

Flexibilization of Work: Leave it, Love it, Change it

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FLEXIBILIZATION OF WORK: LEAVE IT, LOVE IT, CHANGE IT

1 Introduction

Current developments in the world of work seem to imply that flexible work relationships are inexorably on the rise. Digitalization and new technologies have led to an increasingly diverse landscape of work forms, questioning the role, and in particular the scope, of labour laws in protecting ‘new’ workers.¹ This contribution rests on the belief that the ongoing flexibilization of work is an irreversible fact, one that has to be addressed properly. This is even more so with a view to the criticisms that have been voiced about flexibilization trends and their (often detrimental) consequences for some (groups of) workers. That flexibilization may indeed have negative effects has been acknowledged by the EU. While explicitly emphasizing that flexible labour markets facilitate ‘employment creation’, the Annual Growth Survey 2016 also stresses that this should ‘enable transitions towards more permanent contracts’ and ‘not result in more precarious jobs’.² It is this statement that has prompted this contribution’s particular focus.

The specific concern of this contribution is to explore the EU’s emphasis on permanent employment contracts and the concomitant stimulation to create jobs via new technologies and business models, often involving (new) flexible forms of work. It is therefore apposite to address the question whether resorting to ‘old securities’ in the form of (seemingly well-protected) permanent employment would be counterproductive given the current developments in the world of work – which seem to point towards even more flexibility. Drawing on recent amendments in Dutch labour law, I aim to illustrate that the government’s efforts to limit, in particular, the use of fixed-term employment contracts, and thereby trying to encourage transitions to permanent employment, have been quite unsuccessful. It seems that employers still do –

¹ I will refer to labour law as meaning the body of law that is concerned with the employment relationship.

² Commission, ‘Annual Growth Survey 2016: Strengthening the recovery and fostering convergence’, COM(2015) 690 final, 12.

perhaps even more than before – resort to temporary contracts, but then with new workers, or re-hiring former workers after a waiting period, or making use of other forms of flexible work, e.g. self-employment. It is suggested that reverting to ‘old securities’, that is permanent employment, tends to increase the number of employers ‘evading’ protective labour law by relying (even more) on flexible work relationships.

This contribution will proceed as follows. I start by providing a brief overview of the flexibility/security debate at the EU level and the recent emphasis on facilitating more (transitions to) permanent employment (Section 2). As a similar ‘reversing’ trend can be observed in the Netherlands, the adjustments introduced in 2015 to limit (the use of) fixed-term contracts aims to play an exemplifying role in demonstrating that it is likely that the EU’s aspirations will not materialize (Section 3). Drawing on a range of analytical and critical concepts found in the literature is helpful to identify some challenges that need to be addressed in relation to flexible work relationships (Section 4), but also to discuss the complexity involved in trying to find ‘new securities’ that could benefit not only employers and the state, but workers as well (Section 5). This contribution should be viewed only as a modest attempt to grasp the complexity of the flexibilization of work and to disclose some of its challenges, thereby explicitly encouraging future discussions.

2 EU policies and laws on flexibility and security: Current trends

In kicking off the 2016 European Semester, the Annual Growth Survey (AGS) with the title ‘Fostering employment and inclusive social policies’ sets out an ambitious agenda.³ Quite a few issues are addressed, ranging from job creation, achieving both flexibility and security through comprehensive reforms while tackling labour market segmentation, combating (long-term) unemployment, and increasing labour market participation in line with the Europe 2020 strategy. Of particular concern, it seems, is the emphasis on stable and predictable work relationships, notably more permanent types of contracts, as these would induce employers and employees to invest more in skills and lifelong learning. Individuals should be allowed to plan for their future based on sustainable prospects of career and earnings progression. ‘In recent years’, the Commission further stresses, ‘the increase in overall

³ COM(2015) 690 final (n 2) 10–12. Accompanied by: Commission, ‘Draft Joint Employment Report accompanying the Communication from the Commission on the Annual Growth Survey 2016’, COM(2015) 700 final.

employment has been driven mainly by an increase in temporary contracts which is not unusual in the early stages of a recovery'. However, the Commission continues, the more general move towards more flexible labour markets should facilitate not only employment creation but also enable transitions (between different jobs and occupations) towards more permanent contracts while not resulting in more precarious jobs.⁴ Permanent employment has long been promoted as 'the general' form of employment.⁵ At the same time, long-term unemployment is said to be one of the factors linked to an increase in poverty and social exclusion. Furthermore, the AGS highlights that in relation to the product and service markets and the business environment, 'the deployment of new technologies and business models can open up additional sources of growth and lead to significant job creation'. For this to work, Member States should ensure 'an appropriate and accommodating business and regulatory environment'.⁶

At the EU level, flexibility is promoted as a means to increase labour market participation for achieving 'inclusive growth', an explicit aim of the Europe 2020 Strategy.⁷ Here, the EU's flexicurity agenda plays an important role in the EU's agenda, due to the challenges and opportunities triggered by globalization.⁸ The four flexicurity components are: flexible and reliable contractual arrangements; comprehensive lifelong learning strategies; effective active labour market policies; and modern social security systems. Pre-crisis, the 2006 Green Paper emphasized that the flexicurity agenda should advance a labour market which is fairer, more responsive and more inclusive, contributing to the competitiveness of Europe.⁹ Flexicurity aims to combine 'job security' with 'employment security'. But, as Rodgers underlines, the type of security proposed by the flexicurity strategy is different from the type of security that

⁴ COM(2015) 690 final (n 2) 11–12. Similarly, the Commission in the context of the European Social Pillar notes that 'A wide gap is hindering the conversion of temporary into permanent contracts, perpetuating the segmentation of labour markets'. Commission, 'Key economic, employment and social trends behind a European Pillar of Social Rights', SWD(2016) 51 final, 30. See also: Commission, 'Towards Common Principles of Flexicurity: More and better jobs through flexibility and security' (Communication) COM(2007) 359 final, 13.

⁵ See e.g. Directive 2008/104/EC on temporary agency work [2008] OJ L327/9; and Directive 1999/70/EC concerning the framework agreement on fixed-term work [1999] OJ L175/43.

⁶ COM(2015) 690 final (n 2) 13.

⁷ Commission, 'Europe 2020: A strategy for smart, sustainable and inclusive growth', COM(2010) 2020 final. Accordingly, the overall labour participation of men and women aged 20–64 should increase to 75%.

⁸ A Sanders, 'The changing face of "flexicurity" in times of austerity?' in N Countouris and M Freedland (eds), *Resocialising Europe in a time of crisis* (Cambridge, CUP 2013) 318.

⁹ Commission, 'Modernising labour law to meet the challenge of the 21st century' (Communication) COM(2006) 708 final, 4.

labour law attempts to realize – that is, employment security rather than job security.¹⁰ Flexicurity policies have budgetary costs and should be pursued with a view to contributing to sound and financially sustainable budgetary policies.¹¹

Complementary to the flexicurity strategy are the directives on part-time, fixed-term and temporary agency work (adopted in line with the EU's flexicurity policy¹²). Davies notes that in trying to 'normalize' non-permanent work, the directives are based on three 'questionable' assumptions:¹³ (1) part-time, fixed-term and temporary agency work are beneficial to the worker, (2) these work forms act as stepping stones, and (3) the main problem is unequal treatment of non-permanent workers compared with standard workers. The 'benefits argument' tends to refer to working-hours flexibility rather than the duration of stability of the work relationship. While probably benefiting part-time workers, this might not be the case for fixed-term and temporary agency workers, whose work periods are frequently and repetitively interrupted. The Commission uses the 'stepping stones' argument to support the idea that the directives are 'inclusive' instruments for those who experience difficulty in finding work or gaining access to the labour market. Non-standard work might then be used to lead – at least this is hoped for – to the sort of standard employment relationship which most people (still) seem to want. Finally, the 'unequal treatment argument' emphasizes equal treatment in terms of working and employment conditions such as wage, health and safety, and working time. A worker having a fixed-term or temporary agency work contract may still experience disadvantages because of unstable employment. Moreover, equal treatment helps only when there are two people in a comparable situation. Davies' analysis shows that the various forms of flexible work and their potential (dis)advantages should be viewed in a nuanced way and without adopting a (generalized) one-size-fits-all approach.

¹⁰ L Rodgers, 'Labour Law and Employment Policy in the EU: Conflict or Consensus?' (2011) 27 *IJCLIR* 387, 398.

¹¹ COM(2007) 359 final (n 4) 9.

¹² See on this e.g. M Rönmar, 'Flexicurity, Labour Law and the Notion of Equal Treatment' in M Rönmar (ed.), *Labour Law, Fundamental Rights and Social Europe* (Oxford, Hart 2011).

¹³ A Davies, 'Regulating atypical work: beyond equality' in N Countouris and M Freedland (eds), *Resocialising Europe in a time of crisis* (Cambridge, CUP 2013) 230–246.

3 A government's attempt to limit fixed-term employment

'Flexwork' in the Netherlands, and certainly also elsewhere, is said to have become the norm by now.¹⁴ It cannot be said *a priori* whether the shift from permanent to more flexible employment is a development that should be welcomed, or dismissed as being undesirable. In an attempt to properly deal with flexibilization tendencies, the Dutch government proposed a legislative bill in November 2013, adopted in June 2014 as Work and Security Act.¹⁵ In principle, as a means of enhancing the functioning of the labour market, the Work and Security Act addresses three issues: (1) increasing the protection of flexible staff, (2) diminish dismissal protection, and (3) modernizing the unemployment benefit scheme.¹⁶ The Economic Developments and Outlook issued by the Dutch Central Bank, serves as a main source of inspiration for these reforms. It follows from the June 2016 Outlook that employment growth has been mainly driven by an increase in flexible jobs.¹⁷ Approximately 26.1 per cent of the labour force is in flexible work (10 per cent self-employed¹⁸, more than 8 per cent fixed-term employed, 3 per cent employed with a temporary-work agency, and 5 per cent on-call).¹⁹ The growth of the – improper – use of flexible forms of work, resulting in a decreasing number of permanent employment relationships, has been the reason for the changes.

To strengthen the position of flexible staff, the government emphasizes that flexibility and security should be better or re-balanced, by limiting the use of successive fixed-term employment contracts and capping the maximum duration, facilitating faster conversion into a permanent contract.²⁰ Therefore, the rule that three contracts in three years with no more than three months in between successive contracts results in a conversion has been replaced by the 3x2x6-rule, allowing – with effect as of 1 July 2014 – three fixed-term

¹⁴ Financieel Dagblad, 'Politiek schiet tekort over arbeidsmarkt' (1 February 2016) <<http://fd.nl/economie-politiek/1137739/politiek-schiet-tekort-over-arbeidsmarkt>> accessed 6 July 2016.

¹⁵ *Kamerstukken II* 2013/14, 33 818, nr. 3, 2.

¹⁶ The Work and Security Act is largely based on the Social Pact, an agreement between the government and the social partners, published on 11 April 2013. Stichting van de Arbeid, *Perspectief voor een sociaal én ondernemend land: uit de crisis, met goed werk, op weg naar 2020 Verantwoordelijkheid nemen én dragen, kansen creëren én benutten* (11 April 2013).

¹⁷ De Nederlandsche Bank, *Economic Developments and Outlook* (June 2016, number 11) 12–13.

¹⁸ Although recent legislative changes indicate that the number of self-employed is declining. See e.g. Financieel Dagblad, 'Nieuwe wet remt aantal zzp'ers' 4 July 2016 <<http://fd.nl/economie-politiek/1158788/zzp-er-voldoet-niet-aan-nieuwe-wet>> accessed 6 July 2016.

¹⁹ *Kamerstukken II* 2013/14, 33 818, nr. 3, 9. See also CBS, 'Flexwerker houdt vaker werk' (17 May 2016) <<https://www.cbs.nl/nl-nl/nieuws/2016/20/flexwerker-houdt-vaker-werk>> accessed 6 July 2016.

²⁰ *Kamerstukken II* 2013/14, 33 818, nr. 3, 4–5.

employment contracts within two years with in-between periods of no longer than six months, after which conversion into a permanent employment contract should take place.²¹ A loophole exists through collective agreements that may allow a more favourable application of fixed-term employment contracts, just as for temporary agency work or if required by the nature of the work (e.g. the production process or project-financed work, as is the case in media, cultural and academic sectors).

This change has been accompanied by a revision of the dismissal law protection. Essentially, the changes aim to make dismissal simpler, faster, fairer and less costly for employers and more focused on former employees finding a new job.²² As a result, with effect as of 1 July 2015, the dismissal law grants workers the right to a transitional allowance when dismissed, aimed at making so-called work-to-work transitions easier.²³ Notably, the maximum allowance is 76,000 EUR and is to be paid only if the employee, regardless the type of employment contract, has worked at least two years for the employer. Employers may reduce the amount upon demonstrating that they have invested in the employability of the affected employees. Although the transitional allowance ought to enable employees to make successful from-work-to-work transitions, they are free to decide how to spend the amount.

Another relevant aspect is the adjustment of the unemployment benefit scheme as of 1 July 2015. Accordingly, the definition of 'suitable work' has been refined, now determining that after a person has spent six months on unemployment benefits, any job is regarded as suitable. In addition, the maximum duration for which unemployment benefits are paid has been reduced from 36 months to 24 months as of 1 January 2016. After reaching the maximum benefit period, those who are still without work need to rely on social welfare benefits, which is 70 per cent of the statutory minimum wage for single-person households and 100 per cent for families/couples living together.²⁴ It is assumed that unemployed persons will avoid the (further) income loss by accepting a job before the end of the maximum unemployment benefit period, thereby preventing the need for social assistance. That is partly mitigated by the Act on Income Provisions for Older Unemployed, according to which workers aged 60 years or over and who have become unemployed between 1 October 2006 and 1 January 2020 benefit from a special transitional unemployment scheme. Those eligible for this particular regime continue to

²¹ Article 7:668a Civil Code.

²² *Kamerstukken II* 2013/14, 33 818, nr. 3, 5.

²³ *Kamerstukken II* 2013/14, 33 818, nr. 3, 40. See Article 7:673(2) Civil Code.

²⁴ The statutory minimum wage as of July 2016 is 1,537.20 EUR per month.

receive an unemployment benefit amounting to 70 per cent of the statutory minimum wage.

Notwithstanding the relative newness of the legislative changes, the first impressions with regard to their result have been rather disappointing. Why is that? The 1998/99 Flexibility and Security Act – the predecessor of the Work and Security Act – paved the way for increased flexibilization by trying to equalize (or normalize) temporary agency work, part-time work, and fixed-term work with full-time permanent employment. In doing so, it appears that the legislation has gone too far. Consequently, introducing the Work and Security Act as a repair measure, the government was convinced that workers would indeed be offered a permanent contract after the maximum duration and the maximum number of contracts were exhausted. One may wonder whether the government did not seriously take into account that the opposite effect would perhaps occur – namely that employers abandon their temporary workers after the legal possibilities for fixed-term work have been exhausted. That means there are workers moving from job to job, possibly with in-between periods of unemployment. Although overall unemployment has decreased, the increasing number of long-term unemployed (that is, longer than one year) has been quite worrisome.²⁵ Unemployment, and even more so long-term unemployment, poses a challenge to the sustainability of the social security and the pension systems, and thus to Article 126 TFEU which states that ‘Member States shall avoid excessive government deficits’. It is remarkable that long-term unemployment has increased dramatically among the people aged 45 years or older.²⁶

At the same time, however, it can be observed that the new dismissal law protection – aimed at making dismissals *inter alia* simpler and less costly – does not work either, as judges seem to apply the tests for dismissal more strictly than before. Consequently, judges seem to rule far more often that a dismissal is unjustified.²⁷ This observation is important as it appears to suggest that employers will resort to flexible forms of work on an even broader scale. Consequently, the package deal – increasing protection for fixed-term workers and simplifying dismissal protection for permanent contracts – seems to have

²⁵ Long-term unemployment is of particular concern at the EU level: e.g. European Commission, ‘New pathways for the long-term unemployed’ (7 December 2015) <<http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=2409&furtherNews=yes>> accessed 6 July 2016.

²⁶ See, on this, M Kullmann, ‘Unused Potential? The Risk of Unemployed “Older” Workers’ (2016) 7 ELLJ.

²⁷ Financieel Dagblad, ‘Werknemer ontslaan is moeilijker geworden’ (25 November 2015) <<http://fd.nl/economie-politiek/1128662/werknemer-ontslaan-is-moeilijker-geworden>> accessed 6 July 2016.

failed to live up to its promises. It seems to me that the provision on fixed-term work induces a kind of policy resistance by some employers, who fear that since 1 July 2015, with the new dismissal law and when a worker's last employment contract is to be converted into a permanent one, it is becoming ever more difficult to dismiss employees.²⁸

4 Theorizing the flexibilization of work: Depicting the challenges

The underlying tenor of the current EU policy appears to assume that encouraging more permanent employment contracts could – more or less easily – coalesce with new technologies and business models often calling for flexible staff – the very developments that lead scholars to question the role and the scope of labour.²⁹ Why then does the EU want to encourage more (transitions into) permanent employment? Possible reasons for such a move can be found the AGS itself: reducing (long-term) unemployment and poverty, combating labour market segmentation, investment in skills and training, preventing precariousness and social exclusion, creating stable and predictably work relations, and employment creation. These reasons portray, at the same time, the existing challenges of flexible work relations that I aim to address in this section.

Combating labour market segmentation is one problem associated with flexible work and has been an integral part of the EU's flexicurity agenda, which viewed flexibility and security not as trade-offs but as complements.³⁰ Segmentation can have different meanings. According to Deakin, 'segmentation occurs when the labour market is divided or structured in a way which is reflected in the forms taken by the employment relationship or contract'. While this is a relatively neutral statement, Deakin continues by stating that in the case of industrialized economies, it may refer to the division between core and atypical employment.³¹ Segmentation, in the way Freedland describes

²⁸ Financieel Dagblad, 'Werknemer ontslaan is moeilijker geworden' (25 November 2015) <<http://fd.nl/economie-politiek/1128662/werknemer-ontslaan-is-moeilijker-geworden>>. See also: AR Houweling, MJMT Keulaerds and P Kruit, *VAAAN-VuA Evaluatieonderzoek WWZ 2016* (Den Haag, Boom juridisch 2016).

²⁹ See e.g. V De Stefano, 'Introduction: Crowdsourcing, the Gig-Economy and the Law' (2016) 37 *Comp. Labor Law & Pol'y Journal* 1.

³⁰ J Fudge, 'Flexicurity and Labour Law: Labour Market Segmentation, Precarious Work and Just Distribution' in A Numhauser-Henning and M Rönningmar (eds), *Normative Patterns and Legal Developments in the Social Dimension of the EU* (Oxford, Hart 2013) 219.

³¹ S Deakin, 'Addressing labour market segmentation: The role of labour law' (October 2013) ILO Working Paper No. 52, 1.

it, may also refer to situations in which rights or protections are conferred upon one group of workers while excluding another.³² As De Stefano argues, the EU seems to adopt a particular explanation for labour market segmentation, namely as being a matter of ‘dualism’ concerning a ‘two-tier’ labour market with insiders (those benefiting from employment protection) and outsiders (those benefiting from less employment protection).³³ The EU’s mainstream, or rather black-and-white, narrative seems to emphasize that overly protective ‘typical’ permanent employment contracts deter employers from hiring, thus inducing Member States to alter their standard contractual models to make them more flexible.³⁴ In this view, it is the legal regulation of the standard employment contract that is the main – or at least the most important – cause for segmentation.³⁵ De Stefano has a point that this line of reasoning likely ignores that ‘entrepreneurial strategies aimed at curbing production costs and making business organisations leaner’ might be a cause for segmentation.³⁶ While segmentation as such must not necessarily be problematic – it may perfectly mirror the diversity needed by the (participants in the) labour market – it may become a problem, as Deakin emphasizes, if it results in inequality and discrimination.³⁷

In characterizing the variety of flexible forms of work and their regulation, Albin and Prassl use the notion ‘fragmentation’.³⁸ Fragmentation, they suggest, has been mainly the result of agendas of flexibility and globalization, union power decline and the rise of individualistic ideologies.³⁹ An important observation these authors make – particularly with a view to the UK – is that there is a ‘mismatch between the conceptualization and the shaping of the

³² M Freedland, ‘The Segmentation of Workers’ Rights and the Legal Analysis of Personal Work Relations: Redefining a Problem’ (2015) 36 *Comp. Labor Law & Pol’y Journal* 240, 245.

³³ V De Stefano, ‘A Tale of Oversimplification and Deregulation: The Mainstream Approach to Labour Market Segmentation and Recent Responses to the Crisis in European Countries’ (2014) 43 *ILJ* 253, 258.

³⁴ See *ibid.* It seems to be a ‘conventional wisdom across the political spectrum, [...] that legal and other regulations cause “rigidities” in the market’. S Deakin and H Reed, ‘The contested meaning of labour market flexibility: economic theory and the discourse of European integration’ (2000) ESRC Centre for Business Research, University of Cambridge Working Paper No. 162, 7.

³⁵ Fudge, ‘Flexicurity and Labour Law’ (n 30) 220.

³⁶ De Stefano, ‘A Tale of Oversimplification and Deregulation’ (n 33) 276. See also: Fudge, ‘Flexicurity and Labour Law’ (n 30) 232.

³⁷ Deakin, ‘Addressing labour market segmentation’ (n 31) 1. With a view to inequality, it might be useful to consider how regulations and institutions could cultivate equality within the labour market. Fudge, ‘Flexicurity and Labour Law’ (n 30) 232.

³⁸ E Albin and J Prassl, ‘Fragmenting Work, Fragmented Regulation: The Contract of Employment as a Driver of Social Exclusion’ in M Freedland (ed), *The Contract of Employment* (Oxford, OUP 2016) 209–230.

³⁹ *Ibid.* 210.

contract of employment', leading to a full or partial exclusion of workers from the scope of labour law; they emphasize that 'the legal situation does not suit reality'.⁴⁰ The downside of such fragmentation is that using the criteria applied to the standard employment contract to assess whether or not a relationship is covered may result in social exclusion⁴¹ – an unwanted effected targeting by an explicit goal of EU policy.⁴²

Fragmentation of flexible work regulation and practice may produce precarious situations. Precariousness is a label often attached to flexible work relations, thereby framing the standard employment relationship 'as the logical solution' that can overcome precarious situations.⁴³ It is moreover 'associated with the new economy and with the changes it has brought to the labour market'.⁴⁴ To analyse the concept of precarious work, Kountouris developed a legal conceptual framework.⁴⁵ Importantly, and quite fitting for the underlying purpose, Kountouris suggests that precariousness is not necessarily a feature of atypical work (anymore). Drawing on the work of Rodgers, Kountouris favours a broad definition of precariousness, entailing that one should look at a range of factors according to which particular forms of employment expose workers to 'employment instability, a lack of legal and union protection, and social and economic vulnerability'.⁴⁶ Following the flexicurity agenda, the EU's aim is to take away some protection vested within the standard employment relationship – the supposed evildoer of segmentation – thus alleviating the

⁴⁰ The main problem of labour law, Davidov argues, is the 'mismatch between goals and means'. There are two manifestations of this: first, labour law's coverage, and second, that labour laws have not been sufficiently updated and have thus become largely irrelevant in addressing the workers' current problems (also referred to as 'obsolescence'). G Davidov, *A Purposive Approach to Labour Law* (Oxford, OUP 2016) 2–3.

⁴¹ Social exclusion may result in exclusion: (1) from basic labour rights, (2) from the idea of industrial citizenship, and (3) resulting in the deprivation of capabilities. Albin and Prassl, 'Fragmenting Work' (n 38) 216–218.

⁴² According to Article 9 TFEU, the fight against social exclusion is an explicit EU goal. As argued by Collins, social inclusion, the positive counterpart of social exclusion, 'is committed to the achievement of outcomes, not just life-chances'. H Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 *MLR* 16, 23.

⁴³ LF Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford, OUP 2009) 1–2, defining 'precarious employment as work for remuneration characterized by uncertainty, with low income, and limited social benefits and statutory entitlements'.

⁴⁴ E Albin, 'Introduction: Precarious Work and Human Rights' (2012) 34 *Comp. Labor Law & Pol'y Journal* 1, 4.

⁴⁵ N Kountouris, 'The Legal Determinants of Precariousness in Personal Work Relations: A European Perspective' (2012) 34 *Comp. Labor Law & Pol'y Journal* 21.

⁴⁶ *Ibid* 24, quoting G Rodgers, 'Precarious Work in Western Europe: The State of the Debate' in G Rodgers and J Rodgers (eds), *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (Geneva, ILO 1989) 1.

precariousness of the growing numbers of atypical work relations – that is, by levelling down the protective framework for permanent workers while simultaneously levelling up the protection of non-permanent workers. In fact, what this strategy seeks to do is limit the number of employers resorting to atypical and precarious work contracts or arrangements.⁴⁷ Precariousness from an EU understanding, as expressed in the 2016 AGS, seems to refer to unstable and unpredictable work relationships, partly as a result of underinvestment (or even non-investment) in skills and lifelong learning of workers. If Kountouris is right in stating that permanent workers might also find themselves in a precarious situation, then using ‘standard’ work, by reference to the notion of ‘equal treatment’, as a benchmark may no longer be useful for shaping the regulation of nonstandard work.⁴⁸ Therefore, it cannot be said with certainty that just because a worker has a permanent contract, the employer, for instance, will invest more in the worker’s ‘employability’.⁴⁹

A key driver for explicitly excluding or reducing the protection for some groups of workers, and in particular those who are not in permanent employment, can be found in the labour laws and, as a result of that, practice. In this context Mantouvalou’s research on ‘Exploitation and Workers’ Rights’ becomes of interest.⁵⁰ In broadening the concept of exploitation, she argues that exploitation should go beyond referring to extreme forms of abuse, such as slavery and forced labour. Exploitation, as Mantouvalou suggests, is about taking unfair advantage of someone’s vulnerability. She advances the idea of ‘structural exploitation’, where ‘the state, through its laws, may create structural vulnerability to exploitation by private actors, as well as engage in structural exploitation itself’. ‘Structural exploitation’, according to Mantouvalou, consists of three elements: (a) background unfairness in the form of a vulnerability created or exacerbated by law, also called ‘legislative precariousness’; (b) taking advantage of this vulnerability; and (c) a benefit either for the state or for private actors.⁵¹ Notably, as Mantouvalou cautions, not all structural vulnerability leads to structural exploitation by employers.

⁴⁷ Kountouris, ‘The Legal Determinants of Precariousness’ (n 45) 39.

⁴⁸ *Ibid* 25.

⁴⁹ See on this: A Numhauser-Henning, ‘Flexible Qualification – a Key to Labour Law?’ (2001) 17 *IJCLLIR* 101.

⁵⁰ V Mantouvalou, ‘Exploitation and Workers’ Rights’ (Philosophical Foundations of Labour Law Conference, UCL London 16 & 17 June 2016).

⁵¹ V Mantouvalou, ‘Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labour’ (2012) 34 *Comp. Labor Law & Pol’y Journal* 133; V Mantouvalou, ‘The Right to Non-Exploitative Work’ in V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Oxford, Hart Publishing 2015).

Nevertheless, with a view to the Dutch law on fixed-term employment, it could be suggested that it is the law limiting the maximum number and duration of fixed-term employment contracts that puts some workers in a (more) vulnerable position than others, with the sanction being unemployment, while the employer may – legally – take advantage of that vulnerability, which benefits not only the employer but also the state to a certain extent, as the short-term result is less unemployment.

In this context we can observe ‘a trend towards a fundamental reallocation of risk in Member States, away from state and collective structures, and towards individuals’.⁵² Transferring risks appears to be a particular consequence of fragmented labour regulation and practice, and the ‘vertically disintegrated’⁵³ or ‘fissured’⁵⁴ workplace, where workers do not belong to what may be called the ‘core’ workforce; this gives rise to a multilateral complexity going beyond that of the standard employment model.⁵⁵ A particularly useful analytical lens has been offered by Countouris and Freedland, namely the ‘(de)mutualization of risks’.⁵⁶ Essentially, it refers to the shifting of risks and the bearing of costs of risks either away from the individual workers so that the risks or risk-costs are borne by, or shared with, an entity (or entities) (mutualization) or back to the individual (demutualization). Following the 2016 AGS, a particular point of interest is that of a lack of investment in training and education, endangering fulfilment of the Europe 2020 goal of the EU becoming a smart, sustainable and inclusive economy. The less integrated the workers are in an undertaking because of being employed on a flexible contract, or the less important their role is for the undertaking’s core business, the less likely that an employer will make investments, irrespective of those types of work that do not need frequent training and education.

⁵² A Blackham, M Kullmann, H Pettersson and A Zbyszewska, ‘The Rationales of Government Action on Ageing and the Extension of Working Lives’ in A Numhauser-Henning (ed), *Evolving European Perspectives on Elder Law* (Cheltenham, Edward Elgar 2016).

⁵³ H Collins, ‘Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws’ (1990) 10 *Oxford Journal of Legal Studies* 353.

⁵⁴ D Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, HUP 2014).

⁵⁵ P Davies and M Freedland, ‘Labor Markets, Welfare and the Personal Scope of Employment Law’ (1999) 21 *Comp. Labor Law & Pol’y Journal* 231, 243.

⁵⁶ N Countouris and M Freedland, ‘Introduction: The myths and realities of “Social Europe”’ in N Countouris and M Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge, CUP 2013) 7–8; M Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (Oxford, OUP 2011) 443–446.

5 'New old securities' for workers in the changing world of work

With the post-industrial society came far-reaching changes in the world of work, where increasing flexibilization of work relationships has been an explicit goal of the EU and its Member States. Flexibilization may certainly have benefits for a variety of stakeholders. It nevertheless appears to be the case that the balance between flexibility and security, as propounded at the EU level, worked in favour of flexibility – hence the EU's attempt to encourage more (conversion into) permanent employment contracts. This presents the EU (and thus the Member States) with two particular challenges. First, how can employers be encouraged to hire more workers on a permanent contract, when reality seems to point at a situation where (external) flexibility has incrementally become an integral part of the labour market? Second, assuming that we cannot halt or even reverse the trend, how can we best deal with the challenges resulting from flexibilization, relating to the instability of work relationships, precariousness and vulnerability, social exclusion and poverty, in today's labour market?

In the EU, employment creation has become the leading mantra to establish economic growth, therewith addressing the challenges brought about by demographic developments and the consequences – devastating for many – caused by recent financial and economic crises. As noted by the Commission, the EU's growth strategy has indeed led to an increase in the number of jobs; however, it is conspicuous that the increase was brought about by temporary contracts. Acknowledging that such an increase is not unlikely in times of recovery, the Commission provides a clear statement in the 2016 AGS when emphasizing that besides employment creation, flexible labour markets should enable more (transitions towards) permanent contracts. It possibly shows some of the concerns that many have expressed for years, namely that flexibility – at least beyond a certain degree – may not necessarily be beneficial to all parties concerned. While workers may be left in situations of vulnerability and precariousness when being continuously employed on a flexible contract, the state should also be wary of allowing employers too much room to use flexible work relationships. It could be argued that the more flexibility there is, the less stable the contributions paid to social security and pension systems; notably, the sustainability of these systems is of particular concern to the EU, in the first place aiming at ensuring sound public finances.⁵⁷ Member States,

⁵⁷ Article 119(3) TFEU.

when ‘reforming’ or ‘modernizing’ their social security and pension systems, must do so in line with the EU’s budgetary rules. Often this involves cuts in public expenditure, obtruding an ‘activation policy’ that puts certain groups of workers, especially those who do not fit the mould, in a perverse situation. Being faced with an increasingly flexible labour market, these workers may not (yet) be ‘fit for purpose’, lacking the necessary ‘equipment’ to actually participate in the labour market, if they have access at all.⁵⁸ So, there may be a valid reason for the EU to act.

It seems to me that the AGS’s explicit emphasis on the need to ensure more (transitions to) permanent contracts reflects the idea that this would balance flexibility with security. Finding a balance between flexibility and security is difficult, although necessary as the European Social Pillar emphasizes.⁵⁹ A difficulty to be addressed lies in the different (sometimes competing) interests of the state, employers, and workers. Businesses seem to play a decisive role. For employment creation, the state (and thus the EU) is dependent on the businesses, which are in turn dependent on (labour) market conditions as well as applicable labour and employment, social security, and tax regulations. Employers often seek a ‘predictable and legally secure business environment’, enabling them ‘to attract skilled and productive workers but also to adjust to fast-changing market realities’.⁶⁰ It is, *inter alia*, the impeccable role of businesses that allow them to use the panoply of legal work relationships according to their business interests, irrespective of whether this is societally acceptable. Nevertheless, using Mantouvalou’s concept of structural exploitation, there might be a principled reason to strengthen the role of individuals who find themselves in a vulnerable and exploitative situation. Obviously, one feature (but certainly not the only one) that would strengthen individuals is to empower them by equipping them with a right to education or training – a concern highlighted in the 2016 AGS.⁶¹

One may question whether the EU’s move does not mean returning to ‘old securities’ embodying the permanent employment contract, and not necessarily fully mirroring today’s labour market requirements. For some – but certainly not all – types of work or work in sectors that are prone to economic fluctuations, permanent employment would not be the right solution, unless this would involve ‘lowering’ the protection for permanent workers. Instead

⁵⁸ Kullmann, ‘Unused Potential?’ (n 26).

⁵⁹ Commission, ‘Launching a consultation on a European Pillar of Social Rights’ (Communication COM(2016) 127 final, 5.

⁶⁰ *Ibid.*

⁶¹ Numhauser-Henning, ‘Flexible Qualification’ (n 49).

of ‘squeezing’ contemporary labour market developments into traditional patterns, it would be expedient to properly engage in a discussion to identify the actual impediments that prevent employers from hiring permanent staff, allowing us to understand why, for instance, the new Dutch rules on fixed-term employment and dismissal protection do not work the way the legislator intended them to work. To find that out, we need to engage in the questions of what labour law is and who is or ought to be protected – questions that have occupied scholars ever since labour law’s inception.

