Revue de droit comparé du travail et de la sécurité sociale

4 | 2018
English Electronic Edition

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Electronic version

URL: <https://journals.openedition.org/rdctss/1716>

DOI: 10.4000/rdctss.1716

ISSN: 2262-9815

Publisher

Centre de droit comparé du travail et de la sécurité sociale

Printed version

Date of publication: 1 December 2018

Number of pages: 6-17

ISSN: 2117-4350

Electronic reference

Vanessa De Greef, "The varied and changing forms of activation in Belgium", *Revue de droit comparé du travail et de la sécurité sociale* [Online], 4 | 2018, Online since 01 November 2021, connection on 15 November 2021. URL: <http://journals.openedition.org/rdctss/1716> ; DOI: <https://doi.org/10.4000/rdctss.1716>

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THE VARIED AND CHANGING FORMS OF ACTIVATION IN BELGIUM*

ABSTRACT

The aim of this article is to summarise the evolution of activation mechanisms in the Belgian social security system, giving a brief historical summary and particularly emphasizing the reforms of the years 2016 and 2017.

KEYWORDS : *Social security, Activation, Belgium, Professional reintegration, Employment.*

RÉSUMÉ

Cet article a pour but d'exposer de manière synthétique l'évolution des dispositifs d'activation dans le système de sécurité sociale belge, en faisant un bref récapitulatif historique et en insistant particulièrement sur les réformes des années 2016 et 2017.

MOTS CLÉS : *Sécurité sociale, Activation, Belgique, Réinsertion professionnelle, Emploi.*

* This study was completed on 31 December 2017.

Although it is possible in Belgium to find certain features of activation measures that date back to the 1970s,¹ it was at the beginning of the 1990s that different measures, expressly referred to as «active» began to appear which were aimed at the unemployed and replaced employment programmes. The aim of these measures was to get different categories of unemployed into work by means of statuses that were half-way between employment and unemployment.²

However, it was really in 1993 that the figure of the so-called «active welfare state» became more visible when, in the welfare field, the phenomenon of the contractualisation of social protection appeared in the relations between the «CPASs» (public social action centres, known as public social assistance centres until 2004) and the beneficiaries of the minimum income (called beneficiaries of the «right to social integration» since 2002). Belgian legislators were therefore following the French example³ – exactly five years afterwards – when they passed a law that introduced the contract that applies to the «individualised social integration project». Since 2002, it has been possible for the right to social integration to take the form of a job or an integration income, and the two can be combined and each one accompanied by a contract called an «individualised social integration project».⁴ In this contract, the parties set out their respective commitments: the social action centre must specify «the nature of the assistance it will grant the beneficiary, whilst [the latter], for their part must, in return for the aid received, undertake to do a certain number of things intended to facilitate their social integration and the return to work».⁵

If the right to social integration marks the beginning of the active welfare state in Belgium, the Belgian State has not limited its actions to the area of social protection. The Federal Government then embarked on an overhaul of unemployment insurance (I) before moving on subsequently, with the federal legislator, to the area of invalidity benefits (IV and V). However, the right to social integration seems to constitute a kind of «laboratory» for Belgian legislators, who are easily able to intervene in this field – without having to consult with too many different levels of power – and try out activation schemes, such as a *workfare* scheme (II) or a comprehensive roll-out of the contract scheme between beneficiaries and the public social action centres (III). We present these developments in chronological order and will analyse the variety of features of these so-called activation policies.

1 D. Dumont, *La responsabilisation des personnes sans emploi en question: Une étude critique de la contractualisation des prestations sociales en droit belge de l'assurance chômage et de l'aide sociale*, Brussels, La Charte, 2012, p. 425, n° 727.

2 On this hybrid status, *ibid.*, p. 291, n° 534.

3 See R. Lafore, «Le contrat dans la protection sociale, une approche française», in Ph. Auvergnon (ed.) *La contractualisation du droit social. Actes du séminaire international de droit comparé du travail, des relations professionnelles et de la sécurité sociale*, Bordeaux, Comptrasec, 2003, p. 214.

4 Article 2 of the Law of 26 May 2002 on the right to social integration, *Moniteur belge*, 31 July 2002.

5 D. Dumont, *La responsabilisation des personnes sans emploi en question*, op. cit., n° 165, p. 100.

I - THE INSTALLATION OF THE ACTIVE WELFARE STATE WITH UNEMPLOYMENT INSURANCE

From the 2000s onwards, the «active welfare state» dynamic was to accelerate particularly in the field of unemployment insurance. Franck Vandenbroucke, a Flemish socialist, who was Minister for Employment at the time, was inspired by the ideas of Anthony Giddens and considered that the «traditional welfare state is failing», given that it «offers [the insured] an allowance, but no way out»; he added that «the mechanisms of the current social security system (...) discourage people instead of encouraging them to be active».⁶ This transformation of the welfare state is marked, from the legal point of view, by the change in 2004 in one condition for granting unemployment benefit: that of being available on the job market. Until 2004, this condition for granting benefit meant that the unemployed person had to be registered as a jobseeker and willing to accept any suitable employment. In 2004, the Belgian federal government reasserted the condition of availability on the job market, providing that from now on the unemployed person must be passively available - which corresponded to the regulatory definition of the condition until 2004 - but also actively, that he is to say that there was now an obligation to actively make efforts to seek work.⁷

In 2012, the federal government decided to extend the condition of availability on the job market to certain categories of unemployed people that were previously exempt from the procedure, namely those with a reduced ability to work, but who nevertheless are covered by the unemployment insurance system.⁸ Since then, various measures have been taken by the successive federal governments to introduce exceptions to the reform adopted and alleviate this «ordinary» activation, given the difficulties it has raised.⁹

The unemployment insurance reforms of 2004 and 2012 seem to prefigure «a return to the social protection market» and the «abandoning to assistance of those who do not work or are economically weak».¹⁰ In fact, the creaming off of beneficiaries that has occurred in the unemployment insurance system has had the effect of massively increasing the number of beneficiaries of the right to social integration.¹¹ The latter generally benefit from

6 F. Vandenbroucke, quoted by Geoffrey Geuens, «Les médias belges et l'Etat social actif. Genèse, reproduction et diffusion du nouveau sens commun socio-économique», *Quaderni*, n° 45, Autumn 2001, p. 22.

7 Royal Decree of 4 July 2004 amending the unemployment regulations with regard to the totally unemployed who must seek work, *Moniteur belge*, 9 July 2004. For a thorough analysis of this reform, see D. Dumont, *La responsabilisation des personnes sans emploi en question*, op. cit., p. 325-406.

8 For an analysis of this reform, see V. De Greef, *Droit au travail et troubles mentaux. Une analyse critique des exclusions et des inclusions par le droit en assurance chômage et en aide sociale*, La Charte, coll. «Association belge pour le droit du travail et de la sécurité sociale», Brussels, 2016.

9 V. De Greef, «L'activation silencieuse des personnes partiellement inaptes au travail dans l'assurance chômage», *Revue de droit social*, 2016, n° 2, p. 243-275.

10 Ph. Auvergnon, «L'hypothèse d'une contractualisation du droit social dans différents systèmes juridiques», in Ph. Auvergnon (ed.) *La contractualisation du droit social*, Bordeaux, Comptresec, 2003, p. 16.

11 On this subject, see D. Zamora's book, *De l'égalité à la pauvreté. Une socio-histoire de l'assistance en Belgique (1895-2015)*, Editions de l'Université de Bruxelles, Brussels, 2017, p. 140-148.

far lower incomes than unemployment insurance pays.¹² The beneficiaries of the right to social integration can be helped with their efforts to return to work, but sometimes they find themselves working for nothing under «community service schemes».

II - COMMUNITY SERVICE: DOUBLING THE INSECURITY

In 2016, a *workfare* system was introduced in the field of social integration.¹³ It provides that a person «can» carry out a free community service in order to demonstrate their willingness to work. Where appropriate, this community service is included in the individualised social integration project (hereinafter PIIS).

A circular issued on 12 October 2016 then made it clear that «if the person concerned no longer wishes to carry out this service, they must inform their social worker, and they will then review the conditions of the PIIS together». However, it seems highly likely that there will be a gap between the theory and the practice. Indeed, until now, the content of the plan has essentially been determined by the social worker. Furthermore, refusing to sign this plan can also lead to the refusal to grant the integration income and, as for the failure to abide by the plan, this can lead to a temporary total or partial suspension of the integration income for one month, or for three months in the event of a repeat occurrence within the year.

Two cases are currently pending before the Constitutional Court and the Council of State seeking the verification of the validity in the Belgian legal system of the law and the Royal Decree concerning the implementation of community service. Among the criticisms made by the plaintiffs, it is claimed in particular that this law infringes the prohibition on forced labour,¹⁴ that the community service introduced is work that complies with neither the rules on employment contracts nor the rules that apply to work carried out under the authority of another person, and also the fact that this law does not refer explicitly to the

12 Although the gap between the amount of unemployment benefit and that of the integration income has been gradually reduced since the reform on the reinforced degressivity of unemployment benefits adopted in summer 2012. See D. Dumont, «Dégressivité accrue des allocations de chômage versus principe de standstill», *Journal des tribunaux*, n° 6541, 2013/39, p. 769-776; P. Palsterman, «Les réformes de l'été en matière de chômage», in F. Etienne and M. Dumont (ed.) *Regards croisés sur la sécurité sociale*, Anthemis, coll. Commission université-palais, Liège, 2012, p. 952-966.

13 See the Law of 21 July 2016 amending the Law of 26 May 2002 on the right to social integration (*Moniteur belge*, 2 August 2016), the Royal Decree of 3 October 2016 amending the Royal Decree of 11 July 2002 on the general regulation of social integration (*Moniteur belge*, 11 October 2016) and the Circular of 12 October 2016 relating to the Law of 21 July 2016 amending the Law of 26 May 2002 concerning the right to social integration (not published in the *Moniteur belge*).

14 E. Dermine, «Activation Policies for the Unemployed and The International Case Law on the Prohibition of Forced Labour», *Journal européen des droits de l'homme/European Journal of Human Rights*, vol. 1, n° 5, 2013, p. 746-776; E. Dermine and V. De Greef, «Le droit au travail librement entrepris (Art. 1 § 2 of the CSE) face aux situations de travail non protégées par le droit social. Les cas du travail pénitentiaire et des mesures de workfare», in S. Van Drooghenbroeck, F. Dorssemont and G. Van Limberghen (ed.), *Actualités des droits sociaux fondamentaux*, Brussels, La Chartre, 2016, p. 315 to 317.

Law of 3 July 2005 on the rights of volunteers.¹⁵

This transformation in the right to social integration forms the outline of what some are saying is the emergence of a two-tier system within the welfare state, with on one level *insiders* who are generally well-protected and a growing body of *outsiders* who are inactive and in a constantly precarious situation.¹⁶ This shift, which has been taking place in France at the same time, could mean that benefits recipients face a «double penalty», being shut of both the world of work and its protections.¹⁷ As well as making the right to work less secure for the *outsiders*, the scheme could also have an effect on the employment rate. Thus, the more *workfare* includes a contribution to the production of goods and services, the greater the risk that it will come to replace standard employment.¹⁸ Although the Ministry for Social Integration wishes to avoid this, there is nothing to exclude this trend in view of the particularly elusive definition of «community service».

Such a scheme could well penetrate the field of unemployment insurance. The Belgian federal government agreement for the years 2014-2019 does in fact provide that in the future the unemployed will have to work for free under a so-called «community» service scheme.¹⁹ In the field of unemployment insurance, it is the notion of suitable employment - which in particular guarantees quality employment - that would be called into question. As economist B. Van der Linden explains, this system would represent «a break from the past as it would involve offering not suitable employment but an [unpaid] occupation in «services to the community».²⁰

III - THE ACTIVE WELFARE STATE FOR ALL BENEFICIARIES OF THE RIGHT TO SOCIAL INTEGRATION?

As well as community service, there was another important reform in the right to social integration field in 2016. Whereas the individualised social integration project (PIIS) was previously only mandatory for young people aged 18 to 25 and was signed only with a view to obtaining an employment contract, a training course or a qualification, legislators decided to extend this scheme to all the beneficiaries of the CPAS individualised social

¹⁵ *Moniteur belge*, 29 August 2005.

¹⁶ P. Taylor-Gooby, «New Social Risks and Welfare States: New Paradigm and New Politics?», in P. Taylor-Gooby (ed.), *New Risks, New Welfare. The transformation of the European Welfare State*, Oxford University Press, Oxford, 2004, p. 225. N. Van Mechelen and D. Zamora, «Les reconfigurations de l'assistance et de la sécurité sociale en Belgique (1925-2015)», in I. Pannecoucke (ed.), *Annuaire de la pauvreté en Belgique*, ACCO, Leuven, 2016, p. 127.

¹⁷ N. Duvoux, *Le nouvel âge de la solidarité. Pauvreté, précarité et politiques publiques*, La république des idées, Seuil, Paris, 2012. V. De Greef and D. Zamora, «Le système de sécurité sociale belge : de l'universalisation à la dualisation», in I. Daugareilh and M. Badel (ed.), *La sécurité sociale : 70 ans d'âge, une idée neuve*, Ed. Pedone, 2019, forthcoming.

¹⁸ B. Van Der Linden, «Chômage indemnisé contre service à la communauté ?», *Regards économiques*, September 2014, n° 114, available on the journal's website, http://www.regards-economiques.be/images/reco-pdf/reco_144.pdf.

¹⁹ *Doc. Parl.*, Chambre, Déclaration de politique gouvernementale, 14 October 2014, n° 0020/001, p. 28-29.

²⁰ B. Van Der Linden, «Chômage indemnisé contre service à la communauté ?», *op.cit.*

integration project - with a few very rare exceptions relating to fairness or health issues - and increased the grants to the CPASs to take account of the extra work.

In a study commissioned by the Social Integration public programming service (SPP), at the request of the Federal Minister for Social Integration, published in 2015 - therefore before the reform -, researchers at Saint Louis University and the *Karel De Grote Hogeschool* pointed out that;

«The scenario of an extension of the PIIS to all service users may be a virtuous idea, but in fact it also involves a number of risks. The first risk is that the extension of the PIIS to all service users, far from encouraging personalised support, will actually lead to standardised and bureaucratic treatment. All users might well sign a PIIS, but this would be a formality and it is far from sure that the PIIS would match their real social integration needs. In many CPASs, given the lack of funding and social integration resources that the CPASs and their partners can actually offer users, this would lead to PIIS drawing up purely formal and fictitious PIISs or offering PIISs that do not correspond to the situation and needs of the user and the possibilities of the context.

The second risk of extending the PIIS, in its current form and given the differences in philosophy, policy and practice between the 589 CPASs in Belgium, is that it would leave the door open to arbitrary and discretionary practices towards service users, on the basis of local political impulses. While the history of the CPAS is that of the move from the arbitrary attribution of assistance on a case-by-case basis (such as prevailed under the regime of the CAPs -Public Assistance Committees- that preceded the CAPSs between 1925 and 1975) to the recognition of social rights (Article 1 of the Organic Law of July 8 1976 on public social action centres: «Everyone is entitled to welfare. The aim of this assistance is to enable every person to lead a life compatible with human dignity»), such an extension of the PIIS would risk reintroducing a local and subjective appreciation of the right to social integration, which would further reinforce unfairness in the granting and maintaining of the RIS (integration income). At a time when changing social situations and transformations to social security policy (with restrictions on unemployment benefits applicable to a growing number of people (exhaustion of entitlement, degressivity, conditions of access and maintaining of the integration allowance) have led to a substantial increase in the number of people applying to the CPASs for welfare, an extension of individualisation via the PIIS of the conditions for granting and maintaining the RIS risk turning, in some cases, into an instrument increasing insecurity and exclusion from what constitutes the «safety net» in our social protection system. Even if the very great majority of CPASs and social workers work with the aim of furthering social integration, the survey conducted in the CPASs shows that it is also necessary to prevent the risk of the PIIS being used as an instrument of social exclusion».²¹

One of the cases pending before the Constitutional Court - the same one as the one brought concerning community service - should allow the constitutionality of the extension of the individualised social integration project (PIIS) in the Belgian legal system to be verified. One of the criticisms contained in the petition concerns the fact that legislators have deliberately chosen to no longer exercise any control over how employment or social

21 A. Franssen, L. Méhauzen, K. Driessens and J. Depauw, *Le projet individualisé d'intégration sociale. Recherche évaluative et prospective au sein des CPAS belges*, Research report 2015, p. 94-95. <http://hdl.handle.net/2078.3/173117>

integration is implemented. It is pointed out that this would have the following effect: «Everyone in the Kingdom has their own personal opinion about what factors facilitate or hinder the “return to work” or “social integration” and concerning the attitudes that will or will not increase someone’s chances of getting a job or benefiting from such “integration”». It therefore follows that «in such a context, the notions of the “return to work” and “social integration” appear as much too loosely defined and much too dependent on the subjective interpretations that can be made of them to constitute any form of framework for the obligations that have been imposed in the PIIss».

The fact that legislators have entrusted to the executive power the job of laying down the decisive aspects of the right to welfare and the right to privacy could well be in conflict with the principle of legality that requires sufficiently precise royal authority.²²

IV - VOLUNTARY ACTIVATION: THE EXAMPLE OF INVALIDITY INSURANCE

Concerning invalidity insurance, which is intended to cover those unable (or partially unable) to work, compared to the other branches of social security, it is only in the last ten years that the public authorities have started to take an interest in return to work programmes for this population.²³ In 2006, a new philosophy was adopted in this branch of social security, which fundamentally changed the role of the medical examiner (*médécin-conseil*) in 2009. The latter will no longer only be responsible for deciding the benefits the insured person will receive by assessing their inability to work, but will also now prepare the process of rehabilitating the person to return to work.²⁴ It was also in 2009 that individual management began to be introduced for the insured. Since the end of 2010, the approach taken by the National Institute for Health and Disability Insurance (NIHDI), the body in charge of health care insurance and invalidity benefits, has been to work more closely with the regional and community organisations in charge of integration and vocational training in order to organise the management of the return to work of invalidity beneficiaries. Agreements have been signed to this effect by the national Institute, the mutual insurance associations and these organisations.

The major difference between healthcare and invalidity insurance, on the one hand, and unemployment insurance and welfare, on the other, is that the vocational rehabilitation or return to work programme is voluntary, insofar as the insured person’s consent is required to trigger this type of measure and withdrawal from or refusal to take part in such a programme

22 D. Dumont, «Que reste-t-il du principe de légalité en droit de la sécurité sociale ? Sécurité sociale et démocratie parlementaire», special issue *Aux sources du droit social. En hommage à Micheline Jamoulle/Sociaal recht, over bronnen en herbronnen. Als eerbetoon aan Micheline Jamoulle*, edited by D. Dumont and F. Dorsemont (ed.), *Revue de droit social/Tijdschrift voor Sociaal Recht*, 2017, n° 1-2, p. 113-146.

23 See the Law of 13 July 2006 on occupational illnesses, workplace accidents and returning to work (*Moniteur belge*, 1 September 2006) as well as the Royal Decree of 3 July 1996 implementing the Law on mandatory healthcare and invalidity insurance coordinated on 14 July 1994 (*Moniteur belge*, 31 July 1996).

24 Articles 109bis and 153 § 2 of the Law coordinated on 14 July 1994 on healthcare and invalidity insurance (*Moniteur belge*, 27 August 1994).

or to resume work has no impact on the payment of the benefits.²⁵ To assess the voluntary nature of the scheme, it is important to check whether the person is able to «express their willingness».²⁶ It is indispensable to see whether the person understands the nature of a vocational rehabilitation programme as well as the consequences of agreeing to take part in it. In addition, the communication with the person must take place in plain language.²⁷

However, it will be necessary to monitor the changes in the legislation as the federal government wishes to introduce sanctions, in the future, for insured people who fail to see the medical examiner. In March 2017, the federal government announced its intention to introduce sanctions for insured people who fail to fulfil their administrative obligations or to attend appointments with the medical examiner. These people being unfit to work, this is a particularly sensitive issue and such sanctions could lead to dramatic situations inconsistent with their medical condition. Several of the stakeholders consulted - including the National Labour Council (*Conseil National du Travail*) - have come out against the introduction of such sanctions.

The question of the voluntary nature of the support is obviously not the only question that we have to ask ourselves. Although the analysis «from the angle of people being forced to return to work (the duty of work)» seems to us crucial, that of the «increase in ability to find quality employment (the positive freedom to work)» seems to us just as essential and still frequently neglected in OECD countries.²⁸ Yet the two are more closely linked than it might appear: the ILO has in fact recognised that very poor working conditions - linked to the notion of quality employment - can be an infringement of the right of workers to freely choose their employment, and in the most serious cases, a situation of forced labour.²⁹ It follows that if working conditions do not comply with the fundamental right to fair working conditions, the consent given by the worker can be invalidated.³⁰

25 This was specified in 2011 by legislators when the Law of 14 July 1994 on healthcare and invalidity insurance was amended to remove the need for prior authorisation of the return to work and replace it with an authorisation that can be granted *after the fact* (Draft programme law, Explanatory Statement, *Doc. Parl.*, Chambre, 19 May 2011, n° 1481/001).

26 Art. 14 of the Law of 22 August 2002 on patients' rights, *Moniteur belge*, 26 September 2002.

27 Art. 7, §2 of the Law of 22 August 2002 on patients' rights, *Moniteur belge*, 26 September 2002.

28 J.-M. Bonvin et E. Maochon, «Droit au travail et responsabilité individuelle dans les Etats sociaux contemporains. Une analyse en termes de capacités des politiques d'activation des personnes sans emploi» in E. Dermine et D. Dumont (ed.), *Activation Policies for the Unemployed, the Right to Work and the Duty to Work*, Brussels, P.I.E. Peter Lang, p. 779 and 802.

29 ILO, Report of the Director-General of the ILO, *A global alliance against forced labour*, Global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I(B), ILC, 93rd session, Geneva, 2005, p. 9, § 31 and p. 70, § 295. See E. Dermine and V. De Greef, «Le droit au travail librement entrepris (art. 1er, § 2 de la CSE) face aux situations de travail non protégées par le droit social. Les cas du travail pénitentiaire et des mesures de *workfare*», *op. cit.*, p. 318.

30 This concerns the general case law relating to the prohibition of forced labour developed by the International Labour Organisation, the European Court of Human Rights and the European Committee of Social Rights. See E. Dermine and V. De Greef, «Le droit au travail librement entrepris (art. 1er, § 2 de la CSE) face aux situations de travail non protégées par le droit social. Les cas du travail pénitentiaire et des mesures de *workfare*», *op. cit.* and for a more in-depth analysis see E. Dermine, *Droit au travail et politiques d'activation des personnes sans emploi. Etude critique du rôle du droit international des droits humains*, Brussels, Bruylant, 2017.

V - MORE SECURE WORK RELATIONSHIPS, A COLLATERAL OBJECTIVE OF ACTIVATION IN INVALIDITY INSURANCE?

Before possibly bringing forward a new white paper on sanctions, the federal government has already introduced new «reintegration pathways» (*trajets de réinsertion*) for those are unfit for work and also reformed labour law to provide a framework for the work relationship between workers with an employment disability and their employers.³¹ It is through a «programme law» passed on 19 December 2014 - known as the «catch-all» law due to the number and variety of issues it deals with - that the Law on healthcare and invalidity insurance coordinated on 14 July 1994, was amended. This law provides that, at the latest three months after the start of the period of primary incapacity and after an in-depth consultation with the medical examiner and all the parties involved, a «multidisciplinary reintegration plan will be drawn up for the person for whom a return to work can be envisaged in view of their remaining capacities».³² Such a plan did exist previously, but it was not systematically applied or organised to the same extent.

On the labour law front, it took two years - during which various working groups met - for legislators to act. The explanatory statement of the Law of 20 December 2016 states that the reform aims to «make the work relationship legally more secure during the period of adapted working».³³ First of all, it is now provided that the execution of the initial employment contract is not suspended when the worker has been authorised by the medical examiner to return to work on a temporary basis and the employee has agreed. There is in this case, a rebuttable presumption that the initial work relationship will be maintained. As in the past, there is a system allowing the person to receive benefit and a part of their salary. Then the law lays down new rules for cases when the worker is temporarily or permanently subject to a work incapacity, which aim to set the worker on a «reintegration pathway» to avoid the contract being terminated, except where the worker «is permanently unable to resume the work agreed

31 The reform gave rise to laws and decrees: the Programme Law of 19 December 2014 (*Moniteur belge*, 29 December 2014), the Royal Decree of 28 October 2016 amending the Royal Decree of 28 May 2003 on the monitoring of workers' health with regard to the return to work of workers with a work incapacity (*Moniteur belge*, 1 December 2016), the Royal Decree of 8 November 2016 amending the Royal Decree of 3 July 1996 implementing the Law on mandatory healthcare and invalidity insurance coordinated on 14 July 1994 with regard to socio-professional reintegration (*Moniteur belge*, 1 December 2016), the Law of 20 December 2016 containing various labour law provisions relating to work incapacity (*Moniteur belge*, 9 January 2017) and the Royal Decree of 30 January 2017 amending the Royal Decree of 28 May 2003 on the monitoring of workers' health (*Moniteur belge*, 6 February 2017). On these reforms, see A. Mortier, «La réforme tendant à faciliter la réintégration des travailleurs en incapacité de travail», *Revue de la Faculté de droit de l'Université de Liège*, 2017/2, p. 357-378 ; M. Vanhegen, *Arbeidsongeschiktheid en re-integratie in het arbeidsrecht*, Bruges, La Charte, 2017; D. Caccamisi, «Le nouveau trajet de réintégration des travailleurs en incapacité de travail : un aperçu de la réforme et de ses conséquences sur la force majeure médicale», *Orientations*, 2018, n° 1, p. 2-27.

32 *Moniteur belge*, 29 December 2014. This Programme Law inserted a paragraph 1/1 in Article 100 of the Law of July 1994.

33 *Draft law containing various labour law provisions relating to work incapacity, Explanatory Statement, Doc. Parl., Chambre*, 16 November 2016, n° 54-2155/001, p. 3.

and is also unfit to fill an adapted or other post with the employer».³⁴ With this measure, the reform has finally closed off a long-running controversy that has run through case law and legal opinion concerning whether an employer could terminate an employment contract in the event of force majeure or the worker's permanent inability to carry out the work agreed. Now, such a termination cannot take place until the reintegration pathway has been finally completed. As a result of the introduction of this procedure, this reform should counter the majority of earlier case law which «amounted *de facto* to overruling any policy of trying to reintegrate sick workers».³⁵

That said, after the first quarter in which the reform was applied in 2017, the major innovation announced was already raising questions. The Belgian General Federation of Labour (FGTB) - a socialist-leaning trade union federation - observed that in 72 % of medical examiners' decisions, the latter were declaring workers unfit to return to work, which had the consequence of terminating the employment contract on the grounds of medical force majeure.³⁶ These figures will need to be confirmed over the next few quarters, and some of the actors on the ground are criticising their reliability. If the percentage announced by the FGTB were to be validated by subsequent figures, it would be proof of a departure from the legislators' aim, which was to «make the work relationship more secure».

Some (provisional) conclusions on the many and varied forms of activation

We are thus seeing a development of the activation of social benefits recipients in the different sectors of the social security system. This activation takes very diverse forms: for example, the activation may be compulsory or voluntary. The degree of obligation may vary from weak forms consisting of an invitation to carry out a community service to more forceful levels, such as an obligation to actively seek suitable employment. Activation may be intended to get people to return to work or aimed at social integration. It may encourage the signing of an employment contract, participation in voluntary work or now, community service. It can have the effect of making benefits recipients more aware of their responsibilities or reinforce the obligations imposed by the social security institutions or, sometimes, both at the same time. Activation can also be deployed in forms that vary according to the type of support provided. The support can be sustained, or with clearly defined markers, or lighter-touch or almost non-existent. It could be interesting to evaluate, in each sector of the social security system - if nothing else - the time devoted by each adviser to the benefits recipient to help them to look for work, training or other relevant activities.

34 New Art. 73/2, §4 of the Royal Decree of 28 May 2003 on the monitoring of workers' health with regard to the return to work of workers with a work incapacity following the Royal Decree of 28 October 2016 amending the Royal Decree of 28 May 2003 on the monitoring of workers' health with regard to the return to work of workers with a work incapacity (*Moniteur belge*, 1 December 2016).

35 D. Caccamisi, «Le nouveau trajet de réintégration des travailleurs en incapacité de travail : un aperçu de la réforme et de ses conséquences sur la force majeure médicale», *op. cit.*, p. 6.

36 FGTB, «Le trajet de réintégration des malades, une machine à licenciements pour les employeurs», 27 April 2017, <http://www.fgtb.be/-/le-trajet-de-reintegration-des-malades-une-machine-a-licenciements-pour-les-employeurs>, consulted on 26 September 2017.

The application of the rules may also give rise to differentiated activation around the country. Accordingly, it is possible that in the field of unemployment insurance, the voluntary nature of a programme may vary to differing degrees (from enlightened consent to implicit consent, for example). In the field of the right to social integration, social workers want community service to remain voluntary and have decided that it cannot be used to demonstrate willingness to work (and that the person must be exempted from this grant condition). Certain CPASs have gone a step further and decided to «boycott» community service, by simply not proposing to benefits recipients that they take part in such a scheme.

At the current time, activation therefore has very diverse modes of operation. It is regrettable that with such a laboratory of social policy now in place, evaluations of activation policies remain relatively rare. If activation, whatever its contours, systematically facilitated reintegration of the job market by enabling the person to access to quality employment corresponding to their qualifications, many would be in favour of a general roll-out of activation. However, in fact it seems that the effects of activation policies are not so clear-cut.³⁷ In Belgium, while the 2014 report of the Higher Employment Council (CSE) urges that activation policies continue, it also says «the effectiveness in terms of getting people back into work of these procedures and any sanctions to which they may give rise is difficult to evaluate [...]. The impact of a sanction on the return to work has not been unequivocally demonstrated».³⁸ In France, among the studies that have looked at activation policies, it is worth mentioning one from 2012 conducted on young unemployed French people, which reveals that the activation policies introduced in France can have the effect of increasing the employment rate of the unemployed people who benefit from the support measures, but that at the same time they reduce the chances of unsupported benefits recipients finding a job.³⁹ In other words, activation policies have the effect of changing the order in the queue for work without increasing the overall level of employment.

Beyond the wish to see a more systematic evaluation of public policies, certain areas could also be more coordinated. A particular example would be the lack of coherence between the branches of the social security, in particular with regard to the assessment of the ability to work and the support provided. In Belgium, the social protection system for a person with a work incapacity is particularly fragmented.⁴⁰ In the best-case scenario, this person will depend on a sector of the contributory social protection system such as unemployment insurance or healthcare and benefits insurance. Failing that, at least if they are in «a state of need» in monetary terms, they will be able to claim the income replacement allowance intended for the disabled, or, if this is refused, the safety net welfare provided by the CPASs (right to social integration and social assistance in the strictest sense). This constant toing and froing between insurance-based and assistance-type regimes

37 Positive, but limited results were shown regarding young people with little schooling as long as there were enough job offers. B. Cockx, M. Dejemeppe and B. Van der Linden, «L'activation du comportement de recherche favorise-t-elle un retour plus rapide à l'emploi ?», *Regards économiques*, n° 85, February 2011, 16 p.

38 Conseil supérieur de l'emploi, 2014 report, June 2014, p. 10.

39 B. Crepon, E. Duflo, M. Gurgand, R. Rathelot and P. Zamora, «Do Labor Market Policies have Displacement Effects? Evidence from a Clustered Randomized Experiment», *The Quarterly Journal of Economics*, vol. 128, n° 2, 2013, p. 531-580.

40 See P. Palsterman, «L'incapacité de travail des travailleurs salariés dans le droit belge de la sécurité sociale : approche transversale», *Chroniques de droit social*, 2004, n° 6, p. 305.

demonstrates the need for more thought about the profile of the benefits recipients who depend on unemployment benefit or the healthcare and benefits insurance system. Should people who are really no longer fit to work continue to benefit from the unemployment insurance system?

After decades of inaction, politicians at last seem to be willing to have this debate, since a plan is currently being studied to avoid situations where people are pushed from pillar to post between the social security institutions. On 25 April 2014, a national college of social insurance medicine relating to work incapacity was set up, in particular to «propose standardised methods of evaluating work incapacity with the aim of harmonising evaluations in the different branches of social security».⁴¹ Will such a College be able to overcome the budgetary requirements and the reflexes specific to each branch? Will its members be able to think about social security as a unified system that enables work capacities and incapacity to be evaluated in a coherent way? Will this reflection take place with a view to providing social benefits recipients with a decent income and support, whatever the branch of the social security system concerned? It is to be hoped so.

41 Art. 16 and 17 of the Law of 25 April 2014 containing various provisions on social security, *Moniteur belge*, 6 June 2014.

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