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# EMPLOYMENT POLICIES FOR TARGET GROUPS IN THE CONTEXT OF ECONOMIC CRISIS<sup>1</sup>

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## 1. The relationship between policy of employment for target groups and the scope of the Labour Law

Since the 1990s United States and European Governments have introduced programmes for specific groups of population, defined in terms of individual characteristics (gender, age, disabilities) and negative participation on labour markets. With the general aim to promote the equal on the workplace, these programs try to increase the participation in the labour market, to reduce the unemployment rates and to promote a positive workplace, as well as to protect the employee on the workplace. These programmes make two types of intervention in labour market. On the one hand, the anti-discrimination law addresses to remove the fixed barriers on the process of recruitment and hiring, when employers make differential treatment without justification, for intentional reason (direct discrimination), even facially neutral practices that has an adversely impact in these particular groups (indirect discrimination). On the other hand, affirmative action introduces measure in order to compensate the inequality of position of these target groups on the labour market, with different types of interventions (quotas, preferences, temporary contract, tax benefits, state aids for employment).

According to this scheme, employment policy for specific target groups, which the government often use for the purpose that I mentioned above, introduces specific obligations for employers, which it provides a different way of understanding the relationship between employer and employee, as well as the Labour Law. In fact, policy of employment for target groups creates different regimes for the same workers, even if they make their jobs in the same company, which it increases the debate between two different options: a systematic or not Labour Law. In this contradiction, it is possible to find a key of the future of Labour Law, especially on the context of economic crisis, for instance, the validity of these schemes and these interventions have been discussed. But most of papers that analyse the effects of employment policies do not take into account the employment policies for target groups; as well the study of Labour Law usually forgets its impact on the employer's obligations and on the employee's rights.

All of these programs increase the participation of the people in the society and, consequently, are useful for enforcing Welfare State's aims, even they can be change the traditional role of Labour Law. In fact, some changes to the Welfare-state have introduced a new role for the Labour Law, which modify the traditional role of Labour

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<sup>1</sup> Many of the ideas that I analyze on this paper can be founded on my Phd: "Políticas selectivas de empleo: colectivos destinatarios y transiciones en el mercado de trabajo", directed by Professor Santiago González Ortega, Catedrático de Derecho del Trabajo y de la Seguridad Social, that was evaluated in November of 2010 in Pablo Olavide University (Seville, Spain).

Law of regulate the equilibrium of the contract of labour law, based on the regulation of labour market and increased the labour force into labour market. In this new scenario, Labour Law has new responsibility to reduce the difference between contract and fixed worker, to promote the inclusion into the society to the all people whom can work and increase the qualification of the active labour force. The fundamental rights have taken a relevant role as a way to promote the labour participation and to reduce antidiscrimination behaviour. In the flexible regulation of the labour law, the policy of employment has focussed on the participation of the vulnerable groups in the labour market, as well as on the difficulties that the flexible regulation of labour market introduces on the discussion of the employment policy.

In this sense, Welfare State has introduced a new economic, social and political organization, where the Governments must design a policy in order to avoid and reduce the social exclusion, with a different legal system of Labor Law and with a new track to understand the employment policy from an individual and collective point of view. Therefore, Welfare State changes the aims of employment policy focusing on the increase of the participation into labour market and in the protection of vulnerable groups of population. On this context, target groups play an important role in the Welfare State. In contrast, this important meaning of participation in labor market has found a gap on the low rate of employment<sup>2</sup>, especially in some countries of European Union like Spain where the level of unemployment is high for structural reasons related to the national economic and local market, although the rate is particularly high on the context of economic crisis as we can check on the statistics studies<sup>3</sup>. Therefore, Welfare State has increased the regulation of labor market with the employment policy in two ways. The first one, in relation with the target groups of population, has increased and changed its legal framework, using anti-discrimination law and affirmative action. On the other hand, in connection with the types of interventions, in the sense of introducing new target groups and new scheme on the labour law frameworks.

Regarding to the intervention in labor market, Welfare State's policy has jointed its traditional system protection by pension with a new scheme that requires more active citizenship. As the employment it is not an individual question, the concept of unemployment has change in this new scenario, even the protection of the Welfare State has increased in order to get the employability of the he population which can do a job. Therefore, the claimant of unemployment can get the benefit and also can participate in specifics programs of the job-center focused on the target groups<sup>4</sup>. In this context, the Welfare State has become into the Workfare State, increasing the responsibility of participation into labor market. Again, the Workfare State must change its aims and its structure, with different interventions depending on the development of its Welfare State, based on the transitions inside and outside labor market, and where the

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<sup>2</sup> ALONSO OLEA, M.: *El trabajo como bien escaso y la reforma de su mercado*, Civitas, Madrid, 1995.

<sup>3</sup> Regarding with the European Commission statistics, which it is available the "EU employment and Social situations. Quarterly Review. March of 2013", available in <http://ec.europa.eu/social/main.jsp?langId=en&catId=113>, from 2008 to 2011, in European Union countries, the employment rate for the women are lower (58'5%) that as the beginning of the economic crisis (58'9%), and also the male employment was higher in 2011 (70'1%) and in 2008 (72'7%). The unemployment rates of the young people have increasing quickly; even more the inactivity rate has down in all the countries. Regarding with the European Commission statistics that I mentioned above, the youth unemployment is 2'5 times higher than adults. Moreover, the older workers suffer less unemployment than the young people, but the inactivity rate is high and also their difficulties of participation have increased during the 2011.

<sup>4</sup> WILLMAN, C.: *L'identité juridique du chômeur*, Librairie Générale de Droit et de Jurisprudence, Paris, France, 1998, p. 4 y ss.

unemployment it is only a step more of the work-life. On this context, the policy of employment tries to enhance the employability of the citizenship, supporting the transitions into labor market, with the target to secure the relationship between worker and market, in a theory so-called as flexi-security<sup>5</sup>. Therefore, the new way to understand the work-life has raised again the policy of employment for target groups, in the sense that the fundamental rights and equality are necessary in order to promote the transitions into labor market, even its new meaning for the relationship between worker and employers. Finally, we can defend that policy of employment has acquired a relevant role on the construction of the participation of citizenship as a result of these changes, even because the interventions on the labour market are necessary in order to help and to support to all the groups of populations in their transitions on the work-life (entry into labor market, participation and return).

These evidences express that the role of the work it is more important, even when some of scholars were thinking about the possibility of making an experimental society without this important meaning of work<sup>6</sup>, the new Welfare State has rescued the traditional role of work for strengthening its value. The main idea is to put it on the centre of the social construction. Therefore, as the scholars have defended, the work is the engine of the production, distribution and social development in all Welfare States; so that it can be answer the social question. In this sense, we can explain this structure, in all of the models of Welfare State, analyzing the relationship between the subject of social provision (state, market and family)<sup>7</sup> and the different scheme (fundamental and social rights, general policy of employment and policy for target groups, the protection on social risk, and the design of policy of employment as active or passive interventions into labor market)<sup>8</sup>. But the impact of flexi-security has change more the social-democratic model of Welfare State (Denmark, Sweden, Norway, Iceland) than the others<sup>9</sup> like the liberal (EEUU or UK) or the corporative (France or Germany) models of Welfare State, in the sense of increasing the policy of employment and the change of the traditional role of Labor Law.

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<sup>5</sup> SCHMID, G.: "Transitional Labour Markets: A new European Employment Strategy", Berlin: WZB Discussion Paper (FS I 98-206); SCHMID, G. "Transitional Labour Markets and the European Social model: Towards a new employment compact", in SCHMID, G. and GLAZIER: *The dynamics of full employment: Social integration through transitional labour markets*, Edward Elgar, Cheltenham, United Kingdom, 2002; WILTHAGEN, T.: "Flexisecurity: A new paradigma for Labour Market Policy Reform", Berlin WZB Discussion Paper 98-202; WILTHAGEN, T. and ROGOWSKI, R.: "The legal regulation of transitional labour markets", in SCHMID, G. and GAZIER, B.: *The dynamics of full employment: Social integration through transitional labour markets*, ob. cit.; WILTHAGEN, T.; MUFFELS, R. and VAN DEN HEUVEL, N.: "Labour market transitions and Employment Regimenes: Evidence on the flexibility-security nexus in transitionals labour markets", Berlin: WZB Discussion Paper (F-S I 02-204); WILTHAGEN, T. and TROS, F.: "The concept of flexisecurity: A new approach to regulating employment and labour markets", *Transfer: European Review of Labour and Research*, nº 10 (2), 2004.

<sup>6</sup> RIFKIN, J.: *The end of work: the decline of the Global Labor Force and the dawn of the post-market*.

<sup>7</sup> TITMUSS, R.: *Política social*, Ariel, Barcelona, 1981; ESPING-ANDERSEN, G.: *Los tres mundos del Estado del Bienestar*, Edicions Alfons El Magnánim, Valencia, 1993; FERRERA, M.: "Los Estados del Bienestar del Sur en la Europa Social", en SARASA, S. y MORENO, L. (Coord.): *El Estado del Bienestar en la Europa del Sur*, Consejo Superior de Investigaciones Científicas, Madrid, 1995, p. 85-109.

<sup>8</sup> VENCEX y OUTES, J. L.: *Unión Europea y la crisis del Estado del Bienestar*, Síntesis, Madrid, 1998; LUELMO MILLÁN, M.: "Desempleo y familia", *Revista del Ministerio de Trabajo y Asuntos Sociales*, nº 54, 2004, p. 13-34; PÉREZ ERANSUS, B.: *Políticas de activación y rentas mínimas*, Fomento de Estudios Sociales y de Sociología Aplicada, Cáritas, Madrid, 2005, p. 94-98.

<sup>9</sup> SAPIR, A.: "Globalization and the reform of European Social Models", *Journal of Common Market Studies*, nº 44, 2006, p. 375 y ss.

As we know, Labor Law has been used in order to resolve the dilemma of the low rates of employment, although there is not empirical evidence about its contribution on this matter, with the target in to regulate the type of worker, the contract with the employers (temporary/fixed labor contract) or the unemployment social protection. In the same way that Welfare State has changed its meaning in the context of flexi-security, the Labor Law has taken a new role in this scenario with the aim of enforcing the employability and of promote these transitions on the market. In these sense, Labor Law has introduced a lot of measure in order to prevent and to reduce the social exclusion, where it is possible to find several schemes for target groups, although the social protection for employment, in the vast majority Welfare State, promotes a quickly return to the labor market. However, the social protection can develop other different role, supporting the transitions into labor market with a system of pensions and benefits, in order to promote the access or the return into labor market with more guarantees of employability.

But the main objective of Labor Law is the regulation of the relationships between workers and employers. So that the employment policy for target groups finds a relevant barrier in order to introduce these types of interventions, in the sense that the selective scheme breaks the status of worker in which the Labour Law had traditionally thought, focusing on the type of job (industrial worker, sea worker, farmer worker), contract (temporary or fixed- term work) or working condition (part-time).

However, the flexi-security can change this idea, because in a flexible regulation of labor contract, if the Government want to defend the idea of Welfare State, it is necessary to introduce a specific protection for target groups. Jointed over the equality scheme and the fundamental rights, this approach can show us a new future for Labor Law.

In the context of economic crisis, there is no evidence about a change in the process that I had described above. On the one hand, European Union has promoted the flexi-security as a way to reduce the adverse impact of economic crisis and to get a chance for the recover. On the other hand, as I told before, in a flexible labor market or in a context of a deregulated labor law, it is necessary to increase the protection of the target groups, because the negative effect of economic crisis are stronger in these groups of population than in others workers, as we can check for the statistic results in this matters, they have more difficulties for access to labor market, for participate with a labor contract or work as a self-employed and for return to labour market<sup>10</sup>.

But there are some issues of this theory, jointed to the future of Labor Law, that require some additional reflections. The first one of them, the main problem of the employment policy for target groups is the difficulty of designing policies that really they are focused on the groups of population whom have difficulties of participation in labor market. The second one of them and the most important, jointed with the problem above, is the selection of measures that are more convenient for these target groups. This requires not only a selection of the best measures for each groups, but also a clear idea about the priority in connection with the target groups (which required a stronger protection) and the difficulties of participation that have each one. In both case, it is necessary to rethink the fair equilibrium between general policy of employment and

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<sup>10</sup> This idea has been founded in the recent study of European Commission: "EU employment and Social situations. Quarterly Review. March of 2013". It is now available in the following website: <http://ec.europa.eu/social/main.jsp?langId=en&catId=113>.

policy of employment for target groups. Therefore, the policy of employment for target groups must be more or less stronger depending of the groups of populations.

## **2. The target groups of employment policies: identity from an historic and compared perspective**

Generally, the concept of “target groups” includes people who do a job but are in the risk of unemployed (because his/her contract is temporally or partial time) or have special difficulties for do a job, and person without job (who never have done a job or have loosed them job). The situation of the target groups in connection with them job would not mean than he/she must be a target groups of the public employment, although we can find differences between the interventions that the Governments make when they have or not have a job. In fact, the social outsiders are not always a scope of the policy of employment. Only the people that Government thinks that the employment can be the best way for his/her integration or to prevent the exclusion, indeed, are integrated among the aims of the policies of employment. This means that the concept of target groups legitimates the policy’s intervention in order to avoid or correct situations towards the future, designing a selective scheme for getting the social exclusion of the citizenship.

Depending on the social and economic items, the Governments must choose which the groups of population should be protected by the selective policies of employment. However, there is some characteristic that often they use in order to define the protect groups, as we can to deduce from the Court of Justice of the European Union (ECJ). The first one, it is necessary that the protected groups share a personal characteristic or social condition, and that other groups or person cannot define using this personal characteristic or condition, so that this characteristic must allow its identification as a particular group. The second one, it is necessary that the target groups have a past discrimination history, ECJ of 30 of September of 2004 (C-319/03) *Brieche*. The third one, the personal characteristic or social condition must justify that they need a special protection from the Governments; a particularly status of legal protection in which they should be included as the past discriminatory history, without other persons or groups of population have got the same legal framework, ECJ of 11 de June of 2006 (C-13/05) *Chacón Navas*, ECJ of 11 of April of 2012 (C-335/11 y 337/11) *Ring and Skouboe Werge*<sup>11</sup>.

Therefore, the concept of target groups is jointed with the equality and anti-discriminatory framework, in the sense than the personal characteristics or social conditions protected by the legal system (as the sex, disability or age) allow to define the target groups, although there are others factors like the post code, the place to live, the country of birth, the level of qualifications or the background in the labour market, the type of occupation or the activities, that can justify a particular measure for some groups of populations. But these types of measures are less strong that the legal protection of the target groups of the selective employment policies. In this sense, as we know, USA has introduced the concept of affirmative action with the scope to promote the social inclusion for the immigrant. In fact, the affirmative action had been made on basis of the race, the sex, the national origin and the disability<sup>12</sup>, but also EEUU has

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<sup>11</sup> GÓMEZ-MILLÁN HERENCIA, M.J.: *Colectivos destinatarios de las políticas selectivas de empleo*, Laborum, 2011, p. 41.

<sup>12</sup> AGOCS, C.: *Workplace Equality: international perspective on legislation, policy and practice*, “Affirmative action in American Employment Law: Past, present and future”, Kluwer Law International,

designed some special protections for chronically illness, worker with family responsibility or older worker on the last recent years<sup>13</sup>. In contrast, UK has special programs for young people, long term- unemployed, older worker, like benefit or tax jointed some of them with the jobseeker allowance<sup>14</sup>, but also has a large regulation in order to promote the participation of disabled people into labour market which means a special protection on the labour relationship<sup>15</sup>. In Spain, finally, the policy of employment for target groups has focused in a specific protection for women or disabled people, with some measures for young people<sup>16</sup>, but in the last ten years there are specifics protections for older worker with family responsibility<sup>17</sup>. This is a natural result of the change that can be introduced for the social or economic evidence in the concept of equality and the anti-discriminatory law, in the sense that the selective policy of employment must be an answer about the historic or the new gaps in the labour market, even the concept of equality and anti-discriminatory law must be develop in order to promote the social and economic change<sup>18</sup>.

As I had pointed above, the level of unemployment depends of the following factor for the groups of populations. On the one hand, in relation with the sex, the women frequently are a target groups of the selective employment policies, because of they have been victims of the discrimination by the sex in the past and they still have problems in the labour markets; as we can confirm if we compare the levels of

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2002, p. 250. The legal framework basically is: Title VII of the Civil Rights Act of 1964 (Title VII), The Pregnancy Discrimination Act, The Equal Pay Act of 1963, The Equal Pay Act, Guidelines on discrimination because of sex, Guidelines on discrimination because of religion, Guidelines on discrimination because of national origin, Title I of the Americans with Disabilities Act of 1990 (ADA), Regulations to implement the equal employment provisions of the Americans with Disabilities Act, Procedures for complaints/charges of employment discrimination based on disability filed against employers holding government contracts or subcontracts.

<sup>13</sup> The Age Discrimination in Employment Act of 1967 (ADEA), Age Discrimination in Employment Act, Genetic Information non-discrimination Act 2008.

<sup>14</sup> WALKER, R. and WISEMAN, M.: "Making welfare work: UK activation policies under New Labour", *International Social Security Review*, vol. 56, 2003, p. 3-29.

<sup>15</sup> CONOLLY, M.: *Discrimination Law*, Sweet and Maxwell, Thompson Reuters, 2011; DOYLE, B.; CASSERLEY, C.; CHEETHAM, S.; GAY, V. and HYAMS, O.: *Equality and discrimination*, Jordan, 2010; PALMER, C.; GILL, T.; MONOGHAM, K.; MOON, G. and STACY, M.: *Discrimination Law Handbook*, Legal Action Group, 2007.

<sup>16</sup> ROJO TORRECILLA, E.: "Las políticas de empleo. Especial atención a las políticas de inserción para los colectivos más desfavorecidos", *Relaciones Laborales*, Tomo 1, 1998; GONZÁLEZ ORTEGA, S.: "La dimensión europea de la protección social de los grupos vulnerables", en VVAA: *La protección de las personas y grupos vulnerables en el Derecho europeo*, Ministerio de Trabajo y Asuntos Sociales, Madrid, 2001; FERNÁNDEZ LÓPEZ, M.F.: "Políticas selectivas: Un peculiar contenido de las medidas activas de empleo", en VVAA: *Estrategia europea, Estado Autonomico y política de empleo. XVIII Congreso Nacional de Derecho del Trabajo y Seguridad Social*, Ministerio de Trabajo y Asuntos Sociales, Madrid, 2008, p. 527-588.

<sup>17</sup> CHACÓN RODRÍGUEZ, L.: *Colectivos desfavorecidos en el mercado de trabajo y políticas activas de empleo*, Ministerio de Trabajo y Asuntos Sociales, Madrid, 2004, p. 121-172; OLARTE ENCABO, S.: *Políticas de empleo y colectivos con especiales dificultades: La subjetivación de las políticas activas de empleo*, Aranzadi, Pamplona, 2008, p. 177-249; GÓMEZ-MILLÁN HERENCIA, M.: "Políticas selectivas de empleo para personas responsables del cuidado familiar", en VVAA: *Estrategia Europea, Estado Autonomico y Política de Empleo. VIII Congreso Nacional de Derecho del Trabajo y de la Seguridad Social*, Ministerio de Trabajo y Asuntos Sociales, Madrid, 2008, p. 849-867; MERCADER UGUINA, J.R. (Dir.): *Trabajadores maduros: Un análisis multidisciplinar de la repercusión de la edad en el ámbito social*, Lex Nova, Valladolid, 2009; GÓMEZ-MILLÁN HERENCIA, M.J.: *Colectivos destinatarios de las políticas selectivas de empleo*, ob. cit., p. 301-416.

<sup>18</sup> FERNÁNDEZ LÓPEZ, M.F.: "Las causas de la discriminación o la movilidad de un concepto", *Temas Laborales*, nº 98, 2009, p. 11-57.



unemployment of the **women** and the men, with the same age or qualifications, the level of unemployment of the female are more higher that the level of the men.

On the other hand, the disabled people have special difficulties in order to access or return into labor market. Even when they get a job in a regular labour market, as the experience of their labour participation demonstrate, the money that the companies must pay in order to remove the natural barriers that limit the development of the job in the workplace, as we can deduce for their bad results in terms of labour participation, usually create another gap that reduce again their participation in the labour market. On the context of European Union, the concept of disability depends of the national legal framework, although it is possible to identify common grounds on the legal requirements, like a different capacity of participation during long-term time, as the famous decision of ECJ has interpreted: a long-term 'limitation which results in particular from physical, mental or psychological impairments and hinders the participation of the person concerned in professional life', ECJ of 11 of July of 2006 (C-13/05) *Chacon Navas*. Moreover, the concept of disabled people includes a temporary reduction on the capacity of work, when these reductions are jointed with the disability, for instance, the illness of a disabled person, ECJ of 11 of April of 2013 (C-335/11) *Jette Ring v Dansk almennyttigt Boligselskab DAB*.

In the same way, the empirical studies show us that the level of employment also depends of the age. In fact, there are two target groups with low rate of employment or with difficulties of participation for this factor. On the one hand, the **young people** which have problem in order to get the first job, even a fixed contract or a full time job with a high wages. On the other hand, the **older workers** have special difficulties for the social prejudice or the obsolescence of their skills, so that the participation on the collective dismissal is high. In this sense, there is an internal contradiction between the selective policies of employment for young people and older workers, because the policy of employment that promote the increased of employment for the older workers can reduce the impact of the policy of employment for the young people, which it is stronger in the context of the economic crisis as a result of the job destruction. Therefore, it is necessary to find the equilibrium of these kinds of measures which, in both cases, are focused on the age of the worker. The employment policy for older worker can help many people for getting a job. But if the policy of employment promotes that older worker continue doing a job, others target groups (like young people) will find more difficulties of access or participate in the labor market, if the labour force is the same<sup>19</sup>. Moreover, the studies about the future of the Social Security insist on the problem of the aging of the population and this studies support the thesis of the active ageing that means the old worker must be continue to work, because in other case it will be impossible to support the public benefits and the system of Social Security, although the retirement can be less lineal in the future (flexible retirement, partial work)<sup>20</sup>.

For resolve this issue, it is necessary to fix an age which can be used for defining both groups and the limits of their measures. In terms of age, the borders usually tend to fix, for the young people, in the twenty-five of years old, as a top of the protected aged, when the target group has not got a specific qualification, Recommendation OIT n° 45 about youth unemployment (1934); Recommendation OIT n° 60 about apprenticeship

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<sup>19</sup> GÓMEZ-MILLÁN HERENCIA, M.J.: *Colectivos destinatarios de las políticas selectivas de empleo*, ob. cit., p. 301-310.

<sup>20</sup> SCHULZ, J.: "The evolving concept of retirement: looking forward to the year 2050", *International Social Security Review*, vol. 55, 1/2002, p. 85-105.

(1939); Recommendation OIT n° 117 about vocational training (1962). For the older workers, the measures begin on the forty-five or fifty years old in some texts of European Union, Regulations 800/2008/CE, of 6 of August, declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty; Regulations 68/2001/CE, of 12 of January, on the application of Articles 87 and 88 of the EC Treaty to training aid. Without a top of age, the policies of employment for older workers should finish with the retirement; because the limits of public resources and the necessity to expend this resources only in whom have problems for doing a job and can not to support themselves, even the efficiency of a really selective employment policy, each other, recommend to limit the selective employment policies when the older worker can access to the retirement<sup>21</sup>.

Finally, there are other groups of population with social barriers and lower participation into labor market (**like long term unemployment, people that suffers social exclusion, lone parents, victims of wars or terrorist attacks**). However, those groups of population have not a specific status or a legal framework, because they only need some intervention in order to protect their personal or social characteristics, because they did not suffer the past discrimination and also their difficulties are not the same in all the contexts of the social life.

Actually, we can find the protected groups in the Equality Directives of European Union which regulate the framework of this matters, the Directive 2000/78/EC, of 27 November of 2000, establishing a general framework for equal treatment in employment and occupation, and the Directive 54/2006, of 5 of July of 2006, about the implementation of the principle of equal opportunity and equal treatment between men and women in matters of employment and occupation. These Directives introduce specific obligations for the employer and for the Governments whom should be design the measures in order to promote the participation in labor market, rethinking in a Labor Law that creates the necessary conditions for getting the equal opportunity and the instruments for avoiding the discriminatory behavior. In the same way, European Law admits that European Nationals Governments give to the employer aids to supporting the economic cost of the labor contract; and also that they give more opportunity, in the public process of contract, to the employers whom make contracts with the target groups. Regarding to this issue, the Regulation n° 800/2000/CE, of 6 August 2008, declares certain categories of aids compatible with the common market in application of articles 87 and 88 of the Treaty of European Union. The Regulation n° 800/2000/CE defines to as a 'disadvantaged worker' to whom 'has not been in regular paid employment for the previous 6 months; or has not attained an upper secondary educational or vocational qualification (ISCED 3); or is over the age of 50 years; or lives as a single adult with one or more dependents; or works in a sector or profession in a Member State where the gender imbalance is at least 25 % higher than the average gender imbalance across all economic sectors in that Member State, and belongs to that underrepresented gender group; or is a member of an ethnic minority within a Member State and who requires development of his or her linguistic, vocational training or work experience profile to enhance prospects of gaining access to stable employment' (article 2 Regulation n° 800/2000/CE, of 6 August 2008). In addition, there are some of the target groups with more protection so-called 'severely disadvantaged worker' which the article 2 Regulation n° 800/2000/CE, of 6 August 2008, defines as 'a person who has been unemployed for 24 months or more'. In the

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<sup>21</sup> GÓMEZ-MILLÁN HERENCIA, M.J.: *Colectivos destinatarios de las políticas selectivas de empleo*, ob. cit., p. 313-320.

same way, 'disabled worker' is other of the target groups on this legal framework. Therefore the aids for contract or reasonable accommodation with person has been recognized as disabled under national law; or having a recognized limitation which results from physical, mental or psychological impairment, in the terms of article 2 and section 9 of the Regulation n° 800/2000/CE, do not require the notification to European Commission, because these state aids also are compatible with the common market.

This idea can be the right way for the design of the European Guidance of Employment. After many years where the Guidelines for the employment policies of the member states have been more general, finally, Decision n° 707/2010/EU, of 21 October 2010, about guidelines for the employment policies of the Member States, promotes a clear strategy of selective interventions for 'increasing labour market participation of women and men, reducing structural unemployment and promoting job quality', on which the European Guidance of Employment again mention to women, people with disabilities, young people and legal migrants. But this economic crisis has had an adverse and negative impact especially in some of worker like people who suffer illness, migrant worker, temporary or informal worker. This might be evidence about the necessity of doing an institutional and legal reform in order to promote the equality in other target groups, particularly in the case of chronic illness.

### **3. Types of schemes used by the Governments: its impact on the employment protection law and the general principles of Labour Law**

The flexi-security has introduced a new way for making selective employment policy, as I told before. In this sense, it is possible to find more intervention connected with the Labour Law, although the Social Security has a significant role in all of these transitions (entry, maintenance and return into labour market). One of the most important groups of intervention is jointed with the labour contract, in the sense of **state aids for employment**, like reduction in the social charge or money for making these contracts, which Governments can use for all the target groups. In the specifics case of some particularly groups, the affirmative action is jointed with the labour contract, in order to promote the access to the labour market between whom get the same score on process of recruitment (**preference or flexible quotas**); or special barriers and has the qualification for the job (**quotas**)<sup>22</sup>. These types of affirmative action have a supporters and opponents on the countries which have introduced these interventions for getting the equal opportunity.

Nowadays, European Union is trying of introduce the preferences in order to get the equal opportunity for women in the big companies (Proposal for a Directive, of 14 of November of 2012, on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM (2012) 614 final). Even more some parts of the text look like quotas on this proposal, which have been refusing for some European countries, although the European Commission has supported these preferences of women in the context of economic crisis as a way to get gender equality. In the same way, several countries in European Union, like Spain, have quotas in order to promote the entry to the labour market for disabled people in the medium or big companies. On the context of this economic crisis, the last labour market

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<sup>22</sup> OPPENHEIMER, D. B.: "Distinguishing five models of affirmative action", *Berkeley Women's Law Journal*, vol. 4, n° 42, 1988-1990.

reform in Spain gave to the collective bargain the opportunity of introduce preference on the collective dismissal, depending on the special characteristic of these special groups of population like worker with family responsibility, older worker and disabled people (article 51 of Spanish Law 1/1995, of 24 of March, about the legal regimen of workers).

But in the last recent years these types of measure have been connected with other matters of Labor Law. In this sense, women have been protected for their biological condition for the international and national labor law with a particular legal framework that offers a strong protection for pregnancy in different areas: **wages, dismissal and leave for maternity**. European Law has considered that some of those guarantees must be extended to worker family responsibility, like the leave for children care (Directive 18/2010/UE, of 8 of March of 2012, implementing the revised Framework Agreement on parental leave concluded by Business Europe, UEAPME, CEEP and ETUC, and repealing Directive 96/34/EC) or the benefits for the fees of the nurseries. In this sense, the Convention ILO n° 156 of Workers with Family Responsibilities (1981) promotes that the states introduce among of their national policies aims some measures, in order to enable persons with family responsibilities can 'exercise their right to free choice of employment', and the states take into account of 'their needs in terms and conditions of employment and in Social Security'. This means a special protection, for instance, in child-care and family services and facilities, vocational guidance and training, with the aim of become and remain integrated in the labour, and also means that family responsibilities shall not constitute a reason for termination of employment, Convention ILO n° 156 of Workers with Family Responsibilities Convention (1981). In the same way, the European Court has concluded that the benefit for the nurseries (or other childcare attendance) must be extended to the lone parents. Therefore, the employer can not consider the sex (man or women) of the parent in this case, in ECJ of 19 of Mars (C-476/99) *Lommers*.

In the same way, the European Judicial Court has recently considered the necessity of the employers make a different treatment when the disabled person, who do a job in a company, suffer a temporary illness, using the reasonable accommodations as a track for avoid a dismissal for these justify absences of work and considering like indirect discrimination when the employer does not take into account these difference for disabled people, ECJ of 11 of April of 2013 (C-335/11 y C-337/11) *Ring v Dansk almennyttigt Boligselskab and Werge v Dansk Arbejdsgiverforening*. As the judicial decision reminds us, when the employee has paid a sick leave for 120 days during 12 consecutive months, Danish legal framework allows to the employer to conclude the contract. But if the worker is a disabled people, it is necessary to apply a selective measure in order to get the equality in the labour market. Therefore, the reasonable accommodations do not only mean a special adjustment of the workplace or a replacement of the job that the disabled person was doing in the company, because in some case it is necessary to introduce special regulation in the Labour Law framework in order to get the equality (**like working hours, leave for sick or the adjustments of the results expected by employer to the capacity of the employee**).

These types of interventions can be used for making a different legal framework, in the sense that it is possible to create a special regime for some of target groups like young people, each other's. Regarding to the youth people, the particular barrier that limits their access to labour market, therefore, justify a special labour contract, in order to give them the opportunity to get the first experience or the skill in the job that they need. The **temporary contract** for young people has a long tradition in Labour Law, as

we can check for several texts, like the old Recommendation n° 60 of the International Organization of Labour Law about labour law apprenticeship (1939), which ILO has been recently recommended as a way to reduce the high level for unemployment in the Resolutions and Conclusions of the 101st Session of the International Labour Conference (Geneva, 2012) ‘the youth employment crisis: a call for action’.

In contrast, some of the selective policies employment for the young people promotes the access to labour market with a legal framework more flexible or without a high level of protection, even more in the context of economic crisis when one of the most important problems is the high level of youth unemployment. The European Equality Law admits these types of difference for getting the equal opportunity for young people. So that, it is possible to design, in this context, special schemes in the matter of contract law, training and dismissal (article 6 Directive 2000/78/CE), also when the age is a relevant factor for doing the job (ECJ of 12 of January of 2010 (C-229/08) *Wolf*). Therefore, this policy of employment, in some European countries, has reduced the Labour Law standards, in order to offer them a special training during the first experience in labour market, (ECJ of 18 of June of 2009 (C-88/08), *Hutter*). In this sense, European Judicial Court has considered some of these selective employment policies like a discriminatory law. For instance, in ECJ of 19 of January of 2010 (C-555/07), *Küçükdeveci*, European Judicial Court resolved that the principle of non-discrimination on grounds of age must be interpreted as precluding national legislation, which provides a periods of employment completed by an employee before reaching the age of 25 are not taken into account for calculate the notice period of a dismissal, it is not a legal framework according to equality law.

All of these exceptions cannot apply to older workers, as the European Judicial Court has considered in some of its judgments, because these target groups have usually gotten a previous experience into labour market. But it is possible to use them when the employers offer a training experience to the older workers, as we can check in the judgement of ECJ of 22 of November of 2005 (C-144/04) *Manglod*. In fact, the selective polices of employment for older workers have not had a special impact in the European Social Law or in Spanish Social Law. Even though, these types of scheme have increased during the economic crisis in some of countries, like Spain, for the high rate of unemployment of the older workers, particularly when the older worker has problem of social exclusion or has the risk of include in this target group (long-term unemployed).

One of the reasons should be that older workers had not faced with specifics barriers before the economic crisis in the vast majority States of European Union, although some studies notice this problem<sup>23</sup>. Another reason should be that the economic crisis has increased their barriers and reduced their participations into the labour market, in the sense that a lot of employers have decided to dismiss them for their high wages, or they find more difficulties for return into labour market nowadays. In this context, Spain has introduced some particular measures in order to protect them, jointed to the collective dismissal, because the contract of many older workers are broken during this kind of process (article 51 of Spanish Law 1/1995, of 24 of March, about the legal regimen of workers). All these schemes increase the protection of older workers making more expensive to the dismissal in terms of charge of the cost that the employers must pay to Social Security, even more they employer must pay for special

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<sup>23</sup> TAQI, A.: “Older worker, work and equal opportunity”, *International Social Security Review*, vol. 1/2002, p. 107-120.

service of out-placement in the private agency of employment for getting the quickly return of the older worker into the labour market (article 14 Regulation 10/2010, of 16 of June, and article 18 of the Law 3/2012, of 6 of July, about urgency measures for the labour market reform that change the article 51 of Spanish Law 1/1995, of 24 of March, about the legal regimen of workers).

Therefore, Governments normally use the selective policies of employment as a way to increase the standard of Labour Law, because the discrimination law require a design of legal framework with a high level of protection, as we can check in the case of women or disabled people. These common legal practices have some exceptions, as I told above, in the sense that it is possible to design some public policies with the scope of reduce the labour standard of Labour Law as a track to promote the entry into the labour market. Anyway, on the context of economic crisis where the flexibility has been chosen among different possibilities of schemes as a way to reduce its adverse impact on the labour market by some of states, the selective policies of employment can be used in order to protect the vulnerable groups, increasing the standards of Labour Law for getting the equality in the labour market. In the same way that the liberal regimen of Welfare State, the equality and antidiscrimination law probably will take a more significant role in Spain or some of European countries with a more protective standards in Labour Law, because the fundamental rights introduce a different way to understand the equilibrium of the labour contract<sup>24</sup>, even more in the context of a flexible or deregulated Labour Law.

On the other hand, the **social protection regimen** has introduced special benefits for the unfavorable people like long-term unemployed or social exclude which they are some of the target groups of the employment policy. These particular measures try to get the equality with active policy of employment (job-center) and passive policy of employment (unemployment pension), which they are jointed to flexi-security and labor transition theory for getting a new Welfare-state. In fact, this way introduces a new view of Labour Law on which the most important points is focussed on the different transition that the employee can do (to entry on the labour market, to participate in relationship and to return into labour market<sup>25</sup>) during his life. One of the most common measure that European Union has recently promoted is a special guarantee of employment or training for young people. In some European countries, like Belgium, a social protection had been introduced before of this special guarantee, as a track to support the first transition into labour market for the young people.

In Spain, moreover, there are some of experiences of training and job for young people and other target groups (like older worker), that can be called as social protection, because of the employees do their job in a special and protective labour market, even they get some particular benefits during this job and after of the job if they do not get to entry into labour market. This oldest measure can be connected with the Labour Law, because the employees have the guarantee to do the job during some period of time, but the standards of Labour Law are not too high as in the general regime. In addition, some of the target groups (disabled people or social exclude) can do them job in a sheltered employment.

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<sup>24</sup> COLLINS, H: *Employment Law*, Clarendon Law Series, p. 205-232.

<sup>25</sup> CEBRIÁN, I.; LALLEMENT, M. and O'REILLY, J.: "Introduction", at O'REILLY, J.; LALLEMENT, M. and CEBRIÁN, I.: *Working-time changes: Social integration through transnational labour markets*, Edward Elgar, Cheltenham, United Kingdom, 2000, p. 3-4.

Therefore, the policy of employment has a different impact on the Labor Law depending on the Government and the Welfare State, but can be introduced a question for the future of Labor Law, in the sense that these types of intervention have increased on the last year, even more in the context of economic crisis, pointing to a different view of Labour Law. In Spain, the selective policies of employment have gotten more development depending on the kind of transition protected by them. If we analyze the global impact, they get more value in order to get the entry or reinsert into labor market (job-center, quotas, preferences, aids for contract or social protection) than in the measures that try to avoid the dismissal or to promote the maintenance in the labour market, because these interventions have not got impact on the Labor Law<sup>26</sup>. As the main scope of Labor Law is to get a general scheme for all the workers<sup>27</sup>, the policy of employment for target groups has found this barrier in order to introduce special protection for unfavorable worker like women, disabled, young people or older worker, and others that I had mentioned above. But the economic crisis has increased the difference in working class and has polarized the labour market; even the discrimination may be more aggressive in nowadays than in the last recent years, as a consequence of the high unemployment rate. So that, this situation requires a change of the Labor Law scope in order to protect the participation of the citizenship on the society, in my opinion, increasing the protection in workplace in order to provide security on the relationship between employer and employee, even more on the context of a flexible or deregulated Labour Law. In the same way, it is necessary to provide security to the citizenship, using the social protection and pension scheme, in order to guarantee a security framework in the relationship between citizenships, state and labor market, as the theory of flexi-security defends<sup>28</sup>, making a labour market more active and more egalitarian for all of the citizenship.

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<sup>26</sup> CASTELLANO BURGILLOS, E.: *Feminismo de la diferencia y políticas laborales comunitarias para fomentar la igualdad de género*, Consejo Económico y Social, Sevilla, 2008, p. 210 y 211; PÉREZ DOMÍNGUEZ, F.: “Il jobseeker: La tutela delle transizioni nel mercato del lavoro”, multicopied PhD, p. 21-63; FERNÁNDEZ LÓPEZ, M.F.: “Políticas selectivas: Un peculiar contenido de las medidas activas de empleo”, ob. cit., p. 278; MORALES ORTEGA, J.M.: *La comunitarización del empleo*, Consejo Andaluz de Relaciones Laborales, Mergablum, Sevilla, 2003, p. 103-274; GARCÍA GIL, M.B.: *Los instrumentos jurídicos de la política de empleo*, Aranzadi, Pamplona, 2006, p. 103-232.

<sup>27</sup> OJEDA AVILÉS, A.: “Las relaciones laborales especiales: Una perspectiva unitaria”, *Relaciones Laborales*, nº 1, 1990, p. 238; DE SOTO RIOJA, S.: “El Derecho del Trabajo: Entre la unidad y la desfragmentación”, *Temas Laborales*, nº 60, 2001, p. 33-35; CAVAS MARTÍNEZ: “Diversificación versus uniformidad en el Derecho del Trabajo”, *Revista Española de Derecho del Trabajo*, nº 63, 1994, p. 71 y ss.

<sup>28</sup> SCHMID, G.: “Transitional Labour Markets: A new European Employment Strategy”, ob. cit.; SCHMID, G.: “Transitional Labour Markets and the European Social model: Towards a new employment compact”, ob. cit.; WILTHAGEN, T.: “Flexisecurity: A new paradigma for Labour Market Policy Reform”, ob. cit.; WILTHAGEN, T. and ROGOWSKI, R.: “The legal regulation of transitional labour markets”, ob. cit.; WILTHAGEN, T.; MUFFELS, R. and VAN DEN HEUVEL, N.: “Labour market transitions and Employment Regimenes: Evidence on the flexibility-security nexus in transitionals labour markets”, ob. cit.; WILTHAGEN, T. and TROS, F.: “The concept of flexisecurity: A new approach to regulating employment and labour markets”, ob. cit.