Flexicurity, a Strategy of the European Social Policy

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Abstract: Flexicurity should reduce the difference between employed people and people belonging to excluded categories. Currently employed people need assistance in order to be prepared and protected during the transition from one workplace to another. Those who belong to currently excluded categories – including those who are unemployed, among which women, young people and immigrants predominate – need readily accessible ways to a workplace and starting grounds in order to allow for the progress towards stable contractual provisions.

Keywords: flexicurity; flexibility; labour law; technological progress; security

1. Preliminary Ideas

In these European Union documents, as well as in others, such as those coming from E.C.D.O., a number of *new concepts* are used, which are insufficiently clarified either by the doctrine or by the legal regulation practice.

The labour relation. Frequently in these documents, but also in a number of directives, the syntagm „labour contract or labour relation" is used in association; according to this syntagm, a person works either under a labour contract or on the basis of a labour relation. It is thus obvious that the syntagm does not only refer to the *employee exclusively*, who has a labour relation under a labour contract, but also to other workers who are in a labour relationship, on other legal grounds than the labour contract, such as, for instance, public servants, members of the military, members of cooperation, agricultures, etc. However one cannot speak of a labour relation in the case of the independent worker or in the case of those who exercise an independent profession, such as lawyers, notaries etc.

Standard contractual model – the model based on the individual indeterminate term full-time labour contract.

It is significant to note that, during the debate regarding the Green Book, the informal meeting of January 2007 of the EU Member States employment and social affairs ministers strongly emphasized that the *cornerstone of labour relations in the European Union continues to be the indeterminate term full-time labour contract*, even if other types of contracts may be used, which are more flexible and which may meet workers' needs or answer to other specific situations.

In the Commission's Communication regarding the end of the debates generated by the October 2007 Green Book, interviewees' different opinions are noted. Significant about this is the fact that the European Parliament, the European Economic and Social Committee, and the Member States emphasized that *workers' labour stability and security is only provided by the standard labour contract*.

The fragmented labour market, a syntagm launched in 2003 in the report submitted to the European Council by the European working group for the workforce (the Wim Kok group), which distinguishes between *two levels* of the labour market: that of the *„integrated" workers* („insiders"), having a permanent activity in the enterprise, based on an indeterminate term full-time individual labour contract (standard contract), and that of the *„excluded" workers* („outsiders"), made up of unemployed people, people who have left the labour market and people who are in poor working conditions or in the informal sector. The latter category of people find themselves in a *„grey" area*, where employment fundamental rights or social protection can be considerably reduced, triggering a state of insecurity regarding the prospect of finding a workplace, with serious implications over crucial options in their private lives (to have a dwelling, to found a family etc.).

In the circumstances of a fragmented labour market, it was noted that the practice of resorting to other forms of employment than the usual could further develop, encouraging atypical contracts and disguised work, unless measures were taken to adjust *classical (standard)* labour contracts in order to enhance flexibility, both from the workers' and from the employers' points of view. In this respect, the suggestion was to assess the flexibility level of the standard contracts at least regarding the terms of notice, the individual and collective dismissal costs and procedure, and the definition of abusive dismissal, respectively.

Another suggestion was to identify, together with the social partners, those solutions for the „integrated" workers, as well as the „excluded" ones, to be able to

successfully deal with the transition from one status to another (from „integrated" to „excluded" and the other way round), through ongoing learning, in order for them to maintain their training level or to acquire new competences, by means of promoting active policies on the labour market which help the unemployed, and the inactive persons, to find work, by setting supple rules in the field of social security for people who change their workplace or who temporary leave the labour market.

This report contains the conception, which the European Union structured previously, of the need to have common flexicurity principles which, according to the June 2007 Communication of the Commission, could lead to more and better workplaces through flexibility and security.

Before this Communication, the European Union had already adopted, in July 2005, the Integrated Guidelines for development and workforce for the years 2005-2008, which required the adjustment of the employment legislation in order to simultaneously promote flexibility and security and to reduce the labour market fragmentation.

In the Commission's Communication on the result of the public consultations regarding the Green Book, it is precisely stated that **no agreement has been reached** regarding the implementation of the concepts of „integrated" or „excluded" workers within the fragmented labour market framework.

The traditional model of employment law aimed to alleviate the economic and social inequalities inherent in the labour relations and ensured appropriate protection to employees. This model was based on the following hypotheses:

- a permanent full-time job;
- the labour relation under employment law, focusing on the indeterminate term individual labour contract;
- the employer alone was held responsible for meeting the obligations which any employer has in relation with his/her employees.

The traditional model of employment law met, according to the Commission, to different extents, in different states, the requirements of the labour market, until the beginning of the 1990s.

The rapid technological progress, the increasing competition within the framework of globalization, the evolution of the consumers' demand and the constant growth of the service sector imposed an increased employment flexibility, on the one hand,

and the need to organize companies in a more supple manner, on the other hand, which triggered a development of labour organization and timing, of salaries and numbers of employees in different stages of the production cycle, and all these finally led to the *need for more contractual diversity* than that explicitly provided by the European and national legislations.

The national legislative reforms undertaken after the 1990s loosened the existing regulations, allowing for a greater contractual diversity, but also for the labour market fragmentation, by introducing more flexible employment forms, but also a reduced protection in case of dismissal; in this way, the „excluded" people could more easily have access to the labour market, and the „included" people had more options to reconciliate their career with their family life.

The atypical labour contracts (sometimes referred to as fixed-term contracts) are other types of contracts than those based on the indeterminate term full-time individual labour contracts. This category includes fixed-term contracts, part-time contracts, labour contracts through temporary employment agents, intermittent labour contracts (when, for different reasons, a person works only part of the week, for instance, on Saturdays and Sundays), „zero hours" contracts and even independent workers' contracts.

Workers functioning under such atypical contracts are considered – from the perspective of employment law and social security law, respectively – vulnerable workers, mainly as a result of the fact that they can find themselves in successive short-term poor quality workplaces, with an inappropriate social protection.

Worker. The analyzed documents do not promote any definition of this term. Consequently, where it is used, the term „worker" has the meaning in the community law. In this sense, without being defined as such, in the primary and secondary legislation, „worker" is a comprehensive concept (also shaped by the Luxembourg Court case law), typical of community law, which is mainly applied with respect to the workforce free movement within the community space, and which includes all those who either have a labour contract or a labour relation, or are in a specific situation, such as that of an unemployed person or of a person seeking a workplace within the community space. The meaning of the notion of „worker", as specified by the Court, is an extensive one regarding the rights granted by the Treaty and by the secondary legislation to those who carry out an activity, no matter the legal grounds.

From one directive to another, *the concept of worker differs*, and, consequently, it will be transposed in the national legislation in accordance with the exigencies of the respective directive, but aiming to ensure, in each EU Member State, the same social protection for the category of workers addressed by that specific directive. Actually, in the Commission's Communication on the results of the debate regarding the Green Book, it is shown that most of the Member States, together with numerous social partners' organizations „favoured the position that defining workers within most of the directives on employment law should remain an attribute of the Member States."

Basically, the option for a community meaning was aimed at allowing different categories of people – „workers" – benefit, in all Member States, of the same protection by the community norms. Consequently, the workers' category includes those people who carry out a paid work, for a certain term, within a labour relation, and which are subordinated to the beneficiary of their work.

In the field literature it was revealed that *workers are* employees, no matter the type of their individual labour contract, including the apprentices at the workplace; those who are under a professional training program (at their employer); those who, without being proper workers, are expressly assimilated to this category by certain European Union directives (those who are seeking a workplace, those who are to be employed for the first time; unemployed people of active age who were previously employed; people who are not able to work because of a labour accident or professional illness during their employment in the host state; people who reached the retirement age during employment in the host state). In the same way, it has been showed people who exercise liberal professions, self-employed people, public servants, and, as a rule, people who work under a service contract – *are not workers*; people who – even if they carry out an economic activity in exchange for a remuneration, based on a labour relation – are expressly excluded from the implementation of certain sectoral directives.

Disguised work – situation in which a person carries out an activity (work) similar to that carried out by an employee, but without this person being considered an employee, with the aim to dissimulate this person's real juridical status in order to avoid certain compulsory costs and tax collections, as well as the payment of social security contributions. Frequently, disguised work is carried out by resorting to different civil or commercial contracts.

Disguised work is combated by different methods and practices, in general, by all EU Member States. The Commission invented, however, two innovative methods in this field: the absolute legal presumption, which says that there is a labour contract if the work is carried out for someone else in exchange for a weekly wage or at least for twenty hours within three consecutive months (the Netherlands); a constant high quality control of the way in which labour legislation is applied, by concluding agreements in this sense with social partners inclusively (Ireland and Spain).

The debates on the Green Book revealed that the employment legislation is efficient, correct and powerful only if it is applied in all Member States, if it is equally applied to all actors (social partners) and is systematically, constantly and efficiently controlled.

The community action has to complement the action of the Member States, especially because work on the black market, within the community space, acquires an increasingly supranational character However no agreement has been reached on the type of community action; the measures proposed range from instruments with the character of a statement (Council resolutions) to exchanges of good practices and bi- and multilateral forms of administrative cooperation.

Economically dependent labour – type of labour that cannot be strictly categorized either as „waged labour" or as „independent labour". This category of workers does not benefit of a labour contract; they find themselves in a „grey area" between employment law and commercial law. Even if, legally and formally they carry out an independent work, they are still economically dependent on a company or a client/employer in order to earn income.

In the Commission's Communication on the end of the debates regarding the Green Book, it is noted that most of the Member States and social partners were against the idea of introducing a third intermediary category – economically dependent worker – in addition to the categories of employed and independent workers. As a result, the syntagm will be used in theoretical debates, with a certain legal grounding in some community states.

The independent worker, situated, as a rule, on the borderline between employment law and commercial law, is a notion which is diffusely defined in these community documents. In the Green Book, it is stated that „the binary distinction between an employed person and an independent worker no longer is the close reflection of the economic and social reality of labour. Disputes can arise in connection with the

legal nature of a labour relation or anytime a labour relation is disguised or anytime real difficulties arise in the attempt to achieve a correspondence between the new ways of labour and employment and the traditional labour relation".

In general, independent labour is seen as a means to adequately meet the needs of restructuring, to reduce direct and indirect workforce costs and to flexibly manage the resources in unpredictable economic circumstances. This is the case of service providing enterprises, retail industry, agricultural sector and construction sector. Essentially, workers from this category are employed any time an enterprise contracts out a part of its activity, subcontracts works or carries out its activity within certain projects (based on commercial, and rarely enough, civil contracts).

According to this vision, independent work is different from *self-employment*, without employing paid workers.

The Commission's Communication on the end of the debates regarding the Green Book takes note of the opinion of the European Parliament and of the Member States that defining workers and people who carry out an independent activity from the perspective of the community legislation is of a great complexity. It was actually requested that, whenever a directive refers to this note, it should be done by each Member State after consultation with social partners.

The triangular labour relations are the result of temporary employing workers through temporary employment agencies. Obviously, this relation establishes between the agency, the employee and the employing company; the labour relation thus becomes more complex. The temporary employment agency and the employing company conclude a commercial contract. The Romanian legislation regulates, in this sense, the contract through a temporary employment agent.

A triangular relation is also considered the relation which establishes between the *initial company* and the *sub-contracting company*, in which case the responsibility of the two contractors is shared, in case of unfulfillment of obligation by the subcontracting party, the obligations arising from a labour contract included.

The Commission's Communication on the end of the debates regarding the Green Book reveals the different opinions expressed, which eventually are convergent with those of the European Parliament and of some Member States in favour of the initial contractor's responsibility (subsidiary or not). No common EU position is advanced.

Flexicurity - conception (method, strategy) promoted by the European Union, which dialectically combines employment flexibility with employment security, a concept which differs from the classical one in the social security law.

In the Commission's Communication on flexicurity, it is stated that this „can be defined as an *integral strategy* of simultaneously consolidating flexibility and security on the labour market." Flexicurity policies can be put into practice by means of four components: flexible and secure contractual provisions; comprehensive ongoing learning strategies; active and efficient employment policies; modern social security systems.

Beyond this main framework, otherwise perfectly correct, *employment flexibility* can be achieved by means of rendering the dismissal cases and procedures more flexible, by reducing dismissal costs (individual or collective), by limiting the area of dismissals deemed abusive (by the limiting definition of law abuse in the field of labour relations), by promoting other types of labour contracts than the „classical" ones, namely fixed-term contracts, contracts through a temporary employment agent, part-time contracts etc.

If *flexibility* it is aimed – basically – at granting more freedom of action to the employers, *security* is aimed at providing individual security, throughout a person's active life, whatever the professional situation of that person (employee, unemployed, independent worker, exercising a liberal profession, being under professional training etc.); essentially, flexisecurity is aimed at ensuring protection measures, throughout a person's active life, to the entire professional evolution of that particular person. (Popescu, 2008, pp. 341-350)

2. About flexicurity

The public debate included over 450 answers from all the interested parties, a concept which is different from the classical one in social security law, covering governments, regional authorities, national parliaments, social partners at a EU or national level, NGOs, enterprises, universities, legal professionals etc. The European Parliament and the European Economic and Social Committee also formulated opinions on the Green Book.

Beyond this diversity, in the positions taken one can identify points of view which are specific to social partners (trade unions, employers' associations) and governments. (Ţinca O. , 2005, p. 24)

Although the debate covered a plethora of ideas (questions) on which all the interested parties were to express an opinion, the content of the debate can be synthesized in the following lines.

Regarding the *range of persons who are protected* or *should be protected* through the employment law norms, the main idea is the incidence of these protection prescriptions on *all those who have a labour relation*, and *not exclusively* those, but also those who are outside a labour relation.

With respect to *the duration of ensuring legal social protection*, the resulting idea was that this should cover not only the period during which a person works under a labour contract, but should be extended to the whole active life, by establishing the obligation of ongoing professional training.

The *position and role of different categories of individual labour contracts* were also discussed; actually, without expressly mentioning it, diminishing the role of indeterminate term full-time individual labour contracts and placing these at the same level with other labour contracts, primarily with the fixed term contracts were important issues which were also discussed. (Țop, 2008, p. 24)

The flexicurity concept was advanced, with both its components, as a universal solution. We showed above that, after the Green Book, the Commission drew up a Communication on the common principles of flexicurity and that in December 2007, the Lisbon European Council adopted the Common principles of flexicurity.

Because of the Commission's initial position, the debate was on the *individual employment law* and didn't concern – under any aspect – the collective employment law.

In the Commission's Communication on the end of the debates regarding the Green Book, it is noted that some Member States, the trade unions and most of the academic experts pointed out that it would have been desirable for the debate to have focused on collective labour contracts, and not only on the individual labour relations. Only the combined approach of both components of employment law – individual contracts and collective contracts – could have revealed the complex interaction between the overall legal framework of each state and the community framework.

Although the Green Book on modernizing employment law, as well as the Commission's Communication on employment flexicurity also refer to certain aspects which belong to *social security law*, the debate was mainly focused on the

issues regarding employment law, namely the individual labour contract law. (Voiculescu, 2003, pp. 322-326)

3. Conclusions

The main conclusion is that the *employment legislation in the EU Member States should still apply*. Without discussing or questioning the role of community norms in the harmonization of national legislations, the national legislation is applicable, which thus confirms, once again, the character of community norms, namely of directives, established by the Treaties, to complement and guide the national legislations in the fields in which the European Union has shared competences with the Member States.

Actually, a number of positions coming from employers reminded of the limitings of the EU competences and significantly requested that *the employment law reform be carried out within an exclusively national framework.* At the same time, most of the Member States, the European Parliament and the European Economic and Social Committee, the national parliaments and the social partners invoked – in applying the subsidiarity principle – the shared competences between the European Union and the Member States, stating that the drawing up of the national employment law is an attribute of the states together with the social partners, and the community acquis may only have the role of complementing the Member States' actions.

It is also significant that the *problems regarding the EU competence in the social field* were not discussed. In the case of the employment legislation, there are four fields which still constitute the Member States' exclusive competence: trade unions and employers' association organization, salaries, strikes and lock-out.

During the debates, *the concept of flexicurity* was developed, under its two components: flexibility and security. Thus, *flexibility* was better defined in the sense that, in case of dismissal, the term of notice should be extended (obviously, in the employee's favour); also, the grounds for dismissal were more precisely determined, in the sense that it should be real, serious and just. Security should include allotting additional funds for professional training and in case of unemployment, including a professional training period, a number of tax facilities for the self-employed, maternity and paternity leaves, kindergartens, including

certain facilities in the pension system for those who are not, temporarily, in a labour relation, etc.

Elaborating a directive regarding temporary employment (employment through temporary employment agencies) and re-examining the directive regarding the labour timing were identified as European priorities.

Based on this debate, the *Common principles of flexicurity* were adopted within the framework of the 2007 Lisbon European Council.

The Commission will further aim to carry out, together with the social partners, a common analysis regarding the major challenges facing the labour markets in Europe, in order to draw up a program meant to suggest *an integrated approach for applying the principles based on flexicurity*, and will encourage the negotiation, by the social partners, of the problem of professional training.

From our point of view, even the solution proposed by the Commission, which seems to argue that the employment law modernization is carried out through the new concept of „flexicurity", *does not seem a long-term solution*. Of course, this concept and the Principles regarding it, adopted by the December 2007 Lisbon European Council, will influence the evolution of employment law, but, in prospect, from our point of view, it is certain that *the debate is not over. It is only a beginning*. (Popescu, 2008, p. 352)

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