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THE EUROPEAN STRATEGY FOR FLEXICURITY: HOW THE OECD INDICATOR ON EMPLOYMENT PROTECTION LEGISLATION WILL UNDERMINE SOCIAL EUROPE AND TRANSITIONAL SECURITY

Introduction

It is the Commission's intention to re-center the European employment guidelines around (external) flexicurity. Formally, this is about making it easier for employers to fire workers while at the same time reformulating workers' security as the security to be able to move into a new job¹.

To make the European strategy on external flexicurity, and in particular the aspect on 'easy firing', 'bite' for member states, the Commission communication proposes to use the OECD-indicator on employment protection legislation (EPL) as a benchmark indicator around

which 'peer and public pressure' would be organised.

This means that the whole strategy of flexicurity, and indeed even the whole European Employment Strategy, becomes based on this OECD indicator.

However, the OECD - indicator is constructed on the basis of the simplistic philosophy of getting rid of all rules and obligations for business. As such, using the OECD - indicator will inevitably lead to fundamental problems and major disputes with the ETUC and its affiliates, and this for several reasons:

1. The OECD - indicator contradicts several key principles of the European Social Aquis, as set by several EU-directives such as the directives on the rights of workers to information and consultation, the 1999 framework directive on fixed term work and the European social partners' framework agreement on restructuring.
2. The OECD indicator fails to catch the links that can be developed between dimension of negotiated flexibility existing in many Member States which gives workers possibilities to transitional security due to strong employment protection legislation
3. Finally, the OECD - indicator is disconnected from reality because it

¹ Although the Commission easily refers to the 'Danish flexicurity model', it is ambiguous about the generous level of unemployment benefits which are also part and parcel of the Danish model. Instead, the Commission refers to 'adequate' benefits and 'modern' social security systems based on 'workfare' and getting people quickly into another job.

does not correctly estimate the impact of collective bargaining agreements on job protection systems or the role played by legal practice in countries characterised by a system of 'common law'.

How the OECD indicator encourages member states to disrespect key principles of the European Social Aquis and the ILO-convention nr 155

Several elements in the EPL – indicator are in outright contradiction with basic principles of the existing European Social Aquis:

- The 1999 framework agreement and directive on fixed term work stipulates that each member state should set limits to the use of fixed term work contracts, with the aim to limit chains of temporary contracts. However, the EPL-indicator explicitly assigns bad scores if member states follow up on this. If member states limit the maximum number of successive fixed term contracts and/or the maximum cumulated duration of those contracts, the value of the EPL-indicator gets pushed upwards, leading policy makers to conclude member states have become more 'rigid'.
- The 1999 framework agreement also stipulates that fixed term work should remain the exception and that open

ended contracts should remain the general rule. However, if member states follow up on this, for example by allowing fixed term contracts for valid reasons, they get maximum scores of strictness.

- The directive on collective redundancies as well as the 'Renault' directive forces companies to report their intention to restructure and/or to undertake collective redundancies to workers' representation, followed by further consultations and negotiations to limit adverse social consequences and the impact on employment. Again, the EPL-indicator captures this dimension in a negative way. If one or more actors such as works councils need to be notified, the member state gets bad points. In addition, if labour law requires negotiations or the drawing up of social compensation plans, even if they include investment in employment security such as retraining or outplacement (!), additional bad points are 'earned'.
- The 2003 agreement on 'restructuring' says that firing workers should be the last available option when restructuring. If member states implement this principle by requiring that attempts should be made workers to retrain workers to adapt them to a

different job, then they get sanctioned by the EPL-indicator. Again, we find that the OECD indicator is actually reducing (internal) flexibility measures because its only concern is to make life for business as simple and as easy as possible.

In addition, there is the ILO convention nr 155, requiring that employers should provide a valid reason for dismissing workers, that workers should be able to challenge the employer decision in court and that trial periods should be reasonable. Concerning the latter aspect, the OECD indicator, as could be expected, simply chooses to promote the maximum trial periods: countries with trial periods over 24 months, which is clearly unreasonable, get the best score.

So, in conclusion: using the EPL-indicator as a benchmark to press countries to reform their job protection systems boils down to pushing member states to be in civic, not to respect European Social directives and to distort fair competition and the social level playing field of the European internal market.

The OECD's EPL indicator will not promote 'transitional security'

The Commission frequently points out that there are no jobs for life and that workers need to give up on job security to and accept employment

security instead. In reality however, employment security often depends on job security. 'Transitional security' is not like 'manna falling out of the sky'. Economies, both business as well as workers, need to build and invest in employment security. And one important way to ensure this runs through the protection of jobs. There are numerous links between systems of robust job protection and high employment security:

- From the perspective of workers, job protection acts as a counter veiling force against the fact that business would otherwise 'own the job'. If employers can fire workers at will and without much cost, workers find themselves in a much weakened bargaining position. This will lead to worsening working conditions, especially for those workers that are in the weakest bargaining position. Low wages and long working hours will spread throughout the economy and create a two-tier labour market with an impoverished underclass of workers. Both in terms of income as in terms of time, these workers will have much reduced possibilities to engage in lifelong learning. They will also face major difficulties in providing their children with a decent education. In this way, reducing the level of job protection will lead straight to worse working conditions, higher

inequality, lower social mobility between generations of workers and ultimately in less, not more employability.

- On top of the previously described 'income' effect, there is also a 'price' effect. By raising standards of work and wages, job protection systems force the employer to increase the productivity of the jobs, thereby using the talents and skills' capacities of the work force to their fullest potential and match skilled workers into productive jobs. Indeed, in contrast to the widespread opinion that employers are always and everywhere in need of skilled workers, labour market reality shows that there also (too) many businesses employing their workers below their levels of acquired skills. According to the Dublin foundation, one third of European workers report that they could handle more demanding and challenging tasks. What implications does this have for 'employment security'? If workers indeed observe that business does not use labour qualifications to the fullest extent and tends to match skilled workers into relatively lower productive and lower paid jobs, then workers' incentives to invest in education and lifelong learning suffers. So in order for workers to be willing to invest in their

'employability' to the fullest extent, business needs to offer 'workable' and productive jobs and job protection, by raising general standards of work, is one way to ensure that business does so.

- From the perspective of business, robust job protection confronts employers with costs when firing workers. This changes employers' incentives profoundly. Without much job protection, firms simply look upon their work force as a commodity they can easily dispose of. But if there's job protection, firms will start to think of ways to avoid these dismissal costs. Business can do so by investing in worker's training and education so that, if and when the firm runs into competitive problems, it has a qualified work force that is able to engage in an innovative solution, making it unnecessary to fire workers and pay dismissal costs. In this way, robust job protection transforms the firms' work force from a 'commodity' into an asset to invest in. In this way, 'employability', stable jobs as well as internal functional flexibility for business are promoted at the same time.
- Advance notification constitutes one particular dimension of job

protection. It has the important advantage of providing an early warning signal to workers that they are about to lose their job. It gives them the possibility and the time to start preparing themselves, to look for appropriate retraining measures and other jobs. Research (from the OECD) shows that notified workers find a new job more quickly compared to workers that find themselves overnight out of a job. One reason for this is that business does not discriminate against these workers because they post for another job while still working. Another reason might be that the worker can use professional contacts and networks if still in employment. Importantly, this dimension of job protection easily lends itself to be used as a basis for employment security measures. If there are robust periods of advance notification, then the public employment service and/or social partners' sector funds can step in and help notified workers in their search for a new and rewarding job. So, instead of having fired workers simply disappear into the black hole of unemployment, advance notification can be used to 'activate' and support these workers immediately.

- Some labour markets institutions deepen the link between high job protection and 'employability' even further by using the instrument of collective bargaining. In this case, business is again offered a choice: Either it pays high dismissal costs or it negotiates alternative solutions with representative trade unions. The latter has the effect of promoting collective bargaining agreements on strong 'transitional security' measures. The examples of Sweden and the Netherlands stand out. In Sweden, labour law forces business to respect the principle of 'last in, first out'. In practice however, the principle is rarely implemented because labour law allows business to deviate from this rule if a collective agreement is signed with the trade union. Trade unions in Sweden are keen to strike such deals because in return for giving the employer the possibility of keeping younger and most educated workers, they are able to secure substantial investment in transitional security for older workers together with severance pay. It is striking to note that the employment rate for older workers in Sweden is rather high. The Netherlands has similar incentives built into the job protection system. In the Netherlands, firms

can choose: Either they go to labour courts to fire workers in which case they have to pay a substantial severance payment but are at the same time pretty sure about the court's permission to fire workers. The other possibility for firms is to ask permission to fire from regional employment offices. This procedure takes more time and is less certain but the advantage is that the amounts of severance payment involved are low. However, business can be rather sure of the regional office permission to fire if a deal has been struck with trade unions on providing fired workers with adequate measures to promote employability and their mobility into a new job. So, in this case, as well, incentives coming from job protection systems guide business to take the way of investing in the transitional security of workers.

The key question is whether the EPL-indicator is capable of recognising these different interactions between job protection and employment security, including the link with collective bargaining. The answer to this is no: The OECD's EPL indicator is built on the simple hypothesis that the lower the level of job protection, the better. It only focuses on levels of job protection, without considering in any way the design of job protection and in particular how a well designed system of job

protection, together with collective bargaining solutions, promotes transition security.

So, basing the European flexi-security strategy on this indicator will bias policy in favour of a simple reduction of levels of job protection while opportunities to turn robust job protection into a basis for strong employment security policy will be missed. The only tangible results of using the OECD indicator will be to undermine key principles of Social Europe and to improve substantially the bargaining position of business at the expense of labour.

Other limitations and pitfalls of the EPL – indicator

From the description given in the attachment, it is clear that constructing the EPL- indicator is a highly complex, highly technical exercise, involving a lot of assumptions on how to translate what is often a complex but balanced system of job protection into one or two simple figures.

The OECD itself readily admits that its indicator has important limitations:

- Whereas the EPL-indicator fully covers labour law, it is much less certain whether the totality of collective bargaining practices or whether judicial procedures are adequately taken into account. The OECD does

attempt to include collective bargaining on job protection into its figures. So, for example, collective bargaining agreements in Denmark which, in the absence of labour law, fix advance notification for workers are taken into account in the OECD statistics. However, a full and reliable database on the job protection schemes in collective bargaining agreements does not exist so that job protection levels for countries where collective bargaining practice prevails, including possibly Denmark as well, tend to be underestimated. Similarly, countries with weak labour law provisions may in practice have beef up job protection through legal proceedings before (labour) courts. So, in particular in countries where there's a tradition and practice of 'common law' (Anglo-Saxon), the OECD may be underestimating somewhat the extent to which jobs are protected.

- Small and medium enterprises (SME's) often get exceptional treatment and are subject to less stringent job protection requirements. The OECD indicator however only focuses on the main system of job protection system and does not track this kind of flexibility offered to SME's. For Europe, with its large share of SME's, this implies that the OECD is overestimating

the effective strictness of job protection. It also implies that intra-EU comparisons are biased since SME's tend to dominate the economies of some member states more than others.

On top of these data availability related limitations, there are also problems with the weights being used. Attaching an equal weight to regular and temporary job protection is highly questionable. Temporary workers only represent a minority of the total dependant employment. By attaching an equal weight to temporary job protection, countries which have high protection for temporary employment get especially targeted. France is an example of this. Job protection for regular workers in France is not especially high. Nevertheless, France scores high on the overall EPL-indicator exactly because of job protection for temporary workers which barely concerns 13% of workers.

Given these limitations, it does not come as a surprise that the OECD's indicator is sometimes disconnected from reality. Take for example the case of Spain, compared with Germany. Temporary jobs are rampant in Spain, with as high as one third of workers in those contracts. The OECD and the European Commission explain this by high job protection for regular workers, giving 'poor' employers no other possibility than to engage workers on a temporary basis. However, it turns out that job protection for regular workers

between Spain and Germany is almost identical. Yet, the share of fixed-term workers is most much more limited in Germany and with ù even under the European average of %. Again, the reason is probably the OECD indicator not tracking labour market reality. In Spain, labour law limits chains of fixed term contracts to a period of 24 months and this is reported in the OECD indicator on temporary job protection. However, it appears that this labour law obligation could only be implemented by approval by social partners. Until the 2006 social agreement, social partner approval was lacking, with the consequence that the OECD was overestimating the effective protection on temporary jobs in Spain and implying that the high incidence of temporary work in Spain was caused by too low temporary job protection rather than too high regular job protection.

Conclusion and alternatives

The OECD indicator suffers from a fundamental bias. It is constructed to advance the case and the interest of business without any consideration for the interest of labour. Using this indicator in the Employment strategy will come at the expense of key workers' rights and basic principles of the existing European Social Aquis.

Moreover, it will also become difficult to maintain the social credibility of the Commission in the global economy: If Europe is

internally promoting the disrespect of its own social standards as well as one of the ILO-conventions, and then any effort to defend the idea of decent work on the world level is doomed to fail in advance.

What can be done instead? Although the overall OECD indicator is skewed towards deregulating the right of workers on stable jobs, some of sub-indicators can be made good use of:

- The number of days or months of advance notification can be used to assess whether member states are indeed offering the possibility of 'early warning signals' to dismissed workers and whether the time period is long enough to make a difference. The benchmark in this case can indeed be Denmark and/or Sweden, where workers enjoy the longest periods of advance notification.
- Data on limitations on the number and the cumulative duration of fixed term work can be used to see whether and how the 1999 directive on fixed term work is respected. Also, member states showing good practice by closing loopholes and limiting chains of fixed term work contracts can be set as a benchmark.

Attachment: Understanding the EPL indicator

The OECD's Employment Protection Indicator (EPL) ranks overall job protection systems of countries on a scale ranging from 0 (no protection whatsoever) to 6 (impossible to fire). It is a summary indicator, based on three dimensions of job protection systems: Protection for regular workers, protection for temporary workers and the additional protection in case of collective redundancies. In turn, each indicator is based on several sub-indicators measuring different aspects of the job protection construction. For example, job protection for regular workers is based on sub-indices such as pre-notification procedures, advance notification given to workers themselves, number of months of severance payment and so on. In total, there are 18 different aspects that are part of the OECD EPL indicator. These 18 different sub-indices get rescaled so that they can be summarized in one simple figure. Also, to obtain one measure of the overall level of job protection, weights are used. Protection of regular workers and temporary contracts each get an equal weight of 50% and protection against collective redundancies gets a weight of 20%.

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