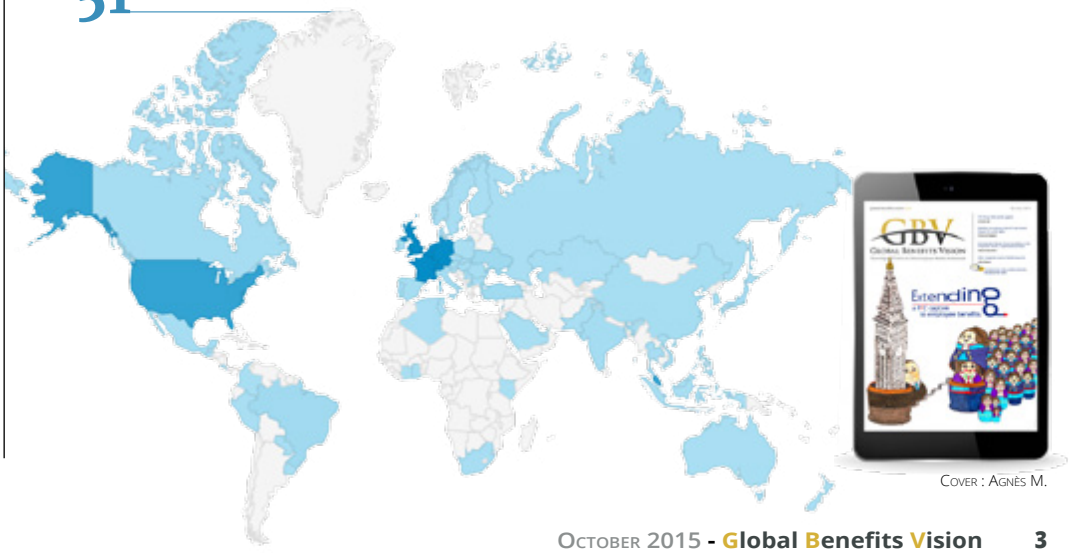

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Francesco is the Director of AEIP, a Brussels-based European lobbying organization. AEIP, through its members, represents roughly 1,200 social protection providers covering 75 million EU citizens, and managing € 1.5 trillion in assets (about $1.7 trillion).

Francesco's primary focus is the negotiation and alignment of EU institutions in relation to cross-border and national employee benefits plans (including, but not limited to: retirement, healthcare, disability, unemployment, health and safety at work, and paid holidays).

He has studied and followed the policies on EU competition law and healthcare services; the obstacles and potential benefits of setting up cross-border employee benefits within Europe; and the legal aspects of setting up social protection plans at company and multi-employer level.

Francesco is a member of the European Commission's Pension Forum and the EU working group aimed at drafting a code of good practices for pension funds, and has provided technical assistance to the Social Protection officials within the Government of Lithuania, to help prepare Lithuania to take over the Presidency of the EU.

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PAGE 26 : *Mobility of workers in the EU and related impact on social rights*

Mobility of workers in the EU and related impact on social rights

Taking a Sector Approach to Pan-European Employee Benefits Plan: A Research-Based Study

Does it still make sense for a multinational company's employee benefits plan to deal with 28 different social and tax legislations in the EU?

Does it make sense for a multinational company to set up as many employee benefits plans as the number of the EU countries in which it operates?

Francesco Briganti

Plausibly, the answer is no. Yet that is exactly what happens in the European Union — and for once, it is unfair to blame the "EU technocrats." According to the conclusions of my recent Ph.D thesis, a Pan-European employee benefit plan is legally possible without any need to change the EU Treaties. The actors that could make it happen are the European employers' federations, European trade unions, and at least nine national governments of the EU.

It is only a lack of political will that stands in the way. But I am not sure that Europe will be able to afford it for very much longer.

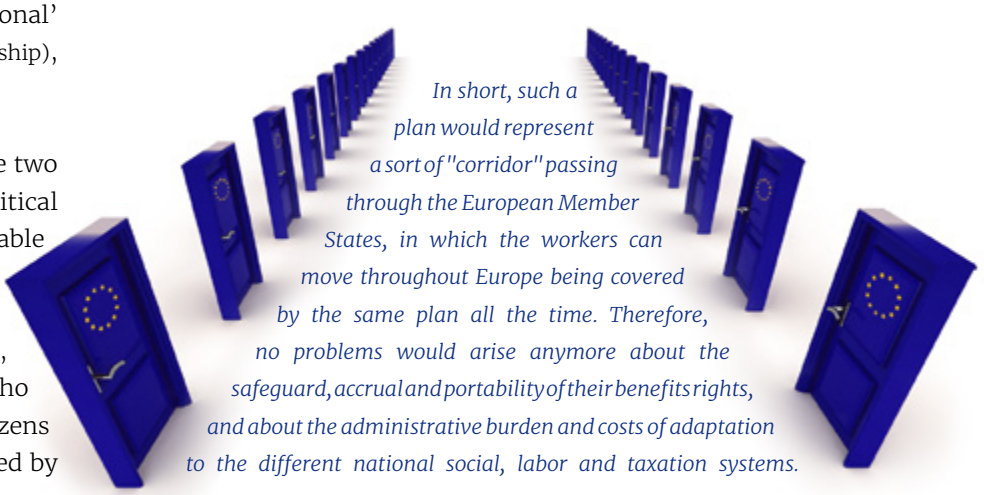
INTRODUCTION

The 2008-2009 financial crisis spawned a number of critical issues that have seriously affected the national economies, the unemployment rates, the so-called "debt crisis," and last but not least, the relationship between states and citizens of the European Union. In addition, the progressive withdrawal of the European States' intervention from the social sphere has left a new and growing role to private social protection. This latter could be "occupational' (built on the basis of an employment relationship), or individual.

At this point, Europe and its citizens face two new main dilemmas. The first is of a political nature, assessing whether it is still affordable and reasonable to keep social protection in the national sphere, or instead to raise it to a European level. The second dilemma, more practical, is choosing the actors who will carry out the mission of providing citizens with the social protection previously offered by the State's social security.

> ***European and national social partners, together with the Member States, still defend their national prerogatives in social protection. But I am not sure that Europe will be able to afford them for very much longer***

In my opinion, "Europeanization" of social protection is the most appropriate solution. Several conflicts between the Member States and the EU finally could be overcome by adopting such an option; after all, many judgments of the EU Court of Justice state that national social and labor legislation often prevent or hamper the assertion of the EU's fundamental freedoms (freedom of movement of goods, capitals, services, and persons). A pan-European solution also would be more financially sustainable, generating large economies of scale and reducing operating costs, which nowadays are incurred by 28 different national social systems.



In short, such a plan would represent a sort of "corridor" passing through the European Member States, in which the workers can move throughout Europe being covered by the same plan all the time. Therefore, no problems would arise anymore about the safeguard, accrual and portability of their benefits rights, and about the administrative burden and costs of adaptation to the different national social, labor and taxation systems.

ESM
European Social Model

With reference to the second dilemma, my Ph.D study concluded that the representatives of Management and Labour (the social partners) are the most appropriate actors to manage the part of social protection left uncovered by the statutory social security. Therefore, the research took into consideration the option of an occupational social protection plan/ employee benefits plan (SECOND PILLAR).

The reasons for this choice are several. One is somehow linked to the European tradition; even if no real European social model (**ESM**) exists, one could surely argue that this continent shares a common sensibility as far as social policies compared to other parts of the world. Even aside from the **ESM**, values like solidarity, not-for-profit in providing social support, lack of discrimination or selection between the good and bad risks, and the social dialogue itself between employers and employees' representatives are very deeply rooted in the European tradition.

Consistent with the aforementioned tradition, the proposed occupational plan would not have for-profit goals. It would offer solidarity among its members by working on a risk-sharing principle (collective in nature), and it would be mandatory, in order to better balance the "good" and "bad" risks of the insured's profiles by avoiding any selection or discrimination.

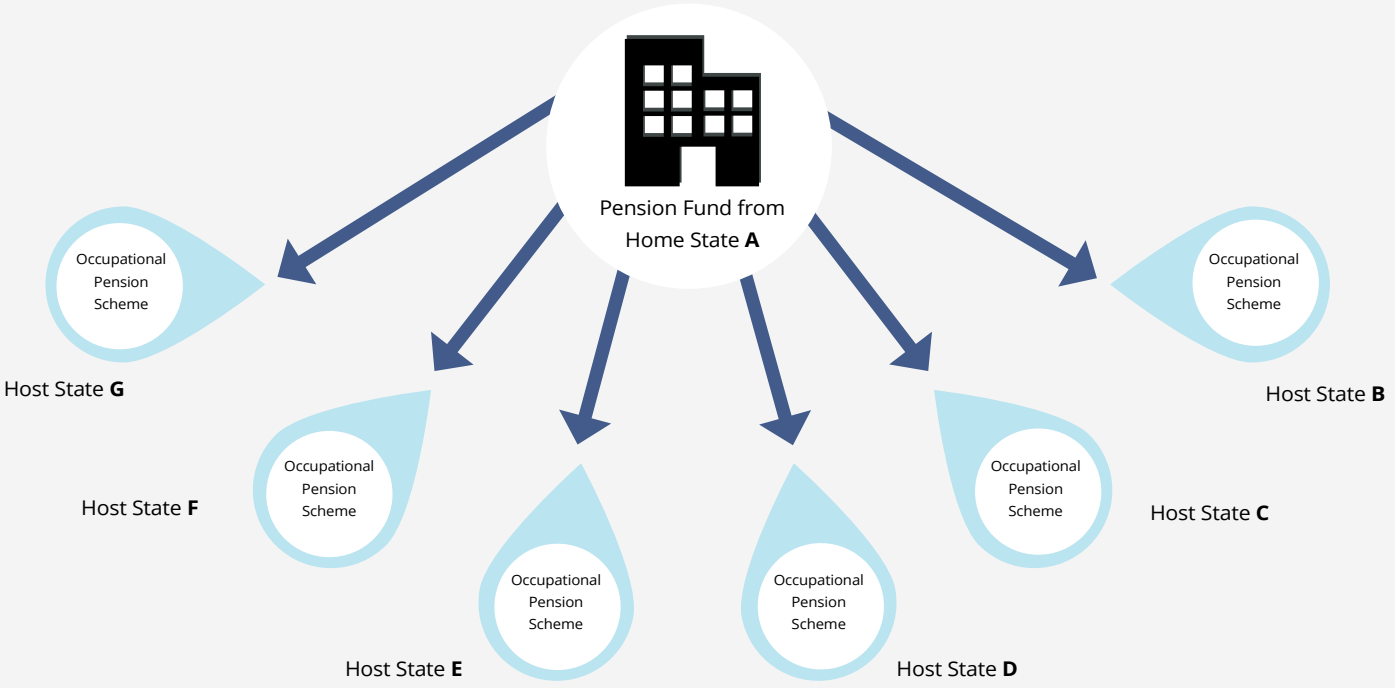
The same reasoning of the European tradition also can be applied to the widespread role of the social partners in negotiating and managing occupational social plans in Europe. Indeed, in those countries where industry-wide social protection plans are created through collective bargaining agreements, their management is entrusted to the same social partners who established them. The fund-like pension funds or healthcare funds in charge of managing these plans are bilateral bodies (or "paritarian"), run by a parity number of employer and trade-union representatives. This way of functioning is also adopted by several companies' employee benefits plans, where employees' representatives (such as work councils) participate in the management of the plan.

Therefore, nothing new would occur under the (European) sky if the creation and the management of a European occupational plan were conferred to these social partners. Rather than an atypical proposal, it would simply reiterate the tradition of several countries.

Another, and more important, reason to involve the European social partners in such an initiative regards the nature of the EU legal system itself. Actually, according to the EU Treaties, the inter-industry and the industry-wide European social partners are probably the only actors empowered to negotiate employee benefits plans at a pan-European level. In practice, such actors could conclude framework agreements to be implemented through the EU legislation. The provisions of such agreements would prevail on the national (social and labor) legislations, and could be exempted by other European laws, if these latter represent an obstacle to the creation of a European employee benefits plan. The Treaties of the EU do not grant the same legal force to the European collective agreements at company level (i.e., for multinational corporations intending to create cross-border employee benefits plans for their workers).

My study concluded that an industry-wide (or sectoral) occupational scheme — such as for the chemical, construction, aviation, or medical personnel sectors — would be the best option. Multinational corporations in the sector covered by the agreement could just join it.

Figure 1. Image of Cross-Border Activity (i.e. IORP)



THE DIFFERENCE BETWEEN A CROSS BORDER ACTIVITY AS PROVIDED BY THE EU LEGISLATION, AND A CROSS BORDER PLAN

Before getting more into the details, let's clarify the difference between so-called cross-border activities and the concept of a cross-border plan (or "scheme"). Figure 1 illustrates such a scenario. By cross-border activity we mean the specific activity of a social- protection provider (i.e., a pension fund/IORP or an insurance company, drawn in the black image of Figure 1) that has the possibility to manage an occupational plan (drawn in the light blue image of Figure 1) located in another (or several) member states. Such activity is in principle already allowed by existing European legislation.

The country of the provider is the "home state," while the country where the plan is established is the "host state." The cross-border activities do not provide any harmonization of national social and labor law, nor of taxation law applicable to the plan of the host state, so every plan must follow its own national rules. In short, there will be as many schemes (or plans) as the member states involved.

THE SCOPE OF THE STUDY

To sum up, this study analyzed the possible creation of an employee benefits plan (or occupational social protection scheme) set up at the industry-wide level, operating at a European level, negotiated and managed by the European social partners through a framework collective agreement. Such a plan would offer solidarity to its members by avoiding any selection of the risks or differentiation for the contributions based on the risk profile. In order to attain such a result, its adhesion would be mandatory for all the companies and workers of the sector covered by the industry-wide collective agreement aimed at creating it. Finally, the plan would have the same binding legal effects of the European legislation, and therefore it would prevail on the national legal systems.

The study did not identify the specific social risk covered by the plan (healthcare, retirement, long-term care, disability, etc.), which at this phase would be irrelevant. The research rather focussed on the legal feasibility of the occupational plan with reference to the EU legal framework.

ECSC
European Coal and Steel Community

1
This solution was particularly supported by France, whose welfare system was very generous. France was afraid of losing its economic competitiveness to low-cost workforce countries (at that time, especially Italy)

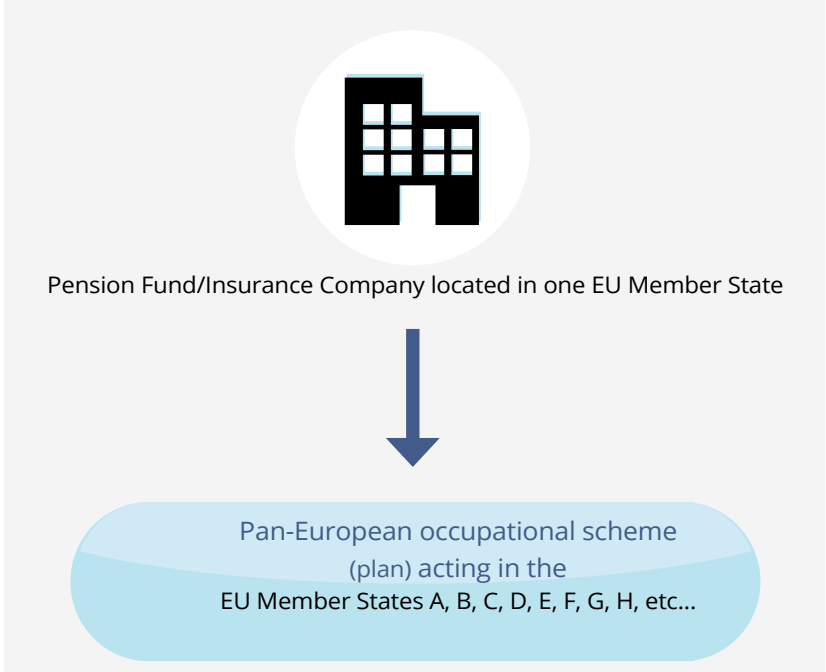
2
This is the so called "negative integration", according to which court decisions aimed at removing obstacles to fundamental EU economic freedoms would have indirectly produced a gradual convergence of the national social systems

Figure 2, instead, exactly reflects the goal of this study: A cross-border scheme/plan (or even a Pan-European one) that would operate in every country at the same conditions (light blue image). By scheme or plan we mean "a contract, an agreement, or a set of rules stipulating which social benefits are granted, how they would be financed, and the conditions for their disbursement." Therefore, in a cross border plan/scheme, no social, labor, or even tax differences would exist among the different jurisdictions of the member states of the EU.

As for the entity charged with running the plan (black image), be it an insurance company or a pension fund, the study took into consideration several options: one sole entity managing the plan, or several ones located in different countries. Such options will be described below.

For reasons of expository clarity, Figure 2 assumes that one sole entity (provider) runs the plan.

Figure 2. Image of a Cross-Border Scheme/Plan



A LITTLE HISTORY: The growing tensions between the EU and the national legal systems, and the progressive erosion of member states' competences in social policies

Already at the time of the European Coal and Steel Community of 1951 (ECSC), the first "social" problem among the six founding states was the social protection of migrant workers. Two options were considered: the coordination and the harmonization of social systems.[1] In the end, the option of the coordination of social security systems prevailed, and every country kept its autonomous social system.

The historical evolution of the EU generated three phenomena: a steady attrition of national competences in social matters through EU case law; a progressive extension of the Union's objectives and competences in social policy; and finally, the "Europeanization" of various other matters. In particular, the introduction of the euro and then the great financial crisis of 2008-09 further reinforced the first aforementioned phenomenon, reducing the autonomy of Member States to regulate their social security systems.

Several judgments of the Court of Justice resulted in the attrition of national competences in social matters. The Court declared several national laws and even some EU member states' constitutions to be incompatible with the EU legal system, because they interfered with the exercise of fundamental EU economic freedoms[2]. Since the late 1980s, EU competences and social objectives have been gradually reinforced and extended until they reached the same hierarchical rank as the economic ones; this is the "social positive integration."

The introduction of the euro in 2002, followed by the economic crisis of 2008-09, forced Member States and the EU to create a new and

stronger EU economic governance and other tools to prevent a systemic collapse. Even more importantly, the Greek crisis revealed the deep interconnection and the risks of contagion among the EU countries (in particular, those of the Eurozone). The national social competencies were further reduced in favor of control and supervision of national states' budgets at the EU level, since social protection represents a huge part of them.

The financial crisis also obliged the EU to centralize the supervision of banks, financial products, and occupational pensions and insurance companies. In particular, three European Authorities were created: the European Banking Authority (**EBA**), the European and Markets Authority (**ESMA**), and the European Insurance and Occupational Pensions Authority (**EIOPA**). Finally, the EU created the European Banking Union, through which the banks of the Continent mutualize their risks in order to avoid the intervention of the governments that made their deficits explode, and, in turn, caused the famous crisis of that debt.

This research should be therefore contextualized in the aforementioned scenario.[3]

Still, even though the preconditions for a (social) positive integration are in place, the Member States and national social partners have been reluctant to move in that direction. Assuming that many European citizens trust in their national social systems, the loss of sovereignty in these matters would mean an intolerable loss of power for the political elites and the national social partners.

EU Competition Law and the Case Law of the European Court of Justice on Mandatory Occupational Plans with Monopolistic Management: Possible Solutions in the Case of a European Employee Benefits Plan

In some EU Countries, the supplementary occupational plans set up by social partners provide for mandatory participation and are managed by a monopolistic provider (an insurance company or a pension fund). The Court of Justice intervened several times to determine whether these characteristics were consistent with EU competition law, in particular with Articles 101 TFEU (prohibition of cartels with reference to the mandatory participation: antitrust) and Article 102 TFEU (prohibition of abuse of dominant position for an enterprise in the market, with particular reference to the monopolistic management of such occupational plans).

In light of this case law, a collective agreement that sets up an occupational protection plan providing mandatory participation for all the companies and workers to which the agreement is referred does not infringe on the EU antitrust law.

As for the monopolistic management of the plan by only one provider (i.e., not allowing the companies and/or workers to choose to enroll in a provider other than the one indicated in the collective agreement), the reasoning of the Court was more subtle and qualified. However, the Court of Justice recognized such a monopoly as functional to the goal of practicing solidarity among members, and therefore not inconsistent with the competition law (a so-called "service of general economic interest," as provided for by art. 106.2 TFEU).

In short, only a compulsory affiliation to the same provider would create a "common pot" aimed at mutualizing the "good" and "bad" risks (risk-sharing or collective system), and thus allowing equal contributions and benefits for all the members, regardless of their physical condition, age, or sex.

And what if the occupational plan, instead of being national, was European? There is no reason to believe that the same principles

EBA
European Banking Authority

ESMA
European and Markets Authority

EIOPA
European Insurance and Occupational Pensions Authority

3
To sum up, the ongoing "Europeanization" process includes: European economic governance (principally European Semester and fiscal compact) and the rescue instruments for states crushed by debt crisis (e.g., the European Stability Mechanism: ESM); the system of supervision of all financial products (including insurance and pension funds) and the Banking Union (provided with a rescue banks fund: SFR and a deposit guarantee scheme). Finally, one could state that the so-called "anti-spread bazooka" (Outright Monetary Transactions: OMT) can represent a first step for a Fiscal Union

that justify national situations toward the EU competition rules cannot also be applied to a potential European plan.

While there are no particular remarks to add about mandatory participation, the issue of the possible monopolistic management of the plan looks more complicated. Granted that only the provision of solidarity would justify a monopoly under the EU law, there are four possible options to consider:

FIGURE 3. OPTION 1

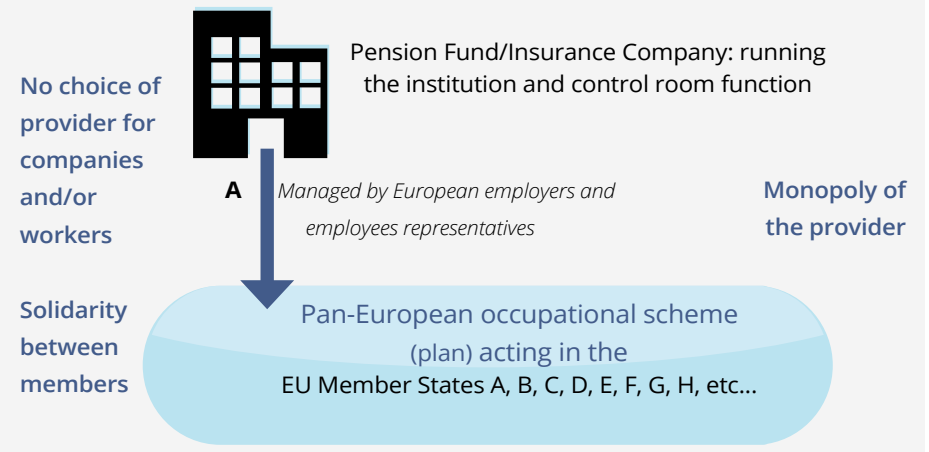
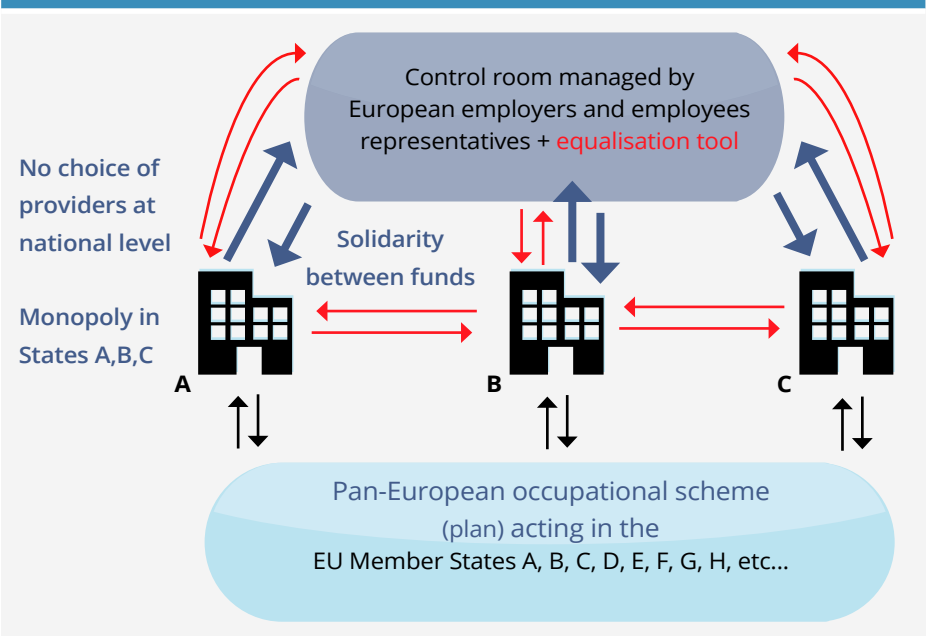


FIGURE 4. OPTION 2



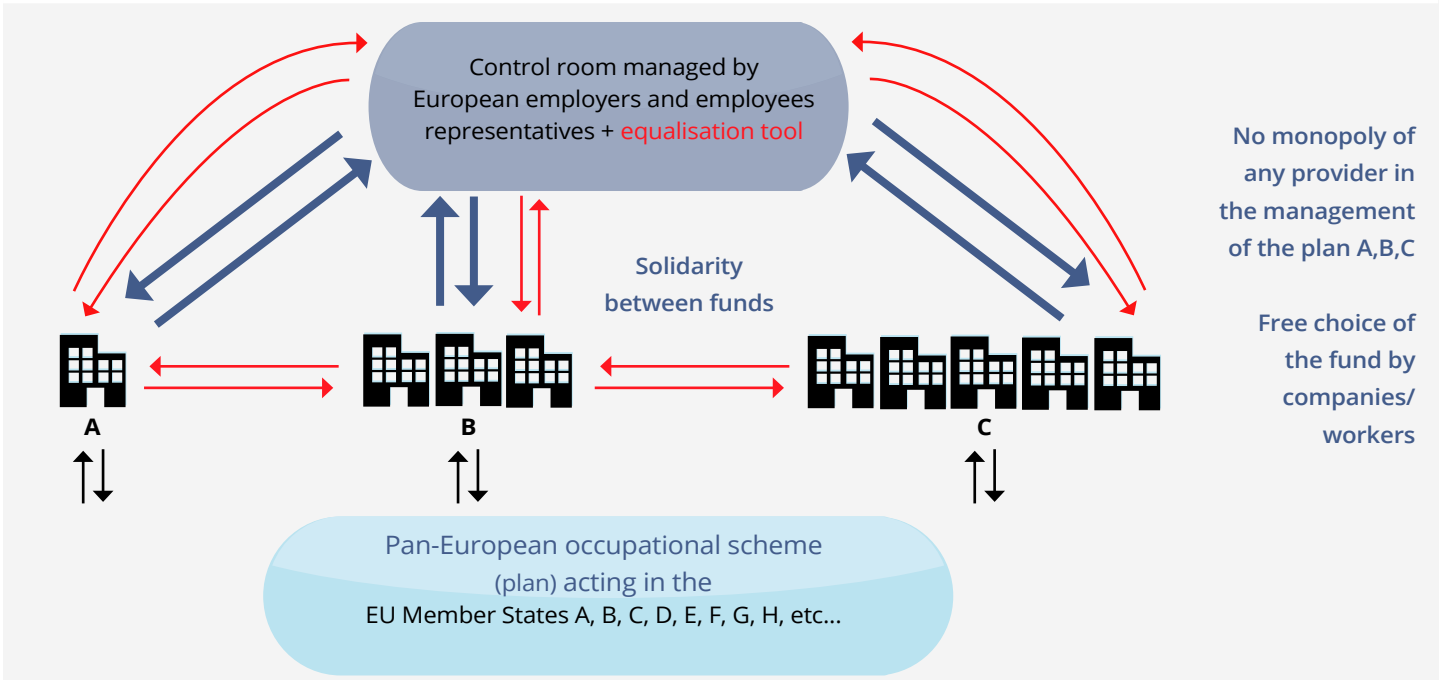
OPTION 1: A centralized European monopoly, in which a single entity, set up and run by the social partners that signed the collective agreement, is responsible for the management of the occupational plan. A "common pot" would be created, and therefore solidarity would be practiced among the members of the plan. Such an entity would have also the task of supervising the functioning of the plan, and possibly adjusting it over the years (control room), as in FIGURE 3.

OPTION 2: The European occupational plan could be managed by national funds, with one fund in charge of managing the plan at the national level under a national monopoly system. Solidarity would still be offered, as the national funds would be coordinated and supervised by a European entity made up of the (European) social partners signatories of the collective agreement. This entity also would serve as equalizer, and would assure that any surplus (national) funds would compensate the ones in deficit (solidarity among funds in order to assure the solidarity among the members). The European Entity would be charged with the supervision and control of the management (control room), as in FIGURE 4.

OPTION 3: Decentralized management of the plan, in which various funds manage the occupational plan in a situation of competition among themselves, but still in a solidarity system. This option does not significantly differ from Option 2. One or several funds could operate in the Member States; the companies and/or the workers would choose a provider to manage the European occupational plan. However, such freedom to choose the provider would not exempt them from joining the occupational plan, which would remain mandatory.

Solidarity could be still offered to the members. The national entities would be coordinated and supervised by a European entity made up of

Figure 5. Option 3

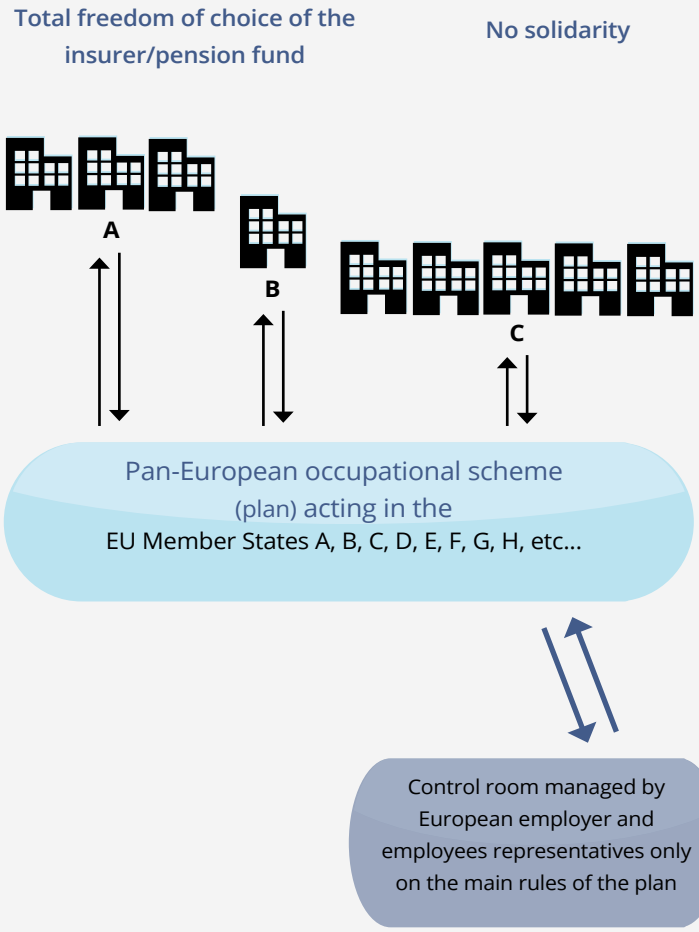


the (European) social partners signatories of the collective agreement. This entity would have the task of equalizer, and would assure that the (national) funds in surplus would compensate the ones in deficit (solidarity between funds). Finally, the European Entity would again be charged with the supervision and control of the management (control room), as in Figure 5.

Option 4: A pure competitive management without any solidarity. Under this option several funds would operate in the Member States, and companies and/or workers would have the freedom to choose a provider from among them. However, even in this scenario, such freedom of choice would not exempt them from joining the occupational plan, which would remain mandatory.

Since solidarity would not be offered, there would be no compulsion for the funds to make compensations among the ones in surplus and the ones in deficit. However, a European Entity made up of the signatories parties of the collective agreement that set up the plan (the social partners) would still be necessary to supervise the functioning of the plan, and to adjust it over the years (control room), as in Figure 6.

Figure 6. Option 4



THE LEGAL COMPETENCES OF THE EUROPEAN UNION TO SUPPORT A EUROPEAN OCCUPATIONAL PLAN SET UP BY AN INDUSTRY-WIDE (EUROPEAN) COLLECTIVE AGREEMENT

Does the EU have the legal competence to endorse a European agreement setting up an occupational plan with its legislation?

The European agreements at the sector-wide and inter-sector levels are regulated by the combined provisions of Articles 153-155 TFEU. In particular, according to article 155 TFEU, the European Agreements concluded by the European social partners could be implemented — at the request of the latter — through a legislative act of the EU itself, by acquiring the same legal force of the other EU legislation in those matters covered by the (previous) article 153 TFEU[4].

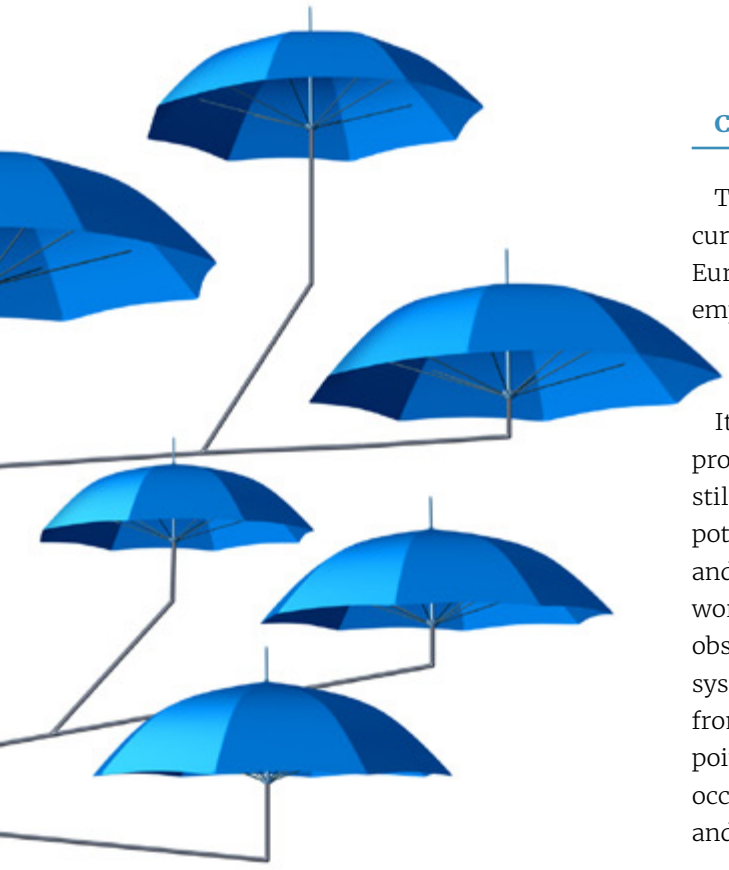
Letter c) of article 153.1 TFEU allows the EU to introduce provisions on "social security and social protection of workers." This option has never been used with regard to this matter. In addition, the unanimity of all the Member States would be required to adopt measures in this matter.

The study made several arguments, case law, and legal analysis on letter c) of Article 153.1 TFEU, and confirmed the EU competence to legislate on social-protection issues. Therefore, a European legislative act aimed at implementing the European collective agreement setting up an occupational plan should not infringe the EU legal system.

Another issue concerns the relation between an employee benefits plan and remuneration. According to the Court of Justice, some social benefits like the occupational pensions are to be considered as deferred remuneration; however, the aforementioned article 153 TFEU (paragraph 5) explicitly excludes any measure related to "remuneration" from its scope. Therefore, some could argue that no EU legislation can be produced insofar as remuneration is concerned — and since an employee benefits plan was considered as "deferred remuneration," it would not be implementable through the EU law.

Here as well, my research made a deep analysis of the reasons behind the exclusion of the remuneration from the scope of the article 153 TFUE, and concluded that the provision should not prevent the creation of an occupational plan at the EU level. In particular, considering that the same article clearly mentions provisions on "social security and social protection of workers," it does not make sense to exclude any legislation in the field of employee benefits plans, because otherwise this provision would remain empty.

4 *Article 155 TFEU:*
1. Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.
2. Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed.
The Council shall act unanimously where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required pursuant to Article 153(2)



CONCLUSIONS

This study tried to analyze whether, in the current economic and social situation of the European Union, a Pan-European occupational employee benefits plan might be suitable.

It found that the different national social protection systems of EU member states still represent a powerful hindrance in the potential development of the European Union, and generate huge costs for companies and workers. Considering the legal and cultural obstacles to harmonize public social security systems, which were therefore kept out from the scope of this study, the starting point of this new approach should be occupational plans, i.e. private workplace plans and/or supplementary plans.

It was also mentioned above that any legislation on this matter requires the unanimous vote of the Member States. The achievement of unanimity is always a big challenge, and more than one Member State would not realistically welcome this initiative. For this reason, a useful solution would be to opt for an "enhanced cooperation," where only nine Member States are required to adopt the legislation, and the others are free to opt out.

A conceptual example of enhanced cooperation is the euro, which was adopted by just some countries of the EU, but not by all[5]. According to the study, an enhanced cooperation would be legally possible for the creation of a cross-border occupational plan, and would overcome the obstacle of satisfying the unanimity of 28 member states.

> ***Different national social protection systems of the EU member states still represent a brake to the full potential development of the Union and generate huge costs for companies and workers. Pan-European occupational plans could represent the starting point of a new approach***

5 Whilst politically true, this is not accurate from a legal standpoint: indeed, the euro was adopted by way of a separate intergovernmental Treaty and not as a result of specific provisions of the EU Treaties regarding "enhanced cooperation"

> ***A Pan-European occupational plan is legally possible and compatible with the economic and social needs and traditions of Europe. The real obstacle seems to be a lack of political will***

It was clearly expounded that a plan strongly differs from mere cross-border activity, which, while allowed by the European legislation, is doomed to founder on the differing national social, labor, and tax systems.

National Social Protection Systems *include the so-called three pillars: public social security, occupational plans, individual plans*

A European occupational plan should be created by employers' and employees' representatives. Such an approach could reflect in great part the tradition of many European member states, and the European Social Partners seem to be the most appropriate actors to launch this initiative. Indeed, if implemented through a legislative act of the EU, a European agreement containing the rules of the occupational plan could prevail on the national legal systems, and even be exempted by some European laws.

This study attempted to prove that such a project is legally possible, and in keeping with the economic and social needs and traditions of Europe. The real obstacle seems to be a lack of political will among the main actors. ∞

This article is a summary of AEIP Director Francesco Briganti's PhD thesis. Francesco's new project is turning it into a book, written for an audience of global EB practitioners and decision-makers in EU member countries.

The book will add other perspectives to the legal angle covered here and be written in a decidedly non-academic style. Francesco is looking for supporters to help fund the translation and adaptation work that is entailed; Global Benefits Vision *has committed to providing editing and publishing services on a pro-bono basis and is looking forward to being joined by other actors in support of this project.*

"Spending time in and out of hospitals is a stark reminder of the fragility of Elias' condition and the need to make the most of every moment with him.

The wish experience did just that. It gave us so many moments to remember – moments of joy. Elias' wish day is still remembered by our family as the most joyous experience of our lives."

– Elias' mom, Margie

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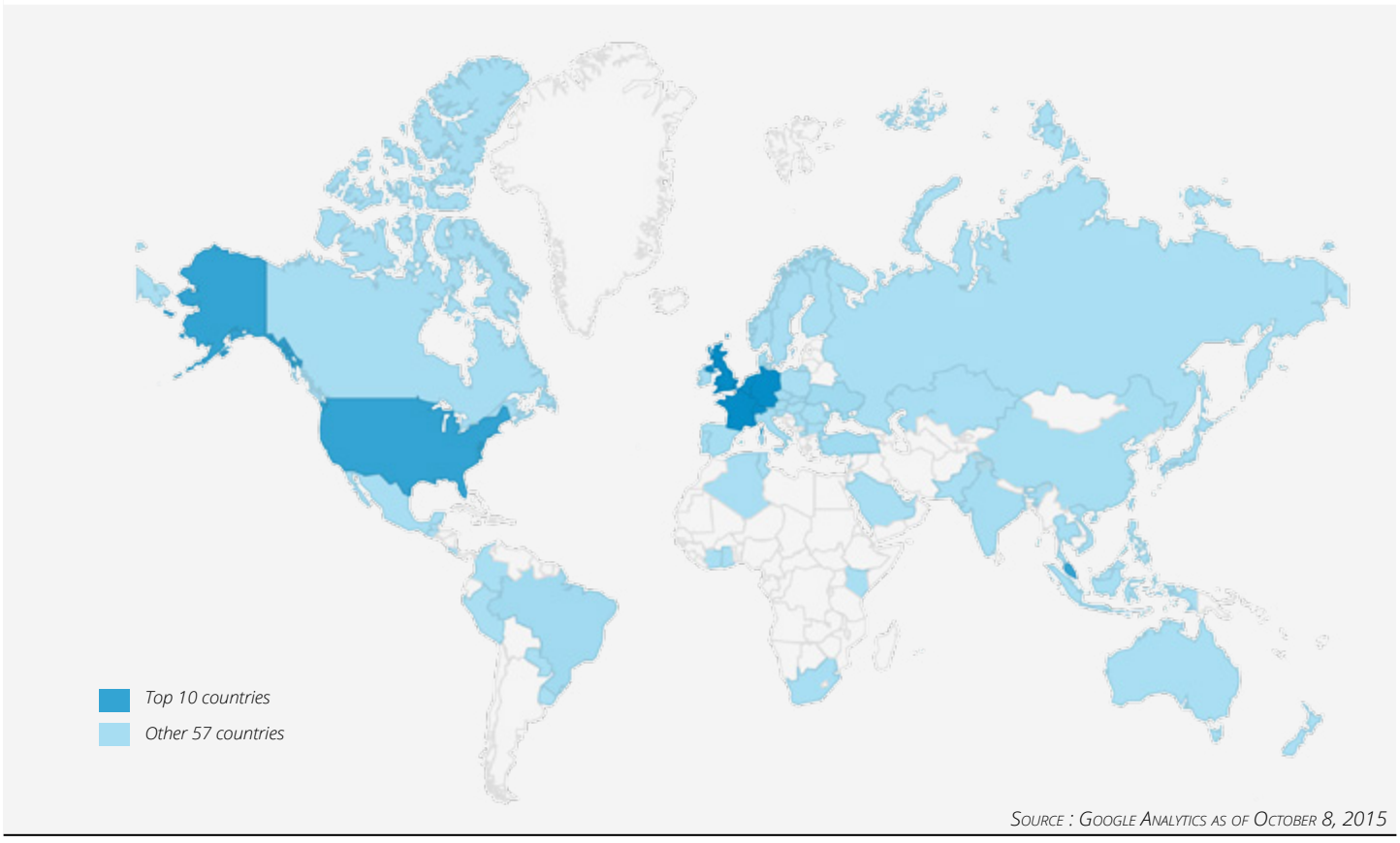

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