Part V

Just Distribution and Normative Development

11

Flexicurity and Labour Law: Labour Market Segmentation, Precarious Work and Just Distribution

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I. INTRODUCTION

FLEXICURITY IS THE European Union's response to how to address the profound changes in the labour market that have accompanied the growth of the European internal market, deepening and expanding globalisation, and the deployment of new technologies. Yet despite the fact that it is the dominant approach to labour market regulation within the European Union, flexicurity's precise meaning or content is contentious; the emphasis tends to oscillate from flexibility to security depending on the specific EU institution or actor endorsing it.[1]

Labour law is a central component of the flexicurity approach, and the key concern of 'modern' European labour law is to address labour segmentation. My goal in this chapter is to probe the relationship between flexicurity, labour law and labour law market segmentation, focusing on women workers in precarious work in particular. To do so, I use the theoretical framework developed by Anna Christensen and Ann Numhauser-Henning under the umbrella of the Norma Research Programme (Norma).[2] Norma's interdisciplinary approach places legal norms and institutions in their social contexts; it is also historical and comparative, as it seeks to understand the relationship between social change and legal developments. Much of the focus of Norma's research has been the 'altered conditions for the functioning of the labour market and their significance for labour law and labour market policy'.[3] Thus, it is ideally suited to studying flexicurity.[4]

[1] L Burroni and M Keune 'Flexicurity: a Conceptual Critique' (2011) 17 *European Journal of Industrial Relations* 75.

[2] A Numhauser-Henning and M Rönnmar (eds), *Fifteen Years with the Norma Research Programme* (Lund, Norma Research Programme, Faculty of Law, Lund University, 2010).

[3] A Numhauser-Henning, 'Introduction' in A Numhauser-Henning and M Rönnmar (eds), *Fifteen Years with the Norma Research Programme* (Lund, Norma Research Programme, Faculty of Law, Lund University, 2010) 15.

[4] See the essays in the collection edited by Numhauser-Henning and Rönnmar, *Fifteen Years with the Norma Research Programme*, above n 2.

Using this theoretical framework, I conceptualise flexicurity as a normative field, of which labour law is a central element, in order to determine whether the normative patterns of market functioning, protection of established positions, and just redistribution has been realigned within modern EU labour law. I will begin by outlining the key components of Norma's theoretical framework that I will use to assess the European Union's flexicurity approach. Once I have sketched this conceptual framework, I will use it to examine the development of the EU's commitment to flexicurity, beginning with the atypical work Directives in the late 1990s through to statements in the Europe 2020 Strategy, focusing on the relationship between flexicurity and modernising labour law. In section IV, I will concentrate upon a key theme in EU labour law, which is regulating atypical forms of employment that are located at the margins of labour law. I suggest that the strategy of increasing 'flexibility at the margins'—the loosening of restrictions on such non-standard or atypical contracts as part-time, fixed-term and through-agency work—runs the risk of reinforcing segmented labour markets, especially labour markets that are segmented on a gender basis. In the conclusion, I reflect on whether, and, if so, the extent to which the normative field of flexicurity has disrupted traditional normative patterns in labour law.

II. NORMATIVE PATTERNS, NORMATIVE FIELDS AND SOCIAL CHANGE

In an attempt to explain the rise of social regulation in the wake of the expansion of the liberal market order, Anna Christensen developed the theory of law as normative patterns in a normative field to account for the post-liberal legal order.[5] She claimed that all societies have ideas about what is just and how social relations should be shaped, and that these ideas become embedded in normative patterns. She used the term 'pattern' to capture the combination of social practice, reality and the ideal, and she identified three basic normative patterns—Market-Functional, Protection of Established Position and Just Distribution—that prevailed under the welfare state. According to Christensen, these normative patterns are not organised hierarchically; they conflict and shift in a normative field, which refers to areas of law that correspond to social life, such as labour law and social security law.[6] She illustrated how normative patterns function as 'magnetic poles seeking to attract legal rules' through an examination of social security law in Europe, and she provided a nuanced and subtle account of how normative patterns have changed position over 50 years.[7]

[5] A Christensen, 'Normative Patterns and the Normative Field: a Post Liberal View on Law' in T Wilhelmsson and S Hurri (eds), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law* (Aldershot, Ashgate, 1999).

[6] Ibid.

[7] Ibid.

Christensen sought to combine an attention to law as 'normative patterns in a normative field' with an appreciation of the relationship between the legal system and the structure of society and conditions of economic production.[8] Ann Numhauser-Henning has elaborated upon the external component of this theoretical framework and she explained that normative patterns 'reflect normative practices functional to society and human relationships'.[9] Changes in the 'conditions of production' explain the movements 'in the normative field, which can thus also be pictured as a functional field'.[10]

The concept of a normative field is particularly useful in the context of the European Union, which is a multilevel governance structure in which Member States retain sovereignty over social policy. It is helpful to think of flexicurity as a project to create a new normative field, rather than as a discourse, which I see as more akin to a normative pattern. The benefit of this approach is that it not only emphasises the extent to which flexicurity challenges existing policy domains, such as the separation of employment policy from social security, it also allows for multiple normative patterns, or discourses, that can conflict and combine in new ways. It takes seriously the claim that flexicurity is an attempt to create a new method of regulating the labour market that transcends the traditional dichotomy between flexibility and security in employment relations. Yet, it also appreciates that there are a variety of normative patterns, not all of which align. Seeing flexicurity as a normative field constructed by actors and institutions through a range of processes allows us to appreciate the conflicts between normative patterns and differences in power relations that help to explain specific positions and understandings.

III. FLEXICURITY AND LABOUR LAW

A. Introduction

The flexicurity policy agenda needs to be placed in the broader economic and political context of Social Europe.[11] It is the outcome of the interactions of, and power relations between, key European institutions, such as the Commission, Council, Parliament, European Court of Justice (CJEU), Member States and social partners, and it is given effect by a range of legal processes, which include Directives, the Open Method of Coordination, social dialogue, and the use of European social funds.

[8] Ibid.

[9] Numhauser-Henning, 'Introduction', above n 3, 18.

[10] Ibid.

[11] For a discussion of the history of flexicurity in the European Union see N Countouris, *The Changing Law of the Employment Relationship: Comparative Analysis in the European Context* (Aldershot, Ashgate, 2007) ch 6; J Kenner, 'New Frontiers in EU Labour Law: from Flexicurity to Flex-Security' in M Dougan, *Fifty Years of European Treaties* (Oxford, Hart, 2009) 279; M Rönnmar, 'Flexicurity, Labour Law and the Notion of Equal Treatment' in M Rönnmar (ed), *Labour Law: Fundamental Rights and Social Europe* (Oxford/Portland, Hart, 2011) 153.

The Single European Act, which came into force on 1 July 1987, added new momentum to European integration and the completion of the internal market. It was fundamental to securing a constitutional priority for economic freedoms and subjecting social rights to challenges; it also shifted power to employers.[12] In response to the expansion and harmonisation of the internal market, explicit Treaty competences over social policy were also expanded and the Community adopted a Charter on the Fundamental Rights of Workers (1989) as a counterbalance. Health and safety standards were harmonised in the Single European Act, the Maastricht Treaty included a wide range of social policy areas that were formally integrated into the Employment Chapter of the 1997 Amsterdam Treaty, and the 2001 Nice Treaty provided for further possibilities for Member State cooperation on social policy.[13] These changes, especially 'the institutionalisation of EU-level social dialogue and the extension of powers to make labour law directives', resulted in a considerable amount of legislative activity in the area of employment policy from 1993 to 2002.[14]

B. Atypical Work Directives

For the purpose of understanding the genealogy of the labour law component of the flexicurity agenda, the Part-Time Work Directive and the Fixed-term Work Directive are crucial.[15] Although the term 'flexicurity' does not appear in either Directive, both explicitly refer to flexibility and security.[16] Moreover, they are specifically designed to address the labour market segmentation associated with different atypical forms of contract. Atypical employment contracts differ from the standard employment contract, which is a full-time, year-round and ongoing employment relationship with a single employer, which has been the fulcrum of employment legislation and social security.[17] Although the precise form of the standard employment relationship took different shapes, and the extent to, and ways in which, it was institutionalised differed in specific national contexts, its

[12] F Scharpf, 'Negative Integration and Positive Integration in the Political Economy of European Welfare States' in G Marks *et al* (eds), *Governance in the European Union* (London, Sage,1996).

[13] M Keune, 'EU Enlargement and Social Standards: Exporting the European Social Model?' in J Orbie and L Tortell (eds), *The European Union and the Social Dimension of Globalization* (London, Routledge, 2009) 46.

[14] S Deakin and R Rogowski, 'Reflexive Labour Law, Capabilities and the Future of Social Europe' in R Rogowski *et al* (eds), *Transforming European Employment Policy: Labour Market Transitions and the Promotion of Capability* (Cheltenham, Edward Elgar, 2012).

[15] Countouris, *The Changing Law of the Employment Relationship*, above n 11, ch 6; Council Directive 97/81 of 15 December 1997 concerning the framework agreement on part-time working [1997] OJ L14/9 ('Part-time Work Directive'); Council Directive 99/70 of 28 June 1999 concerning the framework agreement on fixed-term work [1999] OJ L175/43 ('Fixed-term Work Directive').

[16] Countouris, *The Changing Law of the Employment Relationship*, above n 11, 211.

[17] G Bosch, 'Towards a New Standard Employment Relationship in Western Europe' (2004) 42 *British Journal of Industrial Relations* 618.

function across industrialised capitalist counties was the same.[18] Historically, it 'incorporated a degree of regularity and durability in employment relationships, protected workers from socially unacceptable practices and working conditions, established rights and obligations, and provided a core of social stability to underpin economic growth'.[19] It also rested on a specific gender order; it provided security for male workers and an economically dependent female housewife and children.[20] Women workers have traditionally been, and continue to be, over-represented in atypical working arrangements, especially part-time and casual work, that are lower paid than, and lack the social and employment benefits and job protection associated with, standard employment contracts.[21] The atypical work Directives are designed 'to redress the risk of precariouness through measures designed to improve the quality of non-standard jobs'.[22]

The Part-time Work and Fixed-term Work Directives can be seen as pro-typical flexicurity labour laws both in form and content since they exemplify the flexicurity policy agenda's regulatory techniques and normative patterns. They fall between soft law and hard law measures, and are adaptable to the distinct social models of the Member States. Both Directives are products of the social dialogue procedure and, thus, depart from the 'classic' Community method of law-making.[23] They give legal effect to the social partners' agreements, and they provide principles and standards, with the details to be filled in by Member States.[24] They also provide a great deal of flexibility to Member States and to social partners about how to implement the standards and to exclude groups of workers from their coverage.[25] The flexibility provided in these two atypical work Directives allows for 'vertical dissonance' between EU legislation and the appearance of formal compliance by Member States.[26]

[18] LF Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford, Oxford University Press, 2010) 3–6.

[19] G Rodgers, 'Precarious Work in Western Europe: the State of the Debate' in G Rodgers and JJ Rodgers (eds), *Precarious Jobs in Labor Market Regulation: the Growth of Atypical Employment in Western Europe* (Geneva, ILO, 1989) 1.

[20] J Fudge, 'Labour as a "Fictive Commodity" Radically Reconceptualizing Labour Law' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford, Oxford University Press, 2011) 120.

[21] D Ashiagbor, 'EU Employment Policies and Precarious Work' in J Fudge and R Owens (eds), *Precarious Work, Women, and the New Economy: the Challenge to Legal Norms* (Oxford, Hart, 2006) 77; Vosko, *Managing the Margins*, above n 18.

[22] M Bell, 'Between Flexicurity and Fundamental Social Rights: the EU Directives on Atypical Work' (2012) 37 *EL Rev.* 33.

[23] In this classic method the European Commission has the sole right of initiative, the European Parliament has an increasingly important voice, the Council of Ministers takes the final decision, and the resulting Community hard law is enforced by the CJEU.

[24] M Jeffery, 'Not Really Going to Work? Of the Directive on Part-time Work, "Atypical Work" and Attempts to Regulate it' (1998) 27 *Industrial Law Journal* 193.

[25] Ibid; J Murray, 'Normalising Temporary Work: the Proposed Directive on Fixed-Term Work' (1999) 28 *Industrial Law Journal* 269.

[26] C Kilpatrick and M Freedland, 'The United Kingdom: How is EU Governance Transformative?' in S Sciarra, P Davies and M Freedland (eds), *Employment Policy and the Regulation of Part-time Work in the European Union: a Comparative Analysis* (Cambridge, Cambridge University Press, 2004) 299–357, at 356. An example of this flexibility in the Fixed-term Work Directive is the decision to

The Part-Time Work Directive established a template for the other Directives on different forms of atypical work by combining the principle of non-discrimination as the basis for social protection with an emphasis on flexibility both in procedures and norms.[27] The notion of a comparable full-time or permanent worker was introduced as a means of defining part-time and fixed-term workers, respectively, and the principle of non-discrimination (actually a ban on less favourable treatment unless justified on objective grounds) was introduced, as was recourse to the principle of *pro rata temporis*, which provides employment-related benefits and protection in proportion to the length of time worked. The aims of the Part-time Directive are: (1) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work; (2) to facilitate the development of part-time work on a voluntary basis; and (3) to contribute to the flexible organisation of working time in a manner which takes into account the needs of employers and workers. In contrast to the Part-time Work Directive, the Fixed-term Work Directive does not emphasise promoting this form of atypical work.[28] Instead, its goal is to improve the quality of fixed-term work by ensuring the principle of non-discrimination and to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.[29] Significantly, the fixed-term Directive specifically excluded fixed-term workers placed in a user firm by a temporary employment agency, a form of atypical work that was not the subject of a Directive until 2008.[30]

The emphasis on non-discrimination as the approach to regulating atypical workers owes a great deal to sex equality law, which is not surprising given the fact that the Equal Treatment Directive was used to improve the terms and conditions of employment of the women who historically have filled the ranks of atypical workers.[31] This regulatory approach simultaneously evokes the market-enhancing notion of fair competition and resonates with fundamental social rights endorsed by the European Union.[32] In this way, 'the equal treatment formula' was:

> ideally suited to broker a Social Dialogue agreement that satisfied opposite and in principle conflicting needs. Employers would be able to foster and strengthen change in working practices, trade unions would have improved working conditions for atypical

leave it to each Member State to determine 'the conditions under which fixed-term contracts shall be regarded as successive'.

[27] J Murray, 'Normalising Temporary Work', above n 25; S Sciarra, *Is Flexicurity a European Policy?*, URGE Working Paper 4 (2008),

[28] JMurray, 'Normalising Temporary Work', above n 25, 269–75.

[29] See the Fixed-term Work Directive, above n 15.

[30] Ibid, Annex Preamble, para. 4.

[31] Dir 76/207/EEC of 9 February 1976. A Numhauser-Henning, 'EU Equality Law: Comprehensive and Truly Transformative' in M Rönnmar (ed), *Labour Law: Fundamental Rights and Social Europe* (Oxford/Portland, Hart, 2011) 113.

[32] Bell, 'Between Flexicurity and Fundamental Social Rights', above n 22, 45.

> workers while reducing any temptation to a race to the bottom and the EC institutions were laying down a 'floor of rights' in this area while promoting their job creation.[33]

The broader, more ideological, effect of the EU Directives has been to demarginalise part-time and fixed-term work,[34] a process more akin to recognising that these types of employment contracts are a regular and legitimate component of the labour market that should be facilitated, rather than with providing traditional forms of worker protection.[35] The European Commission has embraced this approach to regulation, which it refers to as providing flexible and reliable contracts.[36] However, the nomenclature of atypical contracts has continued to prevail despite the rapid expansion of these types of working arrangements.

C. Lisbon Employment Strategy

In 2000, the Lisbon European Council set a new strategic goal:

> to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion.[37]

This goal was distilled into the three objectives of full employment, quality and productivity at work, and social cohesion and inclusion, and a target employment rate of 70 per cent was set.[38]

The means of achieving the Lisbon European Employment Strategy was through the Open Method of Coordination (OMC), which is a regulatory technique modelled on the method of governance used to ensure that Member State's economic policies conformed to the requirements of the economic and monetary union. It is a 'soft law' technique for coordination, and it combines an 'intergovernmental approach dominated by the Council and the Commission, political monitoring at the highest level, clear procedures and iterative processes'.[39] The elaboration and implementation of employment policy revolves around the setting of guidelines, benchmarks and indicators at the European level, their translation into national

[33] Countouris, *The Changing Law of the Employment Relationship*, above n 11, 209.

[34] P Davies and M Freedland, 'The Role of EU Employment Law and Policy in the De-marginalization of Part-time Work: a Study in the Interaction between EU Regulation and Member State Regulation' in S Sciarra, P Davies and M Freedland (eds), *Employment Policy and the Regulation of Part-time Work in the European Union: a Comparative Analysis* (Cambridge, Cambridge University Press, 2004) 77.

[35] Ibid.

[36] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards common principles of flexicurity: more and better jobs through flexibility and security, COM(2007)359 final (27 June 2007).

[37] D Ashiagbor, *The European Employment Strategy: Labour Market Regulation and New Governance* (Oxford, Oxford University Press, 2005) 139 quoting the Presidency conclusions.

[38] Ibid 130–40.

[39] C Barnard, *EC Employment Law*, 3rd edn (Oxford, Oxford University Press, 2006) 20, references omitted.

policies, and the periodic monitoring of such implementation, mostly by means of peer review and surveillance by EU institutions.[40] Member States are obliged to report annually on the principal measures taken to implement employment policy in light of the Union's broad economic policy and the employment guidelines.[41] Moreover, the structural funds of the European Union, 'play a key part in the implementation of the Employment Strategy'[42] because they can be used by the European Union to finance active labour market polices in the Member States.[43] However, the ability of the European Union to steer employment policy is limited by the small size of the European Social Fund (ESF) budget.[44]

Lisbon was an important moment for the European Union; it marked a political willingness to prioritise the '"European social model" by means of "activating" the welfare state and modernizing social protection'.[45] It also exemplified the change in social policy 'from employment protection (giving rights to those already in work) to employment creation (getting those out of work into employment)'.[46] The Lisbon Strategy was renewed in 2005, and this renewal led to modifications to the OMC and the governance structure.[47] The centre of gravity for employment policy at the European Commission and Council shifted from labour and social policy actors to ones responsible for economic and financial affairs.[48] The relaunch focused on 'growth, jobs (in numerical terms) and budget stability'.[49] It also led to the adoption in 2007 by the European Union of a set of common principles for flexicurity to guide employment policy and social security in 2007.

D. Flexicurity: an Emerging Policy Agenda

The term 'flexicurity' was initially used to describe the successful combination of flexibility and security in the Dutch and Danish labour market policies in the 1990s.[50] Although very different (the Dutch approach was to promote atypical employment while at the same time providing these workers with employment and social security benefits comparable to workers in standard employment, whereas

[40] Ashiagbor, *The European Employment Strategy*, above n 37; S Velluti, *New Governance and the European Employment Strategy* (London, Routledge, 2010).

[41] The reports, initially called National Action Plans, were renamed National Programme Reviews.

[42] Ashiagbor, *The European Employment Strategy*, above n 37, 195.

[43] Ibid 196.

[44] C Kilpatrick, 'New EU Employment Governance and Constitutionalism' in G de Burca and J Scott (eds), *Law and New Governance in the EU and the US* (Oxford, Hart, 2006) 123.

[45] Ashiagbor, 'EU Employment Policies and Precarious Work', above n 21, 85.

[46] Barnard, *EC Employment Law*, above n 39, 27.

[47] Changes to the OMC are discussed in Sciarra, *Is Flexicurity a European Policy?*, above n 27, 2–4; Deakin and Rogowski, 'Reflexive Labour Law', above n 14, 11–12; Velluti, *New Governance and the European Employment Strategy*, above n 40, 163–65.

[48] T Weishaupt and K Lack, 'The European Employment Strategy: Assessing the Status Quo' (2011) 7 *German Policy Studies* 9.

[49] Velluti, *New Governance and the European Employment Strategy*, above n 40, 23.

[50] Keune, 'EU Enlargement and Social Standards', above n 13, 94.

the Danish model encouraged flexible standard employment contracts combined with high unemployment benefits and active labour market policies), each country reduced unemployment rates and increased employment rates.[51] In an influential article, Ton Wilthagen and Frank Tros elaborated on the concept of flexicurity as a new approach to regulating employment and labour markets.[52] They identified two key components of flexicurity:

> Flexicurity is (1) a degree of job, employment, income and 'combination' security that facilitates the labour market careers and biographies of workers with a relatively weak position and allows for enduring and high quality labour market participation and social inclusion, while at the same time providing (2) a degree of numerical (both external and internal), functional and wage flexibility that allows for labour markets' (and individual companies') timely and adequate adjustment to changing conditions in order to maintain and enhance competitiveness and productivity.[53]

What flexicurity offered was an approach that did not see flexibility and security as trade-offs but, instead, as compliments. It was designed to overcome some of the limits of the deregulation discourse that was so closely aligned to flexibility and, from the outset, its target was combating labour market segmentation.

Flexicurity moved from being a topic of academic discussion to becoming a prominent policy concept within the European Employment Strategy.[54] In 2006, in the *Green Paper on Modernizing Labour Law to Meet the Challenges of the 21st Century*, the European Commission looked at the 'role labour law might play in advancing a "flexicurity" agenda'.[55] While the Commission did not spell out the elements of its flexibility agenda, it identified 'the need for the adaption of employment legislation to promote flexibility combined with employment security and reduce labour market segmentation'.[56] Moreover, the Commission also noted that changes to labour law were not enough; other policy components of flexicurity included:

> life-long learning enabling people to keep pace with new skill needs; active labour market policies encouraging unemployed or inactive people to have a new chance in the labour market; and more flexible social security rules catering for the needs of those switching between jobs or temporarily leaving the labour market.[57]

[51] Ibid.

[52] T Wilthagen and F Tros, 'The Concept of "Flexicurity": a New Approach to Regulating Employment and Labour Markets' (2004) 10(2) *Transfer* 166.

[53] Ibid 6. They developed a matrix of different types of flexicurity and different types of security in order to help to identify the specific trade-offs and interconnections between different combinations of different types of flexibility and security. The matrix consists of 'four forms of flexibility …—external-numerical, internal-numerical, functional flexibility and flexible pay—and four forms of security—job security, employment security, income security (or social security) and "combination security", which refers to "the security of a worker of being able to combine his or her job with other—notably private—responsibilities and commitments"' (ibid 7).

[54] T Wilthagen, 'Mapping out Flexicurity Pathways in the European Union' (2008), available at http://ssrn.com/abstract=11187252; Keune, 'EU Enlargement and Social Standards', above n 13, 95.

[55] European Commission, *Green Paper on Modernizing Labour Law to Meet the Challenges of the 21st Century*, COM(2006)708 final (Brussels, 22 November 2006) 4.

[56] Ibid 3.

[57] Ibid 4.

In the Green Paper, the Commission identified the general tendency in the reform of national employment protection legislation as:

> increasing flexibility 'on the margins', ie introducing more flexible forms of employment with lesser protection against dismissal to promote the entry of newcomers and disadvantaged jobseekers to the labour market and to allow those who wanted to have more choice over their employment. The outcome has given rise to increasingly segmented labour markets.[58]

By contrast, at the EU level, research, political and legislative action has focused on 'establishing how new more flexible forms of work might be combined with minimum social rights for all workers'.[59] The Commission was particularly concerned about the gender dimension of the segmentation,[60] and considered 'stringent employment protection legislation' to worsen the 'prospects of women, youths and older workers'.[61] According to this view, labour market segmentation was regarded as a consequence of the protection of workers with standard employment contracts.

Although the Commission emphasised the need for security, the Green Paper 'introduced, for the first time, a deregulatory emphasis in [its] stance on the development of national labour law system'.[62] Moreover, it focused almost exclusively on individual, and not collective, labour law and did not mention the Supiot Report, which promoted an innovative approach to balancing flexibility and security via the concept of labour force membership.[63]

In June 2007, the European Expert Group, which was appointed by the Commission and included Wilthagen as rapporteur, released its Report.[64] Eschewing a one-size-fits-all strategy, the Report identified four ideal-type situations of labour market failure corresponding to which it mapped out four pathways to flexicurity from which Member States could choose. It also identified four components of flexicurity: flexible and reliable contractual arrangements; comprehensive lifelong learning strategies; effective active labour market policies; and modern social security.[65] The Report described flexicurity as:

> a policy strategy to enhance, at the same time and in a deliberate way, the flexibility of labour markets, work organisations and employment relations, on the one hand, and security—employment security and social security—on the other. Its objective is to combine employment and income security with flexible labour markets, work organisation and labour relations. The key principles that underpin a flexicurity strategy are

[58] Ibid 5.
[59] Ibid 6.
[60] Ibid 9.
[61] Ibid 8.
[62] Deakin and Rogowski, 'Reflexive Labour Law, above n 14, 12.
[63] Ibid; S Sciarra, 'EU Commission Green Paper "Modernising Labour Law to Meet the Challenges of the 21st Century"' (2007) 36 *Industrial Law Journal* 375.
[64] European Expert Group on Flexicurity, *Flexicurity Pathways: Turning Hurdles into Stepping Stones* (June 2007).
[65] Ibid 5.

> that flexibility and security should not be seen as opposites, but can be made mutually supportive.[66]

Flexicurity is not a single policy nor an integrated theory or set of independent policy prescriptions; it is political and strategic concept that can be used to induce legal and policy innovation that can take the shape of a variety of different policies.[67] It is what Peter Auer and Bernard Gazier describe as a policy agenda, which is:

> a deliberate intervention aimed at transforming existing systems of reference in a given field and pointing them in a new direction. [Policy agendas] provide a form of cognitive evidence using concepts, values and evaluations. They are developed by experts and policymakers and are refined through debate; they appear in a pluralistic context because they are diverse and perhaps compete against each other.[68]

In the field of labour market and social policy, Auer and Gazier contrast flexicurity with three other policy agendas that vie for hegemony: flexibility, transitional labour markets and capabilities.[69] They explain that although policy agendas are not generally binding, they can promote convergence by setting targets and by developing recommendations.[70]

Flexicurity is a policy agenda that blurs the borders between the distinct social systems of employment protection and social security by making employability, and not job protection, the favoured form of social protection.[71] It is an attempt to reconfigure a new normative field. It requires a fundamental reconceptualisation of the role of social policy:

> the old social protection offered by Western welfare states was based on what kind of social security would be offered to workers seeking to 'decommodify' their labour and under what conditions. The new forms of protection have focused more on securing and maintaining their 'commodification'.[72]

The relationship between labour law and activation policies is central to the flexicurity agenda,[73] which deploys a range of, largely proceduralist, legal techniques to achieve labour law's new objectives.[74] A key development has been the:

[66] Ibid 11.

[67] P Auer and B Gazier, *Flexicurity as a Policy Agenda*, CESifo DICE Report 2 (2008) 4. Sciarra describes flexicurity as a methodology or a group of policies rather than a single policy, see above n 27.

[68] Auer and Gazier, *Flexicurity as a Policy Agenda*, above n 67, 4.

[69] Ibid 4–6. See also Deakin and Rogowski, 'Reflexive Labour Law', above n 14, on the difference between the flexicurity and capabilities approaches to labour market reform.

[70] Auer and Gazier, *Flexicurity as a Policy Agenda*, above n 67, 4.

[71] T Wilthagen, *Flexicurity: a New Paradigm for Labour Market Policy Reform?*, WZB Discussion Paper FS I (Berlin, 1998) 98–202.

[72] J Lewis and A Plomien, '"Flexicurity" as a Policy Strategy: the Implications for Gender Equality' (2009) 38 *Economy and Society* 438 (references omitted).

[73] C Crouch, 'Beyond the Flexibility/Security Trade-off: Reconciling Confident Consumers with Insecure Workers' (2012) 50 *British Journal of Industrial Relations* 11.

[74] R Rogowski, 'Governance of the European Social Model: the Case of Flexicurity' (March/April 2008) *Intereconomics* 87.

> introduction of 'reflexive regulation', or legally induced 'voluntary' regulation to induce reductions in standards of protection, matching attempts in collective bargaining for derogations from sector standards by company-level negotiations.[75]

The European Expert Group's Report identified combating labour market segmentation between standard employment contracts and atypical or non-standard contracts as the first pathway to flexicurity. The concern was that casual work, agency work and false self-employment were not providing stepping stones to better jobs and that these kinds of contracts received insufficient protection and labour law coverage. The Report recommended integrating atypical or non-standard employment contracts more fully into labour law, collective agreements, social security and lifelong learning, and considered making standard employment more attractive to firms.[76] This idea draws on the approach developed in the Part-time and Fixed-term Work Directives, which is to bring non-standard employment relationships 'fully into labour law and to make them equal to standard employment through the pro rata temporis principle'.[77] The low initial costs of non-standard contracts would be retained in order to facilitate the entry of outsiders into the labour force. Remarkably, however, the Experts Report made no explicit reference to gender equality, despite the fact that only a few months earlier the Commission released a report on *Equality between Women and Men*, in which it warned that flexicurity policies 'should avoid stressing the "flexibility" aspects for women [mainly in the form of atypical contracts] and the "security" aspects for men'.[78]

In its 26 June 2007 Communication, Towards common principles of flexicurity: more and better jobs through flexibility and security, the European Commission identified the need for an 'integrated flexicurity approach' that 'requires policies that address simultaneously the flexibility of labour markets, work organization and labour relations, and security—employment and social security'.[79] It also announced that it and the Member States had reached a consensus on an integrated approach to flexicurity based upon four policy components: flexible and reliable contractual arrangements; comprehensive lifelong learning strategies; effective active labour market policies; and modern social security.[80] The Commission implemented the policy agenda by developing a list of eight common principles

[75] Crouch, 'Beyond the Flexibility/Security Trade-off' above n 73, 11.

[76] European Expert Group Report, above n 64, 23.

[77] However, the European Expert Group Report noted that pension schemes should not be based on *pro rata* principles as this would disfavour part-time workers and that social security benefits should also be made accessible to workers on non-standard contracts. Ibid 28.

[78] European Commission, Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Equality between Women and Men, COM(2002)49 final (Brussels, 2007) para 3.1, as quoted in Lewis and Plomien, '"Flexicurity" as a Policy Strategy', above n 72, 440.

[79] European Commission, Towards common principles of flexicurity, above n 36, 4.

[80] Ibid 5.

of flexicurity, and adopting ends, means, targets and indicators, and integrating them all into a strategic approach.[81]

The Commission's flexicurity Communication generated a great deal of activity at the EU level. Different EU institutions, as well as the social partners and Member States, had different interpretations of, or gave different weights to, the flexicurity agenda's objectives. The Commission, for example, had a deregulatory emphasis when it came to employment protection legislation.[82] It advocated promoting:

> flexibility through low levels of dismissal protection as well as the normalization of non-standard contracts, while security is largely limited to employment security to be fostered through lifelong learning and active labour market policies.[83]

The atypical work Directives exemplified the European Union's approach to normalising non-standard contracts by providing for non-discrimination or parity of treatment with standard employment relationships. The European Commission not only simultaneously emphasised the normative patterns of Market-Functioning and Just Distribution, it brought these two seemingly opposed discourses into realignment by reinterpreting the latter. Just Distribution was no longer concerned exclusively with the relations between workers and employers but, rather, between those workers who had standard employment contracts and those who did not and either had atypical contracts or were unemployed. Protection of Established Position had little normative weight; in fact, it was seen as contributing to the problem of labour market segmentation, which was to be addressed by the reconceived idea of Just Distribution. Implicit in the Commission's agenda was the assumption that flexicurity would contribute to gender equality. But instead of specifying how equality would be cultivated, the Commission appears to have assumed that greater labour force participation of women would lead to greater equality. The problem is that this assumption ignores the different obligations and responsibilities of women when it comes to unpaid care work, a difference that the Commission acknowledged in its equality documents, but not in the mainstream flexicurity agenda.[84]

However, not all of the EU institutions agreed with the particular reading of flexicurity provided by the Commission. In its report to the European Parliament proposing a resolution on the flexicurity principles, the Committee on Employment and Social Affairs explained that the definition of flexicurity in the Commission's *Green Paper on Modernizing Labour Law* was too narrow and not adequately policy-oriented.[85] It called for the provision of a core of rights, which would include, inter alia, freedom of association, protection against dismissal, and social benefits such

[81] Auer and Gazier, 'Flexicurity as a Policy Agenda', above n 67, 14.
[82] Deakin and Rogowski, 'Reflexive Labour Law', above n 14.
[83] Keune, 'EU Enlargement and Social Standards', above n 13, 96.
[84] Lewis and Plomien, '"Flexicurity" as a Policy Strategy', above n 72, 440.
[85] European Parliament, *Report on Common Principles of Flexicurity*, 2007/2209(INI) (Brussels, Committee on Employment and Social Affairs, 15 November 2007) Explanatory Statement, para 6.

as pensions and unemployment benefits, regardless of an employee's specific employment status.[86] Just Distribution and Protection of Established Position were paramount for this Parliamentary Committee. However, the Committee on Economic and Monetary Affairs tended to side with the Commission's deregulation approach and emphasised the importance of the Market-Functional pattern; it regretted 'rigid national employment protection laws'.[87]

The European Parliament endorsed an expansive conception of Just Distribution that encompassed relations between employers and workers, between workers in standard contracts and those in non-standard arrangements, and between women and men. It opposed the European Commission's call for indicators for 'strictness of employment protection', proposing instead a limited set of qualitative indicators on the quality of work.[88] It called for the extension of a core set of rights, including equal treatment, health and safety, freedom of association, collective bargaining, collective action, training and acquired rights, to all forms of contract, not just standard ones. It also advocated for protection against the recurring accumulation of atypical contracts.[89] Moreover, the Parliament expressed particular concern that the Commission was not sufficiently attentive to gender inequality, especially the unequal distribution of unpaid work.[90] It urged the Commission to promote gender equality, drawing attention to the lack of public child care facilities as a central problem for European workers.[91]

The division of opinion amongst the European institutions over the mix of different normative patterns reflects a division between the social partners. BusinessEurope promoted flexible labour law and a variety of employment contracts.[92] By contrast:

> the European Trade Union Congress identifie[d] the prevalence of precarious employment and excessive flexibility as key problems and puts forward the improvement of the quality of jobs as a key objective.[93]

On 14 December 2007, the European Council validated eight principles of flexicurity, and called on Member States to take these into account in drawing up and implementing 'national flexicurity pathways'.[94] Although the flexicurity principles endorsed by the Council were fairly similar to those proposed by the European Commission, there were some significant differences in emphasis. The Council

[86] Ibid, Motion, para 25.

[87] Ibid, Opinion of the Committee on Economic and Monetary Affairs (6 November 2007) for the Committee on Employment and Social Affairs, para 4.

[88] European Parliament Resolution of 29 November 2007 on common principles of flexicurity, 2007/2209(INI), para 11.

[89] Ibid 29.

[90] Ibid 45.

[91] Ibid par. 7.

[92] Keune, 'EU Enlargement and Social Standards', above n 13, 98.

[93] Ibid 98.

[94] Council of the European Union, Council Conclusions: Towards Common Principles of Flexicurity, adopted on 5/6 December 2007.

dropped the references to flexibility in dismissals contained in the Commission's initial principles,[95] and security was expanded to included stepping stones for those people 'at the margins of the labour market' to move into 'legally secure employment'.[96] At the Council's request, the Commission launched a 'Mission for Flexicurity', which aimed:

> to promote the implementation of flexicurity in different national contexts by raising the profile of the flexicurity approach and its common principles and by helping the relevant labour market actors to take ownership of the process.[97]

In 2009, the European Council adopted conclusions on 'flexicurity in times of crisis', which endorsed the flexicurity principles as key elements of Member State responses to the global crisis.[98] The Council emphasised that the 'commitment and active involvement of all stakeholders through social dialogue and collective bargaining is an essential prerequisite for an effective implementation of flexicurity principles'.[99] It also stressed the need to enhance and improve 'activation measures and providing adequate income support and access to quality services to people who are hit by the impacts of the crisis', although it took pains to note that social protection should be in line with 'the sustainability of public finances'.[100]

The following year, in its evaluation of the 2010 Lisbon Strategy, the European Commission identified the 'success of the Flexicurity concept' as representing 'the ability of Lisbon to stimulate and frame policy debates and generate mutually acceptable solutions'.[101] However, the problem was that Member States had not begun to fully implement the agenda. According to the Commission, most labour law reforms 'tended to focus on easing labour market regulation for new entrants to facilitate more contractual diversity', whereas what was needed was 'the reform of legislation on existing contracts'.[102] It emphasised reducing employment protection for existing employment contracts, and advocated 'ensuring transitions between types of contracts and opportunities to progress'.[103]

The Commission also identified shortcomings in the principal governance instruments of the revamped Lisbon governance structure that undermined their effectiveness in policy learning and implementation. The Integrated Guidelines and National Review Programmes were criticised as too broad and not sufficiently

[95] Ibid Principle 4, at 5. Contrast it with European Commission, Towards common principles of flexicurity, above n 36, Principle 5, at 9.

[96] Council Conclusions, above n 94, 5.

[97] Council Secretariat, *Report by the "Flexicurity" Mission*, 17047l1/08REV 1(en) (Brussels, 12 December 2008).

[98] Council of the European Union, Council Conclusions on Flexicurity in Times of Crisis, 294th Employment, Social Policy, Health and Consumer Affairs Council Meeting, Luxembourg, 8 June 2009.

[99] Ibid 3.

[100] Ibid 4.

[101] Lisbon Strategy Evaluation Document, Commission Staff Working Document, SEC(2010)114 final (Brussels, 2 February 2010) 3.

[102] Ibid 16.

[103] Ibid 16.

action-focused.[104] Country specific recommendations were too often vague and adopted a single-strand approach. The lack of a 'transparent and robust evaluation framework' undermined their acceptance in some Member States, where they 'remained low profile policy advice'.[105] Nor did the OMC escape criticism; according to the Report, 'evidence suggests that … most Member States have used the OMC as a reporting device rather than one of policy development'.[106] The problem was that these instruments were too soft.

E. Europe 2020

In March 2010, the European Commission issued a Communication that advocated replacing the failed Lisbon strategy with Europe 2020, which would become the key over-arching strategy for the European Union for the next 10-year period. The Europe 2020 strategy established a new governance process, the European Semester, which was designed to provide for stronger economic governance and coordination at the EU level. After the financial crisis, the goal was to give the Commission a greater role in guiding Member State budgets.[107] It also established three key priorities (smart growth, sustainable growth, inclusive growth), set five targets (including a 75 per cent employment rate), and provided for seven flagship programmes, including a Flagship Agenda for New Skills and Jobs.[108] Flexicurity is a centrepiece of this agenda, and the Commission stressed the importance of moving to the second phase of the flexicurity agenda, during which Member States are to 'implement their national pathways for flexicurity'.[109] The role of labour ministers in this agenda was also enhanced.[110]

The European Council endorsed Europe 2020, and in October adopted the Commission's guidelines for employment policies of the Member States.[111] Flexicurity is the key approach to achieving Guideline 7: 'Increasing labour market participation and reducing structural unemployment'.[112] The elaboration to the Guideline emphasised the need to combat 'segmentation, inactivity and gender inequality',[113] and Member States were called upon 'to step up social dialogue and tackle labour market segmentation with measures addressing precarious

[104] Ibid 20.
[105] Ibid 21.
[106] Ibid.
[107] Weishaupt and Lack, 'The European Employment Strategy', above n 48.
[108] Communication from the Commission, Europe 2020: A strategy for smart, sustainable and inclusive growth, COM(2010)2020 (Brussels, 3 March 2010) 16–17.
[109] Ibid 17.
[110] Weishaupt and Lack, 'The European Employment Strategy', above n 48.
[111] Council Decision of 21 October 2010 on guidelines for the employment policies of the Member States, 2010/707/EU [2010] OJ L308/46.
[112] Annex 7, 508/49.
[113] Ibid.

employment, underemployment and undeclared work'.[114] The Guideline stressed the quality of jobs and the need to provide social security for people on fixed-term contracts or self-employed. Work-life policies are coupled with affordable care and the reorganisation of paid work as a means of improving the employment rate of women.[115] This renewed emphasis on better job quality and working conditions is a prominent theme of the European Commission's Flagship Agenda for New Skills and Jobs.[116]

However, this emphasis on job quality and gender equality does not fit well with the Commission's technique for addressing labour market segmentation, which is to reduce:

> the existing divisions between those holding temporary and permanent contracts by extending the use of open-ended contractual arrangements, with a sufficiently long probation period and a gradual increase of protection rights.[117]

The stress on 'a sufficiently long probation' suggests that parity between workers employed on different types of contracts is likely to be achieved by reducing the protection associated with open-ended contracts.

IV. LABOUR LAW, LABOUR MARKET SEGMENTATION AND PRECARIOUS WORK

The European Parliament's concern with the relationship between atypical contracts and precarious employment, especially the precarious employment of women on very atypical contracts, helps to explain the emphasis on the quality of flexible forms of employment in Europe 2020.[118] In the Flagship Agenda for New Skills and Jobs, the European Commission agreed to the Parliament's request that it review the effectiveness of the EU Directives on part-time work and fixed-term contracts and their impact on female participation in employment and equal pay in 2012.[119]

In February 2010, the Parliamentary Committee on Employment and Social Affairs released a report on 'atypical contracts, secured professional paths, flexicurity and new forms of social dialogue'.[120] Its central theme was the need for protection of strong employment and labour rights and it called for solid labour laws for all kinds of employment based on a clear institutional framework. A key

[114] Ibid.
[115] Ibid.
[116] Communication from the Commission, An Agenda for new skills and jobs: a European contribution towards full employment, COM(2010)682 final (Strasbourg, 23 November 2010).
[117] Ibid 5.
[118] European Parliament Resolution of 19 October 2010 on precarious women workers, 2010/2018 (INI).
[119] Ibid 16.
[120] Committee on Employment and Social Affairs, *Atypical Contracts, Secured Professional Paths, Flexicurity and New Forms of Social Dialogue* [2011] OJ C351 E/06.

concern was that workers on very atypical contracts (those contracts that deviated the most from standard employment contracts) were falling between the cracks of labour law and social policy. Deploring the Council's and Commission's narrow approach to flexicurity, the Report called for security for flexible work in terms of job protection and rights.[121] In the explanatory statement, the rapporteur also suggested that there was:

> an important gender dimension to the debate on atypical work, as men are disproportionately represented in standard employment relationships and increasing numbers of women in the labour force work under atypical conditions.[122]

A month before the European Commission issued its Communication on the new skills and jobs agenda, the European Parliament adopted a resolution pointing out 'the gendered nature of precarious employment' and the need to ensure that non-standard work does not become precarious work.[123] It urged the Council and Commission 'to identify the characteristics of precarious employment in the guidelines of the Member States' employment policies and in the new gender equality strategy'.[124] The Parliament also expressed disappointment with the Directives on atypical work, and called upon the Commission and Members States to take further legislative measures 'introducing binding minimum social standards and granting all employees equal access to social services and benefits'.[125]

The Parliament's concern with atypical and precarious work was informed by mounting evidence that much of the non-standard and flexible work, such as part-time, fixed term and temporary agency work, promoted by EU institutions is precarious in that the resulting jobs are unstable, provide low wages and insecure income, and do not confer access to social protection.[126] While not all forms of employment that deviate from the standard employment relationship are precarious, there is a clear relationship between the form of the employment arrangement and the precarious nature of the job.[127] The 2006 *Green Paper on Modernizing Labour Law* noted that there was evidence of some detrimental effects associated

[121] Ibid para 46.

[122] Ibid 17.

[123] European Parliament Resolution, above n 118, which was forwarded to the European Commission, Council and Member States

[124] Ibid 2.

[125] Ibid 6.

[126] J Fudge and R Owens (eds), *Precarious Women, Work and the New Economy: the Challenge to Legal Norms* (Oxford, Hart, 2006); LF Vosko, M MacDonald and I Campbell (eds), *Gender and the Contours of Precarious Employment* (London, Routledge, 2009); Vosko, *Managing the Margins*, above n 18.

[127] Operationalising the concept of precariousness is difficult because of its multidimensional nature and different approaches use different indicators. See M Laparra, JC Barbier, I Darmon, C Frade, L Frey, R Lindley and K Vogler-Ludwig, *Managing Labour Market Risks in Europe: Policy Implications*, ESOPE Project, Fifth Framework Programme (DG Research, 2004); A Tangian, *Is Flexible Work Precarious? A Study Based on the 4th European Survey of Working Conditions 2005*, Diskussionpapier 153 (Düsseldorf, Hans Bokerler Stiftung, 2007) 37, available at www.boeckler.de/pdf/p_wsi_diskp_153_e.pdf.

with the increasing diversity of working arrangements, and identified the risk that part of the workforce could get 'trapped in a succession of short-term, low quality jobs with inadequate social protection leaving them in a vulnerable position'.[128] Exploratory analyses of the 2005 European survey of working conditions have concluded that the more flexible (or atypical) employment is, the more precarious it is.[129] In general, non-standard forms of employment tend to be associated with lower rates of pay and have lower social security coverage.[130] Moreover, women tend to be over-represented in precarious work.[131]

Instead of providing specific protections and benefits for workers on a full range of atypical contracts in order to combat precariousness, as was noted in the preceding section, the European Union's strategy has been to use the principles of non-discrimination and equal treatment to target specific forms of atypical work for regulation. However, atypical workers Directives, which include the Temporary Agency Work Directive 2008/104/EC that was adopted in 2008, apply these principles in a diluted form. Under the Part-time Work Directive and the Fixed-Term Work Directive a complaint of unfavourable treatment must relate solely to the nature of the contract. Thus, unlike the approach generally adopted in EU anti-discrimination legislation, only direct and not indirect discrimination is prohibited.[132] Moreover, these Directives also permit discrimination between standard workers, on the one hand, and part-time and fixed-term workers, on the other, if the grounds for the discriminatory treatment can be objectively justified.[133] For example, in defining what constitutes comparable full-time work under the Part-time Work Directive, 'due regard' may be given to 'other considerations which may include seniority and qualifications/skills'.[134] Since women's parenting responsibilities take a toll on their ability to accumulate seniority, and skill is gender-saturated and highly correlated with sex segregation and hierarchies that disadvantage women, these considerations are likely to make it difficult for part-time women workers to find comparable full-time workers.[135] The Part-time Work and Fixed-term Work Directives are an uneasy amalgam of a commitment to the principle of non-discrimination while simultaneously providing

[128] European Commission Green Paper, above n 55, 20.

[129] European Foundation for the Improvement of Living and Working Conditions, *Flexible Forms of Work: Very 'Atypical' Contractual Arrangements* (March 2010).

[130] Ibid.

[131] See references cited above n 126; Vosko, *Managing the Margins*, above n 18, 132, 144–46.

[132] Rönnmar, 'Flexicurity, Labour Law', above n 11, 170.

[133] Jeffery, 'Not Really Going to Work?', above n 24, 196; Vosko, *Managing the Margins*, above n 18, 136; A Numhauser-Henning, 'Fixed Term Work in Nordic Labour Law' (2002) 18(4) *International Journal of Comparative Labour Law and Industrial Relations* 429; Case C-586/10 *Kücük*, CJEU, Judgment of 26 January 2012.

[134] Jeffery, 'Not Really Going to Work?', above n 24, 196. However, as Bell, 'Between Flexicurity and Fundamental Social Rights, above n. 22, 39 notes, the CJEU has given a narrow interpretation to what constitutes an objective justification for discrimination.

[135] N Busby, *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford, Oxford University Press, 2011) ch 3.

employers with enough flexibility to 'maintain practices that disadvantage' atypical workers.[136]

Unlike the first two atypical work Directives, the 2008 Temporary Agency Work Directive does not adopt the language of non-discrimination, and instead uses the term 'equal treatment'.[137] While it is not clear how much turns on the specific terminology, the material scope of this Directive is much narrower than that of its predecessors. The Temporary Agency Work Directive restricts the principle of equal treatment to basic working and employment conditions, a restriction not found in the other atypical work Directives.[138] Moreover, it allows for collective agreements to depart from the principle of equal treatment so long as the overall protection of temporary agency workers is respected, whereas the two earlier Directives only permit more favourable provisions to be adopted by the social partners.[139] The Temporary Agency Work Directive also allows the social partners at the Member State level to include a qualifying period for equal treatment, subject to the caveat that the Member States take measures to prevent the misuse of such arrangements.[140] However, unlike the Fixed-term Work Directive there is no requirement for Member States to establish conditions under which the temporary agency work is to be transformed into an open-ended contract with the user.[141]

A major limitation of all the atypical work Directives is their limited material scope. None provide for non-discrimination (or equal treatment) when it comes to statutory social security entitlements. Member States are solely responsible for the provision of social security protection. Moreover, the Part-time Work Directive permits derogations from occupational-based social security when it comes to casual workers. The limited material scope of the Directives clearly illustrates the conflict between the two aims of improving security for workers and enhancing employers' flexibility.[142]

Even more fundamentally, it is not obvious that a non-discrimination approach, especially one that hinges on the principle of comparability, can ensure the quality of atypical jobs. The problem is that an atypical worker must find a comparator in an ongoing employment relationship in order to make a claim and the European Court of Justice has taken a very narrow and formal approach to the issue of comparators. In *Wippel*, the CJEU ruled that full-time workers who had fixed hours

[136] Bell, 'Between Flexicurity and Fundamental Social Rights', above n 22, 37.

[137] See Directive 2008/104/EC ('Temporary Agency Work Directive').

[138] However, as Bell, 'Between Flexicurity and Fundamental Social Rights, above n 22, 37 notes, this restriction in the material scope of the Temporary Agency Work Directive is balanced by the absence of the possibility of providing an objective justification for differences of treatment with respect to basic working conditions. He also shows how the CJEU has given a broad interpretation to the material scope of the Directive.

[139] Temporary Agency Work Directive, Art 5(3).

[140] Ibid Arts 5(4) and 45(5).

[141] Vosko, *Managing the Margins*, above n 18, 155.

[142] I Bleijenberg, J de Bruijn and J Bussemaker, 'European Social Citizenship and Gender: the Part-time Work Directive' (2004) 10 *European Journal of Industrial Relation* 319.

and who could not refuse work did not have the 'same type of contract' as a part-time worker who was employed in the same establishment on a casual (zero hour) basis and, as a result of this difference, they were not comparable workers.[143] The paradox of this approach is that the more precarious the worker's contract the less likely she is to be able to rely upon the Directives in order to improve her working and employment conditions.[144]

In many instances the comparability principle and non-discrimination approach makes little sense as a basis to improve or protect the quality of work of workers employed in atypical contracts. For example, fixed-term workers do not simply need permanent workers' benefits on a *pro rata temporis* basis; instead, what they need is:

> a fully-fledged scheme of portability of entitlements, which recognizes all relevant working experience (even if undertaken with different employers and with breaks in between) for the whole range of conditions of employment and employment rights governing the work in question.[145]

Modeling fixed-term work on permanent employment does not address the distinctive problems associated with fixed-term work.[146] Moreover, none of the atypical work Directives ensure that workers on contracts that deviate from the standard will earn a living wage. As Nicole Busby points out, 'in practical terms, the part-time worker who finds herself employed in a sector which is generally low paid has no redress as long as her pay is set at a similarly low rate as that of her full-time comparator'.[147] The need to find a comparator with a standard worker instead of providing substantive rights to workers in precarious employment arrangements means that the atypical work Directives do not directly address the problem of low quality, bad jobs.

The atypical work Directives are perfectly compatible with a hierarchy of employment protection that is linked to the form of the employment contract, which, in turn, reinforces labour market segmentation. The comparability standard ignores the possibility that the terms and conditions of the standard or norm (the full-time workers) upon which atypical workers' entitlement is based might be in decline. In the long run, parity can be achieved by harmonising wages and working conditions down.

The EU approach to regulating atypical work is premised upon a specific diagnosis of the cause of labour market segmentation in general and the gendered nature of that segmentation in particular. While the simple relationship between

[143] Case 313/02 *Nicole Wippel v Peek & Cloppenburg GmbH & Co. kG* [2004] ECR 1-09483. See the discussion in Rönnmar, 'Flexicurity, Labour Law and the Notion of Equal Treatment', above n 11, 171.

[144] D McCann, *Regulating Flexible Work* (Oxford, Oxford University Press, 2008) 178–80; Bell, 'Between Flexicurity and Fundamental Social Rights', above n 22, 41.

[145] Murray, 'Normalising Temporary Work', above n 25, 274.

[146] Vosko, *Managing the Margins*, above n 18, 152–56, makes similar arguments regarding the Temporary Agency Work Directive.

[147] Busby, *A Right to Care?*, above n 135, 122.

deregulation of labour markets and increased employment has been called into question, Jill Rubery notes that there is a twist to the argument about the disadvantages of labour market regulation that is accepted as conventional wisdom.[148] The twist she identifies is that regulation, especially employment protection legislation, 'while it may not harm the overall levels of employment, it may still harm employment prospects for disadvantaged social groups'.[149] From this flexibility-oriented perspective, labour market deregulation is seen as contributing to gender equality.

The emphasis on labour law as creating labour market segmentation is a prominent theme in the European Union's flexicurity agenda. While the Commission assumes strict employment legislation to have limited effects on total unemployment, it claims that such legislation:

> can have a negative impact on groups that are most likely to face problems of entry into the labour market, such as young people, women, older workers and the long-term unemployed.[150]

In respect to the causes of labour market segmentation, the flexicurity agenda is indistinguishable from a flexibility agenda for labour law. Flexicurity shares another distinctive feature of the 'labour market flexibility debate', which is, according to Rubery, that it considers inequalities to be the product of workers-workers conflicts rather than capital-labour conflicts'.[151]

The problem with this approach to the causes of labour market segmentation is that it is simplistic and it ignores other contributing factors. Labour market segmentation literature and feminist history suggest that divisions in the labour force and labour market segmentation emerge out of struggles between labour and capital. Although it is possible that employment segmentation and gender divisions are an 'outcome, intended or unintended, of employment regulation', their origins are 'found in efforts to regulate an exploitative labour market'.[152] From this perspective, the solution is not to abolish employment regulation in order to combat gender segmentation, but instead to consider what types of regulations and institutions are the most effective at cultivating equality within the labour market. According to Rubery:

> regulation may act to intensify insider/outsider divisions but forms of regulation can equally be used to create more inclusive labour markets by extending the scope of protection to job sectors such as service sectors or to nonstandard contracts where women may be overrepresented.[153]

[148] J Rubery, 'Towards a Gendering of the Labour Market Regulation Debate' (2011) 35 *Cambridge Journal of Economics* 1104.
[149] Ibid.
[150] European Commission, Towards common principles for flexicurity, above n 36, 6.
[151] Rubery, 'Towards a Gendering of the Labour Market Regulation Debate', above n 148.
[152] Ibid 1121.
[153] Ibid 1105.

The labour law pathway of the flexicurity agenda tends to ignore the demand side and 'systemic and structural blockages to equal opportunities, whether due to direct discrimination or to the working of indirect mechanisms'.[154] While the flexicurity agenda endorses the principle of equality between men and women and the European Union is committed to equal pay,[155] very few of the Commission's flexicurity policy documents deal with the structural barriers confronted by women—their responsibility for unpaid care work—that make them flexible workers.[156] The Part-Time Work Directive, for example:

> guarantees equal access to the European labour market for workers with care-giving tasks, without, however, guaranteeing them a minimum of social welfare. Thus, the EU recognizes workers' need to combine a job with domestic responsibilities, but leaves the financial and practical consequences of the combination to the individual.[157]

The failure to integrate the labour law pathway of the flexicurity agenda within a broad family policy agenda means that the unequal division of socially necessary, but unpaid, care and provisioning work is ignored. The problem is that women's traditional and continuing disproportionate responsibility for unpaid care work not only creates a barrier to women's employment, it also reinforces gender stereotypes when it comes to women's occupations and careers, which, in turn, undermine women's economic and employment equality.[158] The flexicurity agenda does not address this vicious circle because it does not challenge the unequal and gendered division of responsibility for care work.

V. CONCLUSION

Different normative patterns compete for dominance in the flexicurity agenda. Flexicurity has a deep affinity with the Market-Functional pattern since promoting flexible and well-functioning labour markets is the policy agenda's fundamental objective. As Ann Numhauser-Henning explains, demands for 'flexibility and market adjustment' have entailed:

> an increase in part-time work, fixed-term work and temporary agency work and other unstable employment relationships—and a decrease in the group of workers offered permanent, relatively secure, traditional employment. These developments impose strains on labour law, in that they engender demands for the deregulation of traditional

[154] J Jenson, 'Writing Women Out, Folding Gender In: the European Union "Modernises" Social Policy' (2008) 15 *Social Politics* 149.

[155] European Commission, Towards common principles for flexicurity, above n 36, 9.

[156] Lewis and Plomien, '"Flexicurity" as a Policy Strategy', above n 72, 453; Busby, *A Right to Care?*, above n 135.

[157] I Bleijenberg, J de Bruijn and J Bussemaker, 'European Social Citizenship and Gender', above n 142, 324.

[158] Åsa Löfström, 'Gender Equality, Economic Growth and Employment', available at www.se2009.eu/polopoly_fs/1.17994!menu/standard/file/EUstudie_sidvis.pdf.

> employment protection, and for conditions conducive to more flexible modes of employment—more lately expressed in the EU flexicurity strategy.[159]

Nonetheless, Just Distribution is a strong competing norm since it is flexicurity's commitment to social protection that distinguishes it as a policy agenda from flexibility, which focuses exclusively on the market as the only legitimate norm of distribution.

However, while Just Distribution is still a vibrant normative pattern, it no longer means what it did under the welfare state. Instead of being simply defined as worker protection, today social justice is defined as 'employability'. This change in the pattern of Just Distribution also reflects a shift in the source of conflict that labour law is designed to mediate. Under flexicurity, the key concern of labour law is to address labour market segmentation. Labour market segmentation, and not the inequality of power between employers and workers, is seen as the key distributive conflict under the flexicurity agenda. The emphasis on flexible contract arrangements is part of the Market-Functional pattern, and it tends to go hand in hand with policies aimed at deregulating the labour market and reducing worker protection. It also minimises the commitment to the Protection of Established Position.

There is, however, a countervailing, albeit weaker, normative pattern of Just Distribution regarding atypical employment contracts, which emphasises social protection and equality. This pattern would reduce the asymmetry between standard employment relationships and non-standard employment relationships by integrating the latter more fully into labour law, collective agreements, social security and lifelong learning.[160] The priority given to good quality jobs in the European Commission's Flagship Agenda on New Skill and Jobs also reinforces an interpretation of Just Distribution that emphasises social protection and equality.

A structuralist analysis helps to explain the bias in the flexicurity agenda towards the normative pattern of market flexibility and away from that of social protection and equality. 'In the context of the "flexicurity" debate', Samantha Velluti reports 'national governments have used the OMC in a rather unbalanced way favouring flexibility measures to the disadvantage of the security of the workers'.[161] The broader context of economic integration and monetary union, especially the economic guidelines and the Stability and Growth Pact, place limits on the extent to which Member States can finance modern social security, lifelong learning and child care. The CJEU has also demonstrated a 'deregulatory bias' regarding labour law in its 'emerging free movement jurisprudence'.[162] Although the case law from the Court interpreting the atypical work Directives opens the

[159] Numhauser-Henning, 'Introduction', above n 3, 16.

[160] European Expert Group Report, above n 64, 23.

[161] Velluti, *New Governance and the European Employment Strategy*, above n 40, 236; Rogowski, 'Governance of the European Social Model', above n 74, 41 also notes that the Barroso Commission has tended to downplay social protection in its conception of flexicurity.

[162] Deakin and Rogowski, 'Reflexive Labour Law', above n 14, 25.

door to a reading that is consonant with fundamental social rights and not simply flexibility, this opening has been very narrow.[163] The accession of Member States with wages, costs and social entitlements that were not aligned with those of existing members contributes to creating the conditions for a race to the bottom for wages and labour standards.[164] The financial crisis and the European Union's governance reforms (the Euro Pact Plus) have tipped the balance in Europe further towards downward harmonisation and towards deregulation of employment protection.[165] The tilt in the OMC process to national civil servants and away from national Parliaments is also a factor contributing to the dominance of the market-functioning discourse.[166]

In this political and economic climate it is unlikely that Member States will be willing to experiment by implementing employment laws and policies designed to improve the quality of atypical work. This is not to claim that there is an inherent economic or political logic to the flexicurity agenda and the OMC; the mechanism of soft law or selective coordination could promote social protection and solidarity. Instead, the claim is that the OMC does not promote social protection and solidarity because the process is embedded in a specific economic agenda that emphasises deregulation and a governance structure at the European Union that provides limited protection for social rights from downward harmonisation.

It is an open question the extent to, and ways in, which the European Union's flexicurity policy agenda will influence labour laws in Member States. Part-time, fixed-term and other forms of non-standard work on the margins of the labour market have the potential to operate as bridges into the labour market and facilitate labour market participation. However, they can also function as traps that confine their incumbents to precarious work. It all depends upon the broader institutional and political structure in which flexicurity policies are embedded, and the willingness of Member States to tackle the gendered division of domestic labour. The challenge for labour law is to develop a new standard employment contract, with new social rights and social obligations, and not simply to adapt atypical work arrangements to the old model.[167]

[163] Bell, 'Between Flexicurity and Fundamental Social Rights', above n 22, 47. However, contrast the Rönnmar, 'Flexicurity, Labour Law and the Notion of Equal Treatment', above n 11, 171 and Busby, *A Right to Care?*, above n 135, 121.

[164] C Woolfson, *Precarious Work, Regulation, and Labour Standards in Times of Crisis*, Themes on Migration and Ethnic Studies 34 (REMESO, Institute for Research on Migration, Ethnicity and Society, 2010).

[165] C Barnard, 'The Financial Crisis and the Euro Plus Pact: a Labour Lawyer's Perspective' (2012) 41 *Industrial Law Journal* 98.

[166] Velluti, *New Governance and the European Employment Strategy*, above n 40, 237 and Sciarra, *Is Flexicurity a European Policy?*, above n 27, 2.

[167] G Schmid, 'Non-standard Employment in Europe: Its Development and Consequences for the European Employment Strategy' (2011) 7 *German Policy Studies* 203.