Abstract - The study, basing on a multidisciplinary literature, considers flexicurity as any balance between flexibility and security and, therefore, proposes ordering any set of contracts, providing the same balance and with the same regulatory framework, in “communities”. It is assumed, therefore, that communities can differ either in terms of a “protective” trade-off, where the differential is not a surrogate measure of security, or in terms of an economic trade-off, where it is met by the provision of social insurance or security. After identifying from ILO, EU and constitutional sources the foundation of the “incompressibility” of rights which guarantee decent work, the paper likens decent work to a public good of general interest, in the same way as laws generally recognize the natural environment. On the basis of this comparative axiom, the paper proposes considering the dispersion of security produced by undeclared work as “un-decent” work and, therefore, as a form of “pollution”. Because an environment can be little or very polluted, the paper proposes considering as social pollution any form, even legal, of security leakage - such as that induced by the precarious and atypical jobs. In this way, each community expresses a degree of social participation in environmental pollution: from the maximum produced by undeclared work to the minimum produced by labour standard. The adopted economic approach allows defining this pollution as a negative externality and, therefore, refer to its contrast in terms of internalization. Among the techniques of internalization, the preferred one is the Pigovian tax, because it can overcome the difficulties associated with the identification of taxable income in the undeclared work and in the informal sector. In this way, it is believed that on one hand you lose your interest in hiding most of the black job. On the other hand, a mechanism would be enforced that forces polluters to contribute to the financing of the security needed to address the pollution created. Because of the adopted ordering of communities, this positive effect would also impact on precarious forms of employment and atypical work in proportion to the security dispersed.


This work poses two key questions: the first is how to order forms of protection; the second is how to overcome the security trade-off between forms of protection (hereafter referred to as flexicurity trade-offs).

We will try to answer these questions in a heterodox manner based on an economic approach. It is therefore necessary to provide a methodological premise and make an epistemological clarification.

The premise of the method also forms part of the general subject of this conference, Pressing Problems in the Law and Legal Education, as it has been inspired by the author’s experience teaching labour law and social security in the economics faculty of his university. This opened up an on-going comparison with a universe that is just beginning and for a long time was very distant from his own; more than the counter opposing methodological, epistemological and ideological discrepancies with his economist colleagues, and the consequent irreconcilable tributes on the primacy of law over economy or vice versa, it was the necessity of making the comparison with students and the necessity of finding a shared channel of communication that stimulated a dialogical approach with these sciences. Dialogue, as per its Greek etymology δια λόγος (through and discourse), produced the intended effect on both interlocutors through the legal discourse of the teacher and the economic discourse of the objections and the forma mentis of the student.

In truth, the fact that it produced an effect on the...
teacher is evidenced by his altered approach to teaching and studying law. Obviously it is only the teacher’s aspiration for it to produce a positive effect on the students! It can at least be hoped that it has instilled in the economics students – and this is the most important thing – the awareness that the law is not subservient to the best possible functioning of the market, and that, especially when it is relative to the constitutional standards, i.e. the founding principles of a community, this cannot be changed ad libitum if the economic model does not produce the desired results, even if the constitutional standards themselves are preventing them from being achieved.4

Thus, without foregoing the role of the legal expert and his methods, the use of an economic lexicon and conceptual framework as a term of comparison meant that the teaching of law did not – as sometimes happens – remain an external body added to economics training for students or a mere addendum to it; it also meant that the economics students’ economic objections were not lost on their law teacher.

With this premise, assuming that the performative value of the social model hinges on constitutional standards and not the economic model, it is possible to use the perspectives and cultural armoury of economics to carry out our analysis. Is this a betrayal of the legal method? Is it an epistemological stretch? Whether it is or not depends both on the role of the interpreter and the use of the perspective. In our opinion, a legal expert who wants to understand the real, empirical effects of the legal system by using economic tools does not violate his or her status, even if these effects provide the starting point for the legal investigation; this also applies when economic observations are applied to the legal system.5

We will therefore start from the assumption held by many economists that “economics alone cannot determine the best way to balance the goals of efficiency and equity. This issue involves political philosophy as well as economics. As such, economics’ role is to ‘shed light on the trade-offs that society faces, just to help us avoid policies that sacrifice efficiency without any benefits in terms of equity’, rather than suggest policy. Indeed, ‘equity, like beauty, is in the eye of the beholder’” [Mankiw]. Therefore, when equity changes, this affects the distributed balance or the implementation or rights established by the law, and the investigation on compliance with the law belongs to the lawyer.

Moreover, although this task may seem more relevant to a politician than a lawyer, it should be noted that in the order of the sources of law not all policies are consistent with the sources’ hierarchical order. In relation to flexicurity – which is created as policy but then brings about considerable actions on the part of the legislator – examining it with an economical-legal approach would mean translating flexibility as efficiency and security as equity.

As such, when flexicurity introduces or alters the balance between flexibility and security, this affects the established distribution of the sources of law.6 In particular, there can be sources that establish a hierarchy of market needs and work needs, as takes place in the Italian Constitution and EU Treaties, for example, though they are at odds. There can be rights, such as fundamental rights, that are resistant to the needs of flexibility and become real limitations (for

433; E. Kaufman Bruce, Il contributo al diritto del lavoro della analisi economica secondo l’approccio neoclassico e istituzionale, in Dir. rel. ind., 2009, 272 ss; A. Zoppoli, La soggettività econo-mico-professionale del lavoratore nelle politiche di flexicurity, in Dir. lav. merc., 2007, 535; P. Loi, L’analisi economica del diritto e il diritto del lavoro, in Giorn. Dir. lav. rel. ind., 1999, 547


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example, the principle of equality and non-discrimination). There are other fundamental rights that can be implemented to varying degrees, but do need to be implemented. Finally, there are fundamental rights that, though not directly affected by efficiency policies, depend on other rights that are involved in policies, such as flexicurity.

All these relationships can be studied: as effects, by means of the economic approach, with these effects reconsidered in light of the sources; by means of the legal approach, as insurmountable limits to policies reconsidered in light of the economics institution. For these reasons law and economics cannot function independently of each other (Perulli 2008). As such, legal experts will use economists’ tools to increase their knowledge of the empirical effects of law, especially with reference to the argument of whether or not they are expected.

In particular, this paper will consider theories of externality and distortion of taxes and analyse the observed effects of them in light of the limits of constitutions and treaties. For the legal expert this means exploiting the conceptual apparatus without betraying the original mission.

2. Related Literature

Many studies on employment, income, employment conditions, safety, flexibility and undeclared work have been conducted in different fields (i.e. law, economics, sociology, politics), but they are not all correlated with one another. This study will gather together suggestions, in particular those of the legal studies by Zoppoli (2007), Bellavista (2007A, 2008), Perulli (2008), Giubboni (2007), and Bell (2012); those of the economic studies by Oropallo and Proto (2006, 2006A) in relation to the impact of the reduction of labour costs on companies and families; and, from a sociological perspective, those by Karpinnen and Bushak (2008, ed.), and Vermeylen and Hurley, regarding flexicurity in the EU; last but not least, the critical studies on flexinsurance by Tangian. Obviously, much of the vocabulary is taken from Wilhagen and Tros.

Although very different from one another, in all of these studies there are implicit functional links to the idea of “social cooperation in which the supreme values and rights of its members are compared with each other as a sign of weighting and balance” (Ghezzi 2004 cited by Perulli 2008), which inspired our research.


This new way translated in rules, at the EU level, means setting up ‘some form of direct social redistribution’ to reduce ‘the distortionary risks due to competition and arising from huge differences in social protection standards in Europe now “at Twentyseven.”’ (GIUBBONI 2007).

3. INTRODUCTION: TOWARDS A CRITICAL READING OF THE ORIGIN OF FLEXICURITY

Flexibility and security are terms that have been used to develop the debate on “new” labour law and the “new” social model for several years; they are the (necessary but insufficient) constituents of flexicurity.

According to what is collectively reported in the literature [ex multis Maarten Keune and Maria Jepsen, Michael Parnis, Wilthagen, Tangian, Jørgensen, the neologism flexicurity traces back to Dutch sociologist Hans Adriaansens who coined the term in the mid 1990s, during an interview on the subject of preparatory works on the Dutch Flexibility and Security law of 1998/99.

Adriaansens defined it «as a shift from job security towards employment security». Keune and Jepsen claim that Adriaansens’ neologism was quickly adopted by some Dutch (Wilthagen, Muffels and oth, German (Keller and Seiftert 2000; Klammer e Tillmann 2001), Danish (Madsen 2002, 2003) and Belgian scholars (Sels e van Hootegem 2001, Sels and oth.), and was adopted by EU economists and sociologists in 2006; however, legal experts did not pay it any significant attention until the EU Commission Green Paper on the modernisation of labour law was published.

After Adriaansens’s statement, the term first appeared as a scientific tenet in a paper by Ton Wiltgthen in 1998 [Flexicurity – A new paradigm for labour market policy reform? Berlin: WZB Discussion paper, FSI 98–202]. While on a normative level the two explicit constituents of flexibility and security appear in

the Dutch Flexibility and Security act of July 1998 which came into force on 1st January of the next year, and in which no explicit mention was made of flexibility, but flexibility and security measures introduced inspired by employment security rather than security in relationships were introduced.

These are summarised in the famous work “The concept of flexicurity: a new approach to regulating employment and labour markets” [Wiltaghen, Tros 2004] that subsequently formed the basis of the aforementioned Green Paper.

In terms of flexibility, these actions were intended to “inject greater flexibility into the labour market”, loosening protection against dismissal and restrictions on the use of temporary work, and in terms of security to synchronically introduce greater security for workers employed in flexible jobs. [W, T, 2004]

This asset reflects the orientation of the Dutch (Labour-Liberal) coalition government of the 90s that, to reconcile the interests of businessmen and workers, at once reinforced companies competitiveness through flexibility and protection of workers through security. This law implicitly marked the creation of the Dutch flexicurity model, even if not explicitly. It was characterised by the use of atypical contracts and flexible types of work, providing them with labour laws and social security for them analogous to those for standard work (Amoroso).

This model has undoubtedly inspired community directives [2008/104] on temporary work and [1997/81], on part time work and[1999/70], on work through agencies, in which the security component seems to have been left as a mere equal treatment clause [Bell] without any added value in relation to standard contracts, and is – in Italy at least – a flexible variant of the latter that provide less protection.

In truth, differentiating between the overall protection given by typical and atypical jobs goes against the spirit of flexicurity. In fact, “flexicurity thesis argues that, due to a more dynamic labour market..., flexibility and security are inextricably linked. They form a kind of 'double bind', a mutual relationship or a syn-

ergy: a high level of mobility or flexibility enables a country to compete successfully and also to afford a high level of in-come and employment security. At the same time, the latter should be an underlying prerequisite for sustaining high levels of flexibility” (Wiltaghen and Tros, 2004)

The premise of this betrayal can be discovered by comparing the doctrinal definition of flexicurity and the institutional definition of the Commission. According to the famous definition by Wiltaghen and Tros (based on Wiltaghen, Rogowski),

«A policy strategy that attempts, synchronically and in a deliberate way, to enhance the flexibility of labour markets, the work organisation and labour relations on the one hand, and to enhance security – employment security and social security – notably for weaker groups in and outside the labour market on the other hand.».

In the same paper the authors emphasise that flexicurity not only indicates a policy but also “a certain state or condition” of the labour market. As such the term must not only define a typical form of security and a typical form of flexibility, it presupposes “a high level of mobility or flexibility enables a country to compete successfully and also to afford a high level of income and employment security” as a prerequisite of flexibility.

Conversely the community definition [Com(2007) 359 def.] describes it as:

«A policy strategy to enhance, at the same time and in a deliberate way, the flexibility of labour markets, work organisations and employment relations on the one hand, and security — employment security and social security — on the other.»

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28B. Amoroso, Luci ed ombre del modello sociale danese, in Dir. lav. merc., 2010, p. 227 ss
As is noted at a first glance, the Commission’s definition no longer states that it “attempts to improve” but rather that it “is used to improve” and as such assumes a normative character. On the other hand, in addition to substituting the heuristic adverb “synchronously” in the definition with the blander “at the same time”, the strategy extracts from its main purpose, which is inclusivity, and transforms it into a general policy that nullifies the complementary aspect of the flexicurity policy in relation to other policies, especially those directed at implementing security as a prerequisite.

This is probably due to the asymmetry of EU competencies in relation to the market and social security; the former is maximal, the latter minimal.

Upholding the spirit of the scientific definition and its heuristic adverb “synchronously” would have kept flexibility and security in a double bid, while it is clear that the Commission’s intervention places the market in a position of primacy and makes security a function of extensive deregulation of labour law.

The Commission thus favours a morphological approach to the fusion of flexibility and security, whereas the scientific definition takes a more holistic approach derived from an attempt to fuse the semantic fields of flexibility and security.

Indeed, from a morphological point of view, flexicurity is a simple fusion of the words flexibility and security; from a semantic perspective, however, this fusion is hard to define. This is both because of the extreme diversity of the semantic fields to which the two constituent terms belong, and because what keeps flexicurity balanced between the crisis of the semantic approach and the oxymoron of the morphological is a third, hidden concept that is poised between the two and (like a metal in an alloy) affects the way they are interpreted. “Balance” is sometimes simplified in relation to flexicurity.

Balance is the element that allows (or would allow) us to get closer to flexicurity in from a holistic perspective. By using this approach it is possible to identify balance as a function of the extent to which the sum of the two terms does not result in a trade-off in favour of one or the other. Indeed, flexicurity aims to prevent ant trade-off and the intrinsic contradictory neutralisation between its constituents.

The Danish social model, with its golden triangle, is generally considered to embody a model of flexicurity that can achieve semantic fusion and overcome the morphological oxymoron.30

In fact, in the empirical application of the so-called Danish model of flexicurity, recently re-examined by Jørgensen [2011], the overcoming of the contradictions is ab origine assigned to a cost that is triple the corresponding average in the EU/27 in terms of GDP percentage. The same author is forced to admit the “need to properly maintain the system – and not do damage to the security elements in it!” As such it is evident that the Danish model is only a Danish model and not an exportable flexicurity model, Jørgensen [2011]. The Danish model does not formalise any loosening of the security rules in employment contracts, but these rules are loose from the beginning; it does not formalise any substitute security, but it is strong and generous as per the tradition of the Scandinavian model. The Danish model does not formally relax any of the security rules in employment contracts: these rules were loose to begin with; it does not formalise any alternative form of security, but it is strong and generous as per the tradition of the Scandinavian model. In Denmark in the nineties, flexicurity brought about a worsening of Scandinavian welfare and a reduction in protection, far from the balance preached in the premise of flexicurity. Indeed, contrary to what is normally believed «the Danish model of flexicurity is a current attempt to reform the Scandinavian welfare system that has been present in Denmark for more than a century in specific relation to the labour market, adapting it to flexible work and production systems, new forms of organising production and the competitiveness required by capitalist

\[29\] The directives on atypical work are a clear example of this, as shown by Bell 2012.

globalisation» [Amoroso, cfr. Jaspersen31].

It does not therefore agree with Jørgensen’s [2011] passionate defence of flexicurity, according to which the two terms are not contradictory and the sum of the two produces a result greater than zero. Their intrinsic literal, logical and functional divergences are not refuted, but merely postulated as non-existent in the consolidated Danish situation and therefore not representative of a model that can be adapted to different orders.

Saying that Danish flexicurity is not exportable is equivalent to rejecting the idea that it constitutes a model and can therefore be used as a basis for a common policy.

The absence of a concrete exportable model, along with the vagueness of the Community acts (see the definition officially adopted by COM(2007) 359 def.), contributes considerably to making the concept of flexicurity elusive.

In the absence of a well-defined archetype, and with a watered-down institutional definition in comparison with the scientific equivalent, even the subsequent doctrinal processing [Muffel and others32] (and the Commission (Com(2007) 359 def.)), reaffirms the notion that flexicurity has no single form, for example the constantly evoked Danish and Dutch models, but must be combined with conditions in individual countries.

In the absence of an archetype the crucial element lies (...) in the faith in the flexicurity system on the part of its actors. This is a characteristic that could give flexicurity a certain degree of wishful thinking and a theological attribute to its supporters.

As such, faith in flexicurity is an archetype in itself that nevertheless resembles the golden triangle of the direct Danish matrix too closely, in relation to which the freedom to adjust it for each member country seems to be an attempt to give it a veneer of democracy. In this respect it has been vividly written that,

It seems hard to disagree. Thus in a Europe with a widespread and long tradition of welfare states, it would be interesting to understand the reasons behind the fate of the word flexicurity, but this task is beyond our powers and must be left to the semioticians. In any case, between 2006 and 2007 this was the central issue of EU employment policies, the subject of the Green Paper Modernising Labour Law to meet the challenges of the 21st Century [COM(2006) 708 definitive], and in Italy it entered the (Fornero) law, art. 1 which makes substantial and explicit reference to it, after having passed from the draft law (Draft Law AS n 1481, presented on 25 March 2009 for the so-called “Flexicurity Project”, n. 1872 and 1873 of11 November 2009, for recoding trade union rights and labour law respectively). In the conclusion we will return to this issue, not to discuss its fortune further but rather the danger of this (undeserved) unconditional trust.33

4. Questions posed by the title.

What flexicurity; what we mean by social pollution and total security; in what terms can flexicurity be a gauge for the differential in the protection of workers.

4.A What flexicurity? Or: Odi et amo34

As already discussed in the introduction, beyond its institutional definition, flexicurity is presented as a holistic philosophy, the constituents of which, flexibility and security, are combined to generate a new subject/object that is greater than and different from their sum. As in biology, the sum of the same elements generates different subjects, not only from the elements in question, but between them as well, so in flexicurity the sum of flexibility and security should not generate analogous to the motto of the Prague Spring in 1968, “socialism with a human face”, “flexicurity is a deregulation of labour markets (=flexibilization) with ‘a human face’” (Tangian 2007).

32 The title is borrowed from the famous ode by Catullus (Liber, Carne 85.) As in the poem Catullus tells us inextricable bond that joins the extreme feelings that literally put him on the cross (= crucifi are crucified) independently of his will, here we want to emphasize that the flexicurity elicits extreme net reactions of acceptance or rejection, but that this attitude, as in the «odi et amo», (that means: love and hate), beyond our will, being intrinsic to the binomial and, therefore, puts us on the cross in the inevitable struggle between the demolition of flexicurity and, depending on limiting the damage, its revision.
a universal flexicurity, but a (balance of) flexicurity adapted to a different cultural, social, economic or, not least, legal environment in which flexibility and security are combined.

Thus the element that allows us to “define” flexicurity is formed through a balance of flexibility and security in each individual normative context. It is also evident that the tertium comparisonis is given by the standard employment, in relation to which the discussion is on increasing flexibility and compensating for it with a synchronic increase in security. Flexicurity policy therefore represents a variation of the balance of flexibility and security, or flexicurity relationship, in relation to the standard model in use.

This definition can also be used when the variation of the point of equilibrium takes place in the opposite direction, i.e. towards a decrease in flexibility compensated by a decrease in security; in this case we can call it unflexicurity.\(^{35}\) If we assume that the purpose of flexicurity is not just any balance between flexibility and security, but rather only a balance that increases flexibility. In both cases this is obviously a relative concept, that is, relative to the standard contract used as a reference. This is the issue we will focus on.

Three corollaries are derived from this that we will apply to our flexicurity.

Firstly, it is contradictory to classify upstream social models as flexicurity or inflexicurity. In fact, if flexicurity is one size does not fit all, each legal system finds its balance point in its regulatory tradition and constitutional principles.

Secondly, as a consequence flexicurity does not adhere to a binary ON/OFF type logic, but can be created to varying degrees both between systems and within one single system.

Lastly, depending on the variability of the flexicurity/unflexicurity points of equilibrium, the standard employment contract also represents a balance point and a flexicurity relationship, or rather it is the balance point from which the variations of greater flexicurity are registered. Thus, as seen in the first corollary, the standard employment contract cannot be excluded from the range of flexicurity contracts, and actually represents the reference point for all the forms of protec- tection that a flexicurity model must replace.

In this perspective, every increase in flexibility or every decrease in security must find compensation synchronically. This compensation, which is typical of flexicurity, implies two issues. The first is that the security differential is a trade-off; the second is that neutralisation of the trade-off implies a cost.

In the economics of this work any group of contracts that ensure the same flexicurity balance with the regulatory framework will be called a community; therefore there may be a protective trade-off between communities when the differential is not replaced by a security measure or an economic trade-off when this is faced with a safety or social security provision.

4.B WHAT DO WE MEAN BY “SOCIAL POLLUTION”?\(^{36}\)

To define the phrase “social pollution” we should consider the pattern of undeclared work, which takes places within an illegal system, with no security at all. This distinguishes it from informal work which, though not illegal, is equally lacking in any social or normative protection. In undeclared work, work flexibility also reaches the highest levels, albeit illegally in this case. Though this pathological and regressive form in which illegality is considered a prerequisite for remaining competitive must be severely repressed (Bellavista 2008);\(^{36}\) it nevertheless provides evidence on which to base a comparison. The undeclared work environment has been defined as a second community by an author (Zoppoli 2007), in opposition to the legal system, which he calls the first community. This author – as widely accepted – arrives at this definition by observing the extreme extent to which the phenomenon of undeclared work has spread to in Italy, becoming a system with its own rules outside of the legal system that has even been integrated into the legal production system to some extent.

From this author we take the idea of the community to define a significantly extended and not necessarily illegal group in which the same rules are applied. As such the black market work community will be called

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35 This aspect must obviously be kept clearly distinct from the other in that no lack of security occurs, though the flexible content is very low (see text below).

36 Elsewhere we have demonstrated that undeclared work does not depend on the rigidity of the rules or lack of flexicurity, but rather on the socio-economic context. C. M. Cammalleri, Lavoro e sicurezza sociale in agricoltura: brevi analisi del mercato del lavoro agricolo (in Sicilia) alla scoperta della flexicurity ante litteram, forthcoming.
community 0 in this paper to emphasise the impossibility of measuring protection in that community and its positioning outside an ordinal scale in which a combination of flexibility and security is formed from first to last, whether it is balanced or not.

We call the loss of all social protection in community 0 ‘social pollution’.

The following paragraphs will investigate the legal basis of this equation, from which the central theme of this study will be developed.

4.c What do we mean by total security?

The term total security expresses two contiguous but not distinct concepts. On the one hand, in opposition to the social pollution of community 0, total security indicates the last community on the ordinal scale of flexicurity communities, i.e. that in which – at least theoretically, or by convention – there is no loss of security, making it a pure social completion environment. As such a hypothetical flexibility intervention would produce a trade-off in security.

With reference to the previously mentioned system of communities, total security represents community 0, and therefore is unattainable by definition and outside of the ordinal system of flexicurity communities, all of which operate in the context of a free market.

On the other hand we use total security to mean an overall regulatory model capable of going beyond flexicurity and eliminating any trade-off between security and flexibility at the system level, by means of flexicurity financing system that is indifferent to the contract type and work place. To create this kind of model it is proposed that we take a line from a financing model for the security component of a fairly unorthodox form of flexicurity as the conception of the relative security will be equally unorthodox.

In this perspective, we will again benefit from a comparison with the undeclared work pattern, as if the mechanism is suitable for supporting security costs in the black market, it will consequently be suitable for redistributing costs and benefits.

5. The paradigm of reference: Rights to necessary protection (“the incompressible rights”)

For the purposes of this work it is necessary to identify the regulatory framework of the uncontrollability of certain rights. The Italian legal system will be used for this, as it is known to the speaker. However, because of its extensive relations with international and EU organisations, the conceptual frameworks used, the literature and proposed solutions, could be adequately exported to other legal systems if appropriately adapted. After all, there are those who claim that ‘similarities are always more than differences in European Social Model(s)’ [Maselli 37]

The investigation in question builds on the concept of decent work.

5.a The decent work

The Decent Work Report presented at the International Labour Conference by Director General of the ILO Juan Somavia in 1999 states: «the primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity». Thus the concept of decent work was formed, comprising of freedom, equity, security and human dignity in work. During the 97th Session of 10 June 2008 decent work was incorporated into the ILO’s Declaration on Social Justice for a Fair Globalization. Four strategic objectives were identified in the context of the Decent Work Agenda: «to promote and implement the standards and fundamental principles and rights at work; to enhance the opportunities for men and women to obtain decent employment and wages; to expand the scope and heighten the effectiveness of social protection for all; to strengthen tripartism and social dialogue». We will refer to the second and third of these objectives in our comparison with undeclared work.38

The phrase decent work therefore focuses the fundamental issues of the ILO’s action in a “single conceptual container” by highlighting that the above objectives are interrelated and interdependent. This creates a reference framework for all the orders (and all policies a fortiori): freedom, equality, security and human dignity define the boundaries of the social environment that the actors within it may not cross.39

39The ILO is concerned with decent work. The goal is not just the creation of jobs, but the creation of jobs of acceptable quality. The quantity of employment cannot be divorced from its quality. All
5.B Decent work, Italian Constitution and Fundamental Social Rights

In the Italian Constitution, which is built with work as its foundation (art.1), decent work has more stringent interpretations. In the Italian constitutional order the word ‘work’ and the adjectives connected to it (equality, freedom, health and social security) are only subordinated to second place after the word ‘law’. Work (art. 1), not the market or enterprise in itself, is the founding pillar of the Republic, together with the republican form and the democratic principle. The three pillars are of equal value and equally essential importance in the construction of the post-war constitutional order in a markedly social sense.41

Beyond the specific provisions, the significant regulation for our investigation is art. 41, par. 2, which states that free private enterprise “cannot be carried out against social use in or in a way that causes harm to security, freedom and to human dignity”. The Italian Constitution subordinates the market to security, freedom and human dignity, among others. This gives social justice its position of primacy, as with its “fundamental duties of political, economic and social solidarity” (art. 2) and the Republic’s task to “to remove those obstacles of an economic or social nature which [impede] the effective participation of all workers in the political, economic and social organisation of the country” (art. 3 paragraph 2) it was intended to establish boundaries for the needs of the market.

In keeping with its statement of principles, the Italian Constitutional Charter devotes numerous and significant provisions to the protection of labour and social security. We may mention art. 35, for example, which “protects work in all its forms and practices,” art. 38 which states that “every citizen unable to work and

without the necessary means of subsistence is entitled to welfare support”, grants workers the right “to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment”, disabled and handicapped persons the right “to receive education and vocational training”, art. 36 that establishes workers rights to “a remuneration commensurate to the quantity and quality of their work and in any case such as to ensure them and their families a free and dignified existence”, to “a weekly rest day and paid annual holidays”, art. 4 that implements art.1 by founding the right and duty to work, art. 37 that sanctions full equality at work, without neglecting the protection of women, stating that “Working conditions must allow women to fulfil their essential role in the family and ensure appropriate protection for the mother and child”, art. 32 that separates healthcare from working positions by making it a universal right.

As can be noted from this simple list, these founding principles, which are binding for legislators and judges, go beyond and in any case anticipate the terms of the Charter of Fundamental Rights of the European Union by half a century, as it was only very timidly brought into existence in the 3rd millennium. The provisions in arts. 20 Equality before the law, 21 Non-discrimination, 23 Equality between women and men, 34 Social security and social assistance, 35 Health care and 31 Fair and just working conditions certainly correspond to those referred to in the Italian Constitution.42

For our purposes we will consider arts. 31 and 43 of the Charter of Fundamental Rights in particular, and, unless otherwise indicated, it can be assumed that this refers to the protection of security.43

According to art. 31.1 “every worker has the right

societies have a notion of decent work, but the quality of employment can mean many things. It could relate to different forms of work, and also to different conditions of work, as well as feelings of value and satisfaction. The need today is to devise social and economic systems which ensure basic security and employment while remaining capable of adaptation to rapidly changing circumstances in a highly competitive global market.” Available at http://www.ilo.org/public/english/support/lib/century/in-dex6.htm

41Verbatim: «Italy is a democratic republic founded on work».
42The Charter of Fundamental Rights of the European Union also includes art. 30 on Protection in the event of unjustified dismissal, which has no directly corresponding Italian constitutional regulation, but however has been broadly covered by ordinary legislation from the 60s, 70s and 90s: law n. 604 of 1966, law n. 300 of 1970, law n. 108 of 1990.

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to working conditions which respect his or her health, safety and dignity.” Consequently, a degree of security must be provided regardless of the type of contract adopted. According to art. 31.2 “every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.” As a result, a degree of security must be provided through imperative legal regulations. According to art. 34.1 “the Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.” We may also consider art. 34.3, according to which the EU “recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.”

It is hard to overlook the strong consonance between the principle of decent work (which is certainly intended for production conditions that far removed from the EU standards) in the Italian Constitution and the terms of the Charter of Fundamental Rights. There is no risk in stating that the Charter of Fundamental Rights analytically interprets that which is defined as decent work by the EU, which is intended to therefore take on a meaning that is consistent with the recognised binding nature of the EU fundamental social rights, with a minimum security value that must be guaranteed to workers by each regulation. To phrase it differently, the Charter’s fundamental social rights represent a basic level of fundamental treatment that cannot be lowered. Although these are fundamental social rights, their content does not appear to be concretely established. In fact, even the principle of equal treatment is massively downsized when it is “comparably” combined with the reference term (as for example in fixed-term contracts and part-time work).44

It follows that each regulation by the Member States interprets and implements the above principles in a consistent manner that is compatible with its own legal, economic and social traditions; there can therefore be difference levels of protection of the fundamental social right both between the Member States and within a individual regulation by a Member State depending on the different types of relationships, for example.

The issue we wish to consider does not concern individual provisions or their degree of implementation in various regulations, nor the Italian regulation that already addresses them.

We are rather interested in the common humus formed by belonging to both the ILO and the EU, considering decent work as a whole, not as a subject that affects actors on the labour market (social partners, companies, workers) but as a mandatory shared system that protects the interests (not only of the actors on the labour market but) of all European society.

We assume here that decent work creates an environment in which the duty to protect generally is a condition of public welfare. Consequently, responsibility for its maintenance is not limited to the category containing those who are directly involved.

This framework aims to compare the natural environment with the social environment (decent work), treating them equally. As a consequence the pollution of the two environments will be comparable: natural pollution, caused by the dumping and spreading of pollutants, and social pollution caused by the removal of protective regulations (i.e. security rules), as occurs in undeclared work.

6. Loss of Security as a Pollutant: A Parallel with Environmental Pollution

In the above framework black market work (community 0) and the polluted environment are superimposable, as are regular work (n community) and the clean environment. At the same time – following the method we pledged to use in the preface – the roles of the actors within the two environments become superimposable and the techniques used to combat environmental pollution become exportable to the social environment. The same applies to policies against (environmental and social) pollution and for valid criteria for identifying the individuals that suffer or benefit from the pollution.

Any legal system can be used to transpose this pollution analysis grid to the social environment. For the sake of convenience we will consider the Italian system, as we know it best. Within the system we find various degrees of social protection and various degrees of implementation of fundamental social rights. With the exception of a hypothesis that will be taken into consideration later, it can said that EU decent work is carried out in each of these labour relation regulations. Since this is carried out with a different gradation of protection, we can order the n degree communities (which we previously defined as regulatory groups that are significantly far-reaching and apply their own rules) from the least to most secure. We will place community 0 at the bottom end of these communities, as it is positioned outside the legal system and therefore lacking any degree of protection (and is flexible to the highest degree). This is the community of undeclared work. As it is an illegal community it is of course placed directly opposite the concept of decent work.

Now, since undeclared work even radically undermines decent work in so-called advanced societies, and since we have agreed it possible to define decent work as a social environment and shared asset, we can say that undeclared work creates strong pollution in the social environment. According to the nomenclature adopted, this is “social pollution”.

It cannot be doubted that undeclared work must be fought and that repressing non-declaration is in the general public interest and not the particular/individual interest of the workers that are exploited by it.

Furthermore, it is indisputable that the fight against undeclared work constitutes a fight for a clean social environment.

We have placed community oo, where work is wholly secure but not at all flexible, at the opposite end of the ordinal scale of communities. These communities at the ends of the spectrum are called social pollution and total security communities respectively, whereas all the intermediary communities are flexicurity communities (or unflexicurity according to the definition used) to various degrees, and will be called nth degree communities. For example, work that is informal but not significantly present in Europe, legal

In Italy these are regulated as additional work recognised with a minimum of welfare rights through a voucher mechanism. Despite but completely lacking in protection would represent community 1; this would typically be a case of unflexicurity.

The ordering of the reference communities from 0 to infinity represents the different points of balance between flexibility and security, with a possible trade-off within the community or transitions between communities at the system level. In relation to this latter aspect, it can be observed that the choice of a point of equilibrium between different communities is neither neutral nor technical. In other words, changing worker protection from security in relationships to market security does not produce a zero-sum game. Even if the sum could be considered zero for a particular group of workers, it would have different implications for the whole system and for other categories of workers.

The exchange between flexibility and security does not readily concern sizes that are homogenous or commensurable with each other; there are forms of protection, e.g. the right to rest, that cannot be exchanged for the equivalent compensation without being considered a security loss for the worker (for example child care or psychological or physical health). There are commensurable and incommensurable sizes within flexicurity, so it would be wrong not to consider these differences if we are to avoid the trap Plato warned us of 25 centuries ago in the Laws through his Athenian dialogue with Kleinas.

Furthermore, the exchanging of flexibility in the relationship and security on the market does not always limit its effect to the relationship being considered. Sometimes it also affects other relationships, as occurs in cases of externalisation for example. We define these effects as network trade-offs.

The problematic nature of the exchange is well known in the most authoritative doctrine, so it is clarified that the balancing of the two constituents requires a constant effort to achieve “adequate adjustment to changing conditions in order to maintain and enhance competitiveness and productivity” (Wilthagen-Tros 2004).

In addition, various degrees of flexicurity (including those between different countries) can create a distortion of competition when greater competitiveness is pursued through social dumping, which is what happened its laudable intent to fight misuse and combat undeclared work, it is very cumbersome and ends up being ineffective.
theory states that externality, though inevitable, should be internalised to some extent, i.e. at least part of the benefits that the individual enjoys by polluting the common good should be given back to the community.

The remedies proposed by the economists to internalise negative externalities are of a diverse nature, and include bans, subsides, tradable entry rights and Pigovian taxes. The proposal we intend to advance is heading in this direction. Considering the existing security differential between one community and another, and taking into account the private costs of the aluminum producers plus the costs to those bystanders adversely affected by the pollution, in such way Mankiw 2006. On theme cfr. F. Pelizzari, 47 Externalità ed efficienza: un’analisi multisettoriale, in Economia politica - Journal of analytical and institutional economics, 2004, 99; F. Sarracino, Externalità negative, beni posizionali e crescita economica, Il Ponte, 2009, 128; G. Chirichelli, Externalità ed il teorema di Coase: un teorema, nessun teorema, o molti teoremi? Una introduzione critica, in Riv. dir. comm. e di dir. gen. obbl., 2004, 673; F. Odella, Conseguenze inattese e geneesi dei processi economici: il ruolo delle externalità nell’approccio sociologico, in Sociologia del lavoro, 2003, 99 ss. 48

a «Such a tax is said to be internalizing the externality because it gives buyers and sellers in the market an incentive to take account of the external effects of their actions», Mankiw (2006)

b «That can reduce pollution most easily would be willing to sell whatever permits they get, and those firms that can reduce pollution only at high cost would be willing to buy whatever permits they need. As long as there is a free market for the pollution rights, the final allocation will be efficient whatever the initial allocation. [...] With pollution permits, polluting firms must pay to buy the permit. (Even firms that already own permits must pay to pollute: The opportunity cost of polluting is what they could have received by selling their permits on the open market). Both Pigovian taxes and pollution permits internalize the externality of pollution by making it costly for firms to pollute», Mankiw (2006)

c «Taxes enacted to correct the effects of negative externalities are called Pigovian taxes, after economist Arthur Pigou (1877-1959), an early advocate of their use. [...] Most economists would prefer the tax. They would first point out that a tax is just as effective as a regulation in reducing the overall level of pollution. [...] In essence, the Pigovian tax places a price on the right to pollute. Just as markets allocate goods to those buyers who value them most highly, a Pigovian tax allocates pollution to those factories that face the highest cost of reducing it. Whatever the level of pollution the EPA chooses, it can achieve this goal at the lowest total cost using a tax. [...] Pigovian taxes are unlike most other taxes. Most taxes distort incentives and move the allocation of resources away from the social optimum. [...] Pigovian Taxes correct incentives for the presence of externalities and thereby move the allocation of resources closer to the social optimum. Thus, while Pigovian taxes raise revenue for the government, they enhance economic efficiency», Mankiw (2006)
into account that as we gradually move towards a flexible community we lose security in favour of flexibility, in the given paradigm the protection, i.e. security, differential constitutes a degree of social pollution.

This particular form of pollution harms social protection, whether considered the product of the transition from a more secure to a less secure community, or considered as the result of remaining in a more flexible and therefore less secure community. This is because at the system level it is invariably not those who use flexible work who pay the (due) greater social and financial costs of flexibility, but the entire (social) environment.

8. Internalising Social Pollution

8.1 Internalisation through Flexinsurance: Partial Adherence.

Specifically in relation to this aspect (not considering community 0, with its undeclared work, as part of the problem at all) flexinsurance was put forward as a proposal (Tangian 2007). It is a measure that uses an insurance type mechanism and tends to internalise the cost of the security required to balance out the increase in flexibility when creating new flexicurity equilibriums, making those who benefit from the flexibility, i.e. from the employment, bear the costs.

The idea, originating in the ancient Roman maxim cuius commoda eius incommoda, is that greater flexibility results in greater compensatory security costs that must be borne by those benefitting from the flexibility and not the community.

According to this theory, which is based on the scalability of security, a social contribution is needed that is borne by the companies that use atypical labour in order to finance the security measures required to balance out the precariousness.

We should acknowledge that flexinsurance introduces a positive redistributive mechanism between those who offer secure work and those who offer precarious work, to the advantage of the former, and therefore constitutes a internalisation tool in the social pollution paradigm adopted.

This approach is definitely interesting and analogous to what is being proposed from a structural perspective, i.e. internalisation of the social pollution dispersion by those who produce it. However, the choice of the insurance mechanism proposed is not convincing at all. In fact, as will shortly be explained, it is a fair but ineffective remedy, in that the insurance mechanism would do nothing more than merely neutralise the internal difference in competitiveness between precarious and stable employment.

Furthermore, the adoption of a traditional insurance mechanism, based on a social contribution proportion-al to pay and in any case related to a contractual type would reverse the costs on precarious workers salaries de facto and would, even for work insured by flexinsurance, reproduce the conditions of low competitiveness that led to the haemorrhage of stable jobs in favour of states in which labour has lower costs than in the EU an in which labour intensive processes are as good as domestic labour from a qualitative perspective, with consequent social dumping.

In other words, flexinsurance presupposes closed markets and the absence of undeclared work, while one of the main problems of protection is that of social dumping between systems and communities, particularly with community 0.

8.1.1 Continued: Prerequisites for Socialised Internalisation

The model being proposed, conversely, is intended above all to tackle the social pollution caused by community 0 and from there apply it to other. The model presupposes that dispersed security is caused by atypical employment. It proposes modifying the source of security financing and, in part, social welfare to make it up-stream. We are aware that the prospect is highly un-orthodox and difficult to understand where the scope of social security and social welfare are fairly clearly distinct (as for example in EU treaties). In Italy, however, this distinction is slightly blurred, as despite the recent welfare reforms, for example, even the pension and unemployment systems draw significantly on resources from general taxation.

Regardless of the differing welfare and assistance regulations, as social welfare is completely outside EU jurisdiction, the point is that that welfare affects and is affected by the assistance and security system. Moreover, welfare is mostly dependent on the standard or non-standard nature of the employment relationship to which it applies and as such this indirectly conditions the degree of security and assistance needed for atypical jobs.
Therefore, even keeping the two areas of social protection separate between social security and welfare, they will still influence each other reciprocally. When the social insurance system becomes unsuitable or insufficient for providing the protection needed, we witness a surrogate social security assistance function. That is, when the scope of the welfare intervention is reduced up stream, for example through minimum income.

When the social insurance system is found to be insufficient, it means that the amount of under protected work at its base is too high, and, once again, this leads to a intervention supplementing the social assistance.

The dispersion of security caused by enlarging the flexible communities is therefore also reproduced in the relationship between care and welfare protection.

In this sense the line of intervention proposed intersects with the functioning of social welfare. In fact, the closer an employment relationship is to standard work, the more welfare coverage it will have, and therefore the need for social care assistance will be less. Therefore the relationship will have another degree of intrinsic and self-financed security.

Conversely, the closer undeclared work is to them (including undeclared work itself) the more minor the community will be considered and the welfare intervention, and correspondingly the need for assistance and the use of general taxation, will be greater to counter-balance a negative externality produced by an individual employer for his or her own benefit.

We can observe that in this system greater flexibility corresponds to greater use of assistance to implement a flexicurity balance. Even if we consider the compensation to be adequate (and therefore regardless of the existence of a trade-off) it emerges that the cost of greater flexibility burdens the community and not those who enjoy the flexibility; under the same working conditions these latter bear lower costs than standard work. This cost differential (which implies a certain protection differential) transferred to the society without any compensation constitutes a dispersion of security.

8A.2 CONTINUED: THE NECESSITY OF HARMONISED INTERNALISATION.

Again, the same social pollution structure, i.e. with a dispersion of security, is reproduced within each state when delocalisation is considered. In fact, delocalising production to countries with a lesser social protection (and therefore smaller cost of work) is equivalent to dispersing a social security financing source from a dual perspective.59

On the one hand, the quota of delocalised production, which is already destined for the domestic market of individual countries, no longer finances any social protection measures for domestic workers-consumers, and on the other hand, its quota no longer contributes to financing social insurance because of the cost of labour required to produce it. We can observe here that flexinsurance, which is based on a Bismarckian payment system with compulsory social contributions, is also completely ineffective in this instance. As said, it affects the cost of labour, but as that cost is either delocalised or shifted to the black market (in the case of undeclared work) it is unable to affect it.51

It therefore appears transitory to pursue work to support the social costs of the flexibility required by the market rather than address the result of the work. However and wherever this is produced, be it in community 0 or in a delocalised or flexible community, it returns to the place in which the products or services procured for the work in question, in the form of revenue. Correspondingly, the need to find another system to finance the on-going economic commitment needed for compensatory security required to balance out the flexicurity.

8B CONTINUED: TOWARDS A PROPOSAL FOR

59. We cannot accept the exploitation and underpayment of our European colleagues. And we cannot accept the relocation of workplaces from Denmark to other countries as companies try to compete on unfair terms and conditions in order to save production costs», said Harald Børsting LO-President.

51. Thus, seen from the point of view of the crisis, flexicurity in its common understanding as a flexibility–security combination looks disadvantageous, with some reservations for cases of generous social security. The Commission’s latest concept of flexicurity as “security through flexibility” turns out to be unconditionally disadvantageous in a crisis. The flexicurity concept promoted by the European Commission therefore does not pass the test imposed by the crisis. This implies that the notion of flexicurity requires a profound revision and should not be further applied in its current form. A better alternative to flexicurity would be “normalisation” of employment lations, that is, a reduction of flexibility, which, among other things, would also result in less social security expenditure. (ETUI Policy Brief European Economic and Employment Policy Issue 3/2010 Not for bad weather: flexicurity challenged by the crisis, Andranik Tangian)
INDIRECT TAXATION ON FLEXICURITY.

We can marry Tangian’s model of flexinsurance with the idea of the scalability of the insurance burden in proportion to flexibility. The proposal is to move a large part of the taxation for social insurance away from a tax on work, which is a type of direct task levied on the cost of work, to an indirect tax on the value of the work.

As has been observed by Davies (2006) «it's not bought levels of welfare. States can still regulate and use taxation to ensure universal coverage. It’s about institutions and borders. Provision is being fragmented and de-nationalised. It remains to see how far this will go, but the trend is for Member States to encourage the process by themselves stimulating more diversity and freedom of provision, and so creating a proto-market which EU law than takes further».52 Though European social law is experiencing a new era (Giubboni 2007), we are still far from having a widespread EU model as per articles 31 paragraph 1, and 31 paragraph 4 of the Charter of Fundamental Rights of The European Union.

At present it is only decent work that is burdened by the weight of financing a widespread social protection system, as it bears the responsibility of security. As such it becomes less and less competitive in communities with precarious work and (exploitation) of undeclared work. A vicious cycle of trade-offs between community 0 and the n degree, more secure communities is triggered in the presence of this security gap, which is greater for employers with high rates of employment.

It is a paradoxical phenomenon. Priority is given to the issue of unemployment and decent work, and efforts are not directed towards harmonising social protection systems but rather towards extending it to work sans phrases (flexibility in flexicurity) instead of concentrating on the issue of security in itself. Following the path that makes protected work more costly and therefore less competitive, while making less protected work more competitive, the gap between protected and exploited widens in violation of the lines traced by arts. 31 and 34 of the Charter of Fundamental Rights. A lot of time is spent focussing on harmonising flexibilit and very little is spent on addressing security.

It is thus possible to infer that it is necessary to harmonise the method of financing the social security system functional to the implementation of worker protection, mobility and the circulation of business, which are in turn required and prerequisite for the common market to avoid distortions. This anti-distortion perspective allows us to dribble, to borrow a foot-balling metaphor, through the hermeneutic tight spot posed by chapter VII on the fundamental value of the Charter. Moreover, chapter VII is also intended to protect against the distortion of competition.

The proposed protection system is not exactly universal, though it may appear to be at first. It cannot be ascribed to either a Bismarckian or Beveridgean model. It is called a “hybrid model” for the reason that elements of both coexist within it, but not referring to the coexistence of various universal and insurance security services on the system level. Rather it is a model that takes from both in relation to the financing of that security service.

The hybrid model helps to neutralise the contract type as a means of financing the social security system that is unaffected by tax and contribution pressures.

Indeed, some EU policies53 suggest reducing the impact of contributions on wages and therefore shift the tax burden from direct to indirect taxes to reduce the cost of work.

Our hypothesis is moving in this direction: a Pigiovian “total security” tax that does not create externalities, and on the other hand helps to internalise externalities by targeting the wages that create them.

It is well known that the financial and institutional situation in the EU/27 countries varies significantly, but the shared pathways of flexicurity do not exclude the transferability of alternative tools. Now let’s suppose that a study relating to changes in the Italian system for financing social security could become a transferable “idea”.

9. THE CONJECTURE: FROM SOCIAL CONTRIBUTIONS ON EARNINGS TO A SPECIAL INDIRECT TAX ON THE VALUE OF THE WORK.

First, let’s consider the system’s security needs as a


universal need, as all studies on flexicurity do (e.g. Wermeylen-Hurley 2007), not in the Beveridgean sense of the term, but in the sense of the general need of a society.

Second, the conjecture does not anticipate any changes in terms of objective and subjective conditions for the provision of services, as with the contribution imposed on the workers, although it may be useful other reasons.

Therefore the conjecture consists of modifying the contributory condition from the extent of remuneration to the value of the result of the work.

In the Danish system often cited by flexicurity supporters, the circular mechanism of auto-adjustment between flexibility, Welfare-Workfare and work is posed without a connection to the working relationship, so the “labour costs” do not seem appreciably different in terms of the type of flexibility. In a system designed in this way the contributory pressure to finance the widespread social security system is circumvented by the use of non-standard contract types.

From this observation it can be inferred that if the taxation system for financing social security is transferred to the price of the product or service, whoever produces the product or service at a competitive price or whoever purchases it at a competitively contributes to it. As long as the social tax is directly levied on work, the only way to avoid this tax is to make use of black market work, which we called an illegal community, where the competitive value is variously achieved through under-pricing and lower costs.

When most of the economy is undeclared and many contract types have different forms of financing that are inversely proportional to the security need that they generate, the relative cost continues, in fact, to be borne by regular work, the relative cost of which increases in relation to its typical counterpart.

In this way community 0 displaces the cost of financing the security required to decrease the need that these communities create in relation to standard work into the n degree communities, and each n degree community displaces it proportionally to the more secure community above it.

There is a part of the price of the product or service that is intrinsically intended for security, but it is subtracted from the financing of this because of a technical tax problem that fails to target the dispersion of security, causing negative externalities and distortion of competition.

One thing is certain: only people pay the taxes. The direct and indirect labour costs are levied on the price of the product. When the same product is made using less labour or more flexibility, the need for security increases and the revenue from the contribution serving the social security system decreases. As such, ultimately, altering the way in which the contribution amount recovers the financing is less heretical than it may seem at first glance.

We think that there is a greater need to redistribute the social contribution between companies in terms of balancing the trade-off between flexibility and security on the one hand, and to remove the social externalities of the trade-off on the other. To increase security and maintain a balance of flexicurity, an analysis will be made of the results of a study by Oropallo-Proto on the incidence of deductibility of the cost of labour based on a tax of net equity paid by companies (IRAP [Italian regional tax on productive activities], the revenue of which is connected to the financing of the national health service, a typical social security measure).

Normally, the cost of labour is not deductible from the taxable IRAP. The study hypothesises the possibility of deducting social contributions of the whole labour cost. The simulation shows that the deduction rate is much higher in the fifth quintile in which the companies are ordered according to the revenue produced by each work per unit of product. This quintile contributes more because it deducts fewer costs, as it does not deduct the cost of labour. Comparing the fifth quintile with the total we can observe the paradoxical effect that those who contribute more to financing the social security system and consequently use less flexible work or black market work pays more contributions. Observing the percentage of reduction between the deduction of the cost of labour it can be deduced that the greater the employment, the lower the need for security though the contribution is greater. The study also highlights that the manufacturing industries in particular pay much more than all the other sectors.

This paradox has been indirectly countered by law no. 296 of 2006 (known as the 2006 Finance Act) with which the government reduced the “tax wedge” by acting on the social security taxable base. The method of obtaining this reduction by means of deductions and surtaxes on the IRAP taxable base is very technically complicated (Coppola). Our interest is limited to its principles and effects of the transition between different tax systems on families and companies. The intervention of the law convinces us of the patency of the theory. The study by Oropallo and Proto (2006, 2006A) also shows the effects of the 2006 Finance Act with reference to the greater or lesser deduction of the cost of labour from the taxable base.

10. The Proposal

As has been seen above, transitions between flexibility models or between communities produce trade-offs. The multi-dimensional nature of flexicurity suggests pursuing the integration of different state policies, increasing the interaction between different element and different policies (labour law, labour market policies and social protection systems) (Vermeleyn-Hurley 2007).

We therefore propose a mechanism that gradually transitions between the various systems towards a uniform financing system based on the added value of the work. This must relate to organisations with high employment rates per unit of product and – indirectly – proportionally higher costs due to those who directly or indirectly bring about social dumping as the result of their policies for containing the cost of labour.

In fact, this is a prerequisite that has been observed as “an important element in the reflection is the financial and institutional situation of each Member State which has an impact on reform possibilities. It should also be underlined that all reforms require not only a good deal of political courage but might also require time for them to bear fruit, depending on specific economic context. The possible transferability of other ‘ideas’ on flexicurity depends on economic capacity and institutional policy capacity, including actors, preferences, economic viability and political will to accept these reforms at different levels” (Vermeleyn-Hurley 2007).

To make the proposal less connected to the Italian system we will refer to VAT rather than IRAP, which has a substantially uniform regulation at EU level. At the archetypal level, in fact, the two tax structures are equal in terms of the hypothesis.

We propose modifying or introducing deductible percentage of a portion of VAT upstream by an amount equal to the portion of financing for the social security system borne by the work compensated by an increase in the general tax rate. Because it is either not declared (as in undeclared work) or because it is minor (as in atypical jobs) the non-deductible portion of the labour cost represents the portion of financing for the social security system borne by those who produced the security need, thereby creating the social internalisation promised by the hypothesis.

The expected effects of the introduction of this hybrid model are in keeping with the recommendations of the European Commission for the re-launch of the Lisbon strategy for growth and jobs.

In fact the system produces these effects:

- Elimination of the tax wedge, resulting in a very close link between labour productivity, labour costs and net pay; elimination of the differences between member States on how to cope with social charges, which makes the contractual model independent of the use of the labour force and then leads to an increase in mobility for workers and companies;

- A reduction in black market work, as it becomes less competitive;

- Participation in social spending on the part of those who have delocalised production, but who continue to operate in the common market, where they continue to sell their products.

In this way flexicurity, the ordering criterion in the distribution of security, becomes a criterion for the redistribution of the social costs of flexibility.

“There is no perfect way to flexicurity, whether it is the 'Danish' model with more flexibility for all work-
ers, or a more 'transitional labour market' approach such as the Dutch model in which people move in and out of the labour market” (Vermeylen-Hurley 2007).

The hybrid system would trigger a virtuous circle with the effect of reducing the difference in competition at the expense of security.

11. Conclusions: «Was not the labour problem the same everywhere?»

The magnificent fable Animal Farm, which Orwell encapsulates with the phrase used in the epigraph “Was not the labour problem the same everywhere?” pronounced by Napoleon with specious rhetoric directed at the humans, who are now commensal, eloquently represents what has been and, without adequate structural correction, is likely to be the parable of the social state revisited by faith in flexibility and flexicurity.

Under the best auspices of equity, justice and freedom the animals transform Manor Farm into Animal Farm. Under the guidance of a single thought they were pejoratively brought back to Manor Farm – since... “the labour problem is the same everywhere” (!)

Similar to this is the parabola of the passage from a liberal state (which hid its iniquities and injustice under the banner of liberty and equality), to a welfare state, with its unequal law and with its never really disproven idea that it needed to protect workers (and the weak in general) from the market and from its highly mysterious invisible hand - so invisible, according to some, that it does not exist!

To quote the economists, the welfare state inevitably led to a sacrifice of efficiency in favour of equity, and this obviously happened in each state in a different way. Yet even given the extreme variety of the forms this took, there is a common thread that unites the varied national experiences, namely the idea of the welfare state that, especially in Europe, has led to the various social models we know. It cannot be said that «the similarities are always more than differences in European Social Model(s)» (Maselli 2011), but it can be said that welfare is and has been considered the common foundation and basis of every economic policy and every regulatory market intervention.

The process of European unification is grafted onto this implicit welfare fabric starting from the Treaty of Rome, which, as known, tends towards the creation of a common market without any concern for a common social model. In this regard, in Italy at least, the accusation made by G. F. Mancini that Europe is affected, or rather suffering, from “social frigidity” is well known. It is a shared economic space that, without a shared welfare system, that seemed, to continue the metaphor used above, to resemble the Manor Farm organisation too closely.

In the past twenty years the effort made on behalf of the doctrine strove towards finding valid arguments in EU sources following the EEC treaty to support the idea that the “social frigidity” has been superseded by subsequent treaties, particularly the Treaty of Lisbon, and, among other things, to recognise the value of the treaty to the Charter of Fundamental Rights of the European Union. However, this commendable effort has failed to compete with the prophetic dimension of G.F. Mancini’s aphorism, namely that a common market requires a common social model of equivalent power, and this point seems to have been lost.

Now, though it is true that on the one hand Mancini’s motto, raw and vivid as it is, conflicts with numerous legislative provisions, not least the incorporation of the Charter of Fundamental Rights of The European Union in the Treaties, which marks a significant step forward for the EU in terms of recognising the foundational nature of certain social rights (Orlandini 2008, Gottardi 2010, Zilio Grandi 2011), on

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59Giuseppe Federico Mancini has been, inter alia, a professor of labor law at the University of Bologna, “Attorney General” at the Court of Justice of the European Communities from October 1982 to October 1988, and Judge of the Court of Justice of the European Communities from October 7, 1988 to his death. In 1997, the Harvard Law School has established the “Annual GF Mancini Prize in European Law.”


the other hand it is equally true that the Community policy, with particular reference to the shared pathways to flexicurity [COM(2007) 350 def.], continues to consider social rights as ancillary to the market (i.e. to greater efficiency of production) and even to its markedly free-market functionality. Evidence of this is given by the approach of the Court of Justice. The Court perfectly embodies the role of a forbidding guardian of the market. Just as the mythological Cerberus guarded the past, present and future with his three heads, both in its apparently pro-social rights and openly pro-market rulings, the Court is guided by the need to pander to the functioning of the market, in relation to which social rights are more or less surreptitiously expendable and, perhaps, a bit less equal than others.

In effect, the Court has an easy according to art. 3 par. 3 of the TEU, which states that «the Union L...] shall work for the sustainable development of Europe based on L...] a highly competitive social market economy, aiming at full employment and social progress L...]».

The Treaty uses the term “(social) market economy”, but in the context of economic regulation. The strong competitiveness of the “social market economy” to which it aspires does not seem to focus on social rights at all. On the contrary, emphasis is placed on market competitiveness and social rights are places as a mere functional limitation on fairer competition and destined to succumb too the needs of the market wherever there is sufficient economic motivation to sacrifice them.

This formally justifiable interpretation is confirmed


by the minor position the Charter of Fundamental Social Rights has assumed within the ranks of the treaty. When “formally” equalised, the narrow hermeneutical cage enclosing the provisions of art. 6, par.2 becomes a “substantial” counter part (“The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties” and especially par. 3 “the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions”.)

On the one hand, paragraph 2 excludes the possibility of the constitutionalisation of the Charter of Fundamental Rights of The European Union initiating any social competence at the level of the EU; on the other hand, by recalling the “common regulations on the competition on taxation and the approximation of legislations” in chapter VII, paragraph 3, glaringly places the protection of social rights below the safeguarding of the functioning of the market.

Nevertheless, even if only in relation to this weak interpretation, it is believed that the constitutionalisation of the fundamental social rights helped demonstrates that it can have a significant effect on the reconstruction of flexicurity

On the one hand, in fact, the adoption of the common principles of flexicurity (27 June 2007) is coeval to the adoption of the Treaty of Lisbon (13 December 2007), so it may not have taken account of all the implication of the legal recognition of the fundamental social rights. On the other hand, even if the non shareable, unequal relationship between fundamental social rights and shared regulations on competition is upheld, the former can be considered to have a limiting function to the so-called economic freedoms, if it is true, and it is, that, like competition, they cannot be based on a downward race in the protection of social rights and between them and especially some workers’ rights. In this context, even if the subordination of the Charter to chapter VII of the Treaty is upheld, it was possible to interpret flexicurity as functional in relation to the primacy of chapter VII on social integration by enhancing the security component.

However, in the absence of adequate resources and
a strong common welfare model, the promise of a European social model made by the Treaty of Lisbon and the Charter of Fundamental Rights is likely to follow in the respective footsteps of the Seven Commandments (which were written in large white letters on the wall of the farm’s granary, a site symbolic of the Rebellion by the animals represented in the Constitution) and the hymn Beast of England (which perfectly embodied the spirit that inspired the animals to strive for better working conditions) by the society that became the “Animal Farm”. It was an organisation in which the social model worked, albeit externally, meaning that doubt was formed among the humans, i.e. on the market, and efforts were made to subvert it to eliminate the possibility of a “dangerous contagion”. The model worked until the Seven Commandments were reduced to the single famous statement “All animals are equal, but some animals are more equal than others”. Some of the “other” animals who were more equal strongly resemble the market and its thirst for efficiency. The Animal Farm model worked until Beast of England was replaced with the anthem: Comrade Napoleon; an anthem praising the “magnifiche sorti e progressive” of the single thought that solved every problem, just like the squaring of the circle that - mutatis mutandis – flexicurity promises to solve the problems of flexibility.

The leitmotif of flexicurity only too closely evokes the legendary Animal Farm character Boxer’s faith in Comrade Napoleon. Whenever faced with an apparent contradiction of the single thought, the honest, faithful, devotee, although quite dim-witted Boxer invariably answered: «Ah, that is different […] If Comrade Napoleon says it, it must be right», and invariably remedied it by reciting the litany «I will work harder» just as flexicurity seems to respond to sirens of the market by saying “we will work more flexibly!”

Though this is based on the experience of the Italian Constitution (which has a reversed the perspective in relation to the EU treaty in its relationship between labour and the market) and the ILO Declaration of 2008 on decent work, it seemed necessary to find new relationships on the strength of which – albeit very generally – some essential rights could play a reconstructive role in governing the relationships between flexibility and security, i.e. relationships between the market and justice.

Therefore our answer is: Yes, the labour problem is the same everywhere, but the remedies for it are not the same. Ultimately, everything can be summarised in the motto: If Comrade Flexicurity suggests it, it is not always right!

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In order to make flexicurity work, it is important to reflect upon the consequences for all parties involved: for the individual (worker), for the society, for companies. The key element to make this link is trust (Vermeylen - Hurley 2007).
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