Modernisation of labour law, European perspectives and judiciary response

Jornades sobre el llibre verd europeu I el future del dret del treball
Barcelona, 8-9 novembre 2007

1. With the presentation of the Green Paper of the European Commission on "*"Modernising labour law to meet the challenges of the 21st century*" in November 2006 and of the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions with the title "*Towards Common Principles of Flexicurity: More and better jobs through flexibility and security*" in June 2007, labour law in Europe is back on the EU agenda.

The purpose of the Green Paper is to launch a public debate in the EU on how labour law can evolve to support the Lisbon Strategy's objective of achieving substainable growth with more and better jobs.

Such public debate, after a long period of stagnation in the building of a social Europe, is an expression of the Open Method of Coordination (OMC) regarding employment policies, social inclusion and welfare, or, in other words, the growth of the European social dimension.

The innovative procedures of the OMC have led to the acquisition of a common ground for discussion and dialogue between the various Member States and the identification of objectives to be jointly pursued. Thanks to the OMC, a shared knowledge of the different national situations, on the basis of consensually accepted quantitative data, has been acquired; *best practices,* combining competitiveness and social cohesion according to the Lisbon perspective, have been identified.

The Green Paper is, therefore, important, irrespective of any objections that may be raised as to its methods and contents, because for the first time in the history of initiatives and research and consultative activities by EU institutions, the

Commission has invited not only experts but a broad spectrum of participants to reflect on the social and cultural role that labour law can play in European society.

The documents of the Commission have the merit to promote a reflection on social rights and the European social model in the context of the enlarged European Union, in the framework of EU-27.

2. As we read in the Green Paper, the flexicurity approach seeks to confront with the issue on how labour law at EU and national level can help the job market become more flexible while maximizing security for workers.

The background of the flexicurity approach followed by the Commission is based on the following factual observations:

- new types of contractual arrangements outside of permanent, full-time work are increasingly common across the EU;
- it is necessary to confront the effects of globalisation and demographic ageing in European labour markets;
- there is a growing gap between those looking for work, those in non-standard, sometimes precarious contractual arrangements (so-called outsiders) and those in permanent, full-time jobs (the insiders).

The last observation is developed in the sense that a two-tier labour market might emerge divided between permanently employed "*insiders*" and "*outsiders*", including those unemployed and detached from the labour market, as well as those precariously and informally employed: a grey area where basic employment or social protection rights may be significantly reduced, giving rise to a situation of uncertainty about future employment prospects and also affecting crucial choices in the private lives of workers involved.

The Green Paper underlines the detrimental effects associated with the increasing diversity of working arrangements: the risk that part of the workforce gets trapped in a succession of short-term, low quality jobs with inadequate social

protection; the association of gender dimension and intergenerational dimension to the risk of having a weaker position in the labour market.

Attention is also paid to temporary agency work, with a suggested liability of the principal contractor, and to undeclared work, considered as a factor of social dumping, exploitation of workers, distortion to competition.

3. When it comes to the proposing part, the Green Paper states that flexicurity agenda is in support of a labour market which is fairer, more responsive and more inclusive, and which contributes to making Europe more competitive.

Policy components of the flexicurity approach include lifelong learning; active labour market policies; more flexible social security rules for the needs of workers switching between jobs or temporarily leaving the labour market.

Furthermore, the Green Paper elaborates a concept of economically dependent work, in order to put order in the mentioned grey area between labour law and commercial law, between dependent and autonomous work; poses the interrogation on how different types of contractual relations, together with employment rights applicable to all workers, could facilitate job creation and assist both workers and enterprises by easing labour market transitions and the one on how new more flexible forms of work might be combined with minimum social rights for all workers.

In this perspective, the Green Paper invites Member States to assess and, where necessary, modify, the level of flexibility provided in standard contracts in sensitive areas such as period of notice, costs and procedures for individual and collective dismissal, or the definition of unfair dismissal.

On the problem of undeclared work, it suggests a mix of incentives for transformation of undeclared work into regular work; sanctions and penalties; better links with the tax systems an benefits; administrative or fiscal simplification; strengthened administrative cooperation at the EU level.

4. After the contributions delivered to the Commission following the dissemination of the Green Paper, the Communication of the Commission, prepared in view of the adoption by the European Council of a set of common principles of flexicurity, highlights four reasons that make it necessary a modernization of labour law: a) European and international economic integration; b) the development of new technologies, particularly in the information and communication areas; c) the demographic ageing of European societies, which puts at risk the sustainability of social protection systems; d) the development of segmented labour markets in many countries, where both relatively protected and unprotected workers coexist.

Flexicurity is defined as an integrated strategy to enhance, at the same time, flexibility and security in the labour market.

Its components are identified in:

– flexible and reliable contractual arrangements (from the perspective of the employer and the employee, of "*insiders*" and "*outsiders*");

– comprehensive lifelong learning (LLL) strategies to ensure the continual adaptability and employability of workers;

– effective active labour market policies (ALMP) that help people cope with rapid change, reduce unemployment spells and ease transitions to new jobs;

– modern social security systems that provide adequate income support, encourage employment and facilitate labour market mobility.

The suggested common principles of flexicurity include:

- a balance between rights and responsibilities for employers, workers, job seekers and public authorities;

- adaptation to the specific circumstances, labour markets and industrial relations of the Member States;

- the objective to reduce the divide between insiders and outsiders on the labour market;

- sufficient flexibility in recruitment and dismissal accompanied by secure transitions from job to job;

- support of gender equality as well as providing equal opportunities to migrants, young, disabled and older workers;

- a climate of trust and dialogue between public authorities and social partners;

- fair distribution of costs and benefits.

It is observed that in countries where a system of unemployment benefits is already in place and benefits are generous, the application of the right-and-duty principle should contribute to make the system cost effective. For countries where benefit systems are less developed, authorities may consider shifting public resources towards enhancing flexicurity policies and distribute any additional costs between different sources, through either increased taxation or social contributions.

5. The key concepts on which the Commission documents focus are the modernisation of labour law and flexibility combined with employment security.

In the first analyses of the Green Paper, among the positive findings of the document it has been underlined the development of the concept of economically dependent employment.

The Green Paper points to a regulatory proposal by EU institutions in the sense of a broad, common definition of an economically dependent worker and the provision of minimum guarantees.

The prospect of modulating protection starting from a universalistic floor of rights is gaining increasing credit among European scholars and is based on the replacement of the rigid juxtaposition between employment and self-employment with a *continuum* of activities to which a series of modulated, variable guarantees are attributed, starting from a shared minimum and then gradually progressing towards stronger forms of protection; such methodological perspective was explored in the Report drawn up for the Commission by a group of scholars coordinated by Alain Supiot, where the protection envisaged comes in the form of concentric circles.

Another positive aspect of the view of labour law modernisation emerging from the Commission's documents is the recognition of the role of collective bargaining

as a fundamental means of regulation, with the same status as the law, at both a national and supranational level.

Also the proposals concerning the setting up of a system of joint responsibility in the chain of sub-contracting, and strengthening the mechanisms for the monitoring and control of the irregular or shadow economy, as well as administrative cooperation at an EU level, seem to be widely accepted.

The critical aspects of the Commission's documents are, first of all, methodological.

The analysis of labour law in Europe seems measured on the basis of mainly economic data (which are disputable) and without the consideration of its function as a dynamic mechanism capable of correcting the imbalance of power that exists in the labour market and employment relationships and promoting social equality in the working place. The Green Paper, in this sense, appears to have been inspired by a unilateral vision of modernisation.

Labour law can be modernised in various ways. The Green Paper explores only one of these: the adaptability of legal rules to the market.

The modernisation hypothesis set forth in the Green Paper is based on an assumption which is contested: there is no proven correlation between the weakening of constraints on flexibility regarding dismissal and an increase in offers of employment by enterprises. And it is not easy to make standard employment more flexible and less expensive, starting with *firing costs,* without jeopardising the protection against insecurity offered by employment contracts as long-term contracts.

Another difficult point is the ambiguous nature of the expression flexicurity, bordering on an oxymoron (security can also be viewed as the exact opposite of flexibility), especially if *flexicurity* is equated with flexibility *tout court*.

The recourse to this model at a European level has to consider that it is closely linked to highly particular welfare and industrial relations systems that appear hard to export beyond the boundaries of Scandinavian democracies.

The concept of flexibility and security changes when referred to more specific models of legal, contractual or mixed regulation regarding single aspects of employment relationships: part time, reconciliation of market work and family work, lifelong learning and training contracts, parental leaves, negotiated management of temporary work are some of the areas in which it is possible to experiment with, provide incentives for, and generalise regulatory measures and models of flexibility and security that can at the same time safeguard certain basic guarantees of standard employment and increasing requests by employers for more modulated availability in the supply of labour.

In this dimension, negotiated flexicurity reflects a series of real needs for modernisation in labour law:

a) a flexibility that will improve the quality and not only the quantity of work;

b) a flexibility in working conditions and working hours that will make it possible to achieve greater balance between women and men in the personal care services;

c) a flexibility that is not only unilaterally imposed (either by the enterprise via individual contracts, or by the State via mere deregulation) but democratically negotiated and thus made more effective, for the enterprise as well, because consensually obtained;

d) a flexibility that is not a negation but a necessary completion and adaptation of protective legislation;

e) a flexibility that can also lead to changes in the sense of strengthening certain forms of protection in the market, following a logic of systemic integration but without totally upsetting particular consolidated national welfare systems and models.

This model of social regulation requires a number of regulatory methods and techniques in line with the multilevel dynamics of the system being built.

The Commission documents impinge on areas involving (according to ILO Conventions, the UN Charter, the European Social Charter, the Nice Charter)

fundamental rights: minimum rest periods, protection against unjustified dismissals, working time, equality of treatment, and so on.

The Nice Charter, for instance, contemplates socio-economic rights as being *pleno iure* rights, stating in its Preamble the inseparability of the fundamental prerogatives of European citizens.

To quote a concrete case, on the basis of the Nice Charter, the two Social Charters, and international legal provisions, the Italian Court of Cassation has repeatedly found that regulatory systems providing no protection against unfair dismissal are in contrast with the concept of internal public order and so cannot find their way into the Italian legal system. Furthermore, the Italian Constitutional Court saw the criterion of necessary justification of dismissal as the constitutionally binding content of the right to work. There are no similar considerations in the Green Paper, which does not evaluate the coherence between the various hypotheses that are (or could be) put forward and the respect of rights (and principles) enshrined in the Nice Charter (and previously in the two European social charters and in the jurisprudence of the judges in Luxemburg).

Any discourse regarding the modernisation of labour law today implies a discussion of fundamental rights and their sphere of reference.

The documents of the Commission propose a model of labour market regulation intended to protect individual needs against the risk of unemployment and lack of income, but in this area they seem to under-evaluate the so-called "*new rights*" (second-generation social rights) that protect and support citizens over and above the existence of a contractual relationship, thus preventing inactivity from being converted into permanent forms of social exclusion.

6. As juridical operators and observers and regulators of the individual and collective conflicts brought before the labour Courts, European judges, when examining the Green Paper, confront with a number of risks, interrogatives, challenges.

The main risk concerns the equation flexibility – lack of guarantees, or flexibility – easy dismissal, or "flexploitation".

If the point of departure is that the rights of the employees are an handicap in the global competition for European enterprises, mechanisms of protection are moved from the contract to the market, with much less effectiveness, and the rights towards the employer become rights towards the State, with unpredictable social costs.

The dark side of flexibility is the entrapment in temporary and non-standard work.

A concept of labour law limited to the right of employment doesn't consider the complexity of a system of canalization and juridification of social conflicts with an objective of social peace.

As labour law judges we are familiar with a concept of substantial inequality which is promoted to substantial equality through the labour law norms and procedures, a concept that should not be neglected.

The interrogatives concern the concrete functioning of the flexicurity approach.

While it seems to have demonstrated to be effective in some Northern countries, with a strong economy, an high level of taxation, and relatively few population, there is no experience about its extension to other (old and new) members of the European Union with rather different social contests.

The best practices and the pathways mentioned in the Green Paper and in the Communication on flexicurity, in this sense, appear generic and not completely relevant.

The main instrument for regulating flexibility and security in labour relations should remain the collective bargaining.

On the other side, it should be avoided the increasing of new contractual forms of para-subordination, with reduced guarantees for the workers, while the perspective of a set of minimum guaranteed rights should be further explored.

Possibly, a Charter of the Rights of the European workers and the establishment of an European Agency for Labour Inspection might be the outcome of the modernization process.

The challenge is to be involved in a modernization that coincides with a better specification and effectiveness of European social rights.

Such modernization has to start from fundamental rights, as enumerated in the European Social Charter and in the Nice Charter of Fundamental Rights.

It has to promote social cohesion and active social policies building on a basis of minimum guaranteed rights, to be progressively extended in consideration of different forms of work, through a multi-level protection as offered by national and international norms and jurisprudence.

In this sense, the modernization of European labour law can actively contribute to the construction not only of the European common market, but mainly of the Europe of rights and citizenship.

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