

## Flexibility - flexicurity - flexinsurance: response to the European Commission's Green Paper "Modernising labour law to meet the challenges of the 21st century"

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**Flexibility–Flexicurity–Flexinsurance:  
Response to the European Commission's  
*Green Paper "Modernising Labour Law to  
Meet the Challenges of the 21<sup>st</sup> Century"*<sup>1</sup>**

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## Abstract

The paper contains both critical remarks on and constructive suggestions to *Green Paper: Modernising labour law to meet the challenges of the 21st century* of the European Commission (2006a) which promotes flexicurity policies, that is, relaxing the employment protection legislation while providing advances in employment and social security for flexible workforces, like fixed-term, part-time and agency workers, or self-employed. The default assumption, that relaxing labour laws can be compensated by these advances, is criticised. These measures are regarded as too vague and insufficient, as also demonstrated in our previous study with empirical evidence.

Therefore, some additional measures are proposed to counterbalance the actual flexibilization of employment relations, including (1) *flexinsurance*, a kind of progressive flexibilization tax, meaning that the employer's contribution to social security should be proportional to the flexibility of the contract/risk of becoming unemployed, (2) elements of the *basic minimum income* model, (3) *constraining financial markets*, as well as (4) developing adequate *policy monitoring/evaluation* instruments. It is argued that all of these meet interests of social partners and solve contradictions between such European policies as flexicurity, make work pay, welfare-state policy, and civil-society policy.

Finally, we provide specific thoughts to 14 questions posed by the *Green Paper*.

**Keywords:** Flexicurity, labour market flexibility, social security, labour law, European employment strategy, Green Paper.

### JEL Classification:

J21 Labor Force and Employment, Size, and Structure

J26 Retirement; Retirement Policies

J65 Unemployment Insurance; Severance Pay; Plant Closings

J83 Workers' Rights

J88 Public Policy



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## **Introduction: *The Green Paper***

The *Green Paper: Modernising labour law to meet the challenges of the 21st century* of the European Commission (2006a) has been issued on November 22, 2006. Additionally to a fluent text it contains 14 questions in boxes. They are aimed at initiating an open internet debate (closing date March 31, 2007) on legislating the flexicurity labour market policy, that is, relaxing the employment protection legislation while providing advances in employment and social security for flexible workforces, like fixed-term, part-time and agency workers, or self-employed, as well as labour market outsiders. The results of the debate will be reflected in a Commission Communication on flexicurity to be presented in June 2007, 'which will set out to develop the arguments in favour of the "flexicurity" approach and to outline a set of common principles by the end of 2007 to help Member States steer the reform efforts' (European Commission 2006a: 4–5).

The *Green Paper* adduces three reference examples: 'the Dutch Flexibility and Security Act 1999, the Austrian Severance Act (*Abfertigungsrecht*) 2002 and the June 2006 Spanish decree easing the conversion of temporary labour contracts into open-ended labour contracts with reduced dismissal costs' (European Commission 2006a: 10). These reforms enhance labour market flexibility, in particular make dismissals easier, and at the same time provide some advantages for certain types of employees; see EIRO (2007) for details. These examples should additionally convince other Member States to pursue the flexicurity policy and to implement corresponding legislation reforms.

First of all it should be noted that the *Green Paper* is written in a particular way, channelling the debate towards certain conclusions. It presents the current deregulation of European labour market as a necessity by default, so that the only question to be discussed is how to relax the legislation to facilitate a further employment flexibilization. Social measures get much less attention.

However, the need for flexibilization of employment relations is not that evident. Neither it is clear from the *Green Paper*'s preamble. For instance, why does globalization imply 'the shortening of the investment horizon' and 'the increasing demand shifts' which condition the need for flexibilization (European Commission 2006a: 5)? Conversely, globalization as a long-term world-wide trend should guarantee long perspectives and stable demand.

Or, is 'sustainable growth with more and better jobs' (European Commission 2006a: 3) really attainable due to flexibilization? In fact, sustainable growth means a non-inflationary



development so much cared of by the European Central Bank. According to the Philips economic law of inflation–employment proportionality, a low inflation is attainable at the price of high unemployment. Then, if 'sustainable growth', where is the room for 'more and better jobs'? Isn't the flexibilization necessary for 'sustainable growth' just a substitute for latent unemployment and underpaid work?

Or, if the European Commission advocates for flexibilization, why doesn't it provide an example itself by moving its permanent full-time staff to flexible contracts? Following the *Green Paper's* logic, then it could better meet 'the challenge of adapting to change' by 'just-in-time management' and 'foster the creativity of the whole workforce' (European Commission 2006a: 5).

These and other inconsistencies evoke doubts in the real necessity of flexibilization. At the same time the actual European trends significantly deviate from the concept of flexicurity intended. There are several causes:

- lack of global political course,
- contradictory social interests,
- inconsistent European policies,
- limitations of legislation alone to regulate flexible work,
- lack of efficient steering instruments,
- methodological gaps, and lack of adequate monitoring tools.

Taking into account all these deficiencies, the legislation changes advocated by the *Green Paper* look insufficiently motivated and little coordinated with social partners. Further deregulation measures in the near future are suggested to adopt under vague promises to improve employment and social security which can take years and which effects are not yet clear.

The paper begins with a brief history of flexicurity and then analyses the above enumerated causes of its inappropriate implementation, devoting a separate section to each item. Critics are combined with constructive proposals which may be useful for further policy design. Finally, specific thoughts to the 14 questions posed by the *Green Paper* are provided.

## **A brief history of flexicurity**

In the larger part of post-war Europe employment relations were regulated by rather constraining employment protection legislation and collective agreements. The contradiction between the flexibilization pursued by employers and labour market regulation defended by trade unions made topical the discussion on flexibilization and employment protection legislation with regard to economical performance and unemployment.

The advantages and disadvantages of labour market regulation/flexibility versus employment were investigated in the two-volume *Jobs Study* by the OECD (1994), containing 'evidence and explanation' in favour of relaxing employment protection. It evoked numerous responses from scholars; for a review focusing on European welfare states see Esping-Andersen (2000a–b). As concluded by Esping-Andersen (2000b: 99), 'the link between labour market regulation and employment is hard to pin down'. Under certain model assumptions, the same empirical evidence, that unemployment is practically independent of the strictness of employment protection legislation, was reported also by the OECD (1999: 47–132). There are even cases when the same legislative changes caused different effects. For instance, the impact of almost equal deregulation measures on the use of fixed-term contracts 'was sharply different' in Germany and Spain (OECD 1999: 71).

At the same time, a good labour market performance under little regulation was inherent in the Anglo-Saxon model, that is, USA, Canada, United Kingdom, and Australia (OECD 1994, Esping-Andersen 2000a). The deregulation of labour market in the Netherlands, which had a different kind of economy, coincided with the 'Dutch miracle' of the 1990s (Visser and Hemerijck 1997, Gorter 2000, van Oorschot 2001). A similar Danish practice in the background of 'Eurosclerosis' (Esping-Andersen 2000a: 67) was successful as well (Björklund 2000, Braun 2001, Madsen 2003 and 2004). All of these convinced some scholars and politicians in the harmlessness and even usefulness of labour market deregulation. It was believed that employment flexibility improved competitiveness of firms and thereby stimulated production, which in turn stimulated labour markets; for criticism on this viewpoint see Coats (2006).

The claims for flexibilization met a hard resistance, especially in countries with old traditions of struggle for labour rights. Wilthagen and Tros (2004: 179) reported with a reference to Korver (2001) that the *Green Paper: Partnership for a New Organisation of Work* of the European Commission (1997) 'which promoted the idea of social partnership and balancing

flexibility and security' got a very negative response from French and German trade unions, because 'the idea of partnership represents a threat to the independence of unions and a denial of the importance of worker's rights and positions, notably at the enterprise level'. The ILO published a report, concluding that 'the flexibilization of the labour market has led to a significant erosion of worker's rights in fundamentally important areas which concern their employment and income security and (relative) stability of their working and living conditions' (Ozaki 1999: 116).

To handle the growing flexibility of employment relations with lower job security and decreasing eligibility to social benefits, the notion of *flexicurity* has been introduced. The most cited definition of flexicurity is due to Wilthagen and Tros (2004)

*[Flexicurity is] a policy strategy that attempts, synchronically and in a deliberate way, to enhance the flexibility of labour markets, work organization and labour relations on the one hand, and to enhance security — employment security and social security — notably for weak groups in and outside the labour market on the other hand.*

One can simply define it, following the analogy with the motto of Prague Spring 1968 'socialism with a human face':

*Flexicurity is a deregulation of labour markets (= flexibilization) with 'a human face', that is, compensated by some advantages in social security, in particular, for the groups affected.*

The main distinction captured by this simplified definition is that flexicurity differs from unconditional deregulation in introducing compensatory measures in social security and employment activation. Specific understandings (definitions) of flexicurity may depend on flexibilization steps suggested, tempo of deregulation, particular social advantages proposed, and estimates of their compensatory equivalence. A consensus in balancing these factors is not a pure academic question but rather an issue for bargaining between governments, employers, and trade unions, similarly to collective agreements. For instance, trade unionists define flexicurity as *social protection for flexible work forces understood as "an alternative to pure flexibilization"* (Keller and Seifert 2004: 226) *but not at the price of relaxing employment protection of normally employed.*

Wilthagen and Tros (2004) ascribe the conception of flexicurity to a member of the Dutch Scientific Council of Government Policy, Professor Hans Adriaansens, and the Dutch Minister of Social Affairs, Ad Melkert (Labour Party). In the autumn of 1995 Adriaansens launched this word in speeches and interviews, having defined it as a shift from job security

towards employment security. He suggested compensating the decreasing job security (fewer permanent jobs and easier dismissals) by improving employment opportunities and social security.

For instance, a relaxation of the employment protection legislation was supposed to be counterbalanced by providing improvements to fixed-term and part-time workers, supporting life-long professional training which facilitates changes of jobs, more favourable regulation of working time, and additional social benefits. In December 1995 Ad Melkert presented a memorandum *Flexibility and Security*, on the relaxation of the employment protection legislation of permanent workers, provided that fixed-term and agency workers get regular employment status, without however adopting the concept of flexicurity as such. By the end of 1997 the Dutch parliament accepted flexibility/security proposals and shaped them into the Dutch Flexibility and Security Act which came in force in 1999.

The OECD (2004b: 97–98) ascribes the flexicurity to Denmark with its traditionally weak employment protection, highly developed social security, and easiness to find a job; see also Madsen (2004) and Breedgaard et al. (2005). Regardless of the priority in inventing the word *flexicurity*, both countries were recognized as 'good-practice examples' (Braun 2001, van Oorschot 2001, Kok et al. 2004) and inspired the international flexicurity debate. Although some authors still consider flexicurity a specific Dutch/Danish phenomenon (Gorter 2000), the idea spread all over Europe in a few years; for a selection of recent international contributions see Jepsen and Klammer (2004).

At the Lisbon summit of 2000 the EU had already referred to this concept (Vielle and Walthery 2003: 2; Keller and Seifert 2004: 227, Kok et al. 2004), and after the meeting in Villach in January 2006 flexicurity became a top theme in the European Commission (European Commission 2006b) culminated now in the publication of the *Green Paper*.

Thus, after 10 years of debate flexicurity became an official issue both of the European employment and social policies.

## **Lack of global political course**

To better understand our view at the background motivation for flexibilization, the driving force of the flexicurity debate, we provide a small historical retrospective.

The actual globalisation started in the 1970s was an extension and enforcement of the Western market economy as an instrument of East–West economical and political

competition. The opening of financial markets in the 1970–1980s was thought to improve living standards in industrialized countries and to solve the poverty problem in the third world. Investments in countries with low labour costs promised cheap goods for consumers and high returns for investors. At the same time, the target countries were expected to profit from modern technologies and job creation (World Bank 2002). Not least was enhancing the Western economical and political presence in developing countries.

With the collapse of the Eastern block, the Western world lost its political opponent which in a sense had directed its development. As said in the novel *Indecision*: "During the Cold War you felt like you had a reason to get up in the morning. Now what have we got?" (Kunkel 2005: 92). Before 1990s both economical and technological progress were influenced by national and international long-running defence programs. The society had a high degree of ideological consensus, understanding of military expenses, and rather common political values. The market economy was an efficient instrument of related policies. After the Cold War had been over, the Western countries continued their development with no radical change. As winners in the world confrontation Western democracies declared themselves politically best and the self-regulating market economy was recognized as most dynamical. However both democracy and market economy with its self-optimization properties were overestimated. It is often missed that the self-optimization runs under given preferences of politic/economic agents, so that goals play the guiding role. Having lost their ideological opponent and military competitor, Western democracies turned to small issues within short periods between successive elections. As for the economy, it is known that an optimal development goes along some main trajectory, whereas short programs inevitably enter and leave it with great losses (von Neumann and Morgenstern 1944).

The coexistence of different social systems was as necessary for the world as several opposite parties are needed for a democratic country. Lacking any political alternative, the European social-democratic capitalism has shifted to the right, and this process continues. Trade unions, even those which did not collaborated with communists, much profited from their political presence with far-going claims. It worked by the same principle as formulated by the father from Truffault's film *400 Blows* (1959): "You ask for 1000 francs, so expect 500, will be glad for 300, get 100." With no communists who asked for 1000, it became difficult for trade unions to get even 100. For instance, in West Germany it was often said that the third side in collective bargaining was the DDR.

The response of the market with no ideological constraints and directing force was a struggle for resources, cheap labour and sale markets, and financial speculations with little social utility. For instance, yearly direct, that is, productive, international investments attained its absolute maximum of 1492 Bio. US dollars in 2000, which is however less than the average amount of daily (!) financial speculations (UNCTAD 2002: 303). It goes well in line with Machiavelli's observation in *The Prince* that politics, lacking any guiding principle, is reduced to a continuous struggle for power with no moral limits. The market economy — an efficient weapon of the Cold War — turned against its owners after the war had been over. It is noteworthy that labour market deregulation reforms in Europe started in the early 1990s (European Commission 2006a: 5, see also Casey 2004) immediately after the collapse of the Soviet Union.

Correspondingly, the Club of Rome foresees three scenarios of the world future (Radermacher 2006a–b):

1. A big war for resources and markets with a drastic reduction of the world population (15% likelihood)
2. The rich benevolently sacrifice their excessive well-being to help the poor (35% likelihood)
3. The 'brasilianization' of the world, meaning that the world population splits into a relatively small group of rich (people, countries) and a large group of poor (50% likelihood). Such a society is described in the novel *The Time Machine* by H. W. Wells (1895), where the bottom class of miserable Morlocks toils maintaining the underground machinery that keep the upper class of Elois docile and plentiful.

The contemporary development meets rather the third scenario (United Nations Development Programme 2002). During the last 30 years living standards, even in the United States, visibly improved exclusively for top earners: the middle class improved its welfare by 35%, whereas the top 0.1% multiplied it by factor 5 (Krugeman 2006). As for developing countries, the poverty problem was not solved and the inequality even increased (Stiglitz 2002).

One has to distinguish between goals and instruments to attain these goals. The much promoted sustainable development is often presented as a goal of the European Union which, in particular, requires flexibilization as an instrument to attain it. However, in the perspective of increasing income differences, the sustainable development looks rather as an instrument itself. As follows from the facts mentioned, the sustainable development is aimed not only to

'meet the challenge of India and China' (Coats 2006: 5, 23, OECD 2005: 25, UK Presidency of the EU 2005) but primarily to **sustain and multiply the superiority of the rich over the poor**. Indeed, if the European well-being was higher before the 'sustainable development' and flexibilization, what are they for?

All these trends are unacceptable for a large majority of population. As said by the 6th Director General of the UNESCO René Maheu (1966: 34) '...The man has an almost unlimited capacity to suffer... It is in fact the injustice... which is intolerable".

Thus, lacking the guiding political goal of the Cold War, the market economy started to work for itself, putting economic values over social ones. The worldwide increasing inequality shows that social priorities are considered secondary and that flexibilization of employment relations aimed at boosting business activities is most advantageous for owners and top managers.

## **Contradictory social interests**

Obviously, every step towards a higher labour flexibility meets interests of employers. Businesses get rid of restrictions, managers improve performance by rotating and squeezing personnel, and firms gain higher profits. All expenses are recovered by the state — costly reforms and additional social security benefits. Therefore, such a flexibilization scenario turns out to be a long-running indirect governmental donation to firms. Since the state budget originates from taxpayers, the employees contribute considerably to the donation.

An innovative feature of this type of industrial relations is an active intermediation of the state. Formerly capitalist industrial relations were restricted to the axis employer–employee. The employer purchased not result of but capacity to work, and used this device to obtain the surplus value, qualified by Marx as exploitation. Now the industrial relations constitute no longer an axis but a circle employer–employee–state–employer with a sophisticated money loop through legislation, social security and tax systems. The exploitation is no longer restricted to relations between one employer and one employee but extended to relations of all employers and all employees, being redistributed through all these systems.

The globalization initiated by Western countries as an invitation to paradise is now transforming into an instrument of pressure. After governments had opened financial markets they began to warn: 'If flexibilization required by employers will not be pursued, they will *legally* increase in foreign investments and move jobs to other countries with more favourable

business conditions.' Moreover, several countries were rapidly integrated into the EU, contrary to their readiness, facilitating export of jobs there.

How is it explained to the broad public? Sustainable development is presented as an objective aimed at higher living standards. Deregulation is needed to enhance the competitiveness of the European economy to make it more powerful. To reconcile employees with individual inconveniences, the catchy word-slogan *flexicurity* is launched (the success of this concept is not least due to the positively sounding word itself). Everything looks fair: one commodity (labour rights) is exchanged for another commodity (social security), and the exchange rate being negotiated.

The bottleneck is that this apparent natural prerequisite leaves employees with no chance to win. In fact, the default assumption that everything can be bought and sold is not always true! In a sense, it is suggested that workers' social health (= the right to remain at work) is exchanged for a treatment (= social care in the form of advanced social security benefits). In other words, give your working hand and get prosthesis instead. However: Can a prosthesis, whatever its value, replace a healthy hand?

Therefore, from the viewpoint of trade unions, giving up labour rights for social benefits is not appropriate. Even if each particular compromise seems more or less fair, their succession can lead away from the social status quo and the employees can finally get nothing or very little for their pains. It can run as in the known tale about a man who exchanges a horse for a cow, then the cow for a sheep, and so on until he finds himself with nothing but a needle which he loses on the way home.

Trade unions doubt that better social guarantees can adequately compensate a higher *risk* to lose a job. The emerging disadvantages can be compensated only partially but never completely. Besides, entrusting the workers' welfare to the welfare-giver, the state, is unreliable. Every political change may result in social cuts (as now in Germany). Employment protection, on the contrary, enhances job security, consequently, a stable income even during recessions and political crises (Bewley 1999).

From the trade-unionist viewpoint, the sustainable development is necessary as long as it improves living and working conditions *of employees*. If under sustainable development the workers' well-being is not enhanced and a better labour market performance (if any) is attained at the price of stress and lack of confidence in the future then the sustainable development can be put in question. Indeed: Are higher industrial productivity and



competitiveness the prime human goals? Why sustainable development is put beyond social values? In other words, is it more important to be economically rich rather than socially healthy?

If economy is not an objective but an instrument of politics, and if the sustainable development with obligatory flexibilization is really intended to contribute to the European social model then flexicurity should be implemented with clear social priorities. However, as follows from our empirical studies (Tangian 2005–2006), the situation is far from being satisfactory. Instead of advantages in social and employment security, the deregulation-only policy is absolutely prevailing. We conclude that the contradictory interests of social partners are not deliberately taken into account in the actual policy implementations.

## **Perspectives of unconditional deregulation**

Let us outline briefly what can happen if the labour market deregulation in Europe will further remain unconstrained.

**Human resources.** A further flexibilization can reduce the fraction of high qualified workers which skills are acquired due to long tenures. It can finally result in degradation of European human capital and, as its consequence, decline of quality of European products.

**Career prospects.** As already mentioned, flexible employment destroys career prospects. Indeed, each new job means a new start, often implying a starting salary, especially if an employee is little experienced in new tasks. Thereby, a higher risk of interrupted employment under flexibilization, or changes of employer increases the risk of remaining at the bottom of professional hierarchy.

**Individualism and climate at work.** The enhanced mobility with frequent changes of working teams means the non-belonging to any collective. It results in an individualistic psychology and no solidarity. If earnings and competitiveness are becoming the only sense of life, the social climate at work can hardly be good and relations between colleagues are unlikely to be more than formal.

**Loss of self-identification and destruction of civil society.** Frequent professional reorientations inherent in flexible work lead to the loss of professional identity and of the feeling of social significance. People with no social self-identification can hardly bare social responsibility and are unlikely to constitute a civil society.

**Family life.** Income insecurity, mobility of the workplace, and individualistic psychology obviously complicate family life. If both partners are flexibly employed then the difficulties are multiplied. The frequent necessity of changing schools is not the best option for children either. Marriages which require settling down are little compatible with professional activities, and the marriage age grows correspondingly.

**Demography and immigration.** Lowering birth quotas caused by aging marriages can create demographic problems. The percentage of aging population will grow, and that of employable population will decrease. The decreasing contributions to social security will sharpen the deficit of retirement funds. On the other hand, the demand for labour force will grow. In turn, it can stimulate additional immigration with a number of side effects.

**Increasing inequality and middle class.** Destroying career prospects of employees means an increasing fraction of population under in-work poverty who are unable to reach the middle-class standards. For instance, the actual German debate on poverty highlights 6.5 Mio-large underclass (Gammelin 2006, König 2006, Schmidt 2006). The middle class will vanish, and the society will fall into top and low clans with little transitions between them and sustained inequality.

Thus, flexibilization is closely linked to the 'brasilianization' scenario of the Club of Rome. If flexibilization will not be constrained and flexicurity will not be implemented with appropriate social advantages, the European social model will not survive.

## **Inconsistent European policies**

The contradictory social interests discussed in the previous section manifest themselves in European policies. Namely, several European policies are hardly consistent with each other:

**European welfare policy** which suggests certain living standards independent of employment. It assumes a stable labour market performance and is backed up by a strong social security system (Esping-Andersen 1990, Auer and Gazier 2002, Ramaux 2006).

**Flexibilization of employment relations** (3<sup>rd</sup> guideline for European Employment Strategy; see European Commission 2005) is aimed at improving the competitiveness of European economy and sustainable development. In particular, it means a relaxation of employment protection legislation. This relaxation contradicts to the employment security assumed in the conception of welfare state.

**Innovation policy** requires a highly qualified manpower which requires long working experience, as opposed to short-time tenures under flexibilization. A loss of high quality of European products can be hardly compensated by their better quality-to-price ratio thanks to better firms' performance. Indeed, at the world market, the niche of highest quality-to-price ratio is already occupied by Asian firms, including Japan. The niche of cheap but still quality goods is occupied by the United States. Europe has traditionally manufactured highest quality products at high prices. If Europe quits its established niche, it will even more strongly compete with Asiatic and American firms with quite questionable outcomes, contrary to the Lisbon Agenda 2010.

**Flexicurity** (European Commission 2006b) The above mentioned contradiction is hoped to be resolved by compensating the relaxation of labour protection by advances in social and employment security, imagined as a *flexicurity* trade-off.

**Make work pay** (8<sup>th</sup> guideline for European Employment strategy, European Commission 2005) is aimed at stimulating the unemployed to active labour market participation. Similarly to flexicurity, the 'make work pay' policy is also a trade-off, but between the social protection and maximizing the gain from moving to work (OECD 2004a: 92). The policy 'make work pay' contradicts flexicurity, because it includes reductions of security benefits which, according to flexicurity, should be improved.

**Improving living and working conditions** (European Foundation 2007) is one of prime goals of the European Union. Flexibilization, however, increases the in-work poverty, and 'make work pay' deteriorates the situation of unemployed. Working conditions and career prospects of flexibly employed are generally worse than that of normally employed. As has been mentioned, flexibilization results in individualism with a negative impact on the working climate.

**Family policy** (European Foundation 2007) is also in the EU focus. As has been emphasized in the previous section, it is hardly consistent with flexible employment with high workplace mobility.

**Demography and immigration** The flexibilization of employment relations with its negative impact on family life results in lower birth quotas and aging population. The need in an additional workforce to retain the living standards comes into contradiction with existing quotas of immigration policy.

**European policy of respecting civil society initiatives** assumes a significant influence of non-governmental organizations on policy-making. In particular, the opinion of trade unions always played an important role in labour market regulation. In recent neo-liberal discussions the role of trade unions and collective agreements is often put in question as an obstacle for flexibilization.

Policy inconsistencies are serious obstacles for their pursuing. Moreover, in such cases some legislation contradictions with unpredictable consequences can occur. It should be emphasized that a social explosion which can outbreak due to policy inconsistencies can be socially very costly, much surpassing gains from particular policies. The nuclear energy also seemed quite cheap before the Chernobyl explosion.

## **Need for legislation–taxation–insurance interactions**

The Western rationalism is shaped by logic which goes back to Ancient Greek mathematicians and Aristotle. Logic, operating on definitions, axioms and deduction rules, made thinking transparent and consistent. Traces of this approach can be found even in politics. When the American *Declaration of Independence* claims “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights...” it follows the axiomatic way of thinking. J.-J. Rousseau’s doctrine of natural human rights is another example of political axioms. Juridical laws are also a kind of axioms for qualifying cases with logical rules.

On the other hand, logic is a human invention (with a place of origin — (V)Elija in Italy, date of origin — 374 BC, and inventors — Parmenides and Zeno) and has its limitations. For instance, it is little adaptable to integrating different elements and finding compromises. According to Bertrand Russell’s *History of Western Philosophy* (1946), the admiration by logic resulted in a belief that knowledge is a derivative from basic presumptions. The necessity in starting points for deduction gave birth to mystical theological dogmas, moreover, delayed the development of natural sciences based on empirical knowledge by two millennia till the 17<sup>th</sup> century. Jurisdiction also had to overcome shortcomings of rigorous logical thinking. Since axioms are never universal, crimes are more or less flexibly penalized within certain ranges of fines and lengths of imprisonment. Occurring incompatibilities of logic with intuition in complex situations are surmounted by jurors (e.g., in the USA) entitled to informal judgments.

As one can see, a rigid legislation is not best suited for all cases. In everyday life, however, certain actions are allowed but not favored. For instance, smoking is generally authorized but prohibited in some places. Immigration is not forbidden but constrained by quotas. Besides, there always emerge ambiguous cases which can be hardly linked to existing definitions. The *Green Paper* refers to the unavoidable ambiguity in definitions of workers, employees, and self-employed which complicates social policy legislation (European Commission 2006a: 11–12, 14).

A general approach to regulating intermediate cases between authorization and prohibition is introducing regulatory charges. For instance, alcohol consumption is moderated by high prices, industries are stimulated to reduce pollution by environmental taxes, etc. In certain situations it can be useful to extend dichotomous Yes/No logic to a continuous scale of variable acceptability with non-prohibitive but constraining measures. In a sense, the axiomatic approach is complemented with a computational evaluation which reflects the degree of compromise. An example of transition from authorization/prohibition to flexible regulation is the replacement of the American anti-alcohol prohibition law by imposing adjustable alcohol taxes.

The difficulty in designing new labour laws is just a low adaptability of dichotomous Yes/No logical schemata to favoring/constraining flexible employment with all imaginable intermediate forms. The legislative regulation would be much easier if the degree of employment flexibility could be evaluated for each particular case by certain rules and, eventually, implemented in an indicator of flexibility. Such an evaluation could be used as an eligibility criterion to social security benefits, like the personal/family situation is used as a tax liability criterion. Moreover, bridging legislation with taxation, one can introduce progressive flexibilization taxes instead of usual prohibition/authorization rules.

Progressive charges to constrain dismissals are already used in the American unemployment insurance based on the so called *experience rating* (Graser 1999). The experience rating is the frequency of dismissals in the enterprise which determines the employer's contributions to unemployment insurance: the more frequent dismissals, the higher the contributions. Graser (2002: 391) draws analogy to motor insurance which price is influenced by the frequency of accidents. Being regarded from our viewpoint, the American practice has two important properties: (1) it operates on the financially fair risk-compensation basis, and (2) constrains the general dismissal freedom of the employer.

Another example of bridging legislation with taxation/insurance is provided by the Austrian Severance Act 2002 (*Abfertigungsrecht*) recognized to be a good practice both by the European Commission (2006a: 10) and the OECD (2006: 99). Now the severance payment is accumulated throughout the whole career of employees at special severance accounts which are accessible upon dismissals or retirement. Employers make obligatory contributions to these accounts of 1.53% of salaries paid and are no longer charged with severance payments in case of dismissals. Since dismissals were relatively easy in Austria, severance pay was the major constraint, especially for small enterprises with tight budget. After the reform, dismissals became a quite formal procedure, and employers got freedom to make quick labour force adjustments for the flat 1.53%-'flexibilization tax'.

Regarded from the employees' viewpoint, the new Austrian *Abfertigungsrecht* is rather a kind of firing insurance. As argued by the European Commission (2006a: 10), its advantage is that a benevolent change of a job does not mean losing the severance entitlement for a long tenure: "The new rules allow workers to leave when they find alternative employment rather than stay in a particular job for fear of losing the accompanying severance payment".

Certainly, it is questionable whether this factual flexibilization of employment relations with all the negative consequences already discussed — bad career prospects and complications of family life — is really compensated by no fear of losing a long-tenure severance award.

In the German debate the instrument of severance pay is linked to the employment protection legislation. The bottle-neck is not the reform of severance pay itself but its suggested role as to replace the remaining employment protection legislation. The severance pay, being a part of employment protection cannot replace the whole of it, even if the severance pay has been made more generous and eligibility conditions have been extended. The Austrian reform is in fact a one-sided enhancement of flexibilization with cosmetic social advantages; see Bothfeld and Zeibig (2006).

Thus, there are precedents of bridging labour law with insurance/taxation forms. Developing this many-sided approach promises wider opportunities than just modernising labour law alone.

## **Towards efficient steering instruments**

The shortcoming of the American experience rating is that the risk of becoming unemployed is linked to dismissals only, regardless of the length and other particularities of the working

contract. In fact, the risk of unemployment is higher for temporarily rather than for permanently employed.

The Austrian reform has the weakness that it is case-independent and thereby does not constrain firings. The interests of employers are little affected by dismissals, because they are seldom charged with severance payments extra to the obligatory social contributions. Besides, all the increasing social expenditures for unfairly dismissed are carried by the statutory social security.

A possible instrument to implement flexicurity with fewer disadvantages mentioned could be *flexinsurance* together with elements of the *basic minimum income model*.

The flexinsurance assumes that the employer's contribution to social security should be proportional to the flexibility of the contract/risk of becoming unemployed (Tangian 2005). The idea is the same as in health insurance. If unemployment is regarded as a social disease then both sick leave and treatment should be insured. The compensation for sick leave corresponds to passive measures — unemployment benefits, and the medical treatment corresponds to active labour market policy measures — professional training, job creation, and others. Similarly to (private) health insurance — the higher the risks (age, chronic diseases), the higher monthly charges, — the flexinsurance assumes that the lower the employment status (short period, weak perspectives), the higher contributions to social security.

The flexinsurance has the following advantages:

- A higher risk of atypical employees to become unemployed is compensated, and contributions to social security are made adequate. The responsibility for the income of unemployed is not transferred to the state but recovered by corresponding insurance contributions.
- The amount of social security contributions is conditioned by the type of contract and thereby affects employers. For instance, an employer, being interested in reducing labour costs, is motivated to issue a permanent contract rather than to prolong a temporary one. Thereby, progressive contributions stimulate employers to hire employees more favourably, but without rigidly restricting the labour market flexibility.
- Flexinsurance can be a flexible instrument for 'regulating the labour market deregulation'. Its updating needs no legislation changes but just administrative

decisions. It is similar to periodic adjustments of statutory health insurance contributions which are changed almost every year. On the contrary, launching new laws can take several years of preparations in governmental commissions and hearings in the parliament.

The basic minimum income model assumes a flat income paid by the state to all residents regardless of their earnings and property status (Keller and Seifert 2005: 320); for pros and cons see Schaefer (2006). Traces of this model appear in some social security branches like child care allowances or old-age provisions. For instance, *Kindergeld* in Germany is paid to all parents. Some basic minimum options are practiced in Switzerland for retirement (Brombacher-Steiner 2000). In a sense, the conception of basic minimum income is incorporated in the minimum wage (Schulten et al 2006). The additional budget expenditures for the basic minimum income can be covered by

- higher taxes of high-earners (to subtract the flat income),
- flexinsurance, and
- funds released from reducing the number of civil servants currently working in social security (since the system becomes much more simple).

As we show next, flexinsurance and elements of basic minimum income model resolve contradictions between some of the European policies enumerated previously.

**European welfare policy.** The basic minimum income model meets the concept of welfare state since it guarantees some unconditional living standards and discharges social tension.

**Flexicurity.** The basic minimum income model means a significant progress in social security and therefore meets the idea of the flexicurity trade-off: 'more security for more flexibility'. At the same time, flexinsurance can contribute to 'softly' regulating flexibilization to keep the situation at the flexicurity trade-off.

**Make work pay.** Since the basic minimum model guarantees statutory payments regardless of income, moving to work means a pure profit. There can be no situations when moving to work is little attractive due to losing out-of-work benefits. On the other hand, the lack of social benefits excludes their penalty cuts. The penalty measures of the policy 'make work pay' are replaced by a more efficient benevolent motivation (cf. with A. Carnegie's 'There is no way to force somebody to do something other than to make to wish it'). Thereby the 'make work pay' policy gains from the measures proposed and becomes compatible with flexicurity.



**Respecting civil society initiatives.** Introducing flexinsurance means respecting the trade-unionist position on constraining the total deregulation of labour markets. Besides, the basic minimum income guarantees that unemployed are not so poor that they are ready to accept any job offer, and thereby will not become 'strike breakers' in the long-running trade union struggle for good working conditions and fair pay.

The last but not least factor in preserving the European welfare state is **constraining the openness of European financial markets**. In fact, easy foreign investments actually mean easily moving jobs from Europe to other countries. As already mentioned, employers have a legal instrument to make pressure on European governments: 'If you do not relax employment protection according to our requirements we shall move jobs abroad'. Thereby, having liberalized finances, European governments paved the way to losing control over labour markets. Since the exit is usually where the entrance was, to get the control back, the financial markets have to be somewhat constrained. Certainly, if social priorities are respected sincerely and consistently.

## **Methodological advances and monitoring instruments**

Although flexicurity is getting to be adopted as a European policy, there exists neither its established definition, nor even an unambiguous idea of it, to say nothing of steering and monitoring instruments. The chapter on flexicurity in *Employment in Europe* by the European Commission (2006c) lacks any 'official' definition but refers to the one by Wilthagen and Tros (2004) and benchmark countries with the OECD *partial* indicators of social security. Neither is flexicurity defined in the *Green Paper* but used first with quotation marks twice in p. 4 and afterwards without. The major questions to be discussed at the *Expert meeting on flexicurity strategies and the implications of their adoption at the European level on the occasion of German–Portugal–Slovenian presidency in the EU* organized by the Portugal government in Lisbon on September 25, 2006, were just on definitions and monitoring instruments. That is, the policy to be adopted at the European level is still ill-defined and supported by no empirical feedback (Tangian 2006).

An operational definition of flexicurity and related *composite* indicators were developed at the Hans-Böckler Foundation (Tangian 2005–2006). They were applied to investigate the 10-year *dynamics* of 16 European countries, basing on data available from European Commission, Eurostat, and OECD. The results are not encouraging. Contrary to theoretical opinions and political promises, the current deregulation of European labour markets is not adequately

compensated by improvements in social security. Flexibilization resulted in an increase of unemployment and in a disproportional growth of the number of atypically employed (Eurostat 2005, Schmid and Gazier 2002, Seifert and Tangian 2006). The average employment status in the society decreases, on the average disqualifying employees from social security benefits, even in the background of some institutional improvements.

To give an idea of the interaction of institutional and flexibilization factors consider an example. Suppose that there are two groups of unemployed, with a high former employment status (recently normally employed, unfairly dismissed) who get 700 EUR a month (90%), and with a low former employment status (flexibly employed, long-term unemployed, etc.) who get 300 EUR a month (10%), giving the national average aid  $700 \cdot 0.9 + 300 \cdot 0.1 = 660$  EUR/month. Let there be a 10%-increase of aid for all, but due to flexibilization the first group is reduced to 50% and the second increases up to 50%. Then the national average is  $770 \cdot 0.5 + 330 \cdot 0.5 = 550$  EUR/month. Thus, regardless of general institutional improvement by 10% the national average decreases due to flexibilization from 660 to 550 EUR/month (= by 16.6%).

After the flexicurity advantages/disadvantages have been accounted proportionally to the size of the groups affected, the trends of average national figures turn out to be rather disappointing. The same conclusions are obtained with three models:

- in the neo-liberal perspective, that is, under the assumption that labour rights *are* tradable for social security benefits,
- from the viewpoint of trade-unions, that is, under the assumption that labour rights *are not* tradable for social security benefits, so that flexicurity is understood as a better social protection of flexibly employed, and
- by tracing the development of the European welfare state, that is, by evaluating the national average of the coverage of unemployed by social security.

Thus, the declared balance between advantages and disadvantages is illusory, because gains are smaller than losses and winners are fewer than losers. To repair the actual situation, the flexibilization should be constrained on the one hand, and, on the other hand, social security rules should be urgently updated.

## Conclusions

It should not be hoped that the great challenge of labour market structural change can be answered by minor reforms. The level of reform should correspond to the level of change. Otherwise, the situation will be similar to the one mocked by Saltykov-Shchedrin (1826–1889): 'How to make an unprofitable enterprise profitable, not changing anything in it?'

Side-by-side with Danish/Dutch flexicurity and Austrian *Abfertigungsrecht*, the package of measures proposed (flexinsurance, basic minimum income, and constraining the openness of financial markets) are aimed at solving the current social and policy contradictions in the European Union.

To keep the policy under operational control, advanced monitoring tools and easily adjustable steering instruments are needed.

## Thoughts to the 14 questions posed by the *Green Paper*

1. *What would you consider to be the priorities for a meaningful labour law reform agenda?*

As long as the real need for flexibilization remains an open question, it may be reasonable just to introduce flexible easily adjustable and reversible regulatory measures like *flexinsurance*. The flexinsurance assumes that the employer's contribution to social security should be proportional to the flexibility of the contract/risk of becoming unemployed. The idea is the same as in health insurance; see pp. 20–21 for more details.

2. *Can the adaptation of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation? If yes, then how?*

It looks rather impossible to attain the both goals, flexibility and employment security, simultaneously. In actuality these targets represent contradictory interests of different social partners, see pp. 13–15. It may be possible to speak of a compromise only. The flexinsurance proposed can be regarded as an instrument for its adjustment. Under flexinsurance, employers are motivated to improve in the employment status of the employees due to lower social contributions. Employees are encouraged to accept flexible work which offers more generous social security benefits in such cases (by analogy with better hospital conditions for those who pay higher contributions).

3. *Do existing regulations, whether in the form of law and/or collective agreements, hinder or stimulate enterprises and employees seeking to avail of opportunities to increase productivity and adjust to the introduction of new technologies and changes linked to international competition? How can improvements be made in the quality of regulations affecting SMEs (= small and medium enterprises), while preserving their objectives?*

The question assumes that adopting innovations may need firing employees with outdated skills, and that it can be too costly for small enterprises charged with severance payments. However, it is not self-evident that innovations imply firing. In fact, innovations themselves result in higher competitiveness and, consequently, higher profits which should be sufficient to compensate expenses for professional training and/or creating a few jobs for new tasks. In fact, firms are seeking for double profits both from innovations and reducing labour costs. These double profits will unlikely be fairly distributed within the firms, but rather will increase the inequality between low- and high-paid personnel, contrary to the concept of welfare state; see also pp. 13–15.

4. *How might recruitment under permanent and temporary contracts be facilitated, whether by law or collective agreement, so as to allow for more flexibility within the framework of these contracts while ensuring adequate standards of employment security and social protection at the same time?*

The formulation of the question is misleading because it assumes by default that flexibilization is necessary (see critics in p. 7). If flexibilization is regarded as a disadvantage for employees, the only way to facilitate the recruitment of flexibly employed is to provide them with some additional advantages. For instance, the flexinsurance can guarantee better social security benefits for flexibly employed. The idea is the same as of additional health insurance options for those who are exposed to additional risks.

5. *Would it be useful to consider a combination of more flexible employment protection legislation and well-designed assistance to the unemployed, both in the form of income compensation (i.e. passive labour market policies) and active labour market policies?*

In fact the question is about the usefulness of passive and/or active security measures under a flexible employment protection legislation. Two measures are better than one, so a combination of several social security measures is more flexible itself and, consequently, provide more possibilities.

6. *What role might law and/or collective agreements negotiated between the social partners play in promoting access to training and transitions between different contractual forms for upward mobility over the course of a fully active working life?*

The flexinsurance suggests, among other things, stimulating the upward mobility of employees, that is, transitions from part-time to full-time work, or from fixed term to permanent contracts. Professional training and transitions between different contractual forms can be negotiated by social partners to be accounted in the flexinsurance as bonus points.

7. *Is greater clarity needed in Member States' legal definitions of employment and self-employment to facilitate bona fide transitions from employment to self-employment and vice versa?*

Definition clarity alone can hardly facilitate mobility between employment and self-employment. Most important are the economical consequences linked to the definitions of employment and self-employment. Transitions from employment to self-employment can be facilitated if self-employed have the same social security benefits as regular employees.

8. *Is there a need for a “floor of rights” dealing with the working conditions of all workers regardless of the form of their work contract? What, in your view, would be the impact of such minimum requirements on job creation as well as on the protection of workers?*

The very idea of the 'floor of rights for working conditions' goes in line with the idea of minimal wage and, finally, with human rights in general.

9. *Do you think the responsibilities of the various parties within multiple employment relationships should be clarified to determine who is accountable for compliance with employment rights? Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of sub-contractors? If not, do you see other ways to ensure adequate protection of workers in "three-way relationships"?*

Particular working conditions at the workplace are beyond the scope of the paper. As for the social security contributions, flexinsurance makes possible a shared responsibility for multiple-way relationships. Each employer should be charged with a certain percentage of social contributions according to the contractual agreement between employers involved.

*10. Is there a need to clarify the employment status of temporary agency workers?*

Every status should be clarified, to avoid both misunderstanding and misuse. Again, the definition alone with no economic consequences makes not much sense. The social guarantees linked to this definition should be specified. It seems fair to compensate the inconveniences of agency work (frequent changes of workplace, adaptation efforts to new tasks and teams) by higher social guarantees.

*11. How could minimum requirements concerning the organization of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers' health and safety? What aspects of the organization of working time should be tackled as a matter of priority by the Community?*

The question is beyond the scope of the paper. As for flexinsurance, inconvenient flexibility of working time can be, among other things, compensated by better social guarantees (accounted, for instance, as insurance bonus factors).

*12. How can the employment rights of workers operating in a transnational context, including in particular frontier workers, be assured throughout the Community? Do you see a need for more convergent definitions of 'worker' in EU Directives in the interests of ensuring that these workers can exercise their employment rights, regardless of the Member State where they work? Or do you believe that Member States should retain their discretion in this matter?*

If the Unites States of Europe are on the agenda then a common definition of (transnational) worker with economical/social security consequences should be on the agenda as well.

*13. Do you think it is necessary to reinforce administrative co-operation between the relevant authorities to boost their effectiveness in enforcing Community labour law? Do you see a role for social partners in such cooperation?*

An administrative cooperation should run, but there is no urgency in an abrupt enforcing Community labour law as long as Member States have considerable national differences and specific traditions of industrial relations.

*14. Do you consider that further initiatives are needed at an EU level to support action by the Member States to combat undeclared work?*

Prohibitive legislation should be accompanied by economic measures. In the background of high unemployment workers consider undeclared work to be 'better than nothing'. Another fundamental problem is the wage differences between countries, so that an undeclared work in Germany can be better paid than a declared work in Poland. Therefore, measures against high unemployment and wage differences can be even more efficient than legislation prohibitions.



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