

Flexicurity or Flexicarity? - A Portuguese Overview

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Abstract: Due to the increasing competition on the labour market, the search for new approaches to labour legislations led to the creation and adoption, in some countries, of so called “flexicurity”. “Flexicurity” became top of the list in the policy agenda in the European Union, but there is doubt that such an agenda for encompassing labour market reform providing not employment. As sources are used “flexicurity” models, in countries where it has already been successfully implemented, as well as Eurostat data, information made available by the European Commission, as well as doctrinal and research papers. Portuguese jurisdiction is considered by national legal doctrine as a closed model. Heavy regulation and constitutional constraints drive an almost unanimous rejection of the possibility to introduce the concept at national level. This article's goal is to discuss the ways the concept could be introduced in the Portuguese jurisdiction. Would the model effectively create security, or would it result in precarity?

KEYWORDS: • labour • flexicurity • security • flexibility • employment

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1 Introduction to “flexicurity”

Globalisation creates new opportunities for growth and employment but also brings challenges and problems such as job displacement and job loss, as well as increased stresses and strains at the workplaces exposed to increasing global competition (Auer, 2006: 17). The pros and cons of globalisation are in fact unfairly distributed between winners and losers within countries even when a country as a whole is a winner in globalisation (Auer et al., 2004: 85–87). It is also said that competition creates a more flexible market. In order to keep up with the needs of such market changes, new policies have arisen, out of which we chose to study “flexicurity”.

“Flexicurity” is a means to reinforce the implementation of the Lisbon Strategy, create more and better jobs, modernise labour markets, and promote good work through new forms of flexibility and security to increase adaptability, employment, and social cohesion. It involves the deliberate combination of flexible and reliable contractual arrangements, comprehensive lifelong learning strategies, effective active labour market policies, and modern, adequate and sustainable social protection systems. Its approaches are not about one single labour market or working life model, nor about a single policy strategy; they should be tailored to the specific circumstances of each Member State. Implies a balance between rights and responsibilities of all concerned. Based on the common principles, each Member State should develop its own “flexicurity” arrangements. Progress should be effectively monitored and promote more open, responsive and inclusive labour markets overcoming segmentation. It concerns both those in work and those out of work. The inactive, the unemployed, those in undeclared work, in unstable employment, or at the margins of the labour market need to be provided with better opportunities, economic incentives and supportive measures for easier access to work or stepping-stones to assist progress into stable and legally secure employment. Support should be available to all those in employment to remain employable, progress and manage transitions both in work and between jobs. Internal (within the enterprise) as well as external “flexicurity” are equally important and should be promoted. Sufficient contractual flexibility must be accompanied by secure transitions from job to job. Upward mobility needs to be facilitated, as well as between unemployment or inactivity and work. High quality and productive workplaces, good organization of work, and continuous upgrading of skills are also essential. Social protection should provide incentives and support for job transitions and access to new employment. It should support gender equality, by promoting equal access to quality employment for women and men and offering measures to reconcile work, family, and private life and requires a climate of trust and broadly-based dialogue among all stakeholders, where all are prepared and intend to take responsibility for change to (or “intending to”) socially balanced policies. While public authorities retain an overall responsibility, the involvement of social partners in the design and implementation of “flexicurity” policies through social dialogue and collective bargaining is of crucial importance. It requires a cost-effective allocation of resources and should remain fully compatible with sound and financially sustainable public budgets. It should also aim at a fair distribution of costs and benefits, especially between businesses, public

authorities and individuals, with particular attention to the specific situation of SMEs (OECD, 2004).

“Flexicurity” in Europe has become a popular topic when the subject is (un)employment. The Danish labour market and its model is an excellent example of successful implementation of “flexicurity”. It’s a combination of both labour market flexibility and social security. Its purpose is to gather various kinds of flexibility with different degrees of security.

In Denmark, the main focus is on security in employment and income combined with flexibility in relation to the hiring and firing of workers (Atkinson, 1984: 11–14).

“There are four different kinds of flexibility:

- numerical flexibility – adjustment of the number of employees;
- functional flexibility – flexibility between work tasks;
- working time flexibility;
- pay level flexibility.

There are four different kinds of security:

- job security: remaining in the same job;
- employment security: staying employed, but not necessarily in the same job;
- income security upon unemployment or illness;
- combination security: the possibility of combining work life and private life through, for instance, parental leave schemes and special schemes for senior employees”.

“Flexicurity” is a word which has been widely spread in the last years. The sudden apparition of such term is deeply related to the fact that the world has been undergoing a continuous economic crisis, and it reflects in the capability of obtaining and maintaining a secure job position. This concept, which emerged in the Netherlands in the mid-90s, carries within itself two presumptions. The first is the presumption that high levels of flexibility are necessary in order to compete successfully in a globalized market and the second is that high levels of flexibility are needed in order to afford high levels of security - when it comes to securing employment.

The word “flexicurity” carries, hence, the concept of both flexibility and security. Even thou one might say they can’t coexist; the reality is that they are not only compatible but can also support one another, in a symbiotic relation. Flexibility shouldn’t be looked at as being a monopoly of the employers, just as well as security should not be totally in the scope of the powers of the employees. It is well known that stability in the employment relation and the satisfaction and loyalty of employees are an advantage to both the employees themselves and their employers, as levels of productivity tend to be higher when workers are satisfied. It’s also no news that the employees have also been trying to find ways to adjust their work to their personal and family life, being willing to have a more flexible way of organizing work.

One could easily understand that if flexibility causes satisfaction and satisfaction causes higher levels of productivity, it also creates security instead of preventing it (as might have been concluded in an initial approach, under the conceived perspective that there would be conflicting interests).

2 Historical Background

The concept “flexicurity” appeared for the first time in the Netherlands in the mid-1990s. It isn’t, however, a concept that was only to be adopted in the Dutch labour market.

“Flexicurity” is a policy strategy that aims to enhance labour market, labour relations and work organization flexibility (labour mobility, fixed-term contracts) on the one hand, and employment and income security, in particular of the sensitive social groups that are located at the margin of labour market on the other (Wilthagen, 2004: 169). This first definition applies, mainly, to the Netherlands, where “flexicurity” was first implemented.

It’s also noted (Wilthagen, 2004: 170) that there is a more comprehensive definition: “flexicurity” aims to strengthen the labour market position of sensitive social groups (unskilled, young and older employees, women, immigrants, minorities etc.) and to promote high labour market participation and social inclusion, providing at the same time numerical, functional and wage flexibility that facilitates the in time adjustment of labour markets to the rapid pace of the challenging global changes, upgrading productivity and, therefore, increasing competitiveness. There has been a clear intent to mingle flexibility with security at the level of the policy discourse at EU level.

The Commission’s Green paper from 1997 titled “*Partnership for a New Organization of Work*”¹, which states: “*The key issue for employees, management, the social partners and policy makers alike is to strike the right balance between flexibility and security*”. This will arise especially in connection with the Lisbon Strategy (2010).

In March 2000, EU heads of state and governments agreed on making the EU “the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.”² It was agreed that to achieve this goal, an overall strategy should be applied. It aimed at: preparing the transition to a knowledge-based economy and society by better policies for the information society and R&D, as well as by stepping up the process of structural reform for competitiveness and innovation and by completing the internal market; modernizing the European social model, investing in people and combating social exclusion; sustaining the healthy economic outlook and favorable growth prospects by applying an appropriate macroeconomic policy mix.

Reconfirmed on its follow-up EU2020 strategy – in 2005 the EU renewed the Lisbon Strategy³. It aimed to achieve economic growth, better jobs and social cohesion, making the EU the most competitive and dynamic knowledge-based economy in the world.

The Brussels European Council⁴, in March 2006, calls on member states to “*direct special attention to the key challenge of “flexicurity” (balancing flexibility and security)*” and invites them “*to pursue in accordance with their individual labour market situations, reforms in labour market and social policies under an integrated ‘flexicurity’ approach, adequately adapted to specific institutional environments and taking into account labour market segmentation*”⁵. Later, in 2008, the Brussels European Council underlines that “flexicurity” helps both the employees and the employers to seize the opportunities – and challenges - globalization offers. Furthermore, since flexibility and security are mutually reinforcing throughout the lifelong circle, intergenerational solidarity should be considered within all four components of “flexicurity”. This is concluded in 2012 with a report for final evaluation of flexicurity, 2007–2010.⁶

“Globalization” and “Europeanization” originated enormous changing processes in several fields. The different countries, because of the different state of the national economy; of the capacity of the established institutional structures and the policy initiatives introduced, took, or are still taking, different periods of time to adapt to the rapid change of economic environment and the technological developments. It’s well known that the promotion and implementation of reforms are bound to the dynamics of political interaction.

Convincing the governments and the population (and when it comes to labour, also the professional unions) of the adequate and necessary reform initiatives is, most of the times, time-consuming and not always fruitful. In every reform, but especially when the narrow interests of large groups of the electorate are affected (e.g. labour market and welfare state reform), governments face a difficult task in their effort to persuade the public and keep the electoral majority on their side - or it may cost re-election.

It is of great significance, in Europe, the welfare state as an instrument for accomplishing the desirable social cohesion and an expression of solidarity, in fulfilment of the European values. The employees should be offered essential protection assuring the necessary income security in order to obtain the requisite qualifications to confront the new challenges, help them remain inside the labour market, and balance career and family and social responsibilities.

3 From “flexicurity” to “flexicarity”

At first, and due to its outstanding success, as seen in the Nordic “flexicurity” experience, the idea of a flexible labour market and high social security, has been cited by OECD as a role model for other European countries (OECD, 2004).

The EU, then, postulates a congruent combination of flexibility and security - of both employers and employees - in the labour market as an adequate model capable of achieving the objective of making the EU “*the world’s most competitive and dynamic knowledge-based economy*”. Initially stated in The Lisbon strategy and reconfirmed on its follow-up EU2020 strategy.

“Flexicurity” appears to be an appealing concept for it may be seen as a way to restoring a positive link between competitiveness and social protection.

There is notwithstanding a serious and well-founded fear concerning the application or implementation of such an ideally positive change. The question which obviously arises is: Is it possible to apply flexibility, or will it be nothing but giving the employers ground for enslavement, exploitation? John Monks says that *“To prevent “flexicurity” to become “flexploitation” the Commission should take responsibility for shaping a strong social dimension to the internal market, guaranteeing worker’s rights and worker’s security.”*

There is no consensual opinion regarding “flexicurity”; some are that defend it should be implemented: “Flexicurity” is an appealing concept because it offers a way to restore a positive link between competitiveness and social protection. Globalization and technological progress require responsiveness to deliver their full benefits and hence finding new ways to combine social protection, and economic flexibility is fundamental to more and higher-productivity jobs⁷.

Others believe there is an evil intent behind the implementation of “flexicurity”: *“The real agenda hiding behind “flexicurity” simply seems to be the dismantling of job protection....”*⁸.

In 2008, with the starting of the ongoing financial crisis, “flexicurity” disappeared from the agenda of EU as no safeguarding of the workers could be foreseen in such model. The »TROIKA« took over some countries such as Spain and Portugal, and necessary adaptations to social security models were foreseen (Heyes, Hasting, 2016: 4), as well as changes in labour law, as we will explain below, regarding Portugal, and its labour law.

Even though at first “flexicurity” looked like a shining bright solution for market problems, after the European Commission, DG Employment, Social Affairs and Inclusion organised an expert hearing on 'Labour market transitions' in June 2016. The conclusion was that “Flexicurity” does not create either flexibility or security and the previous option, of implementing it, was dropped as *“Some experts opted for (re)establishing labour market resilience and fairness by dropping the flexicurity concept and adopting an alternative approach based on social rights and job quality”*. In fact, the conclusion is that there is no need to create or reinvent labour law rules that already exist and are working in full steam. It can be looked at as the perfect model that was everything but perfect.

Perspectives have changed, in 2013, the OCDE report showed that not even in Denmark, security in the labour market was achieved through this model as Denmark does not have a labour market that is particularly flexible and Danish job protection is not very much below the levels of job protection registered in France and Italy, countries that do not apply such model.

Based on the estimates done in 2004, Denmark could indeed be characterised as having a flexible labour market, with the degree of job protection as low as in the UK and Ireland and substantially below continental countries such as Germany or France. But those conclusions just changed in this new report. Was it but a statistical illusion?, one may ask.

Some authors added a twist to the concept, having created a new, and one might say, more accurate one... “flexicarity”, as it results in precarity rather than in security (Agustin, 2009: 22–26, Hansen, 2007a: 88–93), as it only foresees the state-market relations and on social security, and not on the state family relations or on services (Hansen, 2007a: 91).

Also regarding gender perspective, many flaws were found in the security aspect of the model. The non-existence of effective childcare services, that should, in fact be provided by the employee, if not the State, make this concept not applicable to women who play not only the role of workers but also of caretakers for their own children. The same applies to man who play both roles (Emerek, 2008: 5).

The overall conclusion is that the model fails to meet its goals, even in those countries where it had proved to have been effectively successful at first.

4 A Portuguese Overview

The model, that now seems to have never worked in any European Country, for the above-mentioned reasons, would never be implemented in the Portuguese jurisdiction. This analysis may have generated discussion on different ways as rigid labour systems might change to accept and test the concept. To do so, the depth legal analysis of the pertaining rules is performed. Hermeneutical techniques are used to do so.

Portuguese jurisdiction is considered by national legal doctrine as a closed model. Heavy regulation and constitutional constraints drive an almost unanimous rejection of the possibility to introduce the concept at the national level.

Within the Portuguese context, “flexicurity” has only very been submitted for discussion when was first recommended by the EU. The subject was first approached as a seminar held by the Ministry of Employment and Social Solidarity. Right away, it became a controversial issue being immediate opposition declared by CGTP-IN, the major union confederation existing in Portugal, which promoted a ‘*general strike*’. In Portugal, the promotion of general strikes are a usual reaction from the Unions, in accordance with its traditional culture of opposition and confrontation - to fight against the implementation of “flexicurity”⁹.

In the scope of private labour law, the Labour Code currently in force was approved by Law no. 7/2009 of 12 February and since then has been the subject of several legislative changes that are very relevant to the lives of workers, On the one hand, on the basis of

divergent analyses and, on the other hand, in particular the workers, in the light of the numerous legislative changes which took place within the public administration.

Of particular note are the following:

- Law no. 53/2011, of 14 October, which established a new compensation system in various forms of termination of employment contract, applicable only to new employment contracts.
- Law No 3/2012 of 10 January establishing a system for the extraordinary renewal of fixed-term employment contracts, as well as the system and method of calculating the compensation applicable to contracts subject to such renewal.
- Law no. 23/2012 of 25 June, which amended 64 articles of the Code, with emphasis on those relating to bank hour, payment of supplementary work and holidays, compensatory rest, compulsory holidays, compensation for collective dismissal, dismissal for termination of employment and maladaptation, as well as the declaration of nullity of the norms of collective agreements that establish higher amounts than those of the Code in respect to the due compensation for collective dismissal, termination of employment and maladaptation. This law therefore consecrated a package with enormous and serious negative effects on the individual and collective rights of workers and their associations of class.
- Law no. 69/2013, of August 30, which adjusted the amount of compensation that is due in case of termination of employment contract.
- Law No 76/2013 of 7 November, which established a system of extraordinary renewal of fixed-term employment contracts, as well as the system and method of calculating the compensation applicable to contracts subject to such renewal.
- Law no. 48-A / 2014, of July 31, which extended the period of suspension of the provisions of instruments of collective labour regulation and labour contract clauses.
- Law no. 27/2014, of 8 May, which amended the Code with regard to the criteria for choosing workers in dismissal for dismissal of the job and for maladaptation.
- Law no. 55/2014, of 25 August, which amended the deadlines for collective bargaining agreements and the deadline for contracts of employment, thus changing collective bargaining regulations once again.

As for the Portuguese case, the biggest “NO” when it comes to implementing “flexicurity” is related to its CRP – Constitution of the Portuguese Republic,¹⁰ not Labour Code in particular. Portuguese legislation is considered (mainly due to Article 53 of the Constitution) highly inflexible and protective, even if it has become clearer and clearer that believe this labour stiffness to more apparent than real, as employees have been given more and more grounds to justify fair dismissal.

Portuguese legal system is bound to its constitution, as “*It enshrines the fundamental rights that pertain to citizens, the essential principles that govern the Portuguese State, and the major political guidelines with which the latter's entities and organs must*

comply. It also lays down the rules for organizing political power. In other words, it establishes the structure of the state and defines the competencies of the main entities that exercise sovereign power (the President and the Assembly of the Republic, the Government, and the Courts), and regulates the way in which they relate to one another."¹¹ What this means is that all laws ought to respect what is stated in the Constitution, or they will be considered invalid, due to unconstitutionality, subject to prior appreciation by the Constitutional Court. The constitution is divided into parts, the part that will be addressed is Part 1, which relates to the fundamental principles.

On Part I, Title II Chapter III of the Constitution can be found the articles that relate to Labour. The Constitution, as noted in the previous paragraph is divided into parts, the part that will be addressed is Part 1, which relates to the fundamental principles.

The rights and guarantees hereby foreseen prevent (constitutionally speaking) the employers from the dismissal of employees without appropriate cause. Their rights are to be applied transversally to all employees, under the constitutional understanding of what an employee is. A subordinated, who works under the direction and authority of someone else, regardless of the category of the (private or public entity) or the legal nature of its relationship.

It is significant that the first constitutionally enshrined right in respect of freedoms and guarantees of workers is the right to job security. The significance of this guarantee is obvious, resulting in apparent refusal of the right of free or discretionary dismissal by employers withdrawing its control in labour relations. After obtaining a job, the employee is entitled to keep it, unless fair cause, the employer cannot terminate it in its sole discretion. This constitutional prohibition generates illegality - for unconstitutionality - and the consequent annulment of all acts if the dismissal lacks in fair cause. It's up to the State to ensure that this constitutional prohibition is observed (Costa, 2009: 123–144).

There are also some requirements when it comes to accessing if a particular dismissal did – or not- lack fair cause. Those are the principal of the legal definition of fair dismissal as for the facts and the legal rules that constitute fair dismissal, the inadmissibility of absolute causes of dismissal, therefore violating rights, freedoms and guarantees, being only admissible particular circumstances to be presented as a cause in each individual case. Portuguese employers, often with the connivance of the state, have found ways to overcome the text of the law causing the labour market to become more fluid.

Portuguese culture is strongly consensual, which means that, in the case of confrontation, is easily accepted a rescission by agreement if when the employer uses of more perverse and evil means to cause the initial conflict. I have this has been used, more frequently than advisable, an easy and cheap way to overcome individual and collective disputes between employees and employers¹². Other problems arise when deciding on changing the path of things in the Portuguese Legal System.

In Portugal, this process would have to pass through the social dialogue and collective bargaining that would involve negotiations or joint discussions between the Government, the trade unions¹³ and employers' (Santos, 2007: 145–185) has constitutional recognition on Articles 56/2-d of the Constitution and own institutional setting: the Permanent Commission for Social Dialogue, part of the Economic and Social Council.

The Constitution lists in Art. 56, “*rights of trade unions*”, which mostly corresponds to the participatory roles in many areas and instances. Moreover, the exercise of “*collective bargaining rights*”. Are being, however, when the issue at hand the first to oppose this new form of flexibility and security. Are of the opinion that it would only cause more ease in redundancy and increased unemployment.

The Portuguese labour law is created in a way that precarity would not be a reality – even though it is – hence, the risks of this Danish model would always prevent its application.

5 Conclusion

We are facing a worldwide change of paradigms; new challenges are emerging from the global – new – demands of economy and sustainability. The trade-off between employment protection by firms and labour market protection by the state and the social partners requires bargaining on an enlarged agenda that includes both adjustment concerns of companies and security concerns of workers. In any case, globalisation will increase, rather than decrease, the need for insurance against labour market risks and for protected transitions (Agell, 1999: F144, Auer et al., 2004: 69–70, Heyes, Hasting 2016: 1).

With the recent conclusions of the OCDE regarding the results of the actual implementation of “flexicurity” in the northern countries, it was actually a wize decision that such model was not tested or imposed in Portugal.

Still, in Portugal, without a constitutional change there would be no possibility of implemented, at full speed the concept of “flexicurity”, the truth is that flexibility is, and has been, a constant in our labour system. As it is, “*it would deregulate the labour market, undermining it, even more, knowing in advance that there are no conditions to ensure, in those circumstances, a social security system that protects workers. It would not bring any added value for economic development*”.

We were never working towards “flexicurity”. As the concept, in itself, is a mixture of two other concepts: flexibility and security (as seen above). With the actual crisis, no security is granted. The Portuguese economy - due to the globalised crisis, and other political and particular circumstances – and Portuguese Social Security found it impossible to grant the access to the opportunities available, for unemployed people, in those other countries, Nordic and culturally different countries where, in fact, “flexicurity” was – at first - a success.

Would it have been put into motion, this flexibility, would have operated without any protection for the worker, especially regarding the reintegration into the labour market of workers over the age of 45, particularly low-skilled, cannot be obtained and, consequently, would not grant any security, who would have seen gutted all rights and safety, the working harbour, constitutionally guaranteed, without any security component, which allowed the worker to get a subsidy of unemployment – compensation – and appropriate training to their rehabilitation, causing not only unemployment but also precarity in labour relations.

We dare to say that the Portuguese model would clearly be a model of precarity, rather than security.

Notes

¹ Partnership for a New Organisation of Work - Green Paper. Document drawn up on the basis of COM (97) 128 final, 16 April 1997. Bulletin of the European Union, Supplement 4/97. [EU Commission - COM Document].

² In Lisbon European Council 23 and 24 March 2000, Presidency Conclusions, available online at: http://www.europarl.europa.eu/summits/lis1_en.htm (accessed November 2016).

³ Europe 2020, Europe's growth strategy available online at: http://ec.europa.eu/europe2020/pdf/europe_2020_explained.pdf (accessed November 2016).

⁴ Commission staff working document - Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards Common Principles of Flexicurity: More and better jobs through flexibility and security - Impact Assessment {COM(2007) 359 final} {SEC(2007) 862} available online at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52007SC0861> (accessed November 2016).

⁵ For the full text see Council of the European Union, Presidency Conclusions 7775/1/2006 REV 1.

⁶ Evaluation of flexicurity 2007-2010: Final Report A report by ICF GHK to European Commission, Directorate-General Employment, Social Affairs and Equal Opportunities (VC/2011/0682), available online at: <http://ec.europa.eu/social/BlobServlet?docId=10018&langId=en> (accessed November 2016).

⁷ M. Stocker, advisor to Business Europe, in Euro Activ, September 2007.

⁸ “The real agenda hiding behind 'flexicurity' simply seems to be the dismantling of job protection, thereby giving employers even more power to press for lower wages and reduce workers' flexibility”. (R. Janssen, Euro-Activ, 2007), available online at: <https://www.euractiv.com/section/social-europe-jobs/news/interview-social-partners-still-at-odds-over-flexicurity/>.

⁹ Opinion of UGT, available online at: http://www.ugt.pt/parecer_28_03_2007.pdf (accessed November 2016).

¹⁰ Constitution of the Portuguese Republic available online, in English at : https://www.constituteproject.org/constitution/Portugal_2005.pdf (accessed November 2016).

¹¹ República Portuguesa, available online at: <http://www.portugal.gov.pt/en/portuguese-democracy/a-constituicao-da-republica/a-constituicao-da-republica.aspx> (accessed November 2016).

¹² TRABALHO E RELAÇÕES LABORAIS, available online at: http://cies.iscte-iul.pt/destaques/documents/ForumCIES2009_4.pdf (accessed November 2016)

¹³ UGT and CGTP.

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