

## **Non-Standard Employment and the New Standard Employment Contract: Reflections from a Transitional Labour Market Point of View<sup>36</sup>**

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### **Abstract**

*Starting points are two contrasting and provocative perspectives: Temp-agency work or civil service work as possible ideal types of ‘flexicurity’. This thought experiment clearly demonstrates, however, that neither the state nor the temp-agency sector can serve as role-models for the future standard employment contract. The paper, therefore, intends to contribute to the empirical and theoretical backdrop for an alternative. It starts by comparing the extent and dynamic of part-time, temporary, and own-account work in Europe, showing that these forms of non-standard employment relationships are spreading, however at varying degrees and depending on the national employment systems. Although empirical evidence confirms to some extent the thesis of erosion, the same evidence can also be taken as an indication for a still stable fundament of the standard employment contract, all the more as the increasing variety of employment relationships concentrates on new jobs and new labour market participants (women, the young, other vulnerable people). As both the empirical and theoretical backdrop provide plausible arguments for the *raison d’être* of the open-ended employment contract as well as the need for its adjustment, the logical next step is to ask which new elements should be included into the legal or institutional design of employment relationships to ensure the right ‘balance’ of flexibility and security, the ultimate aim of all ‘flexicurity’ rhetoric. The paper responds to this problem by suggesting a set of new institutional arrangements based on the theory of transitional labour markets, in particular the institutionalisation of ‘active securities’ understood as legally guaranteed social rights to participate in decisions about work and employment and to share equally their fruits as well as their risks. The final section exemplifies the potential role of these new securities on the basis of two regulatory ideas: rights and obligations to capacity building and coordinated flexibility as functional equivalent to external (numerical) flexibility. A summary and a brief outlook related to the new European Employment Strategy conclude.*

### **1. Introduction**

A provocative starting point in examining the complex relationship between flexibility, related insecurities and the standard employment contract might be an obvious counter-model reflected in the following cartoon:

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Some employers tend to see the new standard employment model in this way: They would like to dismiss people at will by telling: „Who knows, perhaps we see us again as temp-agency worker!“

The infamous example for such an employer is the retail-trader *Schlecker* in Germany, who closed many small shops and rehired the workers through the dubious temp-agency firm *Meniar* paying its workers wages 30 percent lower than before and providing much lower fringe benefits like holidays and Christmas payments on the basis of an even more dubious collective agreement with the so called *Christian Trade Unions*.

What teaches this case? At least so much: In the meantime, *Schlecker* had to eliminate this practice due to heavy public protest, including top officials of the government. He evidently broke existing labour law. Furthermore, the Christian Trade Unions are charged with not fulfilling the conditions as a representative union for collective agreements.<sup>38</sup>

The grey zone between lawful and unlawful practice, however, is still much too broad in Germany, and neither labour law nor industrial relations law have properly reacted to the increasing risks of

<sup>38</sup> As the government deregulated temp-agency work in the course of the ‘Hartz-Reforms’ in 2002/03, it was not expected that the competition between trade union representatives in the temp-agency sector would develop into a harsh power battle between unions under the umbrella of DGB (*Deutscher Gewerkschaftsbund*) and unions under the umbrella of CGZP (*Christliche Gewerkschaften Zeitarbeit und PersonalServiceAgenturen*). The charge against CGZP comes from VER.DI (a DGB trade union) and is to date (April 2010) still pending. The conflict of interest is also reflected in fragmented representation on the employers’ side; more about this in Vitols (2008).

workers related to temp-agency work. It seems that regulations intending to avoid the worst insecurities related to Temp-agency work would have to meet the following conditions:

- minimum wages, guaranteed by law and/or collective agreements;
- legal acknowledgement of collective agreements through their extension on workers or employers not covered by these (usual sectoral) agreements;
- provision of accumulating rights to transitions into open-ended employment contracts within a limited period of time;
- reflection of higher risks through higher security provisions, for instance through higher contributions to social security or mandatory funds for training or employability provisions.

The German legal framework does not yet satisfy these conditions. This is a pity. I would not go so far as Jelle Visser whom I remember making the following provocative statement on a panel discussion: “*Temporary work agencies are the trade unions of tomorrow!*” Yet, little doubt can be raised that temp-agency firms possibly can play an important role in providing *employment* security as an alternative to *job* security by effectively pooling the risks related to economic ups and downs, or by effectively pooling the risks related to workers’ care obligations and continuous training needs. The hybrid employment contract between temp-agency firms, user firms and temp-agency workers, however, will just be one element and not the paradigm of the new standard employment contract because the firm obviously will remain the core institution of work organisation in the near future.

So, why not going back to the good old times in which the *civil servant* was the prototype for ‘flexicurity’? This model clearly provided employment security *and* social security in case of family formation, illness, disability and old age *in exchange* for accepting a wide-range of *external* flexibility by demanding from the ‘servants’ to move with the jobs, and *internal* flexibility by demanding to move with the tasks. In addition, female civil servants were assumed to live in celibacy, which forced them to quit the civil service when they got married. The implicit social contract of this model was not only the man as the earner of the family, but also the man free from any other obligation to work.

Sure, this model would be hard to sell today. However, since the abolishment of female celibacy and the enforcement of gender equality, the state as employer could be considered as a model for a new standard employment contract at least in some respect. State employees in Germany, for instance, got the right to part-time work or to adjust working-time to life-course conditions long before it was introduced in 2001 to all employees. The state was also the model for including the right to part-time work combined with parental leave in 2008, and state employers were also pioneers for concession bargaining combining wage flexibility with employment security.

On the other hand, anecdotic evidence tells that actual flexibility among state employees is far from the wide range requirements related to the original civil servant model. In addition, mobility between private and public sector is often discouraged, due for instance to the non-transferability of

security provisions related to the civil servant status. Furthermore, civil servant-types of contracts induce insider-outsider cleavages, reflected for instance in the fact that the number of fixed-term contracts in the German public sector is twice as high as the national average.

So, neither the state nor temp-agency firms can serve as models for the new standards. However, before pondering further on possible alternatives to the traditional standard employment contract, a look on the actual contractual development might be useful.

## **2. Why do we need new standards at all?**

There is plenty of evidence that the standard employment contract (understood as open-ended and dependent full-time work) is eroding: Non-standard employment relationships are spreading, however at varying degree depending on the national employment system. The following paragraphs shall illustrate this trend by some stylised facts.<sup>39</sup>

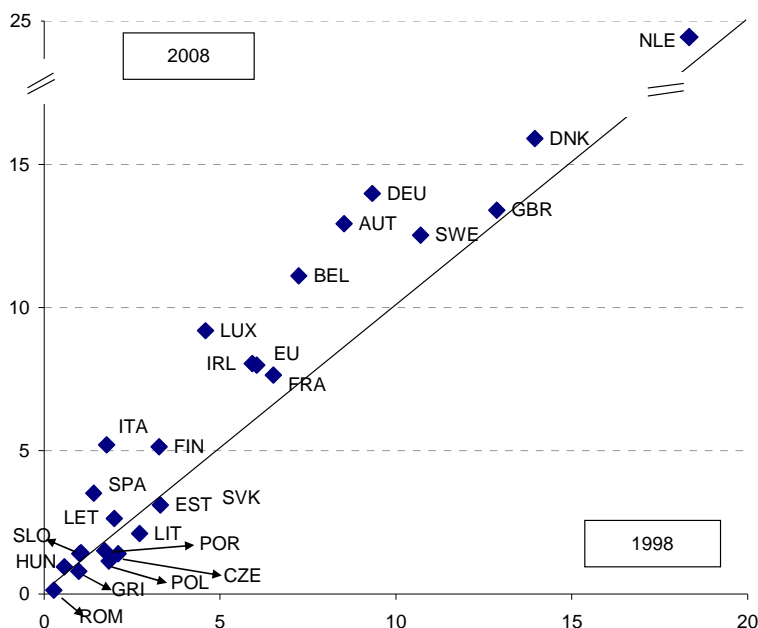
First, *open-ended part-time contracts* as percent of the working age population vary in Europe between almost zero percent in Romania and 25 percent in the Netherlands (Figure 1).<sup>40</sup> Apart from the new member states, open-ended part-time contracts are on the increase. There is also no point in discussing that part-time concentrates on women and low-wage jobs, and that these jobs are risky in terms of social security in old age. However, open-ended part-time contracts might be considered as element of the new ‘standard employment contract’ to the extent that they substantially contribute to household income through skilled work in the range of 20 to 34 hours and including options to move to full-time work. Transitions from open-ended part-time to full-time, however, are still rare, and robust evidence in a comparative perspective is hard to come by.

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<sup>39</sup> For more figures and data see Schmid/ Protsch (2009); Schmid (2010).

<sup>40</sup> Notice that this way of measuring corresponds to the part-time employment rate in contrast to the usually presented share of part-time related to total employment.

**Figure 1: Part-time Employees (only with open-ended contracts, and without self-employed) as Percent of Working Age Population (age 15-64), 1998 and 2008**

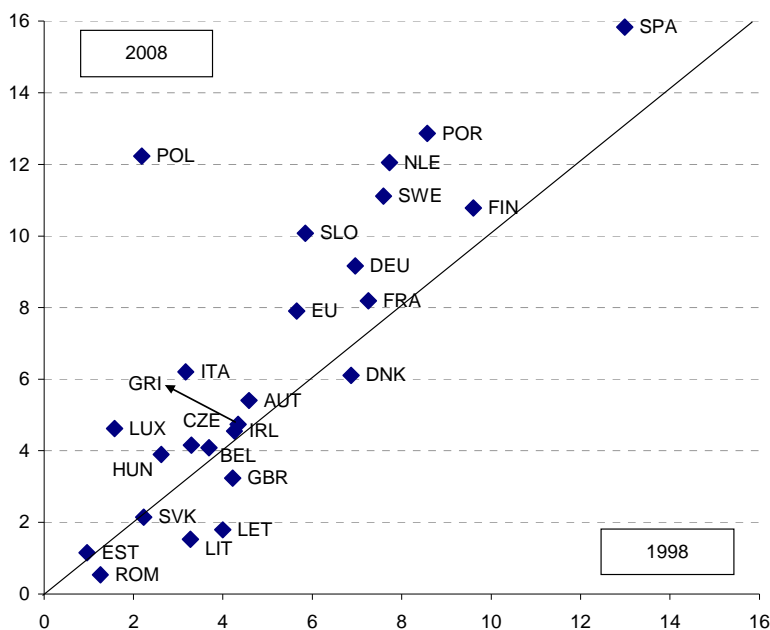


Source: Eurostat, own calculations

Second, fixed-term contracts, including temporary part-timers, as percent of working-age population vary between almost zero percent in Romania and 16 percent in Spain. The dynamic in the last ten years is mixed, but most EU-member states experienced a further increase (Figure 2). Telling examples are the UK and Denmark with a slight decrease. The reason for their deviation from the majority of the ‘old European member states’ is the fact of moderate or low employment protection. The two countries are therefore counter-examples for the otherwise strong positive correlation between employment protection and fixed-term contracts, especially among men. Furthermore, fixed-term contracts, especially in form of temp-agency work, is concentrated among young adults and often combined with low skills and low wages. Many make the transition to open-ended contracts, but also many get stuck and become members of the new precariat. Again: good and actual comparative data on transition rates are missing.<sup>41</sup>

<sup>41</sup> Some figures based on the European Community Household Panel (ECHP) for the period 1994-2001 can be found in Klammer et al. (2008); Leschke (2008) provides an excellent four-country study on non-standard employment (Denmark, Germany, UK and Spain) based on the same data source; The International Monetary Fund (2010, Chapter 3, p 10) delivers some estimates on yearly probability of transitioning from a temporary to a permanent contract, ranging from 12.1% (Portugal) to 47.4% (Austria), missing however estimates for Denmark, Germany, The Netherlands and Sweden). Gensicke et al. (2010) report that 27% of formerly fixed-term workers got a regular contract after termination of their job and an intermediate phase of unemployment (against 34% of formerly temp-agency workers, 17% formerly part-time workers, and 65% formerly ‘permanent’ workers). Statistical monitoring of transitions on a regular (e.g. yearly) basis is still an urgent desideratum, both at national and international level.

**Figure 2: Temporary Employees (including part-timers) as Percent of Working Age population (15-64 years), 1998 and 2008**



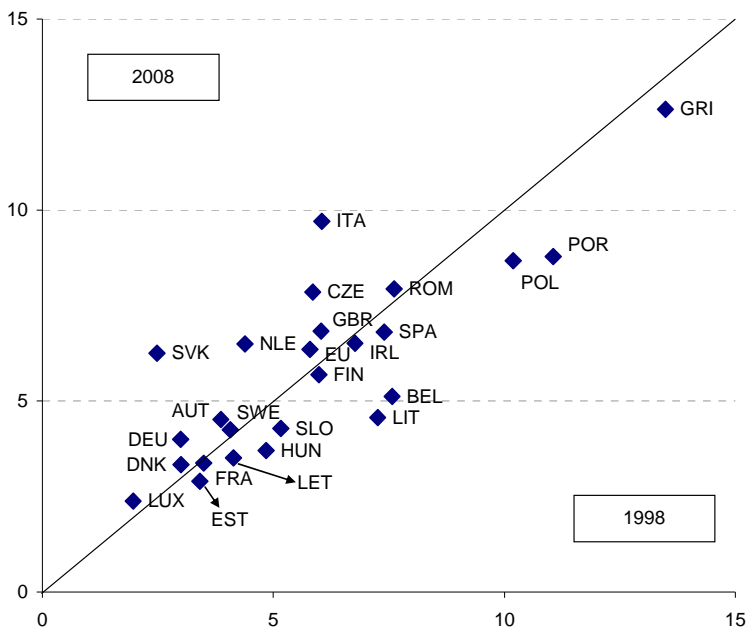
Source: Eurostat, own calculations

However, two overall conclusions seem to be uncontested: The higher the share of temporary contracts, the higher the unemployment elasticity (and therefore the unemployment risk) to cyclical variations of demand, a fact well documented by various studies in the meantime.<sup>42</sup> Finally, the increasing concentration of fixed-term contracts on young adults raises serious concerns about how these young people might be able to plan their life (including family formation and long-term careers) in the future.

Third, the number of self-employed – measured here as own account workers without additional employees and working without an employment contract – as percent of working-age population, lies between two percent in Luxemburg and 13 percent in Greece (Figure 3).

<sup>42</sup> For instance reflected in the dynamic betas (Okun-coefficients), the elasticity measure of unemployment related to output fluctuations, which correlate with temporary work (International Monetary Fund 2010, Chapter 3, p. 14). The authors of a case study comparing the unemployment performance of Spain (drastic increase) and France (moderate increase) during the current crisis (Bentolila et al 2010) argue that labour market institutions in the two economies are rather similar, except for the larger gap between dismissal costs of workers with permanent and temporary contracts in Spain, which lead to huge flows of temporary workers out of and into unemployment. The authors estimate in a counterfactual scenario that more than one half of the increase in the unemployment rate (about 6 percentage points!) would have been avoided had Spain adopted French employment protection institutions before the recession started. The case of the German ‘unemployment miracle’ – to which we come later – is different. Here it was less employment protection than the availability of ‘active securities’ which prevented a drastic increase in unemployment.

**Figure 3: Self-employed (full-time or part time own-account workers) as Percent of Working Age Population (15-64 years), 1998 and 2008**



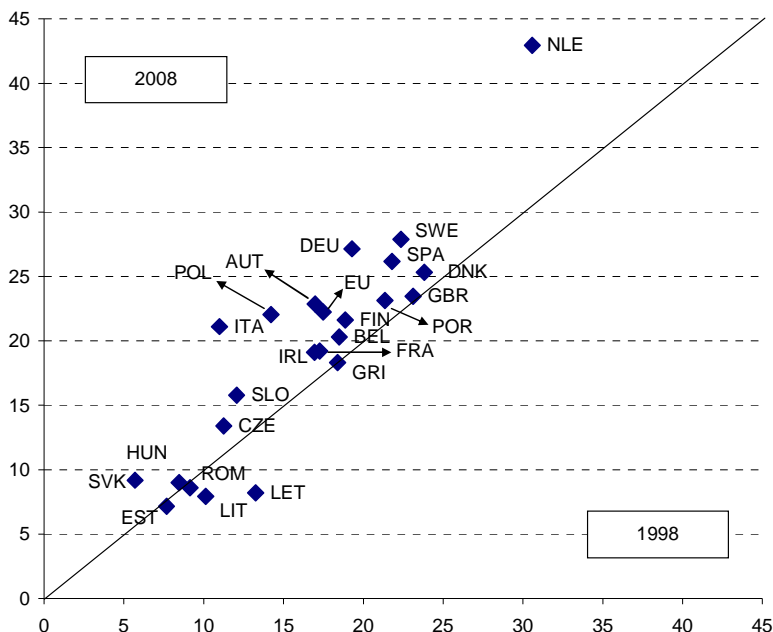
Source: Eurostat, own calculations

There is no clear pattern of the dynamic. In many countries, self-employment is falling mainly due to the decline of traditional small farming, in some countries self-employment is still increasing in the so called creative sector or due to disguised self-employment and to some extent due to enforced self-employment of unemployed people. Many of these own account workers face high risk of volatile income and lack of health or social insurance in old age. We know little about transition rates from self-employment to wage work and vice versa, however an excellent study from Sweden demonstrates that this dynamic may be substantial (Delmar et al. 2008). Especially the combination of open-ended part-time employment with self-employment seems to be a promising strategy for enhancing employment and income security beyond the standard employment contract.

If we combine these three forms of non-standard employment and control for overlapping (for instance, some part-timers have fixed-terms contracts; some self-employed are part-timers), we get the aggregate non-standard employment rate. This rate varies between 7 percent in Estonia and – of course the champion – 43 percent in the Netherlands (Figure 4).

A deeper systematic comparison of employment relationships in the EU member states, their dynamics and their relationship with other performance measures of employment systems over the last decade reveals further insights (Schmid 2010).

**Figure 4: Aggregate non-standard employment rates in Europe, 1998 and 2008**



Source: Eurostat, Labour Force Survey; own calculations. The “aggregate” non-standard employment rate includes part-time, fixed-term and own account work controlling for overlaps; the EU-average excludes Bulgaria, Malta and Cyprus.

First, through differentiation by gender, the picture becomes more telling. Both the level (EU-average of about 15 percent for men, 21 percent for women in 2008) as well as the dynamics (EU-average of about 2 percentage points change from 1998 to 2008 for men, about 4.5 percentage points change for women) hint to the fact that non-standard employment mainly affects women. It may, thereby, come to a surprise that this combined indicator for ‘flexible employment’<sup>43</sup> is highest both in the so-called social democratic systems (Sweden, Denmark, and the champion Netherlands, as a hybrid system, included) and in the ‘liberal’ systems (UK, Ireland). The family centred continental ‘conservative’ systems (e.g. Austria, Belgium, France, and Germany) as well as the Mediterranean systems (e.g. Italy and Spain) are in the middle; and all of the new member states (e.g. Czech Republic, Hungary, the three little Baltic states) – with the exception of Poland<sup>44</sup> – are at the bottom.

<sup>43</sup> Non-standard employment is not necessarily flexible in all respects: Part-timers, for example, are less flexible than full-timers in terms of numerical working-time (overtime, short-time); fixed-term workers are often less flexible than open-ended full-timers in terms of multiple tasks. We will come back later to this point.

<sup>44</sup> Albeit Poland’s employment rate is low like in most of the transition countries, its share of temporary work is very high. Fixed-term employment rocketed from 514,000 (1998) to 3,207,000 (2008), whereas total employment stagnated. The reason probably is the lax regulation of temporary work which allowed fixed-term chain contracts without any limit until 2003. Only in 2004, Poland introduced stricter regulation, except in the seasonal and temp-agency sector. In fact, the height of fixed-term contracts was in 2007, and the number of temporary workers declined slightly in 2008.



Second, non-standard employment increased in almost all EU-member states, especially in the Netherlands, Germany and Italy. On the other hand, it is remarkable that most of the new EU-member states (the ‘transition countries’) not only cluster together, but that some of these countries, especially Latvia, Lithuania, and Romania experienced even a decline in the aggregate non-standard employment rate. The most likely explanation of this feature is the fact that work in the informal economy serves as a functional equivalent for formal non-standard employment. In addition, in countries with low economic prosperity, part-time work (the most important component of ‘non-standard employment’) does not provide enough earning for women engaged in formal labour market work.

Third, the fact that ‘social democratic’ as well as ‘liberal’ systems rank high in terms of non-standard employment can be taken as circumstantial evidence that non-standard jobs are related with very different regulatory frameworks. Whereas the Dutch or Danish non-standard employees seem to be well covered by employment and income security arrangements, this cannot be said, for instance, for their counterparts in Britain, Germany and Italy. Furthermore, not all of these jobs are precarious or exclusionary. They can serve as stepping stones or as intermediary jobs within a meaningful work life career. One can also argue that the concentration of non-standard employment on young adults reflects the renaissance of occupational labour markets (Marsden 1999) requiring a series of job-to-job transitions in order to gain professional experiences and competitiveness on the labour market. Nevertheless, even in countries with high security standards, non-standard jobs often involve higher risk of exclusion than standard jobs.

Fourth, related to the Lisbon Strategy’s goal of social inclusion, the good news is the fact that aggregate non-standard employment correlates both positively with employment and labour force participation as well as with prosperity in terms of gross domestic product per capita. Although correlations cannot be taken as a causal proof, this observation (especially the positive relationship in the dynamic perspective) nevertheless indicates that increased variety of employment relationships supports higher inclusion of people into the labour market as well as a higher level of market transactions. The bad news is that non-standard employment and the related higher risks are heavily concentrated on women, young people, and low-skilled, i.e. on the more vulnerable part of the labour force. In some countries, especially in Germany, the extension of non-standard jobs is closely related with the extension of low-wage jobs.

Fifth, and related to the Lisbon ambitious claim of world-class competitiveness, empirical evidence seems to indicate that rising non-standard employment does not lead to increased productivity. On the contrary, the relationship of employment growth and labour productivity (GDP per employed worker) from 2000 to 2007 is slightly negative. There is no EU Member State obtaining simultaneously high employment and productivity growth (European Commission 2008, pp 37-9).<sup>45</sup>

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<sup>45</sup> The exception, perhaps, is Sweden. According to another (six country) study, Sweden was – apart from the USA – the only country with both an increase in employment and productivity during the last decade. The authors of this study (van Bart et al. 2009) explain this exception basically by productivity gains in services (where Germany, in particular, has productivity deficits), and by high investments in “immaterial capital” (investments in economic competences, among others in firm specific human capital; investments in innovation potential, e.g. in research &

As a consequence, the capacity for redistribution (and with it the possibility to compensate the losers in a highly dynamic economy) is weakened instead of strengthened. In other words, trading-in higher income security through redistribution (an essential element of the Danish ‘flexicurity’ model) for taking over higher risks related to flexible jobs (either in form of non-standard employment or in form of high job turnover) becomes a void option if no better balance of flexibility and security can be found.

The proof that it is non-standard employment which retards productivity growth has yet to be brought about. Peter Auer (2007), attacking this issue from one angle, reports a positive, yet curvilinear relationship of job tenure and productivity on an aggregate level. A recent study at the micro level of firms echoes this result related to innovation (Zhou et al. 2010). Based on a firm panel from the Netherlands and sophisticated econometric models, the authors report that firms with high shares of workers on fixed-term contracts have significantly higher sales of *imitative new products* but perform significantly worse on sales of *innovative new products* (first on the market). High functional flexibility in insider-outsider labour markets enhances a firm’s new product sales, as do training efforts and highly educated personnel. The study found weak evidence that larger and older firms have higher new product sales than do younger and smaller firms. These findings, the authors conclude, should be food for thought to economists making unqualified pleas for the deregulation of labour markets.

To sum up: Evidence tells that the standard employment contract is eroding but not disappearing. Insecurities related to non-standard employment are great, and the related risk of a dual labour market is not yet solved satisfactorily in most if not all countries.

However, non-standard employment is not per se precarious and insecure. Open-ended part-time work in the range of 20 to 34 hours is not necessarily related with insecurities, both in objective as well as in subjective terms. And concerning temporary workers, at least 50 percent (in NL even 70 percent) end-up in open-ended contracts after five years, using fixed-term contracts as stepping stones or spring-boards. So, in some countries, especially in the Netherlands and Scandinavia, non-standard employment seems to be well integrated into the overall social security system; in some countries, especially in Germany, more needs to be done. And comparative survey research shows that subjective job insecurity is not necessarily related to the type of employment contract (e.g., Böckerman 2004).

Furthermore, it would be a mistake to identify non-standard employment with flexible work. Research shows that part-time employees are less likely than permanent employees to switch between different types of work on the job, and there is no difference in the type of ‘task flexibility’ between temporary workers and permanent workers. Performance oriented payment-systems are less likely in part-time and temporary work. Part-timers and temporary workers are less likely to put in extra hours of work. Finally, there is an alternative or at least a functional equivalent to non-

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development; investments in information systems); the huge Swedish investment programme in human resources (The *Knowledge Lift Programme* between 1997 and 2002) may be part of this explanation (Albrecht et al. 2005).

standard employment, which means incorporating negotiated flexibility and security into the standard employment contract.

All this reminds to be careful in demanding radical changes or to bet on interesting but utopian unitary employment contracts such as the French *sécurité sociale professionnelle*” (from the left political corner) or the “*contrat de travail unique*” (from the right political corner), not to speak of the unconditional basic income (“*bedingungsloses Grundeinkommen*”) as a panacea for all labour market insecurities which is so prominent in the current German debate. This conclusion seems also to be confirmed by looking briefly on the theory of the employment relationship developed by Herbert Simon (1951) and his followers like Oliver Williamson (1985) or David Marsden (1999).

### 3. On the theory of employment relationships

What does this theory tell? I will only briefly touch upon this part in order to sketch the rough picture and to identify requirements of further research.<sup>46</sup> The starting point is the interest of the stylised labour market actors (employees and employers) into the standard employment contract. It goes without saying that a further exploration of this issue would also have to differentiate the interests within these stylised actors.

Employees’ are interested in income security, especially in a steady stream and possibly rising stream of income over the life course. Job security is the most important means for income security, but also interesting for employees in terms of stability in social networks. Furthermore, option security, e.g. in terms of available choices of working time and career opportunities play probably an increasingly important role, especially for employees with family obligations and high educational potentials. Employees are ready to accept limitations in *voice* for these securities, to be *loyal* to the employer and not to *exit* opportunistically (to take up the terminology by Albert Hirschman, 1970).

Employers’ primary interest in a standard employment contract is authority in order to ensure flexible use of human resources for which they are ready to exchange some job and income security. They are also interested in reliability for the sake of security of high quality services for which they exchange some voice to workers. Last but not least, they are interested in freedom to hire and fire, which means in external flexibility, for which they are ready to provide some implicit contract, for instance in form of layoffs and seniority rules as an employment insurance device. The latter option, however, will heavily be influenced by the costs of hiring and firing, determined first of all by the market, and second by institutional rules such as dismissal protection or prohibition of discrimination.

Now, one can ask: What about the disinterest of each party in open-ended employment contracts, which would potentially (not necessarily) be reflected by an interest in sales contracts? First, employees might lose some interest in open-ended employment contracts by having other income resources than wages. Little systematic knowledge is available, but anecdotic evidence says that

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<sup>46</sup> More can be found in my book on *Full Employment in Europe* (Schmid 2008a, 178-85).

substantial capital income or assets are available only for a minority, and some kind of assets, such as real estate and houses might even enhance the interest in long-term employment relationships. In return, a well functioning housing market might be a functional requisite for high external flexibility.

Second, interest in experience accumulation on occupational labour markets may reduce interest in open-ended employment contracts. As already noted, there is some sign for the revitalisation of occupational labour markets, and experience accumulation may be of special interest for young adults. One can plausibly assume that temp-agency firms can play an important role in this respect.

Third, the decline of tenure related ('fringe') benefits may be reason for losing interest in long-term contracts. In return, a policy of transferability of such benefits may increase job mobility; the same effect has the shift of financing social security from wage contributions to general taxation as it is largely the case in Denmark.

Employers' interest in open-ended contracts may decrease, first, by reduced opportunity costs to buy specialised knowledge induced through information technology; second by the erosion of internal labour markets, complemented by increasing labour mobility through migration or an improvement of traffic infrastructure; and third by the fact that information technology decreases the half-life of firm-specific knowledge and depreciates tacit knowledge. In addition, overall demand volatility through the structural shift from (manufactured) mass production to services (especially human around the clock services) will decrease the interest in long-term relationships or at least increase the interest in a larger flexibility buffer of human resources. It remains, however, an empirical question how relevant these possibly changing circumstances are compared to countervailing factors such as the permanence of diversified quality production (Streeck 1991), the increase of recruitment costs for highly specialised workers or increased firing costs due to regulation.

Nevertheless, as far as disinterest in open-ended contract on either side of the contracting parties increases, three alternatives are available: First, turning to sales contracts, in other words to buy work or services from outside of the firm instead of relying on the making by their own staff; second, to enrich the employment contract with elements of sales contracts including negotiated elements of flexibility and security; and third, to enrich sales contracts with elements of employment contracts.

Let us turn to the first alternative, accepting the factors driving sales contracts, which means to buy instead to make. These factors could be the availability of cheaper professional services (e.g., through temp-agencies, world-wide sub-contractors); the availability of professional freelancers or the reduction of transaction costs for contracting through specialised legal services.

Possibilities to enhance standard employment contracts through elements of sales contracts are performance incentives of various kinds, cafeteria payments-systems, for example exchanging money for working time accounts or vice versa, and life-course contracts.

Possibilities to enhance sales contracts with elements of employment contracts are to support the transition of employees to self-employment with privileged access to sub-contracts, which can serve as a quality insurance device for the firm. Other examples are providing training capacities for personal service agencies in exchange of privileged access to high quality temporary workers, building up trust relationships by using joint IT infrastructure, or to institutionalise employers' networks for instance for joint vocational training and education or mutual and intermediate exchange of employees' services. These and other possibilities are not yet well researched.

To sum up: The brief sketch of theory on the employment relationship certainly needs more careful exploration, among others by including the concept of the psychological contract (Marsden 2004) as well as new insights of behavioural economics (Kahneman/ Tversky 2000, Schmid 2006). Plausible reasoning, so far however, tells that on the employees' side interest in income-, job- and option security is still high, but demands of voice- or exit options (at least in form of temporary leaves) are rising; on the employers' side, interest in authority, reliability and freedom for hire and fire is still high, but opportunity costs of implicit contract commitments are rising.

So, the general conclusion from this brief theoretical exercise can be metaphorically formulated by paraphrasing Eugene Ionesco (*The king is dead – long live the king!*): *'The standard employment contract is dead – Long live the 'new' standard employment contract!'*

The question now arises: Considering both, the empirical result of a partial erosion of the standard employment contract and the theoretical result of a still existing interest into long-term employment relationships of employees as well as employers, what could or should be 'new' related to the employment contract? The answers coming from labour law seem to be limited as articulated by researchers of labour law themselves (e.g., Mitchell 2010), and by observing the debate on labour law from a sociological point of view (e.g. Knecht 2008, Rogowski 2008). On the contrary, labour law experts unanimously hint to the need to extend the view beyond the labour contract by considering (also) the legal and regulatory policy which shapes labour's position in society: employment policy, training and education, unemployment and accident insurance, superannuation and pensions and so on.

The theory of transitional labour markets (TLM) intends to contribute to this broader perspective.<sup>47</sup> Its tentative answer is – again metaphorically formulated – to provide "social bridges" that compensate for the higher risks of increasing contractual variety and to ensure that non-standard jobs either are intermediate stages in the work-life or become "stepping stones" to sustainable job-careers. New active labour market policy, thereby, has to take care that these institutional bridges contribute also to (or, at least, do not negatively affect) productivity growth. One strategy to realise this objective might be to exploit more systematically the flexibility potential of open-ended contracts (internal numerical as well as functional flexibility, especially in terms of education and training).

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<sup>47</sup> For literature in the spirit of TLM see, among others, Anxo et al. (2007), Auer/ Gazier (2006), Gazier (2003), de Gier/ van den Berg (2005), Howe (2007), de Koning (2007), Lassnigg et al. (2007), Muffels (2008), O'Reilly et al. (2000), Rogowski (2008), Schmid/ Gazier (2002), Schmid (2008), Schömann/ O'Connell (2002).

In other words: TLM theory claims that the implementation of the EU's eight common principles of 'flexicurity'<sup>48</sup> requires to follow consistent normative and analytical principles as well as to take into account the way people perceive their life-course risks and the way they act in situations of uncertainty. In order to establish such institutional arrangements, the theory of TLM uses the concept of social risk management, elaborated elsewhere (Schmid 2008a, 213-241). The following exemplifies this approach by deliberating on the implications of important restrictions of rational economic behaviour.

#### **4. On the Governance of Balancing Flexibility and Security**

The general question from the perspective of social risk management is: How should labour market policy take account of real behavioural traits such as bounded rationality, asymmetric risk perception and risk aversion instead of 'ideal' traits assumed by pure theory? Two questions are of special importance in the TLM-framework: First, how can risk aversion be overcome in order to induce people to take over more risks and the increased responsibility that goes with them? Second, how can the uncertainty entailed in negotiated agreements or contracts be overcome in order to maintain the mutual trust required for continuous cooperation under conflicting interests? Prospect theory, or the theory of intuitive judgements and choices (Kahneman/ Tversky 2000), provides interesting insights to the first question. The theory of learning by monitoring, going back to Albert Hirschman's development theory (Hirschman 1967) and further developed by Charles Sable (1994) supplies useful hints to the second question.

The way how people perceive risks determines much their real daily choices. Most people tend to myopic risk perceptions. They overestimate small-scale risks in foreseeable future, and they underestimate large-scale risks that seem far ahead in the future. Most people buy therefore more easily travel insurance than a occupational disability insurance. Most people underestimate also the risk of unemployment or the risk of large income losses over the life course due to the erosion or lack of skills.

Another important psychological insight is that losses loom larger than gains in risk perception. On the one hand, most people prefer small certain gains over large uncertain gains, in other words, they prefer the bird in the hand instead two birds in the bush. On the other hand, most people are extremely loss averse. They don't like to give things away even if prospect of gains are bright. Psychologists have found out that the loss to gain ratio is about two to one. It makes thus a difference in perception whether one frames a risk in terms of losses or gains.

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<sup>48</sup> The eight common principles decided – after a Green Paper induced consultation of Member States – by the European Council in December 2007 are: (1) good work through new forms of flexibility and security; (2) a deliberate combination of the four 'flexicurity' components: flexible and reliable contractual arrangements, comprehensive lifelong learning strategies, effective active labour market policies, and sustainable social protection systems; (3) a tailored approach according to the member states' specific circumstances; (4) overcoming segmentation through stepping stones and through managing transitions both in work and between jobs; (5) internal as well as external 'flexicurity'; (6) gender equality in the broader sense of reconciling work, family and private life; (7) the crucial importance of the social dialogue in implementing 'flexicurity', which means – in TLM terms – negotiated flexibility and security; and, finally, (8) fair distribution of costs and benefits (European Commission 2007, Kok et al. 2004).

From these insights, important conclusions for the policy design of risk sharing can be drawn. Daniel Bernoulli, one of the founders of probability theory and thus of risk management, gives the clue. He made the observation: ‘A beggar will not give up begging for a workfare job since he would lose his ability to beg. He has to be offered something more’ (Bernstein 1996, p. 119-20). This “more” – what could that be? TLM-theory suggests a specific solution to this psychological problem: the extension of the expectation horizon through a set of opportunity structures available in the most critical events during the life course.

The first pillar of extending the expectation horizon would be the establishment of new social rights that go beyond employment. A solution could be the transformation of the employment contract to a citizen-based ‘labour force membership’ status (*‘statut professionnel’*)<sup>49</sup> that includes *all* forms of work. The ‘statut professionnel’, therefore, would also embrace income and employment risks related to transitions between various forms of employment and work. This concept has been formulated most forcefully in the Supiot-Report already ten years ago. The authors of this report start with the observation that the terms of the trade-off on which the classical employee status was based – that is subordination in return for security – are now turned on their head without any new ones taking their place. This creates the problem of adapting labour force membership to the new employer-employee relationship. Where the Fordist model hinged on the stable organisation of groups of workers, the new model is based on the opposite idea of the coordination of mobile individuals. It has to react to the necessity (and difficulty) of defining a membership of the labour force that integrates individualisation and the mobility of professional careers. To the extent that this individual mobility becomes the dominant characteristic in tomorrow's world, labour law has to ensure employment stability and thereby guarantee workers recognition as labour force members. The paradigm of employment would thus be replaced by a paradigm of labour force membership for individuals, not defined by pursuit of a specific occupation or a specific job, but covering the various forms of work which anyone might perform during his or her life (Supiot 2001, pp. 25-6, 55).

The new social rights are new in that they cover subjects unfamiliar to industrial wage-earners: rights to education and training, to appropriate working hours, to a family life, to occupational redeployment, retraining or vocational rehabilitation, and to fully participate in the civil and social dialogue. Their scope is also new since they would cover not only ‘regular’ wage-earners but also the self-employed, temp-agency, contract and marginal workers. They are new in nature, since they often take the form of social drawing rights, which allow workers to rely on solidarity, within defined and (possibly) collectively bargained limits in order to exercise the new freedoms.

These new securities can no longer be seen as being given in exchange for subordination (as in the old employment contract), but as the foundations of a new freedom to act. They can be considered as *active social securities*, which go hand-in-hand with worker’s initiatives to shoulder the risks of flexible employment relationships instead of restricting them. Whether the institutional guarantee of security takes the form of open-ended contract with inbuilt flexibilities or fixed-term contracts with

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<sup>49</sup> This official English translation is not satisfactory; the original French term “statut professionnel” would be translated in German as “Arbeitsmarktbürger”.

fair risk-sharing devices depends on the situational configuration and on institutional path dependency. We will come back to this point in the last section.

The *second pillar* for extending the expectation horizon would be stepping stones and bridges to overcome critical events during the life course. The tendency of overestimating small-scale risks immediately in sight and underestimating large-scale risks in the long distance leads for instance people to perceive the risk of being stuck in the low-wage sector to be greater than the risk of long-term unemployment resulting possibly from being too choosy about the jobs they will accept. Active labour market policies, therefore, should not be confined solely to offering jobs and placing individuals in work. Follow-up measures are required for *transforming sheer workfare measures into stepping-stones* to sustainable job-careers.

The *third pillar* for extending the expectation horizon would be psychological bridges to overcome asymmetric risk perception. Acceptance of risky jobs means often abandoning familiar certainties, even though they may have a lower value than the new employment prospects. These ‘familiar certainties’ may be of various kinds. The reliability of social assistance benefits possibly supplemented by a small amount of clandestine employment may be one example, the confidence in one’s own *productive capacities* another. Taking on a risky new job, however, brings with it the fear of losing these capacities.

To give an example: Risk aversion of people coming from a relatively poor background has a financial as well as a psychological dimension. Paradoxically, the psychological dimension can be even more important than the financial, as Bernoulli’s example of the beggar had already signalled. From motivation studies we know, that poor people are especially dependent on the sociability of their peer groups. Training and education, however, implies often a change of the peer group, especially when job mobility is required at the end. The consequence of this insight might be to arrange group measures instead of individualised measures in order to stabilise trust within an established social network.

The financial implication is to take care in the programme design that fall back positions remain always in sight. It is therefore important for these target groups to have the opportunity to try out several jobs without benefits withdrawn immediately if one option does not lead to success at once. Trust in such opportunity sets rules out rigid workfare strategies that do not allow trial and error as a productive job search strategy. For the same reason, the implementation of training measures for these target groups should also avoid raising too high expectations, for example through the requirement of passing formal examinations.

The *fourth pillar* for extending the expectation horizon would be the establishment and reinforcement of *learning communities*. Learning communities are a paradigm of negotiated flexibility and security but they differ from traditional collective bargaining in at least two ways. First, they include not only trade unions and employers associations but also other parties that play a key role in the regional economy. Second, learning communities usually involve a representative of public authorities at local, regional or national level.



Learning communities are a relatively recent phenomenon and known under different names, for instance in Germany under 'Alliances for Jobs' (*Bündnisse für Arbeit*), and in the Netherlands as 'covenants'. In a seminal paper, Ton Korver and Peter Oeij (2008) define – and the following relies heavily on their intriguing rhetoric – a covenant as an undersigned written agreement, or a system of agreements, between two or more parties, at least one that is or represents a public authority, meant to effectuate governmental policy. There is not one format of covenants, but they share common features: enough overlapping interests of participants, mechanisms bringing about both definition and the machinery of achievements, the parties cooperate, and formal sanctions are absent, yet parties have the opportunity to go to court in case of another party's default.

Covenants are needed where issues are at stake in which it is not, or not yet, clear what exactly is required of which participants to achieve commonly set and shared values and targets. And since this is unknown, it is quite premature to invoke the regular process of bargaining and thus of deciding on the distribution of the eventual net advantages of the joint effort. In fact, what the net advantages are, how they can be achieved by whom, and how they are then to be distributed, can only be clarified along the way - i.e. through learning by monitoring.

Learning means acquiring the knowledge to make and do things that (labour) markets value (and therewith *un*learning the things not so valued). Monitoring means the assessment of the partner-in-learning in order to determine whether the gains from learning are distributed acceptably. This leads to a dilemma. Learning may undermine stable relationships due to changing identities. The result is conservatism because winners and losers are not known in advance: The advancing knowledge economy, for instance, very likely will increase the inequality of incomes further strengthening the trend of the past two decades. That may lead to a decision trap: When outcomes are uncertain and where the odds are that some will lose and others will win, with the distribution of odds unknown, conservatism is more likely than innovation. In respect to employment and work, conservatism means that parties revert to their already established identities (*'I am a manager'*, *'I am a craft worker'*, and so on) and to the interests associated with those identities, including social hierarchies and rank and ideas of equity. When monitoring is steered by already established identities and vested interests, learning is sure to be hampered, if not immobilized, for learning entails a redefinition of identity and interest. New partnership arrangements, therefore, are needed to overcome such decision traps.

To summarise and to set these observations into the TLM framework, covenants defined and designed as learning by monitoring are a strategy of policy sequencing. Instead of planning we get exploring (Hirschman 1967), and risks are transformed from danger to trust. TLM do not emphasize risks we want to avoid; in other words those risks we would not normally choose to take. In the context of TLM one needs to discuss risks that we take; for instance when moving from one job to the next, from one employer to the next, from one combination of activities in work, care and education to the next, and so forth. Here the counterpart of risk is not danger but trust. We do not want to insure only for accidents, ill-health, unavoidable old age or other undesired mishaps; we want to insure for moves we want to make during our career and, indeed, in our chosen life-course trajectories. And as we make such moves in the expectation that they conform to the general goals

of more flexibility, more transitions and more training, we want to be able to cash in on our insurance when these expectations are disappointed. The opportunities for covenants within the TLM-framework are in the transformation of risks: from danger to trust, from external attribution (events that we undergo) to internal attribution (events we bring about). For it is this transformation that needs to be made in order to tackle the opportunities of flexibility, transitions and training, and the problems (bottlenecks, linkages) these give rise to. It is the same transformation that underlies the problem of employability, with its emphasis on personal responsibility, as distinct from the collective or public responsibility derived from the traditional case of involuntary unemployment.

The paradigm of learning communities, however, cannot be applied to all situations of collective choice. We have to come back therefore to the original concept of transforming the classical employment contract into a citizen based labour market status which broadens the flexibility-security nexus by further elements of ‘active securities’ in the new standard employment contract. In the following, I will elaborate on two regulatory ideas: First, on rights and obligations to capacity building and second on coordinated flexibility as functional equivalents to (numerical) external flexibility.

## **5. Active securities as functional equivalents to (numerical) flexibility**

The first example related to ‘active securities’ can be put under the headline: *Capacity building through ex ante redistribution*. The general strategy would be to remind policy makers of the forgotten part of insurance, which means to stimulate ‘innovative hazard’ instead of only concentrating on the control of ‘moral hazard’. This is what is meant by the slogan ‘making transitions pay’, in other words rewarding and ensuring risk taking.

Under the perspective of new social risks related to critical transitions over the life course, it would make sense to extend unemployment insurance to a system of employment insurance. Mobility insurance, either in form of wage insurance like in Switzerland or in form of the severance payment scheme (*Abfertigungsrecht*) in Austria (Schmid 2008a, 293) are already good practice to make transitions pay. In Germany, I have proposed to link parts of former UI-contributions to a training fund matched by resources from general taxation for ex-ante redistribution in favour for high-risk low skill workers. Each worker would be entitled to the same drawing rights from this fund over his or her life course independent of his or her saving capacities (Schmid 2008b). As the reasoning about transforming danger to trust made clear, such virtual capacities and monetary incentives would have to be complemented through public infrastructures ensuring reliable and efficient implementation.

The second example can be put under the headline: *Capacity building through accommodation*. The general strategy would be to extend work opportunities through ‘making the market fit for workers’ with the aim of greater social inclusion. This would mean to enrich the standard employment contract by imposing duties of reasonable adjustment on employers in favour of workers, especially

those with reduced work capacity.<sup>50</sup> In other words – and recently also formulated by Simon Deakin in his recent book with Alain Supiot – rather than requiring the individual to be ‘adaptable’ to changing market conditions, the employment contract requires that employment practices be adapted to the circumstances of the individual (Deakin 2009, 28).

Simon Deakin interestingly provides good practices mainly related to disability policy in Europe, an emphasis correctly reflecting the salience of this problem, noted also by Amartya Sen (2009).<sup>51</sup> A good example in this direction, too, is the recent modification of the German law for severely disabled people, which stipulates the right of disabled against their employer to

- an employment which enables them to utilise and to develop further their abilities and knowledge,
- the right to privileged access to firm-specific training,
- the rights to facilitation the participation in external training,
- the right to disability-conform work environment, and
- the right to equipping the work place with required technical facilities.<sup>52</sup>

It is evident, that these kinds of adjustments duties require support through collective agreements or social pacts between firms and other key actors at the local or regional labour market.

The first example for ‘coordinated flexibility’ can be put under the headline: *Enhancing internal flexibility through mutual obligations*. The general strategy is to enhance internal adjustment capacities through continuous and – possibly – anticyclical investment. This would mean imposing duties or responsibilities for reasonable adjustment not only on employers but also on employees, especially in terms of investing continuously into their employability over the life course. The conceptual terminology of ‘hiring’ may help to reveal the rationale for such a demand. Whereas the Fordist relations may have required little effort from employers for keeping the working capacity of hired workers in due shape (so as to be able to return it at the end of the term of contract), the modern labour market requires more efforts to fulfil this obligation (Knegt 2010); sharing responsibility from the ‘hired’ employees’ side would be the other side of the coin.

I know, this is a sensitive and difficult question. Duties or responsibilities may easily overburden either side of the employment contract or restrict freedom of choice. However, negative

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<sup>50</sup> Such duties can be derived (in contrast to all utility related approaches of justice) from the principle of *justice as agency*, called “responsibility of effective power” by Sen (2009, 270 ff), or from the concept of “individual solidarity” in my own terminology (Schmid 2008a, 226 ff).

<sup>51</sup> Sen (2009, 258-60) draws the attention to the fact that for people with disabilities, the *impairment of income-earning ability* is often severely aggravated by a *conversion handicap*. He cites a study for the UK showing that poverty drastically jumps by 20 percentage points for families with a disabled member if taking account for conversion handicaps, whereby a quarter can be attributed to income handicap and three quarters to conversion handicap (the central issue that distinguishes the capability perspective from the perspective of incomes and resources).

<sup>52</sup> SGB (*Sozialgesetzbuch*) IX, § 81 (4).

externalities for not investing into the future may be one justification, for instance the danger of work accidents, health risks or functional illiteracy through inability to use new technologies. Positive externalities through individual investment, on the other hand, may not be fairly distributed in case of bad luck on the market if no (*ex ante*) provision is taken care for periodic redistribution (Dworkin 2000), for example through progressive taxation, and/ or for renegotiation of the contract, e.g. through collective agreements. Especially related to mutual investments like training and education, contracts dealing with the distribution of future surpluses *ex ante* can be more efficient than *ex post* in order to prevent exploitation of *hold-up situations* since investments are often not verifiable for one of the parties due to information asymmetries. Also the delegation of contract renegotiating to a higher level than the firm may help since renegotiating themselves would undermine the trust relationship between employer and employee at the micro level (Teulings/ Hartog 1998, 65-76).

The second example for coordinated flexibility can be put under the headline: *Enhancing internal flexibility through risk-sharing or pooling of human resources*. The general strategy here is to enhance internal flexibility and security through risk-sharing within the internal labour market or through extending the internal labour market beyond the firm through resource pooling.

An example for risk-sharing within the internal labour market is the German *Kurzarbeit* ('short-time work'). This instrument has a long tradition in Germany, but can nevertheless still be counted as a 'best practice' case for the TLM inspired concept of employment insurance. Dismissals or layoffs are avoided through sharing the income risk of falling demand between employees, employers and the state (via the public unemployment insurance system). When the world-wide financial crisis started, the number of short-time workers rocketed within a few months to its top of about 1.5 million in May 2009, averaging 1.2 million for the whole year, of which 700,000 were related to the (export-oriented) metal-electric sector. The crisis hit especially skilled men in economically strong firms and Germany's hot spot regions (Baden-Wuerttemberg, Bavaria). It is estimated that workers, so far, carried about 3 billion Euros of the costs,<sup>53</sup> employers about 5 billion,<sup>54</sup> and the federal employment agency about 4.6 billion.<sup>55</sup> The new regulatory idea connected with this instrument is to protect not individual jobs per se but to ensure the preservation of accumulated 'human capital' and to enhance this capital through further employability measures, especially training and education.

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<sup>53</sup> The replacement rate of earnings for the reduced working-time corresponds to the unemployment benefit scheme: 60% (without children), 67% (with children) related to the "normal" net earnings.

<sup>54</sup> For the employer, *Kurzarbeit* does not reduce labour costs proportionally with working hours. Some of the fixed costs of labour remain, estimated between 24% and 46% per reduced working hour, depending on the size of state subsidies. These remaining costs, practically, increase through many collective agreements topping up short-time-allowance as an additional kind of wage insurance through negotiated flexibility (Bach/ Spitznagel 2009).

<sup>55</sup> Financed by unemployment insurance contributions and partly through tax financed subsidies by the federal government. Apart from extending the possible duration of short-time up to two years, the government stimulated take-up of short-time especially by taking over 50 percent of social security contributions the employers, otherwise, would have to pay) during the first half year, and 100 percent thereafter. If training is combined with short-time, the 100 percent rule applies already for the first half year, plus coverage of training costs as far as they occur.

*Kurzarbeit*, so far, has prevented – in combination (!) with other work-sharing measures<sup>56</sup> plus a demand stimulus for the automobile industry<sup>57</sup> – mass unemployment in an astonishing way. Despite of at least 5 percent decline in economic output, unemployment rose only by 150,000 (0.35 percentage points) in 2009, whereas employment remained stable or even slightly increased. This remarkable pattern induced the global media industry<sup>58</sup> to celebrate the ‘*German job miracle*’, which certainly is correct compared to the crisis response of many other countries (e.g. Spain or the United States), but an exaggeration considered the (potential) side effects. The intended combination with training measures, for instance, was not really successful. In October 2009, the employment agency counted only 113,272 workers combining short-time work and training (cumulated entries). The instrument is also quite dangerous for it may preserve industrial structures which in the long run are not competitive. There is also concern about the fact that, for the first time in German history, productivity fell during a recession due to additional labour hoarding (Herzog-Stein 2010), but possibly also due to the steady decline of private or public investments in Germany during the last decade.<sup>59</sup> In any case, the flip side of this kind of employment security will be an extended period of jobless growth during the recovery (Möller 2010, 336).

A more innovative example of pooling human resources outside risky temporary or fixed-term employment contracts is the recent collective agreement in NRW’s metal and electric industry. This agreement allows firms to lease redundant workers (by keeping the standard employment contract) to firms with labour or skill deficits. The social partners adopted with this agreement a good practice already familiar in the soccer industry.<sup>60</sup> The story has yet another interesting side issue. If one agrees that this practice should also be possible between industrial sectors (for instance between main contractors and subcontractors falling under different collective agreements), the German law on Temp-agency work (*Arbeitnehmerüberlassungsgesetz*) would have to be changed since it allows such a personnel change only within the same sector.

A final example of coordinated flexibility relates to the TLM emphasis on life course orientation of new active labour market policy, which is ‘new’ involving to a larger extent as in conventional labour market policy the element of negotiated flexibility and security. A good practice case is the collective agreement of the German social partners in the chemical industry in April 2008. This

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<sup>56</sup> Melting down accumulated time accounts (saving the equivalent of 244,000 jobs), overtime work (285,000 jobs equivalent), and other forms of working time reductions (equivalent of about 500,000 jobs) through flexible working-time corridors allowed by collective agreements (Herzog-Stein/ Seifert 2010, Möller 2010).

<sup>57</sup> A wreck-bonus (*Abwrackprämie*) of 2,500 Euro for buying a new car (supposed to be less polluting) in exchange for a car at least nine years old; the German government spent altogether about € 5 billion, however, the bonus also benefitted imported non-German cars.

<sup>58</sup> For instance the magazine *Economist* devoting a special issue (March 13<sup>th</sup>, 2010) to the German job miracle, as well as Nobel Prize winner Paul Krugman in his columns in *The New York Times* and *International Herald Tribune*.

<sup>59</sup> This alarming trend reflects the probably too heavy reliance of the German employment system on the export industry.

<sup>60</sup> Pundits of German *Fußball* were curiously following up a prominent example: *FC Bayern München* lent *Toni Kroos* to *Bayer Leverkusen*. This example is especially telling because it hints to a sensitive issue and to potential limits of this model. *Bayern München* and *Bayer Leverkusen* are both at the top of the German league (*Bundesliga*). The decisive game between these two clubs took place on the 10<sup>th</sup> of April (2010); *Toni Kroos* turned out to be decisive in preparing the one goal for *Leverkusen* to reach a draw, which means he could have scored against his employer to whom he has to return after the 2009/10 season.

agreement establishes so-called demography funds (*Demografiefonds*) at the company level, yet with an overall framework agreement at the sectoral level of the chemical industry (including mining and energy companies). With the beginning of 2008, all employers in this sector are obligated to yearly contribute €300 for each employee into a fund, which can be utilized after corresponding negotiations and deliberations at the firm level for various aims, among others for early retirement under the condition of building a bridge for young workers entering employment or for buying occupational disability insurance. Also from now on, building up a corresponding and transparent information system reflecting the age and qualification structure of the companies' workforce is required for all firms. This can be expected to lead to the extension of the planning horizon thereby inducing an explicit employability policy of the firm.

## **6. Summary and Outlook**

The starting point – to sum up – was that 'flexicurity', the flagship of the European Employment Strategy, still lacks empirical and theoretical rigour. It often invites to lose talk, to the mistake that flexibility is only in the interest of employers and security only in the interest of employees, and it tends to be captured by various political interests. The aim of this paper was to contribute to conceptual clarity by using the theory of transitional labour markets (TLM) in the framework of the debate on the new standard employment contract.

We started therefore with two contrasting and provocative perspectives: Some pundits of 'flexicurity' see the model of the new standard employment contract in the hybrid employment relationship between temp-agencies, employers and employees. Even if well-known 'bad practices', exemplified by an infamous example from Germany, may easily kill this argument, it has been argued that the potential of this 'hybrid' employment contract (a mix of employment and sales contract) should be considered an important element of the new employment contract under the condition that the related (new) risks are properly taken care by corresponding (new) security provisions.

The counter-provocative perspective is: Why not going back to the good old times in which the civil servant was the prototype of 'flexicurity'? In former times, this model clearly provided reliable employment (not job) security and social security in exchange for accepting a wide-range of external flexibility by demanding from the 'servants' to move with the jobs, and internal flexibility by demanding to move with the tasks. This model would be hard to sell today, yet it can be argued that the perspective of trading in employment (not job) security for flexibility of various kinds has still some charm. We came to the conclusion, however, that neither the state as civil service employer nor temp-agency firms as 'hybrid' private employers can serve as the paradigm for the new standard employment contract.

In the next step, we tried to provide food for the empirical backdrop of this conclusion through a systematic comparative overview on the extent and dynamic of non-standard employment in 24 EU-member states in 1998 and 2008. The main aim was to explain the sources of (new) insecurities and the sources of (new) demands for flexibility on both sides – employers as well as employees. Among the 'non-standard' forms of employment, *part-time work* is the most important driver for

the – at least partly successful – inclusion of mature aged workers and (especially more) women into the labour market. Whereas its flexibility potential is uncontested related to employees, part-time work – especially in its open-ended and substantive form (more than 20 hours) – does not necessarily increase employers’ flexibility, partly on the contrary. The most important insecurity aspect related to part-time (especially in its marginal forms) is reduced accumulation of pension entitlement.

*Temporary work* is basically driven by the wish of employers to manage (new) uncertainties related to volatile demands and – especially – to cut down wage costs by avoiding, for instance, insurance related wage increases of open-ended contracts (e.g. seniority wages). High dismissal costs through employment protection regulation are important drivers, too, explaining to some extent systematic national differences in utilising temporary work. The most important insecurity aspects related to temporary work is its higher risk of unemployment, of low wages and the danger of getting stuck in a downward spiral of precarious fixed-term contracts.

*Self-employment*, as the third most important element of ‘non-standard’ employment, is on the decline related to its traditional components (farming, petty bourgeois business), but thriving – at least in the more prosperous EU member states – in terms of ‘modern’ forms related especially to the so-called creative sector, and often also in combination (or sequence) with dependent wage-work. Whereas the latter form of self-employment opens some interesting opportunities for employers to (cheaply) outsource tasks and services, it seems to be an interesting playing field for young adults to try individual autonomy and agency, or for parents to combine family work with gainful employment. In any case, however, the related risk of social insecurity (low and volatile income, and under-insurance in case of illness and old age) is high.

Among many more interesting facets of this exercise, two important conclusions came out: First, there is still a tremendous lack of information on transitions and transition sequences between ‘non-standard’ and ‘standard’ forms of employment, especially in terms of life-course careers, which inhibits firm conclusions on the flexibility and security implications of non-standard employment. What is clear however, is that these implications are quite different related to the various forms of non-standard contract. Second, (still anecdotic) evidence seems to hint on the failure to improve overall productivity and competitiveness based on ‘flexible’ employment relationships via ‘non-standard’ forms, especially related to fixed-term contracts.

Another weakness in the ‘flexicurity’ discourse is the often implicit assumption that employers are for flexibility and employees for security. The flexibility-security-nexus, however, is much more complex, as elsewhere discussed at length.<sup>61</sup> Another approach to get analytically a more rigorous hold of this nexus is the theory of employment relationship going back to Herbert Simon’s seminal article in 1951, refined in many ways, especially by the literature of institutional economics and employment systems. Taking up this route in a brief sketch, it turned out that both (stylised) actors of the labour market still have strong interests in open-ended employment contracts. However, from both sides, interests in new flexibilities and new securities arise for various reasons requiring to be

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<sup>61</sup> See Leschke et al. (2007), and Schmid (2008a, 314-422).

taken into account in a renewed ‘standard employment contract’. Yet – following the recent debate on labour law – we warned also not to set too much hopes into a unitary or all-encompassing new contract and argued for a more evolutionary perspective in developing these standards.

In exploring such new standards, TLM theory emphasises the importance of individual behavioural traits in perceiving (new) labour market risks and in making decisions that respond to these risks. Any policy intending to support labour market actors in preventing, mitigating or coping with (new) employment risks must consider these traits in designing the right policies or institutions. Thus, this matter of ‘flexicurity-governance’ was taken up in the fourth step by briefly summarizing insights of new behavioural economics and the theory of learning by monitoring. As most people tend to be myopic related to high risks with low probability and highly responsive to low risks with high probability, and since most people are – depending on the situation and the framing of the problem – either risk averse or unreasonably speculative risk takers, the strategy of extending the expectation (and corresponding planning) horizon seems to be a useful guideline for policy intervention. Four (mutually not exclusive but complementing) possibilities were presented and discussed: First, the establishment of (new) social rights beyond employment; second, stepping stones for navigating through various risks over the life course; third, group instead of individual employability measures; fourth – and especially promising – the establishment of learning communities through social pacts or covenants.

Agreeing covenants (the most interesting element of ‘active securities’) is rather different than issuing rules and laws. Instead of enforcing institutional forms of ‘insurance’, covenants build on trust and social cohesion, thus, on forms of ‘ensurance’. They are examples of what is nowadays called ‘soft law’ or ‘soft regulation’, and fit in with the larger European trends on coordination. Although it may be too early to advocate covenants for the European level, if only because none of the more essential partners (Council, Commission, European trade unions and employers) possesses the muscle to bring them about, many EU Member States dispose about these conditions, and the new European Employment Strategy might at least play a midwife role in supporting such social pacts; European border regions even might start pilot projects in this direction.

Another weakness in the current ‘flexicurity’ concept is its neglect of the interrelationship between flexibility and security. In many cases, security provisions are the precondition for ordinary human beings (with ‘animal spirits’) taking over risks. However, securities can be of different kind and may have different incentives. As theory tells us, any (social) insurance-contract leads people to think of their contributions as kind of investment that must have some pecuniary return (even in case they are lucky not being affected by the risk, e.g. unemployment, over their life course). It is, however wrong, to consider only the negative incentives related to (in fact any kind of) insurance and to concentrate all policies to get this ‘moral hazard’ under control. Much neglected are the positive incentives, which we may call the ‘innovative hazard’ of insurance and which encourages people to take over risks (with positive externalities for the society) they otherwise would not take. Such innovative hazard requires a corresponding safety net either in terms of monetary benefits or in terms of social infrastructures on which workers can rely with trust if they are caught by the negative side of the risks they have taken over.



The real art of *'balancing flexibility and security'*, therefore, is to balance 'moral hazard' as well as 'innovative hazards' in such a way, that society indeed reaches a higher level ('equilibrium') of flexibility and security. As the empirical part of this paper has shown, the concentration of flexibility measures on external flexibility such as fixed-term contracts and out-contracting (among others to own account workers) has shifted risks to individuals or small enterprises without, yet, persuasive compensations of security and without producing persuasive evidence of increased sustainable productivity and competitiveness. This gave reason to look to alternatives for which I presented two regulatory ideas on the basis of 'active securities', which means institutional support enhancing the 'innovative hazard' instead of controlling 'moral hazard' related to securities: Rights and obligations to capacity building and coordinated flexibility as functional equivalents to (numerical) external flexibility. The final section exemplified the potential role of such 'active securities' with special emphasis on good practices from the recent 'German job miracle', which, however, had to be partly qualified considering their real or potential dangerous side effects.

A final caveat, therefore, seems to be in order: As successful countries demonstrate, balancing flexibility and security has to be embedded in sound macro-economic and macro social policy. Without a sustainable job creation dynamics, all employability and stepping-stone strategies are in danger of ending up in a cul-de-sac or of displacing other categories of workers. Without new active securities, envisaged and represented perhaps in a 'social progression clause' of a revised Lisbon Treaty, all 'flexicurity' strategies might end up in new forms of labour market segmentation.

As the process of Europeanization, in particular through the Eurozone, increases interdependencies, co-ordinated efforts to stimulate sustainable economic growth are required, especially through investments in a better European economic and social infrastructure. Related to our emphasis on 'active securities' (and in a bit of speculative mood), the extension of the European Social Fund to a European Employment Insurance Fund, or at least a complementation of the European Social Fund through a focused European Knowledge Lift Fund,<sup>62</sup> would make the European Social Model not only more visible and tangible, but might also develop into a new level-playing field for balancing flexibility and security through an enhanced civil and social dialogue.

## 7. Literature

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<sup>62</sup> According to the Swedish example (see Albrecht et al. 2005).

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