The Regulation of Temporary work in the light of Flexicurity: between soft law and hard law*

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1. The new frontiers of flexicurity after Lisbon

Initially the subject of theoretical debate and then summed up in an original linguistic formula, the concept of "flexicurity" represents the fascinating oxymoron which has inspired much of the European Employment Strategy (EES) since the Council of Luxembourg. Embracing the pillars of employability, adaptability and entrepreneurship, the attempt has been to achieve a notion of "soft" flexibility[692] that guarantees workers' rights of access to opportunities in education and training and at the same time paves the way towards modernising the organisation of labour, not least by redefining flexible forms of contract within the framework of acceptable security standards. In this context, the EES assigns a key role to the "most adaptable" types of contract, which imply an internal differentiation in the traditional model of subordinate employment, with the dual aim of enhancing the productivity and competitiveness of enterprises and ensuring adequate levels of job security for the workers involved.

It is only recently, however, that forms of employment that combine flexibility and security have become synonyms of "quality work". Since the European Council in Lisbon, in March 2000 and Stockholm in March 2001 a new, ambitious strategic objective has emerged: that of modernising the European social model[693] by investing in people and building an active social state; according to the conclusions drawn by the President of the Lisbon Council, this objective can be achieved by developing a knowledge-based economy, in which the providing of employment for all does not mean concentrating exclusively on the creation of new jobs but also on better jobs, and it is in this perspective that the European Union proposes to define common approaches to maintain and improve the quality of work as one of the general aims of employment policies. The search for quality in work[694] finds a concrete form in a series of "horizontal objectives" to be pursued in all intervention by EU institutions regarding both the characteristics of employment, and thus the inherent quality of jobs, and the mechanisms regulating the labour market, with reference to issues such as integration and access to the labour market, gender equality, flexibility, certainty of employment, etc. As emerges from indications given by the European Commission, if it is taken to mean precariousness, uncertainty, or mediocre employment with no prospects, flexibility should be considered as a "negative value" to be avoided. Although the discussion here will be confined to the implications as far as adaptability is concerned, it should be pointed out that this turning point has tightened the margins of the compromise behind the strategy adopted to weaken labour market constraints: the aim of reconciling flexibility and security has to be seen no longer, or not only, as a necessary combination of the two terms in which "security" has to be reconciled with and adapted to the superior claims of "flexibility", but – with a view to achieving the quality mentioned above – has much stronger and more radical implications, that is, that *flexible employment of quality* is either "secure" in the sense that it guarantees adequate social protection for workers in a context of continuous change or, more simply, does not exist.

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692 See Caruso 2000a, 141 ff.

693 On the evolution of the European social model from the Second World War to the present and the distribution of competencies in Europe between the supranational community and the member states as regards social policy, see the interesting reconstruction by Giubboni 2001, 26 and ff. For a reflection on the future development of the European social model, see also Scharpf 2002, 645; Streeck 2000, 3; Trubek, Mosher 2001.

694 COM (2001) 313 del 20.6.2001, 9.

Limiting the notion of flexibility to the narrower context of the so-called atypical forms of employment, the aim of this paper is to identify and analyse a number of possible profiles of security that can be achieved on the basis of the indications contained in EU policy and legislation in relation to a certain type of contract: temporary work[695]. The starting point for reflection on the possible mechanisms by which this can be achieved is given in particular by the process of drawing up the discipline regulating the conditions of employment of temporary workers, the subject of a recent Directive proposal presented by the European Commission on March 20th 2002 and subsequently modified in the November of the same year[696].

Analysis of the procedure with which this discipline was drawn up is of particular interest for reflection on the new trends, modalities and protagonists of the process of social integration in Europe. Through the Open Method of Co-ordination (OMC)[697] EU institutions and member states have converged on the necessity of achieving important objectives in employment policy. However, many of the doubts raised[698] concerning the possible scenarios of future social policy seem doomed to remain partially unsolved; one particular doubt is whether the OMC is a mask hiding an attitude of renunciation or at least an absence of action by EU institutions concerning social issues; or, more simply, ineffective, given its incapacity as an instrument to have real influence on national dynamics[699]; or, currently, the only possible way to create an "umbrella" that is suitable for all member states while respecting their inherent diversities; or, finally, only a transient mechanism that can open up the way to traditional modes of regulation[700].

From this point of view, the concept of flexicurity and the possibility of achieving it in the context of temporary work provides a wealth of topics for debate: it acts, in fact, as an observatory on the various sources of regulation interwoven in the EU legal system, in particular the dynamics of interaction between regulation via the OMC and traditional forms of regulation. As will be seen, part of the doctrine[701] has claimed the need to strengthen the objectives of the EES by establishing *hard* precepts in social legislation. However, as will emerge from the various sources of regulation concerning temporary work – *guidelines* and proposals for directives – it can be pointed

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695 The notion of temporary work, or *travail intèrimaire,* as outlined in proposals for EU regulations from the late 1970s onwards and used on the following pages, does not always coincide, in the various member states, with a broader notion of *temporary work:* in some countries, such as the United Kingdom, the expression *temporary work* usual embraces, in fact, various forms of *temporary work through agencies, casual work* and *seasonal work*. For the terminology used in the United Kingdom, see Hepple 1993, 263. For a survey of European experiences, see Carabelli 1999, 33 and ff.; Veneziani 1993, 278 and ff.

696 See European Commission, COM (2002) 149, 20.3.2002 and the subsequent proposal of a modified Directive, COM (2002) 701, 28.11.2002.

697 On the "new open method of co-ordination" see Barbera 2000, 145 and ff.; Hodson, Maher 2002, 719 and ff. On the new model of *governance* and repercussions on the process of constraint in social Europe, see also Teague 2001, 7 and ff.

698 De La Porte, Pochet 2002, 15 and ff.

699 This is the conclusion reached by Lo Faro 2002, 533 and ff.

700 This is the scenario foreseen in particular by Hodson, Maher 2001, 719 and ff. Also partially critical of the OMC is the stand taken by Scharpf 2002, 645 and ff.; while recognising the importance of the method to create convergence on strategic objectives for the Union, he expresses great doubts as to the real possibility of using the OMC alone to solve the lack of symmetry between the process of economic integration and the process of social integration.

701 The prospect of strengthening the EES through social legislation is supported by Goetschy 2001, 151 ff.; Bercusson 2001, 101 ff. On the connections between the *European Employment Strategy* and *EC Labour Law* after Amsterdam, see the interesting reconstruction by Bruun 2001, 309 ff.

out that the system of sources has reached such a level of complexity that it no longer boils down to the simple dichotomy of *guidelines-soft law* and directives-*hard law.* In the following paragraphs it will be observed that the interweaving of two types of regulation concerning a single topic may give rise to a sort of circular process in which legislative prescriptions which are increasingly acquiring the features of *soft law* need to be interpreted in coherence with the objectives pursued by the European Union by means of the EES.

2. Between co-ordination and harmonisation

In an interesting essay written a few years ago, in which he conducted a detailed analysis of the relationship between employment policy[702] and labour law, Mark Freedland highlighted the several different aims interwoven in EU regulations. He remarks that the whole history of *European Community employment law* has been linked to the possibility of legitimising Community intervention in terms of economic and/or social policy[703], but at the same time stresses the fact that the process of juridification of Community labour law has always been permeated by employment policy aims that do not always coincide with those of social policy. The two terms, in fact, cannot be considered to be synonymous as the aim of social policy is the creation of a network of minimum unalienable rights, whereas employment policy has always pursued objectives directly connected with regulating the labour market and, in particular, creating and maintaining employment and promoting professional and vocational training. In short, according to Freedland, employment policy can be considered to be connected to a broader sphere of reference comprising *active labour market policy*[704] in which *economic policy* e *social policy* are indissolubly linked in a single discourse which has only recently been enshrined in Title VIII of the Treaty of Amsterdam[705].

Atypical forms of employment, along with the issue of equal opportunities, are one of the most important areas in which it is possible to find a superimposition of topics dealt with – in the Treaty of Amsterdam - in Title VIII concerning employment policies and Title XII on social policies[706]; for this reason, a single issue may well at the same time be the subject of procedures of *co-ordination* and legislation oriented towards *harmonisation.* This possibility appears to be confirmed by a glance at the latest products of Community social law: from Directives on *part-time* and fixed-term contracts to those concerning new forms of discrimination, it appears evident that the objectives of the EES have become increasingly intertwined with the aims pursued by means of social legislation. Therefore, although the "neo-voluntaristic" model excludes (Article 129 Tce) the

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[702] Freedland 1996a, 275 ff.

[703] See Freedland 1996a, 287.

[704] On this topic, see also Deakin, Reed 2000, 83.

[705] On the *employment policy* pursued after the Council of Essen as a compromise between the requirements expressed in the White Papers and Green Paper of the Commission quoted above, see the analysis made by Freedland 1996a, 297 ff.; finally, on the balance between *employment policy, economic policy* and *social policy,* see Bercusson 2001, 101 ff., and Ashiagbor 2001, 313 ff. , who stresses that employment has become a central issue in Community policies, above all with a view to supporting economic and monetary policies; on Title VIII of the Tce see Sciarra 1999b, 157 ff.

[706] In relation to this, see Barbera 2000, 137; Szyszczak 2000, 197 ff.; Szyszczak 2001, 1160, who points out that the new paradigm of social policy after Amsterdam and in particular the positions taken on the subject of flexibility have greatly influenced the European legislative agenda.

possibility of *soft law* measures adopted via the open method of co-ordination leading to harmonisation of the legislative and regulatory provisions of the member states, it must be pointed out that the convergence between the contents of some *guidelines* and the objectives pursued in the Title on social policy relating to certain spheres of intervention (Arts. 136-137) has led to a hybridisation of the regulatory techniques applied in several fields. As observed above (§ 1), a more direct connection between the EES and social legislation has been supported with a view to strengthening – if not actually transforming into *hard law* - objectives which, through the co-ordination procedure, are rarely being implemented in national plans of action, as well as to eliminating the persistent lack of symmetry between the stage reached in the process of economic integration and the as yet incomplete process of social integration[707].

The progressive hybridisation of social law by the insertion into EU directives of objectives "typical" of employment policies has a whole series of consequences: on the one hand, the directives tend to become, among other things, tools whereby the EES can be implemented, thus placing stronger constraints on member states to implement the Commission guidelines; and on the other hand, the directives themselves are affected by an extension of the traditional aims of social legislation, but at the same time they borrow from the co-ordination procedure a reduced power to harmonise existing member state legislation.

Atypical forms of employment are among the objectives of both the OMC and social legislation, and thus provide an opportunity to see whether and how the combination of these two regulatory tools – the *new governance* of which OMC is an expression and the *old governance,* or regulation by means of Directives - can achieve a blend of flexibility and security. In this sense, a reading of the directive proposal concerning working conditions for temporary workers offers various points for reflection. The effect of the hybridisation between the EES and social legislation is to transform the so-called "second-generation" directives, in both form and substance.

i) From the point of view of substance, it emerges that articulation of the discipline *in fieri* concerning temporary work is pervaded by a dual core: on the one hand, it is inspired by aims of *social policy* in the establishment of a network of protection and rights for temporary workers; on the other, it proposes aims of *employment policy* by provisions expressly oriented towards promoting the efficient functioning of the labour market. On certain points, the two cores of the Directive are so close that the *social policy* objectives tend to be eclipsed by the crushing presence of *employment policy* aims[708].

ii) From the formal point of view, on the other hand*,* the proposal features a series of tools of an increasingly *soft* nature in which the harmonisation function is reduced to a minimum in favour of the provision of general, more or less binding, principles, as well as laying emphasis on a different way of co-ordinating national regulations, in the awareness that solutions are to be sought and flexibly adapted in relation to the different regulatory requirements of the various member states. As in the two previous Directives on atypical jobs, it appears clear that the Union does not

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[707] This, in particular, is the position taken by Scharpf 2002, 662 ff.

[708] For a critical interpretation of recent developments in the EES and the re-dimensioning of *social policy* in favour of an approach that gives almost absolute priority to *employment creation,* see Ashiagbor 2001, 311 ff.

propose to regulate the subject directly but to provide states with a possible model for the re-regulation[709] of national systems. Alongside the provision of a series of protection measures, which still leave states a certain amount of discretion as to their implementation, some of the indications contained in the proposed Directive – above all those inspired by employment aims - have an essentially propulsive and qualifying role[710], actively encouraging structural reform of the labour market and the connected national systems of social protection without, however, taking on any further direct regulatory commitment (or at least only minimal commitment). In this context, the EU is thus taking the role of a *catalyst for change*[711], activating a process of *persuasion* that will encourage states to "rethink" their social policy[712] in relation to pursuing certain key objectives towards which it has been decided that national systems should converge.

Given these characteristics, the proposed Directive on temporary work and the complex process of approving it, which recently witnessed the failure of dialogue between the social partners and then the start of heated institutional debate, offers – as said previously and as will become clearer later on - a good starting point for a discussion of the strength, effectiveness and possible contents of the concept of *flexicurity,* as well as the persistent difficulties, both theoretical and practical, connected with regulation of the social sphere in Europe.

3. Temporary work and the European Union: the "resistible" ascent of Community regulation of atypical jobs

As emerged from a recent study by the European Foundation in Dublin[713] - on which the proposed Directive mentioned above is based[714] - temporary work has increased considerably in the last ten years. Despite its spread, the study showed that the general quality of temporary work and the prevailing working conditions are still considerably worse than the status of workers with a standard employment contract.

In the light of this reference context, it is clear that temporary work has been the focus of Community action, both via the open co-ordination procedure, as a tool for adaptable *job creation,* and in order to issue a harmonisation directive that will guarantee minimum working condition standards for the workers involved. The two perspectives connected with regulation of temporary work, i.e. increasing employment and ensuring a system of worker protection by limiting abuse connected with recourse to it, have been at the centre of the debate that witnessed the failure of social dialogue between the Unice and the Etuc[715]. As a consequence, in March 2002,

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[709] On labour law becoming "a new word in national and European juridical discourse" when it "becomes synonymous with re-regulation, accepting the challenge of flexibility" see Sciarra 1999a, 373.

[710] Giubboni 2001, 94; Kenner 1999, 415 ff. More generally, on the new models of Community intervention in social policy, see Streeck 1996, 64 ff. who speaks, in reference to social legislation that leaves member states various modes of implementation, of *governance by choice.*

[711] Giubboni 2001, 94 and Rhodes 1998, 48.

[712] In this sense, see Szyszczak 2000, 201. See also Ferrera, Hemerijck, Rhodes 2000, 741.

[713] Storrie 2002, *Temporary work in the European Union,* European Foundation for the improvement of living and working conditions, Dublin, 27 ff.

[714] See the *Explanatory memorandum* preceding the proposal, p. 2.

[715] See Jones 2002, 183 ff.

acting in its role as *gatekeeper* of the legislative initiative[716], and aware of the impossibility of any further delay in introducing regulations, the Commission presented the above-mentioned directive proposal. While on the one hand, it partially reflects the points of convergence reached by the social partners, on the other it does not seem to be fully capable of reconciling the divergences which had resulted in an impasse in the social dialogue, thus giving rise to dissent by both employers' and workers' associations. On the basis of various amendments proposed first by the Economic and Social Committee[717] and then by the European Parliament[718], the Commission subsequently intervened, as allowed by Article 250 Tce, c. 2, modifying the proposal in partial acceptance of the points raised by the Parliament. It is on the basis of the new proposal that the co-decision procedure laid down in the Treaty[719] will proceed in the coming months.

It may, however, be useful to consider the process whereby the directive was drawn up, in order to analyse, through the combination of EES *guidelines* and legislation via directives, the strength of the concept of *flexicurity* and its contents.

In particular, it is already clear that the prevailing aim in formulating the proposal was a promotional one, whose effect was to blend the objectives of guaranteeing minimum standards of treatment with those of favouring the spread of temporary work contracts. Despite opposition by Etuc during negotiations, the mediation role taken by the Commission does not imply supine acceptance of the pressure that employers certainly brought to bear, but rather an informed choice dictated by coherence with the aims of the EES. The aim of promoting temporary work in the proposal does not, in fact, appear to contradict the *ratio* of the previous agreement on fixed-term contracts, nor the concept of "flexibility and security" which inspired a number of Commission *guidelines*. What emerges from the proposal is enhancement of the role played by temporary work agencies, in the sense that they are implicitly considered to be tools that will contribute towards creating work opportunities for *outsiders* who have a "real" preference for temporary work. There are, however, signs of awareness of the fact that that temporary work – as stated on p. 5 of the *Explanatory Memorandum* – will not be able to act as a driving force for the creation of jobs unless it provides sufficient guarantees for workers and the unemployed, that is, unless it offers quality employment that will compensate for its temporary nature. Reading of the directive's measures aiming to achieve *employment policy* objectives can therefore not neglect the strengthening of *social policy* aspects underlying the employment strategy; the direct reference to quality work in the C*onsideranda,* objectives and tools to be used to promote permanent employment therefore leads the reader to view this aim as being the key to the inspiration behind the whole of the directive.

In coherence with the objectives and provisions pursued by the EES, the aims outlined in the proposal can therefore be viewed as implying a rejection of pressing requests by the supporters of laissez-faire who invoke flexibility, in the form of deregulation, as the only way to defeat mass

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716 On this point, see Schmidt 1997, 6. On the role of the Commission, see also Teague 2001, 13.

717 See Ces 1027/2002, 19.09.2002.

718 See Resolution PE n. 14331/02, 20.11.2002.

719 On the procedure of co-decision, see Shackleton 2000, 325; Schmidt 1997; Farrel, Héritier 2001.

unemployment in Europe[720]. It is obviously beyond the scope of this paper to conduct a thorough examination of the economic and social reasons for the need for legal regulation of work contracts[721]; mention can be made, however, of the circumstance whereby the prescriptions contained in the proposal, aiming at establishing an adequate framework for the use of temporary work, can prevalently be identified with the aims of "social regulation" and what is called "competitive regulation"[722], in which economic and social objectives are blended. Therefore, far from invoking a deregulatory drift which would had an adverse effect on the spread and social acceptability of this type of contract, the aim of the proposal is to encourage member states to adopt regulations that will guarantee an adequate (normative) framework by means of a series of *labour standards*, the substantial, procedural and promotional[723] contents of which are directed towards economic efficiency and social equity.

If, therefore, it appears evident that the employment perspective pervades the whole proposal, it will be of greater interest to see whether and how the trend towards a strategy of flexibility has been concretely balanced with counterweights and tools that will at the same time guarantee security. It is, in fact, in identifying these counterweights that the theoretical and practical difficulty of drawing up the discipline emerges. Whereas the OMC has led to broad convergence by member states on the contents and importance of the *guidelines* oriented towards a model of "flexibility and security", the concrete establishment of the *quantum* and the *modus* whereby this security can be guaranteed led, as we have seem, to failure in the dialogue between the social partners and then to conflict between the European Commission and Parliament.

4. The enigmatic requirement to review prohibitions and restrictions as laid down by Article 4 of the proposal

Although quality work and flexicurity are objectives that inspire the whole discipline, the proposal does not dictate prescriptive models whereby these objectives can be achieved, but confines itself to providing minimum indications as to some aspects regarding the quality of work (relating to the principle of non-discrimination, training, etc.). So although the *social policy* aims pursued are evident, the lack of clear indications as to the elements that will ensure security gives rise to a whole series of doubts as to how to interpret its real meaning and the sphere of action of the *employment policy*-inspired measures the directive contains; these doubts will bring great pressure to bear on the system if and when the provisions promoting contracts are not interpreted coherently with the aims behind the social legislation accompanying the EES, as well as a systematic reading of the guidelines supplied by Commission and the most recent results obtained by the OMC.

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[720] Debate on this issue is vast and the various stands taken cannot be summarised here. See Siebert 1997, 33 ff. for a survey of the view that the roots of unemployment lie in the rigidity of the European labour market; see also Pierson, Forster, Jones 1997, 5 ff, for an analysis of the problem of unemployment in Europe that considers not only the rigidity of the labour market but also a broad series of contributory factors. Finally, for a highly critical stance against uncontrolled deregulation and exportation of the American model as a pre-packed recipe to fight unemployment, cf. Deakin, Reed 2000, 71 ff. and Ashiagbor 2001, 311, who maintain that the unique character of European unemployment requires an *ad hoc* European solution.

[721] In general on the theories and social and economic aims of regulation, see Ogus 1994. On regulation of the labour market and work relations to guarantee efficiency and competitiveness, see Deakin 2001, 17 ff., Deakin, Reed 2000, 83 ff., Collins 2000, 3 ff., Collins 2001a, 29 ff.

[722] See Collins 2001b, 218 ff.

[723] On the types of *standards* mentioned, see Deakin, Wilkinson 1999.

One of the most problematic areas in this respect is represented by Article 4, which is entirely inspired by *employment policy* objectives. The article states that "Prohibitions or restrictions on the use of temporary work are justified only on grounds of general interest relating in particular to the protection of temporary workers, the requirements of health and safety at work and the need to ensure that the labour market functions properly and abuses are prevented. The Member States, after consulting the social partners (…), shall review any restrictions or prohibitions mentioned above in order to verify whether they are justified on the grounds given in paragraph 1. If not, the Member States shall discontinue them. The Member States shall inform the Commission of the results of that review." (cc. 1 and 2).

It seems undeniable that this provision is an expression of the desire to remove - in member states where similar legislation is in force - constraints which limit the spread of temporary work. The category of limits most likely to be affected will be those whose aim is to avoid the de-structuring of standard jobs: that is, limits aiming to prevent recourse to temporary work in order to fill posts connected with ordinary, stable production activity. Whereas in some countries, for example the United Kingdom, Ireland, Holland, or Sweden, there exist at will supply contracts, i.e. with no limitations, and so it is unlikely to be necessary to revise any restrictions, other countries such as France, Spain and Italy possess various types of limits on the stipulation of contracts for the supply of labour.

The attempt to prevent de-structuring steady jobs – as shown in countries where the system is inspired by this ratio – can be made through several possible "antidotes" to flexibility: a range of regulatory devices mainly based on the common leitmotif that a contract to supply labour can only be legitimately stipulated when the employer has temporary requirements. In some systems, for example, in France, there is both a general rule prohibiting temporary work from providing stable employment connected with the ordinary, permanent activity of the company involved, and a series of considerations identifying the individual instances of possible recourse to temporary work. In Spain, the temporary nature of employment is intrinsically linked to specific types of work established by law. In Italy, the types of temporary employment are established both by law and/or collective bargaining, and by the ratio behind certain specific prohibitions. In these systems, to protect the central role of steady employment, there are also further limits on supply contracts, concerning their duration (that is, the duration of single contracts and/or the possible of renewal, as well as the maximum number of renewals for labour supply contracts) and the maximum percentage of temporary contracts an employer can stipulate.

Faced with such a profoundly different regulatory panorama, the proposal chooses to remain silent: neither in the Consideranda nor in the single provisions is it possible to find a preference for one or the other kinds of regulation. However, in the following pages the attempt will be made to provide an interpretation of the provision that is coherent with the objectives pursued by the EU within the framework of the EES.

5. The requirement to review limits in various national contexts: the need for a systematic interpretation to avoid "short circuiting"

Although, as we have seen, reading between the lines of the proposal gives a glimpse of the desire on the part of EU institutions to promote the recourse to temporary work in Europe, on account of its obvious potential to increase employment, seeing *only* this would be a serious mistake and would give a misleading view of the much more complex *ratio* behind the proposal.

The provision made in Article 4 regarding the revision of restrictions is evidently one of the mostsymptomatic expressions of the aims of *employment policy* which presupposes, in both form and substance, a hybridisation of social legislation and the Open Method of Co-ordination. Its aim is not to establish minimum *standards* of protection for the workers involved, but – through a *soft* formulation of the indications given to member states, imitating the contents of the *guidelines* – to provide *input* for more efficient regulation of the temporary labour market in accordance with the objectives of the EES. For this reason, as mentioned previously, it is this provision that may cause difficulties of interpretation if it is not seen as strengthening and completing the employment strategy. In connection with this, it should be recalled that all the provisions in the proposal, including the one inviting member states to review existing restrictions and prohibitions, are to be read in the light of the objective behind the whole discipline and the recent evolution of the EES, that is, the achievement of *flexible work of quality* in the sense outlined above. Only in the light of this basic idea – through a teleological-systematic interpretation - is it possible to understand the general plan of the proposal and its various aims: to achieve greater efficiency in the labour market and more flexible management of the workforce, but at the same time to guarantee adequate levels of security. According to these aims, which are summed up in the notion of quality temporary work, member states should find a new way of viewing flexibility that will reject the binary logic of a *trade-off* between "efficiency" and "social justice"[724]. As we have seen, the objective stated in Article 2, c. 2, i.e. the establishment of an adequate legal framework for the use of temporary work re-dimensions the potentially deregulatory scope that Article 4 would appear, *prima facie*, to have. In the Commission *guidelines* relating to adaptability, the tool used to guarantee an efficient labour market is not deregulation but re-regulation, which will take specific circumstances into account and, if necessary provide protection against the risk of malfunctioning of the labour market in the various member states.

If, therefore, on the one hand the proposal is coherent with the aims of the EES in that it leans towards – but *does not impose* - a reduction in the "antidotes" to flexibility that exist in the member states and can hinder efficient functioning of the market, on the other hand, by pursuing a high level of quality in temporary work it leaves it up to the states themselves to evaluate the "degree of tolerability", on the social plane, of the effects of partial deregulation of this type of contract.

With Article 4 the Commission is trying to bring to light the degree of acceptance of greater flexibility by the member states. It clearly has no intention of attempting to harmonise national legislation: in the re-regulation process the member states do not have to remove all constraints and restrictions on temporary work *tout court*, but evaluate – in collaboration with the social partners - "in order to verify whether they are justified": each system will therefore have to ascertain whether it possesses the necessary "antibodies" that will make greater flexibility tolerable and coherent with the aim of ensuring quality employment.

In this sense, Article 4, cc. 1 and 2, state that restrictions and prohibitions are only justifiable "on grounds of general interest relating in particular to the protection of temporary workers, the requirements of health and safety at work and the need to ensure that the labour market functions properly and abuses are prevented". Nothing, however, is stated concerning the parameters with

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[724] On this point see Ferrera, Rhodes 2000, 83 ff.

which the member states are to assess the degree of permanence of the reasons for legislative restrictions on temporary work. This apparent gap can, however, be bridged by the teleological-systematic hermeneutic operation mentioned above, which leads to an interpretation of the prescriptions of EU law in relation to the aim of the provision and coherently with the principles and objectives of the Treaty and the EES, the effectiveness of which – as we have seen - the directive aspires to strengthen.

On this basis, the problem of interpretation is easily solved: there can be no deregulation without a blend of flexibility and security, flexibility and certainty of employment. The grounds of general interest, which mainly concern worker protection, the health and safety requirements and/or the proper functioning of the labour market, which will not allow member states to remove all limits on temporary work, should thus be identified as a lack of mechanisms to guarantee security in the labour market and/or in employment relationships. However, as regards evaluation of these grounds, member states are left free to choose the most suitable solution for the specific features of their markets and *welfare* systems. No uniformity is being sought but rather a "eulogy of differentiation"[725] and implicit recognition of the fact that in the various member states there may be several ways to combine flexibility and security, competitiveness and solidarity, by means of regulation that is economically sustainable, politically feasible and socially acceptable[726].

It should, however, be pointed out that the decision not to impose *hard* requirements in order to achieve an effective balance between flexibility and security in temporary work undoubtedly represents a failure to take the opportunity to develop EU social law, above all with a view to strengthening the numerous points in the *guidelines* that aim to prevent the possibility of a laissez-faire drift in market regulation and employment relationships. The *soft* nature of Article 4, the rather volatile reference to grounds of general interest connected with worker protection or the need to ensure the proper functioning of the labour market, which amount to *limits* on the introduction of flexibility and/or deregulation in national systems, and even the more binding requirements laid down in the proposal (such as the principle of non-discrimination and the right to training) are, in fact, too weak and vague to assure that the blend of flexibility and security will be concretely achieved at all, still less in a way that can be monitored by the Court of Justice if and when implementation of the directive by the member states is to be ascertained.

However, although no uniformity is imposed or even sought, thus giving member states great discretionary power, it is also true that certain profiles of the flexibility/security combination do emerge from a systematic interpretation of the Commission guidelines in the framework of the EES and the (few) binding provisions contained in the proposal. Given the lack of binding models and requirements in the directive, it also appears to provide member states with an opportunity to co-operate, exchanging experiences and best practice, comparing themselves with each other - in accordance with the social policy *benchmarking* procedures outlined by the European Council in Lisbon in 2000[727] - on the basis of the indicators concerning the quality of employment supplied by the Commission: an exchange of experiences and good practice that is not the result of a *top*

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[725] Giubboni, Sciarra 2000, 555. Cf. also Sciarra 1999a, 375.

[726] Ferrera, Hemerijck, Rhodes 2000, 730 ff.

[727] On the new open method of co-ordination and *social benchmarking* after Lisbon, see De La Porte, Pochet 2001, 291 ff.; Hoffmann 2001, 129 ff.

down imposition, but derives naturally from the initiatives taken by each single state (*bottom up social benchmarking*) which, in trying to combine flexibility and security in temporary work, may well be interested in imitating the *best practice* achieved in other member states.

Recognising that there exist a number of possible solutions and trade-offs in the various member states, the attempt will be made in the following pages to identify the counterweights, in terms of security, that the proposal deems suitable to balance flexibility and render it sustainable.

6. The possibility of accessing permanent employment

A first feature which strengthens security for temporary workers can be identified in provisions facilitating access to permanent employment with the user company, which annul clauses whose effect is to prevent or limit such employment. In this sense, certain grounds of general interest concerning the protection of workers find specific limitations in the proposal (Article 6, cc. 1 and 2): first of all, workers are to be informed of any vacancies occurring in the user company, so that they have the same opportunity as the other employees of the company to be given a permanent job (c. 1, cit.).

Of particular interest is the apparently *hard* provision in c. 2 which invites member states to adopt "any action required to ensure that any clauses prohibiting or having the effect of preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the temporary worker after his posting are null and void or may be declared null and void". As originally formulated, the provision required the annulment of both supply contract clauses explicitly prohibiting the employment of workers by the user company, and clauses that can be agreed on by the agency and the worker or the agency and the user, outside the supply contract, to establish a *temp-to-perm-fee* or *transfer fee,* that is, compensation to be paid to the agency if a worker is taken on directly by the company at the end of the period of temporary work. Such clauses are already prohibited in several member states (Italy, France, Spain) whereas they are quite common in countries like the United Kingdom, Ireland and Finland. The economic *ratio* behind these clauses is clear: it is in the interests of the agencies to keep the most capable and reliable workers, or those in whom they have invested in the form of training[728]. The provision of a *temp-to-perm-fee* in a supply contract is also an additional cost for an employer wanting to take on a worker permanently, and may discourage him from attempting to do so. However, this *hard* provision, which seemed capable of guaranteeing security for temporary workers, was subsequently weakened by the introduction of a third clause to Article 6: in implementation of an amendment by the European Parliament[729], it established that "This paragraph is without prejudice to provisions under which temporary agencies receive a reasonable level of recompense for services rendered to user undertakings for posting, recruitment and training of temporary workers". Once again, therefore, the process of drawing up the discipline regulating temporary work seems to have missed the opportunity to use a *hard* provision to promote profiles that will promote the blend of flexibility and security by favouring transition from temporary to steady employment. In addition, the reference to the *reasonable level of recompense* – unless the Court of Justice intervenes to clarify the matter – does not appear to be capable of protecting workers

[728] The ban on using *temp-to-perm-fees* is one of the problems most focused on by the *Regulatory Impact Assessment* drawn up by the *Department of Trade and Industry* in April 2002.
[729] PE 316.363, emend. n. 47 which makes explicit reference to the desire to legitimise the *"temp-to-perm-fees"* common in the UK.

against possible abuse that could prevent or hinder them from being taken on by the user company, or reduce the opportunities for them to receive training, and thus risks jeopardising the quality work objectives behind the discipline *in fieri.*

7. Training temporary workers

Some aspects of security in the relationship between agencies and workers may also be necessary to facilitate their re-entry into the labour market once a temporary job is terminated. With a view to ensuring greater employability, these aspects mainly concern the training of temporary workers. In order to achieve quality work, the *learning culture* is an essential tool, both for employers to increase the competitiveness of their firms in an economy increasingly based on knowledge, and for workers, for whom it represents a crucial substitute for stability in employment. In this sense, the right to gain access to ongoing professional training as set forth in Article 14 of the Nice Charter must be read in combination with Article 15 (the right to work), the contents of which have been identified with the right to have *chances* of work*:* on the basis of these provisions, the right to professional training can be considered as a "third generation" social right which will guarantee workers at least *employment security*, if not *job security*[730]. The social right to training can therefore be identified as the right to be provided with the means to achieve economic self-sufficiency and improve one's capabilities[731].

It is evident that the immediate effect of failure to regulate the training of temporary workers would be that of jeopardising the individual workers' employability and competitiveness on the labour market, with the risk of his falling into what has been defined[732] as *the low skill bad job trap* (which will limit his future prospects of employment by other firms, promotion, a higher salary, etc.); in the long term, on the other hand, the negative effect would be on the production of the collective asset represented by the professional capabilities of human resources. For this reason, the proposal intervenes – also using the numerous *guidelines* issued concerning employability - proposing the creation of a series of *labour standards* in training that will attenuate persistent inequalities and unemployment even in a partially deregulated labour market and prevent a possible drift towards economic inefficiency[733]. Article 6, c. 5 of the proposal states that "Member States shall take suitable measures or shall promote dialogue between the social partners, in accordance with their national traditions and practices in order to improve temporary workers' access to training in the temporary agencies, even in the periods between their postings, in order to enhance their career development and employability; and improve temporary workers' access to training for user undertakings' workers".

However, given the inevitable risk of opportunistic behaviour by agencies and/or employers, which may jeopardise an essential aspect of quality in temporary employment, it would have desirable for the directive to have adopted a "stronger" solution to guarantee professional training for these workers. Once again, however, the effective feasibility of a fundamental aspect of security on the labour market and in employment relationships capable of balancing greater flexibility

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730 On the role of training as a tool for security in a context featuring a multiplicity of precarious work experiences, see also Freedland 1996b, 119; on the "right to training" see also Sciarra 1996, 15.

731 This notion recalls the broader concept of *capability,* on this point see Sen 1999; Deakin, Wilkinson 2000, 317 ff.

732 Snower 1996, 109 ff.

733 Deakin, Wilkinson 1999, 617 ff.

has in fact - thanks to the *soft* formulation of the requirement - been left up to the discretionary powers of the member states, thus missing an opportunity for concrete strengthening of one of the crucial objectives of the EES by social legislation.

Of course it is to be hoped that member states will autonomously choose to adopt "strong" solutions to guarantee training opportunities for these workers: that is, despite the lack of a *hard* requirement, it is hoped that the invitation to "improve temporary workers' access to training" will be translated at a national level into an *obligation* for agencies or user companies to provide training. In this sense a *best practice* that could be imitated by member states can be found in the Italian system. Article 5 of Law n. 196/97, in fact, *obliges* supply companies to pay a contribution into a Fund set up by means of a trade union agreement, the main aim of which is the promotion and financing of training and retraining for temporary workers.

8. The principle of non-discrimination and exceptions to it

A recent study by Ciett[734] maintained that *cost cutting,* that is, the possibility of "saving" on wages, is not the main attraction for companies that take on temporary workers; and yet the data supplied by the Dublin Foundation in 2002, comparing the salaries of temporary workers and those of standard workers*,* would seem to contradict this statement. In many cases – despite the presence in the various national systems of the principle of *equal wages for equal work* – temporary workers earn on average 17-32% less than those permanently employed by the user companies.

Given the interests involved (the possibility of making temporary work contracts more "appetising" for employers, and also the need to ensure one of the fundamental aspects of quality work) it is clear why it was the principle of non-discrimination that caused the most heated clash between the trade unions, leading – as mentioned previously - to a breakdown in negotiations, and subsequently to some of the most significant amendments proposed by the European Parliament.

The modified version of Article 5, c. 1 of the proposal contains a provision that only in part follows the provisions contained in Directives 97/71 and 99/70. It states that "The basic working and employment conditions of temporary workers shall be, for the duration of their posting at a user undertaking, at least those that would apply if they had been recruited directly by that enterprise to occupy the same job". The *tertium comparationis* is not, therefore, an "abstract model of a worker" but a concrete reference that can be identified with a worker employed by the user company who occupies a post identical or similar to that of the worker supplied by the temporary labour agency, taking into account seniority, qualifications and job description. With this, the Commission intended to put an end to the dispute which had led to a breakdown in the dialogue between the social partners concerning the so-called "comparative sphere"[735]. The greatest sticking point which caused negotiations to stall was, in fact, the notion of a "comparable worker" to refer to in order to fulfil the equality requirement: while employers' organisations maintained that temporary workers should be entitled to the same wages as workers employed by the agencies, the trade unions were of the opinion that the comparison was to be made with permanent employees of the user companies doing the same or similar work. As mentioned earlier, the proposal embraces the stand taken by the trade unions, stating that the conditions of employment

[734] Ciett, *Orchestrating the evolution…,* cit.

[735] Freedland, Kilpatrick 2001, 668.

must be at least identical to those a temporary worker would be offered if he were directly employed by the user company. The *ratio* behind this choice is clear and totally acceptable: with a view to eliminating the most despicable forms of competition between steady and temporary employment, the proposal states that it is not the precarious, occasional labour market, but rather the steady, guaranteed market that should establish the parameters for the wages to be paid to temporary workers, obviously according to the normal variations between the various commercial sectors and professional categories. Once again, we have apparent confirmation of the fact that construction of the model regulating flexibility does not affect the central role occupied by stable, permanent employment. Although the proposal makes no explicit mention of this point, it is implicitly confirmed as the *normal* type of employment relationship.

After stating the principle of equality in c. 1, in the following cc. 2, 3 and 4 the proposal leaves room for a whole series of admissible exceptions. Some of these exceptions raise immediate doubts because, on the one hand, their effect is to weaken the solemnly announced principle of non-discrimination, and on the other they are in clear contrast with consolidated EU law forbidding direct discrimination, which has more than once stated that different, even penalising, treatment for atypical work is admissible as long as it does not depend exclusively on the fact that the workers involved are *non-standard*.

The first exception is to be found in c. 2, where member states are authorised, following consultation with the social partners, to derogate – as far as salaries are concerned - from the principle of equal treatment, only when temporary workers have a permanent contract with labour agencies and continue to be paid between one job and another[736]. If the equality requirement is not to be deprived of all meaning, the provision obviously needs interpreting in a restrictive sense: that is, an exception can be made to the principle of equality only in relation to wages paid to workers between one job and another[737], given that in this case there would not be any comparable worker to refer to; when, on the other hand, a worker is sent back to the same or another user company, the equality requirement comes into full force again. *Only* in this sense is the exception justified, above all to favour an increase in temporary work in which a worker has a permanent contract with an agency.

The second exception is made in c. 3 where it is stated that "Member States may, after consulting the social partners at the appropriate level, give them the option of upholding or concluding collective agreements which derogate from the principle established in paragraph 1 as long as an adequate level of protection is provided for temporary workers". Providing for less cogent application of the principle of equality, this provision would allow - via collective autonomy - for "differentiated adaptation of the rules of labour law"[738] , which cannot but raise serious doubts. According to the logic of the proposal, the reason for collective autonomy to accept the application of "attenuated equality" for temporary workers is quite clear: the need to spread this type of contract in order to increase employment rates, for example in areas where unemployment levels are high or for specific categories of disadvantaged workers to be reinserted into the labour market (the long-term unemployed, etc.). This provision is without doubt one of the most emblematic

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[736] In the modified version of the directive, the clause quoted is the result of partial acceptance of an amendment presented by the European Parliament (PE 316.363, emend. n. 40) which stressed the need to specify that the exception only referred to pay.

[737] This is the so-called "retainer" provided for in Italy by Article 4, c. 3, Law No. 196/97.

[738] On these problems, although in the broader context of regulating immigrant labour, see Caruso 2000b, 305 ff.

examples of the hybridisation of the objectives of social legislation by the EES, and it also reveals the existence of potential, and perhaps not sufficiently pondered, negative effects: provisions like these, aiming at creating minimum protections standards, regarding equal pay, for example, may - in the effort to promote employment - become adaptable and open to differentiation in the various national contexts, thus leaving room for dangerous cracks to open up despite the effectiveness of the certain principles firmly enshrined in the directive. A number of basic doubts remain, in fact, regarding this exception: how is it to be reconciled with the *ratio* behind the directive, not to mention previous directives relating to atypical work, which is to prevent competition between temporary and standard workers exclusively based on the opportunity for cost cutting? On what conditions and with what guarantees of a real increase in employment levels will collective autonomy be able to authorise differentiated pay for temporary workers without jeopardising the objective of achieving quality in employment behind the whole directive? Which trade union will be considered to be sufficiently representative of the instances and interests of temporary workers when faced by a differentiation in pay involving and penalising these workers and thus adding less favourable working conditions than those enjoyed by standard workers to the precariousness and uncertainty of their situation? And again – given that the proposal does not mention the point – how, with what parameters, and in relation to what *tertium comparationis* will it be possible to determine "an adequate level of protection"[739]?

These and the many other doubts raised by the provision can obviously not be answered here. It can only be pointed out that collective autonomy is being called upon to play a difficult role; the *social adequacy* of the exceptions introduced will probably be assessed *ex post,* possibly on the basis of posthumous comparison between the advantages, in terms of employment, and the sacrifices imposed by the exception to the principle of non-discrimination. The provision is certainly bound to create a number of problems of application in the various member states, even though the reasons may be different. Only in some systems is this exception to the principle of non-discrimination already applied: in Holland, for example, as mentioned above, the whole sector is covered by collective bargaining. As far as wages are concerned, two types of workers have been identified: *school-leavers, holiday workers* and the workers re-entering the labour market after a long period of unemployment on the one hand, and all other workers on the other. Whereas the principle of equal pay is applied to all those in the second category, those in the first may earn lower wages, on condition, however, that they can remain in this "disadvantaged" group up to a maximum of two months, after which they have to pass to the other group. It will be more difficult to apply the exception in other countries such as Italy where the Law currently in force, No. 196/97, does not provide for similar exceptions to the principle of equal treatment, or other countries, such as the United Kingdom, where for different reasons doubts have been raised as

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[739] This exception has also been positively assessed by the European Parliament, which even proposed an amendment (PE 316.363 emend. n. 41) strengthening even further the role of collective bargaining, both in the sense of directly legitimising the possibility for the social partners to make exceptions to the principle of non-discrimination without the need for any authorisation for the member state involved, and by eliminating the reference to an "adequate level of protection", which the Parliament considered to have the potential to jeopardise the autonomy of the social partners, since it provides an opportunity for an agreement to be impugned before the Court of Justice on the grounds of "insufficient protection". The amendment was not, however, accepted by the Commission: in the modified 2002 proposal, the Commission decided to keep the reference to the need to guarantee an "adequate level of protection".

to the appropriacy of giving such an important role to collective bargaining, which is seen as a vehicle of rigidity, especially given that bargaining does not cover all sectors. For this reason, the United Kingdom has already proposed[740] more flexible mechanisms to allow for exceptions to the rule of equal treatment.

Whereas the second exception to the rule of equal treatment has caused great perplexity, the third, contained in c. 4 of Article 5 [741] has led to harsh criticism. This exception has been censured by both trade unions[742] and the European Parliament[743] and the criticism – as mentioned above – is justified for a number of reasons. The clause refers to work done for a user company "in a post which, due to its duration or nature, can be accomplished in a period not exceeding six weeks": here, therefore, the exception to the principle of equality is justified by the *temporary nature* of the requirements which induce a user company to stipulate a labour supply contract. *Only* temporary requirements – which, as stated, are not the only opportunity for recourse to temporary work in the EU perspective – can justify exceptions to the principle of equality by member states. There does not, however, appear to be any *ratio* in this provision that presupposes a combination of flexibility and security: the only *ratio* is to favour flexibility and a reduction in costs for companies taking on workers for temporary requirements, without any real benefits for the workers themselves. In particular, there does not appear to be any attempt to improve employment rates that would at least make the exception socially "tolerable". It is obvious that for temporary requirements companies are almost *forced* to stipulate flexible contracts; in these cases, leaving aside, that is, the exception being discussed, a company would always have recourse to temporary (or fixed-term) contracts: if the economic conditions are also convenient, even better. Furthermore, the potential expansion of this exception risks jeopardising the whole foundation on which the *ratio* of the proposal is based: as emerged from the Dublin study, a large number of labour supply contracts go up to a maximum of thirty days. The clause also risks introducing an element of irrationality: whereas, as we have seen, Article 4 seems to invoke controlled deregulation regarding certain restrictions, within the limits and in the ways outlined above, the last part of Article 5, clause 4 requires member states to take "appropriate measures with a view to preventing misuse in the application of this exception; that is, it requires direct regulation to prevent abuse but gives no indications as to the mechanisms to be used for this control to be achieved. It is likely that member states deciding to adopt the exception will have to introduce control mechanisms, if they do not already have any, regarding the reasons for recourse to temporary contracts and in particular the element of temporariness; they will also have to regulate the succession of supply contracts in such a way as to prevent abuse in the form of fraudulently side-stepping the six-week limit but still being able to pay temporary workers less. Finally, it

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[740] See *Explanatory Memorandum on European Community Legislation (7430/02 – COM(02)149)* by the Department of Trade and Industry, 29 April 2002.

[741] This clause states that, along with the exceptions previously laid down in clauses 2 and 3, "Member States may**,** with regard to pay**,** provide that paragraph 1 shall not apply where a temporary worker works on an assignment or series of assignments with the same user enterprise in a post which, due to its duration or nature, can be accomplished in a period not exceeding six weeks. Member States shall take appropriate measures with a view to preventing misuse in the application of this paragraph".

[742] See the Etuc press release, *Commission strikes right note on agency work,* 20 March 2002, at http:/www.etuc.org/EN/Press/releases/colbargain/tempdit.cfm

[743] PE 316.363 Amend. Nos. 39 and 42.

should be pointed out that the exception makes no mention of how pay rates for temporary workers are to be established, the level of protection that has to be guaranteed, and the "comparable worker" to whom reference is to be made. For the reasons briefly outlined above, it is clear that the exception opens up a dangerous gap in the temporary work discipline being approved, thwarting the whole principle of non-discrimination, along with the broader objective of achieving work of quality. As stated in the reasons for the amendments presented by the European Parliament[744], in fact, if adopted in its current form the exception would completely jeopardise the impact and efficacy of the directive. It is no coincidence that, in monitoring the rationality and social sustainability of the exceptions to the principle of equality for temporary workers, the Parliament promoted further strengthening of the possibility for collective bargaining to introduce exceptions, as already provided for in clause 3, including the possibility of exceptions for contracts of a limited duration. Unexpectedly, however, the Commission – by means of the modified proposal presented in November 2002 - decided not to widen the sphere of action of collective autonomy and also to maintain the general exception for contracts lasting less than six weeks. It seems likely, however, that the strong dissent voiced by the European Parliament will draw out the process of completing this directive for quite some time.

For the time being, however, one remark should be made: the exceptions to the principle of equality, and more generally the whole process of establishing the regulations, would seem to show that the employment-promoting objectives of the EES have the potential to impair and weaken the aim of providing minimum standards of protection for temporary workers, which is becoming increasingly *soft* and adaptable, depending on different national contexts and dynamics. In this respect as well, therefore, despite the objectives stated in the *Consideranda* and Article 2, the proposal unfortunately represents a failure by the Union to strengthen and render effective those aspects aiming at improving the quality of work provided for in the most recent developments of the employment strategy following Lisbon.

9. The non regression clause as a constraint on the soft provisions of the directive

To conclude this analysis the concept of flexibility and security in temporary work, through the development and interweaving in the EU system of various sources of regulation, it is worthwhile devoting some space to the "non regression clause" which concludes the proposal being examined, according to a tradition consolidated in a number of directives drawn up in the 1990s. After confirming the possibility for member states to introduce more favourable provisions for workers, clause 2 of Article 9 states that "The implementation of this Directive shall under no circumstances constitute sufficient grounds for justifying a reduction in the general level of protection of workers in the fields covered by this Directive"; the clause goes on to grant member states the faculty to modify their national regulations concerning temporary work, *on condition that* the minimum requirements laid out in the directive are ensured.

Expert opinion is that "the function of such clauses is surely to avoid, in *direct and immediate* connection with the transposition of the social directives, a deterioration in domestic regulations,

[744] PE 316.363, p. 42.

and to promote real progress for protective measures, as required by the EEC Treaty"[745]. It is, however, a common opinion that this principle does not impose a general *standstill* on member states[746]*:* this appears to be confirmed by the overall formulation of the proposal and above all by Article 4, which provides for the need to review and, if necessary, eliminate any restrictions and limits on temporary work for the purpose of promoting employment, given that "worker protection and the promotion of employment are interests that *can* and, when the directive is implemented, *must* co-exist"[747].

It must, however, be pointed out that, in the "second-generation" directives that take from the OMC the features of increasingly *softer* forms of regulation, setting objectives that can be moulded in a number of ways by the member states, the "non regression clause", which maintains the typical features of *hard law,* is called upon to play an important role in balancing the directive's provisions and scope, in connection with both worker protection and the promotion of employment.

The "non regression clause" therefore makes it possible to reconcile the *soft* means of regulation used by the OMC with the need to force member states to respect minimum protection standards without, however, legitimising a drop in standards in countries where existing legislation already provides adequate levels of protection[748]. Given the hybridisation of social legislation by the EES, the aim of the non regression clause can be seen as being that of limiting - while respecting the differences between the various national regulations and welfare systems - the effects of possible deregulation and/or the introduction of greater flexibility in the labour markets in member states, which some parts of the directive appear to be promoting[749]*;* the clause thus guarantees that where – as is the case *de quo* - there is convergence between social law and an employment strategy oriented towards making the market or employment relationships more flexible, there must be no opportunity for a drop in standards. In this sense, the clause will facilitate, in the general formulation of the directive, the harmonisation of common standards in member states. In some states (e.g. the UK, etc.) where there is very little regulation of contracts, the directive will confine itself to establishing objectives and protection standards (including, as we have seen, the principle of non-discrimination) that can be adapted to the national context, thus emulating the OMC, which excludes harmonisation effects. In other states (e. g. Italy, France, etc.), on the other hand, where worker protection and thus a high level of quality in temporary work are firmly guaranteed, the directive provides input for the states to rethink and improve existing regulations, with a view to improving employment rates; however, in these countries, where the non regression clause will find a broad sphere of application, the directive will also act as a way to counteract any excessive deregulation that may derive from an extensive interpretation of certain *guidelines,* thus limiting the possible effects of a downward harmonisation of the existing forms

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[745] Carabelli 2001.

[746] Carabelli 2001.

[747] The remark, made with reference to the directive on *part-time work,* is by Delfino 2002, 13.

[748] Given the necessity to guarantee EU legislation that respects national diversities, in accordance with the experience that led the EU to adopt the model of *governance* expressed by the OMC, an authoritative source (Scharpf 2002, 662) hypothesises the issuing of a series of *framework directives* on social matters, differentiated in such a way as to adapt to the various welfare systems.

[749] This is confirmed by the fact that in the latest products of EU social law (see, for example, Directive 2000/78/CE), which are confined to setting forth and reinforcing the contents of certain *guidelines,* for example regarding equal opportunities, with no attempt at deregulating national systems and/or making them more flexible, there was no need to include a non regression clause.

of protection. The EES, like the objectives of the directive, therefore proposes to activate more efficient functioning of the labour market and employment relationships in the member states, while the aim of the non regression clause is to ensure that, despite the opportunity for states to reconsider existing legislation in order to combine flexibility for companies with security for workers via new principles and techniques, states in which the quality of temporary work is already guaranteed will be *obliged* to maintain protection standards that are at least equivalent, if not the same.

If, however, the possibility for member states to introduce different, perhaps more liberal, regulations concerning temporary work and the prohibition against lowering protection standards coexist, it becomes of crucial importance to assess possible cases in which a "general reduction in the level of protection" may occur. One cannot but agree with the opinion[750] that "the comparison cannot be accurate, but must refer to the very essence of protection and thus to the essential, defining parts of the discipline (even though, in order to achieve balance, a comparison has to be made between ameliorative and pejorative clauses)". It would, in any case, be desirable for all states to lay maximum emphasis on the key aim of the proposal as a whole, that is, work of quality, evaluating any prospect of reform with the work quality indicators provided by the Commission[751].

In the light of what has been said, the following question needs answering: will a state, with a provision in which it *formally and explicitly* implements a directive and its non regression clause, be able to openly modify existing regulations in a pejorative sense, even though they comply with the minimum standards? The proposal gives a number of evident examples of showing that this possibility is far from being a remote one: it is sufficient to recall the exceptions to the principle of equality in Article 5 and to consider the potential effects of this provision in systems – for example the Italian one *ex* Law No. 196/97 – in which no exceptions to the principle are admitted. Will these states be able to lower protection standards with the excuse that they are implementing the directive? Is a downward harmonisation likely to occur? The answer given by experts is that it is possible "but only if the economic and social reasons for such a modification *in pejus* are *explicitly* stated, in such a way that it clearly emerges as a deliberate political decision by national legislators"[752] who is answerable to his electorate. For the reasons given, however, one cannot but feel that even changes *in pejus,* like the ones mentioned above, will be limited by the impossibility for states to reduce the "general level of protection"; provisions of this kind can *only* be introduced as long as the *overall* quality of temporary work is not affected. In this sense, therefore, there is nothing to prevent a member state from introducing exceptions to the principle of equality already in force, but at the same time it will have to guarantee that the quality of the work will remain high, for example by increasing training opportunities for workers at times when their terms of employment are less favourable or, in general, by guaranteeing greater opportunities for stable employment.

Despite the evident strengthening of the social objectives – work of quality as outlined in the

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[750] Carabelli 2001.

[751] COM (2001) 313 def. del 20.6.2001.

[752] Carabelli 2001; Speziale 2003.

Lisbon strategy - the process of drawing up regulations concerning temporary work and the prevalently *soft* instruments proposed by the directive confirm the impression that the process of social integration in the EU is based on a destructured and many-sided juridical foundation, an impression which still does not solve with any certainty the problem of the real capacity to influence national dynamics. With a view to ensuring a combination of flexibility and security, the question of *whether* it will really be possible to achieve the aims of the proposal, and more generally those of employment policies, "without member states being *forced* to proportion and calibrate their domestic welfare and labour law systems"[753] remains largely unsolved; not even the attempt to strengthen the objectives of the EES through social legislation, in fact, fully convinces one of the concrete possibility of "decisively conditioning the orientations of legal policy, which are still mostly the result of exclusively national political dynamics"[754]. In the case of temporary work, the perplexity is reinforced by the extreme complexity of the rather loosely woven model proposed by the EES, the highly *soft* nature of the provisions contained in the directive, increasing pressure brought to bear on the legal rules by certain interests, which causes them to vary considerably, and finally the evident risks connected with arbitrary extrapolation of pieces of the discipline[755] which may defeat the overall *ratio* behind the model of "flexibility and security" the EU proposes. Given the increasing complexity of this new stage in EU legislation, it is not easy to foresee the interpretative contribution that the Court of Justice will be able to make. Detailed analysis of the problems connected with the role of the Court in the process of social integration lies beyond the scope of this paper, but some concluding remarks in relation to the problems dealt with above can be made. The Court is not likely to become a spokesman for opponents who have not succeeded in making their voice heard during the legislative process. Nor is it likely to take the place of EU legislators by attributing binding effectiveness to precepts that are meant to be adaptable to national contexts. In this respect, in fact, the opposite would seem to be true: the emphasis on the use of soft law in the sphere of social policy would appear to be destined to reduce the supplementary, creative role traditionally played by the Court of Justice.[756] However, in the case of "light" regulatory intervention like that referring to flexible employment, a legal interpretation that supports the protection of certain fundamental rights is to be considered desirable, even when the room left for this interpretation is not clearly defined. It is evident that, given the increasing complexity of the models and tools of governance, the ways in which the Court will proceed to interpret the soft provisions contained in the directives concerning atypical forms of employment are still uncertain, thus not answering the question of whether and how the Court will be able to contribute, in co-operation with other institutional actors and through the already consolidated dialogue with national courts and legislators, towards the real achievement of a policy that combines flexibility and security.

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[753] In this sense, see Caruso 2000a, 143.

[754] Lo Faro 2002, 28.

[755] For an example of how the EU discipline can be erroneously interpreted, thus providing a misleading view of the original *ratio*, see the Italian debate concerning implementation of Directive 99/70 as discussed in Speziale 2003.

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