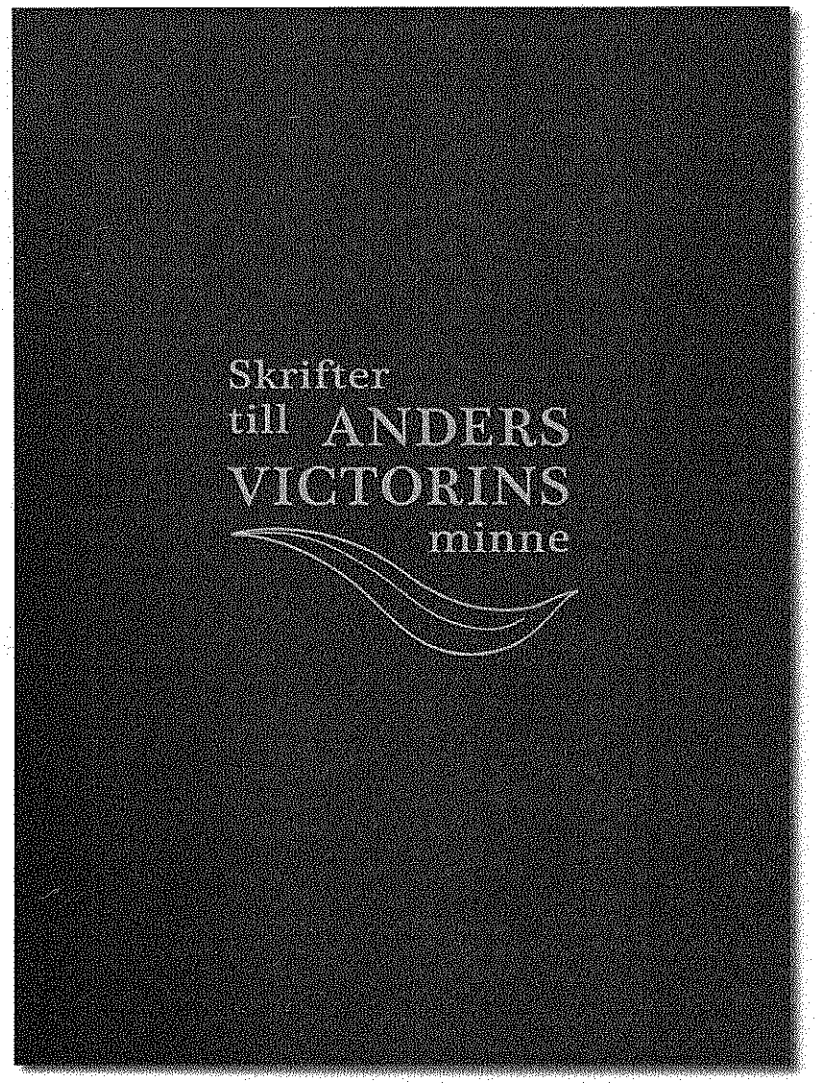

IUSTUS FÖRLAG 2009

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Is Flexicurity a European Policy?*

1 How new is the new Open Method of Coordination

In the aftermath of the Irish referendum observers of European integration have reacted in many different ways. Those who want to pursue the ratification of the Treaty[1] are active in seeking new political compromises and in magnifying the existing ones. I submit that, due to institutional uncertainty in the current situation, stronger emphasis has been put on policies, rather than on institutions. This may cause significant changes in employment policies, as it will be argued in this chapter. Changes are in fact already taking shape, regardless of the novelty introduced in the new art. 136 bis, in which formal acknowledgment is given of the tripartite Council on growth and employment.[2]

The image I want to suggest in approaching the notion of flexicurity is that of a stream running underneath the earth, only occasionally emerging on surface to become well visible for all. The question addressed in the title has to do with the – at times ambivalent – nature of flexicurity: is it

* I am grateful to Dr. Francesca Bassetti, former student at the University of Florence, for her competent help in revising all references. Usual disclaimers apply.

[1] The Treaty of Lisbon intervenes with significant changes in modifying the TEU and the TEC. It was signed in Lisbon on 13 December 2007. The Irish referendum was held in June 2008

[2] Should the Treaty be ratified, the question would then be how to relate the tripartite Council with the other specialised sector Council's meetings, which should be chaired by the relevant ministers in each field.

a European policy on its own standing or is it just a component of current European social policies.

When addressing this question, attention must be paid to the 'soft' legal context enshrined in Title VIII TEC.[3] Whereas harmonization embodies the regulatory technique apt to pursuing the integration of the market, coordination represents an alternative option. It aims at introducing elements of stronger rationality in national employment policies and at making them more coherent with economic targets. Compatibility with European macro economic guidelines thus becomes – particularly in the early implementation of Title VIII – the only binding criterion within an adaptable notion of supranational coordination.

Tracing back the history of European social policies, several examples stand up to confirm that, because of the weak legal basis in the Treaties, political compromises have constantly been intertwined with major legislative innovations. It may suffice to recall the historical confrontation between Jacques Delors and Margaret Thatcher during the European Council held at Maastricht in 1992. The opting out of the UK from the Social Chapter, as disruptive as it may have appeared at the time, did not stop further legislative initiatives in the social field.

Over the years, the visible role played by the European social partners at Maastricht, gave rise to new unexpected solutions in the combination of regulatory techniques, as it emerges from the adoption, later on, of framework directives.[4] With regard to employment policies, such directives set in motion a manifold dialogue among European institutions, due also to the active role played by national courts in initiating procedures for preliminary rulings.[5]

[3] D. Ashiagbor, *The European employment strategy: labour market regulation ad new governance*, Oxford University Press, Oxford, 2005; C. Barnard, *EC Employment Law, Oxford University Press*, Oxford, 2006, p. 105 ff.

[4] This new phase of European social policies is characterised by the active role played by social partners in signing framework agreements, then incorporated in Directives. See, for example, Directive n. 96/34/EC, 3 June 1996, incorporating the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, in *OJ*, 19 June 1996, L 145; Directive n. 97/81/EC, 15 December 1997, incorporating the framework agreement on part time work signed by UNICE, CEEP, ETUC, in *OJ*, 20 January 1998, n. L 14; Directive n. 99/70/EC 28 June 1999, incorporating the frame work agreement signed by UNICE, CEEP, ETUC on fixed term work, in *OJ*, 10 July 1999, n. L 75.

[5] A revealing case is C- 144/04, 22 November 2005, Mangold, Rec. 2005, I, 9981; for further information see Maximilian Fuchs, *The Transposition of EU Antidiscrimination Legislation into German Labour Law*, in *WP C.S.D.L.E. "Massimo D'Antona"*, INT - 53/2007, http:// www.lex.unict.it/eurolabor/ricerca/wp/int/fuchs_n53-2007int.pdf.

Bearing all this in mind, it is difficult to share the pessimistic view recently expressed in scholarly work on the 'social deficit' which characterised European integration. Economic rationality rather than law prevailed – according to the authors – when the Monetary Union and the Stability Pact saw the light, after Maastricht.[6] One can argue, on the contrary, that the agenda adopted by Jacques Delors did not under evaluate social policies in pursuing a new institutional equilibrium. In the end ventures launched at Maastricht strengthened the representation of collective interests at a supranational level.

In order to capture the novelty of the current debate on employment policies, different from the one of the origins, the turning point must be found in the decline of the Open Method of Coordination (OMC), at first included in the so called Lisbon strategy. We need to re-construct that debate, before attempting an interpretation of its most recent developments.

The intensive experimentation set off in Lisbon in 2000 lasted for about five years. The well renowned broad enthusiasm of the beginning was generated by those who most insisted for the coordination of existing European methods, rather than attempting to introduce a new one. The Portuguese Presidency of the time spoke proudly of an acquired supremacy of politics over economic choices[7] and paved the way to the expansion of OMC, applicable to social inclusion, as well as to social protection and pensions.

OMC was part of the cultural environment generated by the setting up of a European governance.[8] The central idea was to promote consultation and dialogue and, at the same time, introduce a 'framework of co-regulation', whereby binding legislative actions would be combined with initiatives started by the most relevant actors concerned.

However, in its practical implications, the emphasis put on the combination of soft and hard law brought in a gradual deconstruction of normative techniques. The result was a slow but sure marginalization of social partners in dealing with national and supranational employment policies and

[6] C. Joerges, *What is left of the European Economic Constitution? A Melancholic Eulogy*, in European Law Review, 2005, 4, p. 461 ff.; C. Joerges - F. Rödl, *On the 'Social Deficit' of the European Integration Project and its Perpetuation through the ECJ Judgments in Viking and Laval*, in *RECON online WP* 2008/6, p.4 http:// www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html.

[7] I have analysed the Lisbon summit and its historical background – with a particular emphasis on the 1994 Essen Council – in S. Sciarra, *Integration through coordination: the employment title in the Amsterdam Treaty*, in *The Columbia Journal of European Law*, 2000, p. 209 ff.

[8] European Governance. A White Paper COM (2001) 428 final., 25 July 2001, in *OJ*, 12 October 2001, n. C 287.

a parallel weakening of politics (as opposed to policies), exemplified for some years by the lack of significant legislative initiatives. The most relevant exceptions to such faults of the supranational legislature were, as previously mentioned, the framework directives on part time and fixed term work. In these two sources the combination of binding principles and soft guidelines issued to the Member States has been widely recognised as an innovation in European employment policies.

Despite the disappointing results in meeting the ambitious targets set at Lisbon, it has been correctly underlined that the so called employment strategy started a constructive convergence of means and goals. It built 'bridges' between employment legislation and the European Social Fund, thus giving rise to 'a self-consciously integrated regime'.[9]

In 2005, the European Commission chaired by Barroso pointed to the urgency to review OMC, in order to create a more transparent institutional framework and include national parliaments in the launching of employment policies, as well as in translating them into legislative proposals. The yearly submission of National Employment Plans (NAP), in compliance with Council's guidelines, could otherwise be perceived by political actors as an empty rhetorical exercise. It needed to be revitalised, in order to fulfil more ambitious objectives.

Council's guidelines have been simplified and are now issued every three years; a stricter coordination with economic policies guidelines must be practiced.[10] Yearly reports on the state of the art. in implementing policies are still expected by governments, despite the new commitment to submit National Reform Plans (NRP) every three years.[11] The inclusion of national parliaments still stands as an issue to be addressed and, for this reason, has attracted the attention of commentators.[12]

Notwithstanding the slight – and yet symbolically relevant – adjustment in the terminology adopted (a 'reform' should imply a more structured governmental strategy than an 'action') the legal nature of these documents still remains very vague and difficult to identify.

[9] C. Kilpatrick, *New EU Employment Governance and Constitutionalism*, in G. de Búrca - J. Scott (eds.), *Law and New Governance in the EU and the US*, Hart Publishing, Oxford, 2006, p. 131.

[10] Council Decision n. 2005/600/EC, 12 July 2005, *OJ*, 6 August 2005, n. L 205.

[11] Council Decision n. 2007/491/EC, 10 July 2007, *OJ*, 13 July 2007, n. L 183; Council Decision n. 2008/618/EC, 15 July 2008, *OJ*, 26 July 2008, n. L 177.

[12] F. Duina - T. Raunio, *The open method of co-ordination and national parliaments: further marginalization or new opportunities?*, in *Journal of European public policy*, 2007, p. 489 ff.; R. Tapio, *Does OMC really benefit national parliaments?*, *European law Journal*, 2006, p. 130 ff., arguing for 'policy transfer', namely for improvements of law-making, due to learning from other states.

As in previous phases of its enforcement, OMC favours coordination without imposing specific duties on legislatures. The latter could not possibly be constrained within strict deadlines, neither be limited in their sovereignty. They can only be induced in adopting more virtuous behaviour, favouring reforms which are recommended by European institutions as the most suitable ones, within the given economic scenario.

One novelty, however, needs to be highlighted. In this new phase of employment policies a clearer accent is put on linking up the Council's employment guidelines with programming Member States' use of Community funding and of the European Social Fund in particular. If this connection should become a leading criterion, then we would witness a new form of selective coordination, based on the availability of a European budget for employment policies.

In a very critical investigation of OMC and of its impact on national legal orders it has been suggested that, in the medium to long term, national policy processes are only indirectly affected by Council's guidelines. National reports submitted to the Council are not relevant in domestic policy-making, neither are Council's recommendations sent subsequently to national governments.[13]

Hence, the decreasing importance of supranational guidelines must be seen as the sign of an inevitable decline of coordination as a European method. Furthermore, the lack of continuity in national administrations, as far as changes brought about by OMC are concerned, is yet another sign of the limited impact that merely persuasive measures can have on national political actors.

At the supranational level institutions – such as the European Parliament and the European Court of Justice – are excluded by the allegedly open process of coordination, whereas the European Council finds itself in the anomalous position of dealing with commissions of national experts, rather than with Member States' political representatives.[14]

Whereas critical comments are addressed towards the legal framework in which OMC operates, a recent economic analysis of employment trends in the EU 15 has acknowledged the decrease of unemployed (around 4 millions less than in 1996) and a 6 % increase of the average employment rate

[13] V. Hatzopoulos, *Why the Open Method of Coordination is bad for you: a letter to the EU*, in *European Law Journal*, 2007, pp. 314–316.

[14] *Ibidem*, pp. 20–321.

in the last ten years.[15] The economic analysis in question puts forward a few contradictions. Despite the good outcomes achieved by governments in creating new jobs, negative feelings and fears dominate the public opinion. For example, in Spain, under the Aznar administration, over 5 million new jobs were created; in Italy the Berlusconi government in 2001–2006 gave rise to 1.3 million jobs. Both leaders, however, lost the elections, as did the 2006–2008 Prodi administration in Italy, able to foster over 400.000 new jobs in less than two years.[16]

This complex background would require a detailed analysis of the deep transformations occurred in European labour markets, that cannot be properly developed in this paper.[17] It may suffice to say, as an introduction to the next section, that dual labour markets characterise most national economies. Legislative reforms aimed at enhancing flexibility in employment relationships, even when successful in creating jobs, do not completely cure the anxiety generated by a pervasive need for security. Such a need encompasses very different expectations, spread over workers' life cycle.[18]

Employment policies are, for all such reasons, undergoing deep changes. It will be argued further on in this paper that the inextricable links keeping together economic and social developments need now to be interpreted in broader terms.

On the one hand we observe a new, although very tentative, indication of delivering financial support, under the ESF, to governments adopting flexicurity measures. This choice, new in itself, would be even more innovative if accompanied by changes in monitoring techniques and in establishing ways of praising the most virtuous national behaviours.

On the other hand, the legislative agenda on flexicurity must take into account the extensive initiatives on restructuring occurring within the EU,

[15] T. Boeri, Paradossi del calo della disoccupazione, http:/www.lavoce.info/articoli/pagina 1000612.html.

[16] T. Boeri, *ibidem*.

[17] References, for example, in J.H. Haahr - T. Andersen, Restructuring and flexicurity: the macro level, Danish Technological Institute, Thematic Paper, 2006, http:// pdf.mutual-learning-employment.net/pdf/thematic%20reviews%2006/TRS_D_06/HaahrEN.pdf. J.H. Haahr – M. E. Hansen - T. Andersen, *Restructuring in Europe: The Anticipation of Negative Labour Market Effects*, Danish Technological Institute, 2006, http:// ec.europa.eu/employment_social/employment_analysis/restruct/sem06_dti_final_rep_en.pdf.

[18] See the results of the research promoted by the Foundation for the improvement of living and working conditions, *Flexibility and security over the life course: key findings and policy messages*, at http:// www.eurofound.europa.eu/pubdocs/2008/61/en/1/EF0861EN.pdf.

as in the rest of the world. This challenge adds a new dimension to employment policies and requires further clarifications, as far as measures of financial aids are concerned.

2 Modernising Labour Law through flexicurity

Flexicurity is a notion borrowed from the 1999 Dutch law on temporary agency work. This successful formula generated interest in comparative labour law research[19] and is relevant in current European debates, as we shall see later on.

The philosophy inspiring this new set of measures – well represented in a word merging together flexibility and security – endeavours a combination of different styles of labour law reforms. In the European jargon, a potentially ambivalent message, relying on two different and possibly opposite aims, is in fact translated into a multi level reform agenda. Rather than entering one specific field or endorsing a single regulatory technique, flexicurity resembles an open space, in which policies can be mixed together, drawing from social security to labour law, to fiscal measures. In underlying the role of collective agreements, most commentators acknowledge that this option, well rooted in national traditions across Europe, continues to be a valid one, even in the adoption of flexicurity measures.[20]

In 2006 the Commission published the Green Paper 'Modernising labour law to meet the challenges of the 21st Century'.[21] This document opened up a debate among governments of the Member States and all stakeholders, through an open consultation launched by the Commission on internet. Attention was paid to controversial issues on the agenda of national legislatures and of the social partners. The consultation addressed to a 'virtual' community proved to be a way of raising awareness, even among non institutional actors.[22]

Furthermore, the Green Paper confirmed in several passages the need to enhance synergies with the European Council's 'Integrated guidelines 2005–

[19] S. Sciarra, *The evolution of labour law* (1992–2003), Vol. I, General Report, OOPEC, Luxembourg, 2005, p. 25.

[20] Haahr – Andersen, cit., with an emphasis on corporate level collective agreements.

[21] COM (2006) 708 final, 22 November 2006.

[22] The results of this very wide consultation are reported in the Commission's Communication on the outcome of the public consultation, COM (2007) 627 final, 24 October 2007.

2008',[23] thus showing consideration for this 'new' regime in employment policies.

The public opinion's critical attention raised by the Green Paper was soon distracted by a newly established – possibly even stronger – support expressed by the Commission towards the flexicurity agenda. A high level group of experts was efficiently set up and asked to produce a comparative analysis on the most relevant features of flexicurity.[24] The experts' comparative report was shortly followed by a Commission's Communication.[25] Subsequently the Ecofin Council adopted the principles of flexicurity[26] and soon after addressed its recommendations to Member States arguing for the inclusion of such principles in NRPs for 2008.[27]

This series of events is characterised by a quick and integrated approach, less ambitious than the Green Paper and yet more pragmatically tailored around the immediate needs of European institutions, ready to set in motion a new phase of employment policies.

Comparative legal research[28], as well as previous analysis carried on by the Commission in the aftermath of the strategy inaugurated at Lisbon in

[23] Council Decision on Guidelines for the employment policies of the Member States (2005 – 2008), Annex, 2005/600/EC, 12 July 2005, in *OJ*, L 205, http:///eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_205/l_20520050806en00210027.pdf.

Council Recommendation on the broad guidelines for the economic policies of the Member States and the Community (2005–2008), 2005/601/EC, 12 July 2005, in *OJ*, L 205, http://ec.europa.eu/employment_social/employment_analysis/earnings/bepg_2005_601_ec_en.pdf.

[24] The group, chaired by a Dutch sociologist, Prof. T. Wilthagen, produced a very timely report. See *Flexicurity Pathways. Turning hurdles into stepping stones*, Report by the European Expert Group on Flexicurity, Bruxelles, June 2007. References to the overall debate in B. Caruso - C. Massimiani, *Prove di democrazia europea: la flessicurezza nel lessico ufficiale e nella pubblica opinione europea*, WP C.S.D.L.E. "Massimo D'Antona".INT - 59/2008, http://www.lex.unict.it/eurolabor/ricerca/wp/int/caruso_massimiani_n59-2008int.pdf.

[25] *Towards Common Principles of Flexicurity: More and better jobs through flexibility and security*, 27 June 2007, COM (2007) 359 final.

[26] European Council, Council Conclusions, 6 December 2007, Annex, http:// etuce.homestead.com/Documents/2008/Flexicurity_annex.pdf.

[27] European Council 13–14 March 2008 Bruxelles, Presidency Conclusions, 20 may 2008, point 16, http:// www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/99410.pdf.

[28] A. Supiot, *Beyond Employment, Changes in Work and the Future of Labour Law in Europe*, Oxford, OUP, 2001; S. Sciarra, *The evolution of labour law (1992–2003)*, Vol 1, General Report, Luxembourg, OOPEC, 2005; National reports of 15 countries, vol. 2, Luxembourg, OOPEC, 2005; *The evolving structure of collective bargaining*, Research project co-financed by the European Commission and the University of Florence, http:// www.cprints.unifi.it/archive/00001151; S. Sciarra, *The evolution of collective bargaining. Observations on a comparison in the countries of the EU*, CLLPJ, 2007.

2000[29], had already revealed a variety of solutions adopted by national legislatures in the field of employment policies. In all such investigations enduring national diversities were valued as most original components of a multi-level legal order. For this reason they needed to be praised and supported as distinct parts of a supranational reform strategy.

The Wilthagen Report[30] acknowledged this tradition and approached flexicurity with a close attention to the function of labour law in national legal systems. Over the years 'pathways' of reforms brought about considerable changes both in individual and collective labour law. 'Principles' emerging from pathways of reforms had to resemble national traditions and constitutional values, in order to strengthen the internal coherence of national legal systems. It can therefore be argued that the main challenge within this renewed employment strategy is to combine policies and rights. This may help in specifying some of the concepts developed in the Wilthagen Report.

The Commission's Communication presents flexicurity as a combination of measures addressed into two different directions. On one side, they pursue a better definition of contractual obligations within individual contracts of employment; on the other side they propose to adopt wider labour market reforms. For example, drawing on the Dutch notion of phased or clustered legislation – tailored on agency workers in the previously mentioned 1999 Flexibility and Security Act – the suggestion is made that 'progressive build up of job protection' should be guaranteed to all temporary workers, be they fixed term or agency workers.[31] The 'tenure track approach', highlighted in the Wilthagen Report, becomes the most inspiring proposal, as well as the most approachable one in terms of policies and rights.

Another example has to do with life-long learning. The latter must become part of contractual obligations within individual contracts of employment and, at the same time, be integrated in a wider policy perspective, whereby financing lifelong learning is the responsibility of the state or of local authorities. It is crucial to clarify when such a policy gives origin to specific rights and duties for the contracting parties. Once more, collective agreements can efficiently provide the framework for specific regulations.

Unlike in other employment policies, all such measures are necessarily grounded on interventions of national welfare systems or on other sources

[29] Communication from the Commission, *Taking Stock of Five Years of the European Employment Strategy*, COM (2002) 416 final, 17 July 2002.

[30] See fn. n. 24.

[31] *Towards Common Principles of Flexicurity* ... at fn. n. 25, Annex 1, Pathway 1.

of financial support. NRP should therefore stand as new and better shaped phases of a more coherent procedure, whenever it is indispensable to set aside economic resources for the implementation of flexicurity oriented reforms.

The point to underline in the flexicurity debate is continuity. Despite increased international competition and unprecedented technological innovations, labour law traditions are echoed, both in the Report and in the Commission's Communication, when mention is made of the close legal link that keeps together individual contracts of employment and collective agreements.

I argue that this side of flexicurity has to do with a clever combination of legal and voluntary sources and can usefully foster research on regimes of 'regulated flexibility'. The principal idea – well represented in comparative studies on the evolution of labour law – is that both individual contracts of employment and collective agreements can be sources of legal certainty, while providing flexible outcomes. Legal certainty brings about stability within national legal orders and improves the level of compliance with respect to European law. The most influential archetype in labour law, namely the combined impact of individual and collective sources in regulating employment relationships can thus be re-visited, in view of assigning more specific meanings to 'pathways' and 'principles'. I suggest we can describe this analysis as a search of 'legal indicators'.[32]

In flexicurity discourses legal indicators should aim at constructing a balance of powers within individual contracts of employment. One example we can select, looking at the proposals presented in the Commission's Communication has to do with employment protection legislation. Flexible measures should not depart from the protection of fundamental rights of the individual, such as the right to dignity, the principle of non discrimination, the right to information and to receive notice. Legal sanctions should be effective, if such infringements occur. Sanctions against unjust dismissals could – drawing on the previously mentioned model of phased legislation – increase their intensity after a certain number of years in employment.[33]

[32] A Working group on indicators assists the Employment Committee. In 2003 indicators have been reviewed. The criteria adopted in 2006 put an emphasis on 'analysis indicators' as well as on 'monitoring indicators'.

[33] This issue is currently debated in Italy. See P. Ichino, *Scenari di riforma del mercato del lavoro italiano*, Fondazione Italianieuropei, 2008, http:// www.pietroichino.it/wp-content/uploads/2008/09/rifmdl_viii0835.pdf; T. Boeri - P. Garibaldi, *Un nuovo contratto per tutti*, Chiarelettere, Milan, 2008.

In adopting this methodology, aimed at enhancing what I have described as 'regulated flexibility', one can draw on the 2006 ILO Report *The Employment Relationship*. ILO research establishes that 'a number of European countries have moved away from a situation where flexibility creates insecurity to one in which security promotes flexibility'.[34] The traditional notion of protection is well developed in ILO sources and researches. It brought about concepts which have become familiar to labour lawyers after the adoption of the Decent Work Agenda: 'equity' 'adaptability' 'a durable employment relationship' 'ensuring compliance of the law' making sure that access to courts is in practice made possible.[35]

Furthermore, comparative research in countries of the latest enlargement puts an emphasis on the different meanings that flexicurity acquires in national labour markets characterised by instability and very low wages.[36]

Taking all this into account, the Economic and Social Committee and the Employment and Social Protection Committee recently argued for a better involvement of the social partners in the enforcement of flexicurity. Quoting OECD sources, the point is made that flexicurity has developed between 1995 and 2005 mainly through the creation of part-time and fixed term work. These two flexible forms of employment are regulated by Directives based on framework agreements. Agency workers are seen as the most fragile among non standard workers, exposed to jobs with low professional contents, therefore standing less chances to be permanently employed.[37]

[34] Report V (1) *The Employment Relationship*, International Labour Conference 95th Session, Geneva 2006, pp. 15–17. See also R 198 *Employment Relationship Recommendation*, adopted on 15 June 2006; D. Ghai (ed.), *Decent Work: Objectives and Strategies*, ILO-IILS, Geneva, 2006.

[35] References to the comparative analysis on which ILO research is based in P. Auer, *Protected mobility for Employment and decent Work: Labour Market security in a globalised world*, in *JIR*, 2006, n. 48.

[36] S. Cazes - A. Nesporova, *Flexicurity. A relevant approach in Central and Eastern Europe*, ILO, Geneva, 2007.

[37] Joint opinion by the Employment and the Social Protection Committees on the common principles of flexicurity, 16 November 2007, 15320/07, SOC 461, ECOFIN 471 section 3.2.7, http:///register.consilium.europa.eu/pdf/en/07/st15/st15320.en07.pdf, for references to OECD, *Assessing the impact of labour market policies on productivity: a difference-in-difference approach*, Social Employment and Migration Working Papers n. 54/2007, http:// www.oecd.org/dataoecd/28/0/38797384.pdf.

After years of harsh confrontation and of vetoes put by some governments on legislative initiatives in this field, a Directive on temporary agency work has now been approved, as part of the flexicurity agenda.[38]

A trend in regulating flexicurity is confirmed. The 'hybrid' solution of Directives combining hard and soft law is one of the possible answers in a very diversified agenda in which national legislatures have several roles to play.

In order to start new – and more efficient – monitoring mechanisms and to enhance mutual learning among Member States, we need to address common principles of flexicurity as prescriptive, rather than merely descriptive, once they are clearly supported by financial measures and enshrined in transparent contractual relationships. The eligibility of flexicurity policies for financial support of the European Social Fund, mentioned in the Commission's Communication[39] is therefore a way ahead to follow.

3 Restructuring, the European Globalisation Adjustment Fund, Transnational Company Agreements

In between traditional social policies and employment policies, a new European source must be underscored. In the last few years the Commission, assisted by a European Taskforce on Restructuring, focused on extended business reorganization taking place in Member States, as a result of global competition putting increasing pressures on national labour markets.[40]

[38] On 22 October 2008 the European Parliament approved the Council's common position on temporary agency work. See: http:// eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:254E:0036:0045:EN:PDF, in *OJ*, C 254 E/36.

[39] *Towards Common Principles of Flexicurity* ..., at fn. 25, point 7. A clear reference to flexicurity has also been included in the Integrated Guidelines (2008–2010). See the Council Proposal for a Council decision on the Guidelines for the Employment Policies of the Member States, 3 March 2008, http:// ec.europa.eu/employment_social/employment_strategy/pdf/epscoguidelines_080303_en.pdf, point 2, *"Improve adaptability of workers and enterprises"*, where an integrated flexicurity approach is described in order to successfully meet the challenges of the Lisbon Strategy. Member States are also required to implement their own flexicurity pathways (as they are stressed in the Annex to COM (2007) 359 final, *Towards Common Principles of Flexicurity* ..., at fn. n. 25) when dealing with the Employment Guidelines. The Commission and the Council seem to agree on the importance of flexicurity in reforming national labour markets. It could be argued that flexicurity, while maintaining a broader conceptual independence, is now regarded as a tool to implement the Lisbon Strategy and thus admitted among the eligibility criteria to the European Social Fund.

[40] ec.europa.eu/employment_social/employment_strategy/flex_meaning_en.htm. See also: *Restructuring and employment* COM (2005) 120 final; *European restructuring monitor quarterly*, published under the auspices of the European Foundation for the Improvement of Living and Working Conditions, Dublin, http://www.eurofound.europa.eu/emcc/erm/index.php?template=quarterly.

Monitoring these phenomena in different sectors of economic activities is illuminating for the understanding of their impact in different geographic areas. The size of the companies involved is also a relevant feature to consider, when trying to suggest ways ahead.[41]

In January 2007 the European Globalisation Adjustment Fund started to operate, after the coming into force of a Regulation[42] promoted by the President of the Commission, within a broader plan on restructuring. The Fund intervenes when major job losses – over 1 000 in a single enterprise or in a region – are expected, as a consequence of global restructuring. The latter can be the result of structural changes occurring in world trade, the consequence of which is the expansion of imports. A decline in local productions can also occur.

Financial help is granted after a close scrutiny of the applications put in by Member States.[43] It is addressed to individual workers affected by dismissals and should supply opportunities for re-training and looking for new jobs. The Fund is not meant to substitute other national measures provided for by law or collective agreements, neither to clash with measures under the structural funds. It is yet another source in the multifaceted scenario of European social and employment policies.

It is worth underlying that, notwithstanding the fact that exceptional and disruptive events should have occurred in local labour markets and be properly documented, providing a European budget in all such cases is a new and unprecedented solution. After the approval of several applications and the granting of economic resources,[44] an original notion of solidarity is slowly emerging in European policies.

[41] European Council 13–14 March 2008, Presidency Conclusions, at fn. 27, points 9–12.

[42] Regulation (EC) n. 1927/2006 of the European Parliament and of the Council, 20 December 2006, in *OJ*, 30 December 2006, n. L 406, p. 1. The Fund is financed up to 2013. The legal basis provided for this new measure is art. 159.3 TEC, dealing with actions on economic and social cohesion.

[43] K. Novaczek, *The European Globalisation Adjustment Fund: A Social Pilot Project between Political and Economic Realms*, in *European Governance*, 2007, 1,http:// www.urge.it/files/cg1.pdf The Commission announces a report on the functioning of the Fund in its Communication on the Social Agenda, COM (2008) 412 final, 2 July 2008, sec 4.2.

[44] In Italy the textile industry was severely hit by globalisation. See measures approved and addressed to almost 6000 workers in the regions of Sardinia, Piedmont, Lombardy and Tuscany. These four applications were considered together, as they all refer to the same industry: COM (2008) 609 final – Proposal for a decision of the European Parliament and of the Council on the mobilisation of the European Globalisation Adjustment Fund http:// www.lex.unict.it/eurolabor/en/documentation/com/2008/com(2008)-609en.pdf.

This novelty has to do with a shared condition of disadvantage in which workers find themselves because of the inequity brought about by global – namely non EU – trade. The paradox is that equally dramatic effects caused by dislocations of businesses within European countries do not qualify for financial support.[45]

Another dimension related to restructuring must be put forward. In a recent document[46] the Commission analyses the role of transnational company agreements whenever 'promoting anticipation and adaptation to structural change in times of globalisation' is at stake. Workers' involvement in all such cases is an element of fairness. It is also an element of efficiency, since individual and collective expectations need to be remodelled and dealt with in transnational sources.

Since 2000 this new dimension of social dialogue has been expanding, irrespective of a legal provision in the Treaty. European Works Councils have gained visibility in enhancing negotiations, beyond their institutional competence in information and consultation, provided for in Directive 94/45 EC.

One needs only to look at the large variety of so called transnational texts to understand the practical implications of this new mode of building consensus. They do not resemble traditional collective bargaining; neither they are meant to pre-empt national systems of collective negotiations. They should respond to new social demands originated by the transnational nature of the collective interests at stake. Restructuring is one of them; so are training and mobility, health and safety at work, protection of personal data.

Even outside the EU, recourse to 'cross-border' collective sources is spreading and so is the notion of supranational and international solidarity,

Around 600 Lithuanian workers in the textile industry will also receive support from the Fund, after the announcement of over 1000 redundancies in the Southern part of the Country. See COM(2008) 547 Final – Proposal for a decision of the European Parliament and of the Council on the mobilisation of the European Globalisation Adjustment, http:// eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0547:FIN:EN:PDF.

[45] For one example see *Nokia closes its Bochum plant*, in *European restructuring monitor quarterly*, 2008, n. 1 p. 11 http:// www.eurofound.europa.eu/pubdocs/2008/37/en/1/ef0837en.pdf. Nokia received subsidies from the German Government for the opening of the plant, in view of creating stable jobs. A settlement was reached in July 2008, following the positive results of negotiations between management and the works' council. The German state of North Rhine-Westphalia and the City of Bochum have agreed not to ask for the repayment of subsidies.

[46] Commission Staff Working Document, *The role of transnational company agreements in the context of increasing international integration*, SEC (2008) 2155, 2 July 2008.

generated by the global implications of business and trade.[47] The indication emerging from the analysis of these new sources is that transnational collective interests are not sufficiently taken into account by corporate codes of conduct and need to be better specified within more formalised schemes of agreement.

In the light of all such changes, there is a clear need to reconsider procedures aimed at building consensus and suggest new representative bodies, capable to capture the complex and constantly varying nature of collective interests. Anticipation is therefore the correct rationale inspiring these new forms of bargaining, taking into account quick and often unpredictable organizational changes.

New rules assisting workers' representation should take into account ways of establishing dialogue over the nature and function of collective agreements dealing with restructuring measures, as well as to their enforceability under national law.

The alternative – should labour law not undergo deep transformations – would be to observe from the outside the circulation of business and the free movement of services across frontiers and let regulatory competition emerge as the only solution offered by the market.[48] In an overall vision of employment policies and flexicurity measures, labour lawyers should include policies on restructuring and argue even at this regard for the combination of policies and rights, to avoid dispersion of all such initiatives in different directions. Labour law suggests how to identify rights and duties of individual contracting parties and to do so with references to collective agreements.

4 Conclusions

One of the arguments developed in this paper is that legal indicators mark the evolution of labour law across most countries of the European Union and contribute to legal certainty as well as to flexible adaptations of existing standards.

I suggest that flexicurity enhances a critique of labour law leading to the practice of labour laws. The plural here exemplifies how labour law adapts

[47] K. Papadakis (a cura di) *Cross-Border Social Dialogue and Agreements: an Emerging Global Industrial Relations Framework*, I.L.O, Geneva, 2008.

[48] See B. Galcóczi - M. Keune - A. Watt, *Relocation: challenges for the European trade unions*, DP 2005.01, ETUI-REHS, 2005.

its principles to different organizational needs and to new demands put forward by flexible workers.

The emphasis – as I have argued – must be placed on the contract of employment and on its combination with collective agreements. To discover again this traditional labour law nexus means to move from the mere declaration of objectives and targets – as in employment guidelines – towards a clearer combination of policies and rights.

Following the assumption that legal sanctions enhance legal certainty within national legal orders, it is suggested that European institutions should go beyond the practice of monitoring national performances in employment policies and adopt positive sanctions, namely economic incentives. 'Selective coordination ' – I have suggested – should be the aim when economic incentives are granted to employment measures truly addressed at balancing policies and rights, within the flexicurity agenda.

The overall structure of OMC should, in this perspective, continue to favour mutual learning, while, at the same time improving compliance of European law at national level. The European method to bring forward at this regard is advanced co-operation among state administrations, aiming at some form of continuity in national procedures and in building up bureaucratic expertise.

To answer the question put in the title of this paper – is flexicurity a European policy – we should say that flexicurity attracts within its agenda more than one policy. Rather than acquiring an autonomy of its own, it develops interconnected policies within the renewed Lisbon strategy. Because of its multilevel approach to employment policies, the Lisbon strategy in its current version goes beyond coordination. It is remarkable that the Directive on agency work has been approved; it is equally noteworthy to observe how restructuring measures are developing.

If we go back to the metaphor introduced at the beginning of this paper, the underground river appears every now and then on the surface and finds its own way out whenever new concepts of collective interests are envisaged and new dimensions of solidarity are interpreted. Flexicurity thus becomes a methodology, a tool to observe and address new demands emerging from shared conditions of social disadvantage.