

Labour Market Policy and Labour Law Reforms in Germany: Towards Inclusive Growth

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This article, first, provides a comprehensive overview of German labour market policy and labour law reforms since the beginning of this millennium and assesses to what extent Germany is pursuing the principles of inclusive growth, accompanied by selective evidence of their consequences for the German labour market performance. A stylized and descriptive overview of the inclusive impact of these reforms in quantitative and qualitative terms follows, complemented finally with an essay reflecting the concept of the inclusive labour contract.

1 INTRODUCTION: THE PARDIGM SHIFT TOWARDS INCLUSION

In March 2010 the European Council declared the new European Employment Strategy (EU2020) with three overriding objectives: smart, sustainable and *inclusive growth*. Related to inclusion, by 2020 all EU-Member States shall strive for an the employment rate of 75% for people in age twenty to sixty-four; for a school dropout rate of less than 10%; for a rate of at least 40% with an academic degree related to the thirty to thirty-four age cohort; and – last, but not least – for a reduction of poverty by at least 20 million people.¹ As the specification of these objectives shows, the new employment strategy did not fully reflect the ambitions stated in the famous 2008-UN-Convention on the rights of persons with disabilities based on the *principles of inclusion*.² The preamble of this convention lucidly emphasizes the intended paradigm shift: Instead of viewing persons with disabilities as ‘objects’ of charity, medical treatment and social protection, persons with disabilities should be viewed as ‘subjects’ with rights, who are capable of

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¹ European Commission, *Europe 2020 – A Strategy for Smart, Sustainable and Inclusive Growth*, Communication from the Commission, Brussels, 3 Apr. 2010, COM (2010) 2020.

² United Nations, *Convention on the Rights of Persons with Disabilities (CRPD)*(2008), <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> (accessed 29 Nov. 2018).

claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.

In this article I argue that this perspective of inclusion can and should also serve as the new paradigm of labour market policy and labour law related to all persons intending to fully participate in the labour market. Apart from neglecting the target group of persons with disabilities, the EU2020 documents were concentrating on quantitative targets without embedding the corresponding instruments to reach these targets into a new legal framework. Only recently, the ‘solemn’ proclamation of the European Pillar of Social Rights by the European Parliament, the Council and the Commission in Gothenburg on 17 November 2017 tried to fill this gap with currently uncertain perspectives of its realization.³ For a critical review of German labour market policies and labour law reforms, it is therefore necessary to start with a brief definition of inclusion to set a clear framework for a normative assessment in addition to conventional objectives of labour market policy. The following four principles of inclusions are derived from the concept of transitional labour markets (TLM).⁴

First, concerning the right to gainful work, I consider ‘labour market security’ as the overall objective of inclusive growth. In contrast to the growth objective reflected in the EU2020 strategy, inclusion implies not to maximize employment as such but to minimize unemployment, among others through protected flexibility of employment relationships, maintenance of jobs through internal flexibility and public job guarantees. Second, concerning equal treatment, a strong emphasis should be put on the strategy of making the market fit to workers in order to overcome the various restrictions of individual earning capacities over the life course, in particular due to unpaid social work obligations and disabilities, among others through reasonable adjustment of work-places. Third, concerning the labour market status, inclusive growth emphasizes early access to gainful work and voice through negotiated flexibility, above all through co-determination in collective agreements at firm, regional or branch level. Fourth, concerning social protection, inclusive growth would accentuate social insurance principles with

³ European Commission, *European Pillar of Social Rights*, Luxembourg (2017), https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf.

⁴ *The Dynamics of Full Employment. Social Integration Through Transitional Labour Markets* (Günther Schmid & Bernard Gazier eds, Edward Elgar 2002); Bernard Gazier, ‘Tous Sublimes’ – *Vers un nouveau plein-emploi*, Flammarion; *The European Social Model and Transitional Labour Markets – Law and Policy* (Ralf Rogowski ed., Ashgate 2008); Günther Schmid, *Transitional Labour Markets: Theoretical Foundations and Policy Strategies*, *The New Palgrave Dictionary of Economics* 1–15 (2017); https://link.springer.com/referenceworkentry/10.1057/978-1-349-95121-5_3050-2; Günther Schmid, ‘Towards an Employment Strategy of Inclusive Growth’, in *Reframing Global Social Policy – Social Investment for Sustainable and Inclusive Growth*, Policy Press 145–87 (Christopher Deeming & Paul Smith eds, 2017); Günther Schmid, *Europa in Arbeit: Plädoyer für eine neue Vollbeschäftigung durch inklusives Wachstum* (Campus 2018).

strong elements of ex ante redistribution through shared contributions to health, pension and unemployment insurance; this would, among others, allow anti-cyclical ('breathing') unemployment benefits or short-time work allowances to stabilize effective demand in cyclical troughs.

The following of this study is structured into two parts: First, an encompassing overview of the German labour market policy and labour law reforms is given, complemented by an assessment of their inclusion impact in quantitative and qualitative terms compared to the overall development in Europe. The results of this exercise hint to a potential trade-off between quantitative and qualitative aspects of inclusion into the labour market, which raises the question of how to possibly overcome conflicting objectives. The second and shorter part of this study, therefore, reflects on the necessary relaunch of the institutional framework for ensuring the multiple aspects of inclusive growth. As the legal dimension of the employment relationship is the central pillar of labour market institutions, I suggest the concept of an inclusive labour contract as regulatory idea for managing the increasing complexity of labour relations over the life course. A brief summary concludes.

2 THE GERMAN LABOUR MARKET POLICY AND LAW REFORMS

The recent German labour market reforms are commonly subsumed under the so-called 'Hartz reforms' adopted in 2003 and 2004.⁵ Despite their prominence, other – and some even more important – reforms have to be mentioned under the perspective of inclusive growth. The structure of the following part follows the analytical framework of TLM which distinguishes five main risks of exclusion – the reverse to inclusion – over the life course: (1) School to work transitions with the risk of insufficient earnings capacities; (2) job-to-job transitions or transitions between standard and non-standard employment with the risk of precarious jobs and volatile or too low earnings; (3) transitions between employment and unemployment with the risk of downward careers or even being permanently excluded; (4) transitions between family work or own work and employment with the risk of restricted earnings capacities and career interruption; (5) transitions between employment and inactivity due to old age or disablement with the risk of reduced earnings or even total loss of any earnings capacities.

⁵ Due to the fact that chancellor Schröder did not follow the proposals by the Hartz Commission in some important respects, I will talk of the 'Schröder reforms' in the following; see Werner Jann & Günther Schmid, *Eins zu Eins? Eine Zwischenbilanz der Hartz-Reformen am Arbeitsmarkt*, edition sigma; Günther Schmid, *Übergänge am Arbeitsmarkt: Arbeit, nicht nur Arbeitslosigkeit versichern*, edition sigma 2011, <http://www.nomos-shop.de/25483>.

2.1 SCHOOL-TO-WORK TRANSITIONS

With respect to school-to-work transitions, there has been no basic labour market reform. The main reason is that the German system of school-to-work transitions already widely corresponds to the principles of inclusive growth. The dual system in the form of apprenticeship or tertiary vocational training combines theoretical with practical education as well as learning with gainful work, which means that young people can earn some part of their living while still being trained and educated for full earnings capacities. Inclusion into the labour market measured by total employment even increased among youth and young adults, and youth unemployment is one of the lowest in Europe (Table 1).

This does not mean, however, that this system is without flaws. Even many of those who are included suffer, for instance, through an increase in non-standard forms of employment⁶ and from low apprenticeship allowances. The new grand coalition Christian Democratic Union/Christian Social Union and Social Democratic Party Information and Communication Technology (CDU/CSU and SPD) therefore intends to establish a *minimum allowance for apprentices* in order to increase the falling motivation to take up an apprenticeship and to stop the trend of young people entering university even though they lack the cognitive capacities, facing therefore the risk of failure: about one-third of beginners currently drop out after two years, in particular in science subjects like mathematics, physics, chemistry and ICT.

The flip side of the coin is that the successful inclusion for most young people into the labour market has negative repercussions for those who face disadvantages in terms of physical capacities (e.g. disabilities), ethnic background (e.g. deficits in language and communication abilities) or lack of endowments with basic cognitive skills (e.g. reading, mathematics). Many of these disadvantaged remain stuck in the complex transition system maintained by labour market policy measures. In 2015, 6% of youth finished school without a certificate, and 13.4% of youth aged twenty to thirty-four were without a vocational training certificate (in total, almost two million); for those with a migration background this percentage is 29.8%.⁷ So, almost two million young adults are excluded from sustainable labour market careers. On the positive side, however, legal reforms in recent decades have opened the access to universities also to youth with certified vocational training; the negative side is that those people without an occupational degree still never have the chance to enter universities.

⁶ Which increased by 6.7 percentage points from 1998 to 2016, whereas the standard employment rate decreased by 3.5% (Table 1).

⁷ Bundesministerium für Bildung und Forschung, *Berufsbildungsbericht*, 10 & 50 (2017).

Table 1 Indicators of Inclusion into the German Labour Market 1998, 2008, 2016 (Compared to EU28): Employment (ER) and Unemployment Rates (UR) for Different Categories as Percent of Population in the Respective Working Age (Total: 15–69)

<i>Indicator</i>	<i>1998</i>	<i>2008</i>	<i>2016</i>	<i>Difference (2016–1998)</i>
Total ER (15–69)	65.1 (62.2)	69.9 (65.9)	72.7 (67.5)	7.6 (5.3)
Youth ER (15–29)	60.0 (55.8)	61.6 (57.1)	61.4 (55.8)	1.4 (0.0)
Core ER (30–59)	81.0 (76.8)	85.7 (80.9)	86.9 (83.5)	5.9 (6.7)
Women ER (15–69)	56.9 (53.1)	63.3 (58.7)	68.2 (61.8)	11.3 (8.7)
Elderly ER (60–69)	13.3 (16.0)	21.2 (20.9)	38.8 (28.2)	25.5 (12.2)
Total Standard ER	37.2 (35.4)	35.9 (37.1)	39.0 (36.6)	1.8 (1.2)
Youth St-ER (15–29)	30.0 (28.2)	23.6 (27.1)	26.5 (23.8)	- 3.5 (- 4.4)
Core St-ER (30–59)	48.5 (46.4)	48.3 (48.7)	50.3 (48.8)	1.8 (2.4)
Women St-ER (15–69)	25.3 (26.3)	24.0 (28.9)	26.9 (29.5)	1.6 (3.2)
Elderly St-ET (60–69)	5.6 (5.0)	8.9 (8.2)	17.0 (12.3)	11.4 (7.3)
Total Nonstandard ER	21.6 (20.5)	28.3 (24.1)	30.7 (25.1)	9.1 (4.6)
Youth Nst-ER (15–29)	24.5 (18.6)	32.0 (23.0)	31.2 (23.7)	6.7 (5.1)
Core Nst-ER (30–59)	24.2 (24.0)	31.5 (27.6)	33.4 (28.7)	9.2 (4.7)
Women Nst-ER (15–69)	25.7 (20.6)	34.4 (25.4)	38.7 (26.9)	13.0 (6.3)
Elderly Nst-ER (60–69)	6.9 (10.4)	10.8 (11.9)	20.3 (14.3)	13.4 (3.9)
Total UR (15–69)	6.4 (6.3)	5.2 (4.7)	3.0 (5.8)	- 3.4 (- 0.5)
Youth UR (15–29)	5.5 (9.0)	6.0 (7.0)	3.8 (8.3)	- 1.7 (- 0.7)
Core UR (30–59)	8.2 (6.3)	5.9 (4.8)	3.1 (6.1)	- 5.1 (- 0.3)
Women UR (15–69)	6.0 (6.3)	4.9 (4.5)	2.6 (5.5)	- 3.4 (- 0.8)
Elderly UR (60–69)	0.9 (0.7)	1.5 (0.8)	1.4 (1.5)	0.5 (0.8)

Source: European Labour Force Survey, own calculations; see Günther Schmid, *Europa in Arbeit*, supra note 4; and Günther Schmid & Johannes Wagner, *Atypische Beschäftigung in Europa: Auswertung der Daten der Europäischen Beschäftigtenstichprobe*,

http://www.guentherschmid.eu/pdf/discussion/EU_Arbeit_Datenband_G%FCS_JW-2018.pdf.

Note: In contrast to official statistics, all figures are as percent of the population in working age fifteen to sixty-nine (or respectively, e.g. fifteen to twenty-nine, thirty to fifty-nine, sixty to sixty-nine). The advantage of this denominator is, first, its nonaffectation by the nominator; second the total is the sum of its components, e.g. the German total employment rate in 2016 (72.7% of working age population fifteen to sixty-nine) is the sum of the total standard employment rate (39.0%), the total nonstandard employment rate (30.7%) and the total unemployment rate (3.0%). *Standard employment* is defined as employment in open-ended, dependent and full-time work contracts; *non-standard employment* is a composition of part-time, temporary and self-employment controlled by overlaps.

2.2 JOB-TO-JOB TRANSITIONS

Under the flag of ‘flexicurity’, in Germany renamed to ‘*Fördern and Fordern*’ (promoting and demanding), the German labour market reforms advanced three types of non-standard employment (NSE): self-employment, temporary jobs (in particular through temp-agency work), and marginal jobs.⁸ Before going into details, however, the reader shall be reminded that one reason for the low labour turnover in Germany, compared for instance to Denmark, is internal flexibility, in particular through working-time flexibility either in the form of collective agreements or in the form of *short-time working*. Both measures were heavily used as adjustment measures in the crisis of 2008/09 and correspond, in broad terms at least, to the principles of inclusive growth.⁹

(1) The Schroeder reforms invented a new *start-up subsidy* (*‘Ich-AG’*) that supplemented the already existing bridging allowance (*Überbrückungsgeld*, since 1986), which capitalized unemployment benefit entitlements in order to support the unemployed in setting up their own businesses.¹⁰ The *Ich-AG* paid a relatively generous but decreasing lump sum for three years, provided the recipient’s annual income did not exceed EUR 25,000. The take-up of this instrument was much higher than expected. For the unemployed, the subsidy was a temptation to escape the ‘demanding’ threats of the Public Employment Service (PES), and from the perspective of employers, the possibility of buying the services of a self-employed instead of hiring a dependent employed person is always an attractive option, since dismissal protection does not apply to this category of workers. Furthermore, bureaucratic thresholds for employment creation were loosened: all business start-ups had the option of hiring additional employees on the basis of fixed-term contracts for up to four years.

Even though evaluation research has given credit to this component of the Schröder reforms, the *Ich-AG* scheme was abolished in 2006 and merged with the more efficient bridging allowance to create an overall Start-up Allowance (*Gründungszuschuss*) for the unemployed. Since then, the take-up of this measure remained at a level of around 140,000 up to the end of 2011 when – in the vein of

⁸ For the ‘flexicurity’ concept see Per K. Madsen, *How Can it Possibly Fly? The Paradox of a Dynamic Labour Market*, in *National Identity and the Varieties of Capitalism, The Danish Experience* 321–55 (J. L. Campbell, J. A. Hall & O. K. Pedersen eds, McGill-Queen’s University Press 2006); and Ton Wilthagen & Frank Tros, *The Concept of Flexicurity: A New Approach to Regulating Employment and Labour Markets*, 10 *Transfer* 166–86 (2004).

⁹ As these labour market instruments are familiar to the scientific community, I abstain from further explanations and details; for further references see Günther Schmid, *Sharing Risks of Labour Market Transitions: Towards a System of Employment Insurance*, 53(1) *Brit. J. of Indus. Rel.* 70–93 (2015), http://www.guentherschmid.eu/pdf/Sharing_Risks_BJIR-2015.pdf.

¹⁰ This measure, of course, also belongs to the section on transitions between employment and unemployment.

overall budget cuts – the regulation was sharply tightened: most important was the change from a so-called ‘obligatory measure’ (*Pflichtmaßnahme*) to a discretionary measure (*Ermessensmaßnahme*). In Germany an ‘obligatory’ measure means *having the right to be promoted* to self-employment if certain conditions are fulfilled. At the end of the day this means that the worker can go to court to claim his or her right.¹¹ A ‘discretionary’ measure means that it remains up to the administrator to decide on the measure depending on the labour market or – more commonly – budgetary conditions. The new discretionary measure was further tightened by the requirement that potential beneficiaries still have to be entitled to at least 150 days of insurance-related unemployment benefits (ALG I). Unemployed who already exhausted these days, i.e. the long-term unemployed, were thus excluded.

The current two basic features of the new start-up measure for the unemployed are topping up, in the first six-month phase, the unemployment benefits by 300 Euro monthly so as to ensure the social security contributions of the self-employed; during the following second phase of nine months (after a judgment of whether the start-up will likely be sustainable), the beneficiary only receives the monthly allowance of 300 Euro. The result of this reform was a sharp drop in the number of participants, down to around 25,000. The PES now plans to revitalize the measure by doubling the targeted budget, not least due to quite positive evaluations of this measure.¹²

(2) Although marginal forms of employment existed even before the year 2000, the Schröder reforms (2003–2005) intended to ease the transition from unemployment or inactivity to standard employment through so-called ‘*minijobs*’ and ‘*midijobs*’.¹³ Other objectives were also envisaged, for instance, the curtailment of illegal work, especially in private households.

Prior to the former reforms, full social insurance contributions became mandatory for the main form of *minijobs* at the current level of up to 450 Euro per month.¹⁴ The employer, however, pays the bulk of these contributions: roughly

¹¹ The success of short-time work goes back, among others, to still being an ‘obligatory’ measure, i.e. a right for the workers. Even works councils are entitled to apply for short-time work at the PES.

¹² Stefan Bernhard, Katalin Evers & Michael Grüttner, *Der Gründungszuschuss nach seiner gesetzlichen Neuregelung: Die Folgen des Kurswechsels*, in IAB-Kurzbericht 21, Nürnberg (2015); Verónica Escudero, *Are Active Labour Market Policies Effective in Activating and Integrating Low-skilled Individuals? An International Comparison*, 7(4) IZA J. Lab. Pol’y (2018), open access: <https://izajolp.springeropen.com/>.

¹³ *Midijobs* are jobs with an income between 451 Euro and 850 Euro monthly; employers pay full social insurance contributions (‘only’ about 21%), whereas employees’ contributions increase linearly until they reach the regular rate of 21% at 850 Euro; in total there are only about 1.3 million *midijobs*.

¹⁴ 300 Euros in 2003. There are also time-limited *minijobs* with the limit of three months, unlimited in terms of income per year, and without any contributions to social security, but playing only a minor role (their number declined from 286,000 (2003) to 184,000 (2016)).

30% shared among the main insurance categories (15% goes towards the pension system, 13% to the health insurance; the rest to other items). Employees contribute 4% of their earnings, but they can opt out, and most of them do.¹⁵ Mini-jobbers are not covered by unemployment insurance as both sides pay no contributions; they also do not acquire health insurance coverage; but most mini-jobbers are covered by derived entitlements (i.e. through the parents or working spouses in regular employment).

As a key element of the reform, the fifteen-hour limit on weekly working hours has been abolished. Hence, marginal employment can be carried out *in addition* to regular employment *without becoming subject to social security contributions* for employees. This exemption can hardly be justified with respect to the principles of inclusion:

- (1) First, it privileges insiders who already have a standard employment relationships and potentially excludes those without any job.
- (2) Second, it also makes it harder for mini-jobbers to transit into regular jobs because insiders who might move to better-paid jobs (or strive to move!) stay put as they have the chance of an additional untaxed income.
- (3) Third, it serves as a Trojan horse for creating jobs with low wages because workers who already have a regular income are more willing to take low-paid side-jobs.
- (4) Fourth, people who minijob in private household services (including *Haushaltschecks*) perversely cross-subsidize well-earning households through low wages.
- (5) Fifth, minijobs – last but not least – lead to foregone tax revenues and social security contributions in the range of around 4 billion Euro per year, which can be regarded as the costs of subsidizing minijobs.

The total number of minijobs increased from 6 million in 2003 to 7.6 million in 2016. Whereas minijobs as the only source of income has declined slightly since the year 2009 (from 5.3 to 4.9 million), minijobs as a side-job more than doubled from 1.2 to 2.7 million. Minijobs as a percentage of total jobs, however, declined due to the favourable development of regular jobs, which might be interpreted as an indicator of the limited substitution effect (minijobs substituting regular jobs), and possibly even as an indicator of the complementarity of minijobs and regular jobs – a speculation which needs further research.

¹⁵ For further valuable details see Nicola Düll, *Case Study: Gaps in Access to Social Protection for Mini-jobs in Germany*, Publications Office of the European Union (2018).

The overall evaluation of marginal employment by employer representatives turns out to be positive: Minijobs are recognized as a cost-efficient and very flexible measure for dealing with peak periods and extended opening hours. In this context, competitive branches such as retail, cleaning, catering and tourism, but also private households, take advantage of this measure. In particular, small businesses appreciate the aspect of a flexible and rapid use of marginal employment at relatively low costs. Whereas these aspects already existed before 2003, the Schröder reforms abolished the limitation on weekly working hours for mini-jobbers and thus helped to strengthen internal numerical flexibility. The tripling of declared marginal employment in private households (from about 100,000 to approximately 300,000) may serve as a further indicator of the success of this strategy. Private household employers, however, are subsidized twice through the 'Household check' procedure: they have to pay lower taxes and social security contributions, and they can deduct the expenses from their income tax duties.¹⁶

From the employees' and trade unions' point of view, however, there is great concern about minijobs offering employers the possibility to substitute regular employment and keep outsiders in a low-income and dead-end trap which also eventually leads to low social security entitlements and poverty in old age. Transition rates to standard employment are low, thus, minijobs cannot be regarded as an adequate bridge into regular employment. On the positive side, however, it should also be mentioned that young (under twenty-five) and elderly people (over fifty-five) are overrepresented among the mini-jobbers. Persons belonging to these 'marginal' age groups can be considered as special target groups for inclusive growth because they might be (in the case of education or in the event of early retirement) predominantly interested in uncomplicated additional income sources and less in additional employment or social protection.¹⁷

(3) The Schröder reforms also deregulated one important part of *temporary jobs*, i.e. temp-agency work, or the triangular form of temporary employment relationships. Prior to this reform, the *Teilzeit- und Befristungsgesetz* of 2000 (implementing the EU directive for part-time work) eased the arrangement of fixed-term work contracts. The intention was, again, to mobilize job-to-job transitions in general and the transition from unemployment to employment in particular. Temporary contracts altogether increased since then from about 5.2 (2002) to 8.3 (2017)%. They are strongly related to first jobs, in particular of young people. According to most recent figures (2017), 42% transit after the end of the contract into regular employment, 36% into extension of the fixed-term contract, and 25% are

¹⁶ For further detailed information, again, visit the excellent study by Düll, *supra* n. 15.

¹⁷ 61% of persons whose minijob is the main job are below 25 or older than 55; among the mini-jobbers in side-jobs this percentage is only 28.

terminated. The current grand coalition government intends to reduce substantially fixed-term contracts without a given reason (about 50% of all contracts), yet it remains open whether this gets into ‘real law’ without compromises towards the many employers who disagree. There are even good reasons, to rely more on economic incentives through internalizing the costs of higher unemployment risks through variations in contributions to unemployment insurance.¹⁸

The Schröder reforms almost completely deregulated temp-agency work (or *Leiharbeit*, *Arbeitnehmerüberlassung*) only with the remaining provision that the employment relationships shall be controlled by collective agreements. Under this provision, collective agreements even allowed to deviate from the principle of equal treatment – a form of regulation which bluntly violates the inclusion principles. Furthermore, the government at that time did not expect that the competition between trade union representatives in the temp-agency sector would develop into a harsh power battle between unions under the umbrella of the *Deutscher Gewerkschaftsbund* (DGB) and unions under the umbrella of *Christliche Gewerkschaften Zeitarbeit und PersonalServiceAgenturen* (CGZP). For instance, a collective agreement of the so-called Christian [sic!] Trade Union allowed *Schlecker* (a former German employer in retailing which has since gone bankrupt) to close many shops and rehire the workers through a dubious temp-agency firm which paid its workers 30% lower wages than before and provided much less generous fringe benefits like holidays and Christmas payments. This led to a charge against CGZP by ver.di (a large DGB trade union) which eventually succeeded because the CGZP did not fulfil the clause on representing the majority of the corresponding retail workers.

In the meantime, the so-called *Tarifautonomiestärkungsgesetz* of July 2014 established a mandatory *minimum wage* of 8.50 Euro since January 2015. The newly established and since then responsible commission for setting the minimum wage increased this level successively to 8.84 Euro (2017), 9.19 Euro (2019), and 9.35 Euro (2020). The new wage floor brought significant increases for low-paid employees at limited observable negative employment effects thus far, thereby solving many problems related to temp-agency work.¹⁹

Temp-agency work (officially *Leiharbeit*) has increased rapidly from a level of about 200,000 to over one million since 2015, however, with a lower speed than before. Although its share of employment reaches only 2.8%, 14% of transitions

¹⁸ Figures reported by Christian Hohendanner, *Reform der befristeten Beschäftigung im Koalitionsvertrag. Reichweite, Risiken und Alternativen*, Nürnberg, IAB-Kurznachrichten 16 (2018), also critically assessing the implications of the suggested reform and discussing alternatives.

¹⁹ Oliver Bruttel, Arne Baumann & Matthias Dütsch, *The New German Statutory Minimum Wage in Comparative Perspective: Employment Effects and Other Adjustment Channels*, 1 Eur. J. Indus. Rel. 1–18 (2017).

into unemployment and 19% of transitions from unemployment into employment come from temp-agency workers.

Nowadays, *Leiharbeit* is commonly accepted as a legitimized instrument of flexibility for employers and the overall economy. The social and even the economic risks connected with this employment relationship, however, are still not managed satisfactorily. For employees, the risk of unemployment is almost five times higher than for regular employees (3.06 *v.* 0.63), but only a minority of temp-agency workers are covered by UI; most of them receive only means tested basic income (*Hartz IV*).²⁰ Furthermore, many temp-agency workers are low-wage earners; 5% of temp-agency workers (with 75% working full-time!) receive additional *Hartz IV* transfers, compared to 2% of ‘regular’ workers. Average wages of temp-agency workers are far below those of regular workers. Approximately 50% of temp-agency workers are contracted out for less than three months. The envisaged stepping stone function – transitions from temp-agency work to regular work – is rather modest (at most for about 20%); for unemployed, however, these stepping stones are at least marginally better than for those who do not use this opportunity.²¹

From an inclusive point of view, however, three features of current temp-agency work in Germany are still quite problematic

- (1) First, even the recent reform of the *Arbeitnehmerüberlassungsgesetz* (21 February 2017) did not fully establish the equal treatment principle. Equal pay only has to be realized after nine months of continuous employment (in 2017, only 30% of temp-agency workers reached this level), and collective agreements can even legitimize unequal pay for up to fifteen months.
- (2) Second, although the new regulation now stipulates the maximal duration of ‘*Entleihung*’ at eighteen months (the Schröder regulation set no time limit at all), practically it is still possible to recruit the same temp-agency workers permanently: a break of three months after eighteen months (probably bridged by unemployment benefits) is enough to rehire the same worker. Thus, the rationale for temp-agency – that it should only temporarily bridge the lack of a workforce (typically seasonal or replacing workers on parental leave) – is bluntly violated. Temp-agency work still opens the door for lower rather than regular wages and de facto discrimination against workers.

²⁰ Bundesagentur für Arbeit, *Aktuelle Entwicklungen in der Zeitarbeit*, Nürnberg (2018).

²¹ Florian Lehmer & Kerstin Ziegler, *Brückenfunktion der Leiharbeit – Zumindest ein schmaler Steg*, Nürnberg IAB-Kurzbericht 13 (2010).

- (3) The negative indirect economic repercussions of this regulation should not be underestimated, as employers have a convenient instrument of flexibility with this measure. They can relax and neglect long-term investments in a larger part of their staff, thus deepening the cleavage between insiders and outsiders. Furthermore, the expected overall impact on productivity, innovation and competitiveness is more than doubtful: both microeconomic and macroeconomic research hints more towards a negative impact.²²

The overall inclusive impact of reforms related to job-to-job transitions is reflected in the changing labour market participation of the core working age group (thirty to fifty-nine) which improved at the aggregate level from 81% (1998) to 86.9% (2016) and is substantially higher than for EU28 (Table 1). Only a minor part of this growth, however, was due to there being more people in regular jobs at a level corresponding to the EU28 average; most of this growth is related to the increase of non-standard labour force participation from 24.2 to 33.4%. On the other hand, unemployment started to go down at about the same time by 5.1% age points from 8.2 to 3.1% whereas unemployment for this age group at the EU28 level remained almost constant (6.4 *v.* 6.1%).

2.3 TRANSITIONS BETWEEN EMPLOYMENT AND UNEMPLOYMENT

The key part of the Schröder reforms was directed towards speeding the transition from unemployment to employment in general and preventing long-term unemployment in particular through the ‘*modernisation of labour market services*’.²³ Apart from the already mentioned ‘Ich-AGs’ (transitions from unemployment to self-employment) and the minijobs (thought of as stepping stones to regular jobs), these reforms consisted of five main elements (‘*Module*’), which can be presented here only in summarized form.

(1) The first part of the administrative reforms can be subsumed under the strategy to *activate the unemployed* through ‘promoting and demanding’ (‘*Fördern und Fordern*’) measures. The promoting measures were mainly an improvement of placement services, especially through systematic profiling of inflowing unemployed for individual case management as well as a larger and better-trained staff responsible for placement services and employment promotion. The demanding measures mainly consisted of tightening the rules on accepting a ‘suitable’ job, in

²² See Schmid, *Europa in Arbeit*, *supra* n. 4, at 69–76.

²³ Peter Hartz et al., *Moderne Dienstleistungen am Arbeitsmarkt. Vorschläge der Kommission zum Abbau der Arbeitslosigkeit und zur Umstrukturierung der Bundesanstalt für Arbeit*, Bundesministerium für Arbeit und Sozialordnung (2002).

reducing unemployment benefit duration for older people combined with restricting early retirement through pension regulations which now foresee an actuarial reduction of benefits. It is – at least partly – due to these new regulations that in the course of the economic upswing the employment rates of elderly employees have starkly risen (Table 1).

(2) *Services to employers* were improved through time-budget allocation for such services (at least 20% of the agencies' time) and 'premium' clients, faster reaction times, prior contacts to both employers and jobseekers, referral of a limited number of qualified contacts, follow-up contacts, an improved vacancy database and monitoring the matching process. The central goal lies in obtaining employers' attention and willingness to cooperate and, thus, increasing the share of notified vacancies. These measures have also considerably improved matching efficiency.²⁴

(3) The reform also emphasized *privatization* in the form of the outside provision of placement services. Most of the corresponding instruments, however, especially the Personnel Service Agencies (PSA), were not successful.²⁵

(4) The core, albeit ambivalent, of the reform was the *merging of unemployment assistance and social assistance*. Prior to the reform, the PES administered two types of benefits, which de facto defined its clientele for active measures: unemployment benefits (*Arbeitslosengeld*), which provided payments at a level of 67% (unemployed with children) or 60% (unemployed without children) of previous net wages for twelve months (or up to thirty-two months for older employees), and unemployment assistance (*Arbeitslosenhilfe*) after eligibility for regular unemployment benefits had expired. Unlike unemployment benefits, unemployment assistance was means-tested, amounted to 53 to 57% of previous net wages, and was paid for an unlimited period as long as PES could not provide a 'suitable' job. A third type of benefit was the so-called social assistance (*Sozialhilfe*), in other words, means-tested benefits at the subsistence level. Social assistance for unemployed people who were not eligible for PES benefits was funded and administered by the local authorities, the counties and the larger municipalities. This complex system of benefit provision had many problematic consequences for the supply of job-brokering and other active measures in particular for the long-term unemployed. The institutional responsibility for them shifted from PES to the municipalities and

²⁴ One of these studies came to the conclusion that the organizational reforms explain about 20% of the decrease in unemployment, whereas the reform of unemployment benefits explains only about 5%, cf. Andrey Launova & Klaus Wälde, *The Employment Effect of Reforming a Public Employment Agency*, 84 Eur. Econ. Rev. 140–64 (2016).

²⁵ Doris Hess, Petra Kaps & Hugh Mosley, *Implementation und Wirkungsanalyse der Personal-Service-Agentur*, 75 DIW-Vierteljahreshäfte 9–31 (2006).

back to PES, so that some experts labelled this system as an ‘*organised irresponsibility*’.

The Schröder reforms overhauled this governance confusion by replacing unemployment assistance with ‘basic (income) security’ (*Grundsicherung*, or *Arbeitslosengeld II*). ALG II, better known as *Hartz IV*, is a means-tested and flat-rate allowance for *all* jobseekers who are not entitled to unemployment benefits, no matter whether they are clients of the local authorities (formerly social assistance recipients) or clients of the PES (formerly unemployment benefit recipients). The reform established thereby two completely separate regulatory systems (‘*Rechtskreise*’) for jobseekers: with the *Sozialgesetzbuch III* (SGB III) setting the rules for ALG I recipients and the *Sozialgesetzbuch II* (SGB II) setting the rules for *Hartz IV* recipients. Most importantly, from an inclusive growth perspective, is the fact that the definition of an employable jobseekers was extended. All those who are able to work at least three hours per day are now ‘employable’ and fall under the ‘regulatory circle’ of SGB II.

The current level of social protection for jobseekers outside the unemployment insurance system in the narrower sense (ALG I) is the following (January 2018): For a needy single unemployed person, *Hartz IV* pays an allowance of 416 Euro per month; married adults receive 90% (374 Euro). In the case of an unemployed family with two children (four and twelve years old), the family may receive altogether: 2x374 Euro + 240 Euro (child four years old) + 296 Euro (child twelve years old) + 644 Euro (accommodation and heating) = 1,928 Euro minus 388 Euro ‘*Kindergeld*’, which makes a total of 1,540 Euro.²⁶ This sum corresponds roughly to the gross wage of one full-time wage earner working at the minimum wage (8.84 Euro). Under certain circumstances, additional allowances can increase the amount of the transfer income. The transfer recipients can also earn some additional income up to a certain amount. As a result, economic incentives to work turn out to be rather mean for low-income earners, in some cases even negative.²⁷

The corresponding administrative reform, however, was not fully successful in establishing effective ‘job centres’ or one-stop shops for all of the clients under the clear responsibility of the PES. Due to the complex interrelationships under German federalism and a political stalemate between the leading parties, a compromise emerged which again established fragmented responsibilities between the

²⁶ <http://www.bmas.de/DE/Themen/Arbeitsmarkt/Grundsicherung/Leistungen-zur-Sicherung-des-Lebensunterhalts/2-teaser-artikelseite-arbeitslosengeld-2-sozialgeld.html>; download 07 May 2018.

²⁷ A single person without child would receive 737 Euro (416+321 accommodation); a single person with a child up to four years old would receive 922 Euro (416+150 [‘Mehrbedarf’]+240 [child]+464 [accommodation]-194 [child allowance]-154 [subsistence allowance]). The deduction of child and subsistence allowance violate the principle of inclusion because such transfers are to be considered as citizens’ right.

PES and the local authorities with respect to the recipients of ‘basic security’.²⁸ Long-term unemployed who are disadvantaged either by age, low skills or limited work capacities, therefore, still have few chances to transit to a sustainable job with a decent income. Furthermore, the PES’ or the job centres’ staff administering activation programmes are often not qualified enough or are overloaded; many having only fixed-term contracts. Thus, long-term unemployment is still at a level of about one third of total unemployment, and a growing part of these people are unemployed for longer than four years. There remains also the problem of the working poor, whose earnings (often despite full-time work) fall below the minimum income and who therefore receive ‘basic security’ to top up their incomes (currently about 800,000). Finally, the procedures of calculating the ‘*Grundsicherung*’ became extremely bureaucratic leading to many individual suits against the false or delayed decisions of the Hartz IV administration.

The impact of this part of Schröders reform – often neglected by critical opponents – was an improvement of the inclusion in the labour market in two respects: First, more jobseekers (unemployed) are now covered by the broader unemployment insurance (ALG I and ALG II) system: the coverage increased from 79% (2003) to 92% (2015), although the share of ALG I recipients declined from 38 to 26%, whereas the share of ALG II recipients increased from 41 to 66%²⁹; second, all ALG II recipients are now included in the system of ‘active labour market policy’, although to some extent under less favourable conditions than ALG I recipients (e.g. excluded from supported start-up measures). Despite these positive features, this part of the Schröder reforms gained such a bad reputation that ‘Hartz IV’ became the stereotype for a ‘neoliberal’ policy that eventually broke the neck of the Social Democratic Party.

2.4 TRANSITIONS BETWEEN EMPLOYMENT AND FAMILY WORK

Under the inclusive growth perspective, issues of equal opportunity for women and work-life-balance become crucial. The *Teilzeit- und Befristungsgesetz* of 2000 made it easier to arrange part-time contracts and to ensure principles of inclusion such as equal treatment in terms of wages, dismissals and social protection. As in many other EU Member States, part-time jobs increased steadily, in particular for women, and this employment dynamic is – in contrast to other forms of non-standard work – unbroken. One of the hottest issues in the recent political debate

²⁸ The majority of jobcentres at the regional level are cooperative ‘*Arbeitsgemeinschaften*’ between PES and the municipalities; a smaller part is run only by municipalities.

²⁹ These figures are calculated from Table IV. D.1, Bundesagentur für Arbeit, *Arbeitsmarkt 2015*, 112.

was the intention of the new government (enforced by the social democratic party) to establish an effective right to intermediate part-time work (*‘Brückenteilzeit’*) which means the right to take part-time work and to return into full-time under equal conditions. The law, finally, was enacted in October 2018 with some compromises: All workers in companies with more than forty-five employees are now entitled to reduce working time for one to five years and to return to full-time; however, only one of fifteen employees can actually realize this right in firms up to 200 employees.

The reform of parental leave in 2007 made part-time work for men slightly more attractive than before. The new parental leave allowance (*‘Elterngeld’*) is inclusive in as far as it also covers the income risk due to transiting into full ‘inactivity’ or to intermediate part-time work due to parental care work. In other words, income loss due to full-time or part-time leave is now insured, like in the case of ‘full-time’ unemployment, by 67% of the former net wage income. The take-up conditions involve to some extent a kind of gender risk-sharing, yet still incomplete: two of the fourteen months in which *Elterngeld* is paid, are reserved for the partner not taking the bulk of the leave – usually the father. Such a leave allowance might also be considered as an element of employment insurance although it is formally not included in UI and is not financed by individual or employer’s contributions. Moreover, the entitlements are portable from one employer to another and to any other location in the country.³⁰

In 2015, this law was supplemented by another innovative element. The *‘Elterngeld Plus’* now supports all those parents who want to work even during the time of receiving this allowance. In this way, mothers and fathers have the possibility to extend the (pro rate) supported time of parental leave up to two years: One month *Elterngeld* doubles to two months *Elterngeld Plus*: If both parents share child care equally by working twenty-five to thirty hours per week, they receive four additional months, called *Partnerschaftsbonus*. The take-up of the new scheme is very encouraging, and the new government allocated 6.4 billion Euro to this item in 2018.

The inclusive impact of the last labour market reforms in Germany in quantitative terms was much stronger for women than for men; it was also larger compared to EU28 (Table 1): First, female unemployment improved and is now significantly below the level of men (2.6% women *v.* 3.4% men). Female labour force participation rocketed within the eighteen-year period

³⁰ For details and evaluation see Anette Bergemann & Regina T. Riphahn, *Maternal Employment Effects of Paid Parental Leave*, IZA Discussion Paper No. 9073 (2015), SSRN: <https://ssrn.com/abstract=2612325>.

from 56.9 to 68.2%, whereas the labour force participation rate of men only slightly improved from 73.2 to 77.1%; the gender gap thereby diminished from 21.3 to 8.9% age points. The corresponding gender gap at the EU28 level also improved but is still at 11.5%. Most of this inclusion or gender gap reduction, however, was obtained through non-standard work, in particular part-time work which is now far beyond the level of EU28 (38.7 *v.* 26.9%). With respect to regular work, German women are now even below the EU28 level (26.9% *v.* 29.5%); correspondingly, the German gender gap between men and women related to standard employment only slightly improved from 23.9 to 23.5% age points.

2.5 TRANSITIONS BETWEEN EMPLOYMENT AND RETIREMENT

Transitions to early retirement only for age reasons have been starkly reduced since the labour market reforms under Schröder. In the 1990s it was not unusual, in particular for men, to retire early in age fifty-five or fifty-eight supported by generous transfers or golden handshakes. Later, under the first grand coalition, the retirement age was even lifted from sixty-five to sixty-seven, stepwise to be implemented from cohort to cohort until 2029. The last grand coalition, however, eased again the possibility to retire at sixty-three for people who had completed forty-five years of continuous employment covered by social security. Nevertheless, this little reform against the spirit of increasing working life time produced only a small dip in the rising trend of the *average retirement age*, which increased from about sixty-two (2000) to sixty-four (2016), slightly more for women than men.

Transitions to early retirement due to health problems (*Erwerbsminderung*), however, still make up 18% of all retirement flows (20% in 2000), with an average retirement age of fifty-two for men and fifty-one for women.³¹ The employment rate for people with restricted work capacity is only 35%, and the unemployment rate is one of the highest and above the EU28 average of 18%.³² The number of severely disabled people who are unemployed rose by 1.2% from 2009 to 2016, although total unemployment declined by 21.2%; during the same time period, the number of participants in labour market policy measures fell by 35.4%.³³

³¹ The dominant reason being 42.8% for psychic (and not, as expected, for physis) reasons, with an upward trend of this share!

³² Catrin Berger, *Deutschland noch weit von UN-Zielvorgaben entfernt: Analysen zur Arbeitsmarktsituation von behinderten Menschen in der Europäischen Union*, 53 Informationsdienst Soziale Indikatoren (ISI) 1–7 (2015).

³³ Figures from DGB, *10 Jahre UN-Behindertenrechtskonvention: Wie ist der Umsetzungsstand am deutschen Arbeitsmarkt?*, in *Arbeitsmarkt aktuell* Nr. 8 (Dez. 2016); according to these figures, the activation ratio for the disabled is only 18% compared to 25% of all unemployed.

From the inclusive growth perspective, the labour market (policy and law) reform for the integration of severely disabled people in 2001 was in theory quite modern in anticipating some key principles of the UN Convention of 2008. The law stipulated *the right of disabled people* against their employer to a job that enables them to utilize and to develop further their abilities and knowledge; privileged access to firm-specific training; facilitation of their participation in external training; a work environment that conforms to their disability, and a workplace that is equipped with the required technical facilities.³⁴

This reform, which can be labelled as '*negotiated capacity building through accommodation*', corresponds to the general TLM strategy of extending work opportunities through 'making the market fit to workers' with the aim of greater social inclusion. This means enriching the standard employment contract by imposing on employers duties of reasonable adjustment in favour of workers, especially for those with reduced work capacity. In other words – and recently also formulated by Simon Deakin in a joint publication with Alain Supiot – rather than requiring the individual to be 'adaptable' to changing market conditions, the employment contract requires that employment practices be adapted to the circumstances of the individual.³⁵

It is evident that these kinds of adjustment duties require support through procedural rules, for instance, negotiation through collective agreements, social pacts or covenants between firms and other key actors in the local or regional labour market. At the firm level, i.e. the case of workplace accommodation for severely disabled people, German law envisages clear procedures to be taken in order to ensure the maintenance of the employment relationship through, for example, the involvement of rehabilitation experts, 'integration management' and 'integration agreements'.³⁶

Yet, as the figures above suggest, the reality in implementing such rules is far from the ideal. Complementary regulations are necessary which – to some extent – have been considered in a new and complementary law. Therefore, the *Bundesteilhabegesetz* of 2016 stipulated or induced four important amendments:

³⁴ SGB (Sozialgesetzbuch) IX, §81 (4).

³⁵ Simon Deakin, *Capacitas: Contract Law, Capabilities and the Legal Foundations*, in *Capacitas – Contract Law and the Institutional Preconditions of a Market Economy* 1–29 (Simon Deakin & Alain Supiot eds, Hart Publishing 2009); this article provides good practices mainly related to disability policy in Europe, an emphasis that correctly reflects the salience of this problem as also noted by Amartya Sen, *The Idea of Justice*, Allan Lane & Penguin Books (2009).

³⁶ §§ 83, 84 SGB IX. A pathbreaking pilot project for '*Betriebliches Eingliederungsmanagement*' is described in Marianne Giesert, Tobias Reuter & Diana Reiter (2013), *Neue Wege im Betrieblichen Eingliederungsmanagement – Arbeits- und Beschäftigungsfähigkeit wiederherstellen, erhalten und fördern. Evaluation des Betrieblichen Eingliederungsmanagements*, DGB Bildungswerk (2013), which tried to institutionalize a kind of 'employability coaching'.

- (1) First, the priority of rehabilitation before pension, in other words, the priority of the right to work against the right to income replacement.
- (2) Second, if a new job or job maintenance is ensured through workplace adjustment and/or personal assistance then the own work income (wages) is to a large extent not counted against the social transfer entitlements for disability – in other words: work pays.
- (3) Third, works councils are now – through an amendment of the Betriebsverfassungsgesetz (§ 92, 3 (2)) – explicitly mandated to monitor the work priority for the disabled or people with restricted work capacities and to take initiatives for necessary adjustments measures.
- (4) Fourth, jobcentres and pension agencies are – since the start of 2018 up to 2022 – entitled to apply for rehabilitation pilot projects for which a special budget position has been allocated (one billion Euro).

Most impressive was the inclusion impact for mature aged people in the age group sixty to sixty-nine: Labour force participation jumped from 13.3% to 38.8%, accompanied by a slight increase in unemployment, which reflects the stronger labour market attachment of this group compared to the late 1990s (Table 1). This dynamic was less impressive at the EU28 level where labour force participation of mature aged people ‘only’ increased from 16% to 28.2%. It is thereby remarkable that this positive dynamic was accompanied by a parallel increase of both standard and non-standard employment: The non-standard participation rate for Germany in this age group is now at 20.3% (EU28: 14.3%), and the standard employment rate at the level of 17% (EU28: 12.3%).

To sum up: Germany’s overall inclusive growth in terms of labour market participation was stronger than at the overall EU28 level. Yet this growth was promoted to a large extent by non-standard employment. Beyond some other negative aspects already mentioned (in particular erosion of labour market security and diminishing social protection), it seems plausible that the following outlook on inequality and poverty will turn out to be less favourable.

2.6 THE QUALITY SIDE OF THE GERMAN INCLUSIVE LABOUR MARKET POLICY

Inclusion in form of labour market participation might be a necessary condition for a decent living standard, but sufficient is this not. Income in form of good and fair wages or remuneration is crucial, apart from immaterial factors related to work (social recognition, pleasant work environment, learning

opportunities, risk of accidents et al.). Related to its inclusive growth strategy, the European Commission monitors this qualitative aspect through a set of indicators which are represented in the following table, and in which Germany is compared to the Eurozone (EU19) and the European Union (EU28) (Table 2).

Table 2 Indicators of Qualitative Inclusion in Europe, 2005, 2010, 2016

Indicator	Country	2005	2010	2016	Difference (2016–2005)
Income Poverty (% of population <60% median)*	EU19	15.5	16.3	17.4	1.9
	EU28	16.4	16.5	17.3	0.9
	Germany	12.2	15.6	16.5	4.3
Material Poverty (% of population with severe material deprivation)*	EU19	6.3	6.1	6.6	0.3
	EU28	10.7	8.4	7.5	-3.2
	Germany	4.6	4.5	3.7	-0.9
Earnings Capacity Poverty (% of pop. in households with low employment intensity)*	EU19	9.8	10.4	11.1	1.3
	EU28	10.3	10.3	10.5	0.2
	Germany	12.0	11.2	9.6	-2.4
Income Inequality (proportion S80/S20)	EU19	4.7	4.9	5.2	0.5
	EU28	5.0	4.9	5.2	0.2
	Germany	3.8	4.5	4.6	0.8

Source: *European Commission, Employment and Social Developments 2017 and 2018*; Tables in Appendix, difference in percentage points.

* These are the three dimensions chosen by the European Commission as a weighted benchmark for being at risk of poverty or exclusion (AROPE); for definitions see http://ec.europa.eu/eurostat/statistics-explained/index.php/People_at_risk_of_poverty_or_social_exclusion (download: 02.04.2018).

As the table speaks for itself, only the main results shall be emphasized: The risk of income poverty increased in Germany much faster than in the EU28 or EU19 by 4.3% points from 2005 to 2016, albeit from a level below the EU average. Material deprivation decreased (-0.9), albeit at a low level ('rich' country), but declining lesser than at the overall EU28 level. The increase in income inequality in

Germany was one of the highest among EU Member States, again from a lower level than the European average. The only favourable exception among the selected indicators is earnings capacity poverty measured as the per cent of the population living in households with low employment intensity: measured by this indicator German performance improved, in contrast in particular to the Eurozone, which is probably a reflection of the strong quantitative inclusion impact of German employment policy.

So, is there an unavoidable trade-off between quantitative and qualitative inclusion? It is the task of the final section to develop the idea of an inclusive labour contract which might be the solution to overcome the trade-off and to develop a virtuous (instead of a vicious circle) between quantitative and qualitative inclusion.

3 THE INCLUSIVE LABOUR CONTRACT AS REGULATORY IDEA

The previous sections provided evidence that Germany's success in terms of labour force participation was partly impressive but mainly built on non-standard employment (NSE). So far, the dangerous elements of risks related to this form of inclusion have been emphasized: precarious and dead-end jobs, rising inequality and segmentation. This view is certainly justified by the facts, but a more optimistic view might be also justified by pointing to the opportunity elements of risks related to NSE, that is, enhancing productivity through increasing the variability of employment relationships and greater sovereignty of workers for choosing the most suitable form of employment relationship over the life course with changing needs and preferences. The provocative news from the empirical part of the underlying study to this essay is the observation that it is *voluntary* part-time in particular (taken as an indicator of working-time flexibility over the life course) which seems to be an important driver for a new 'marriage' of equity and efficiency in the digital economy.³⁷ Furthermore, Europe should not dismiss the labour market complexity of the global world around its small continent which is, to a large extent, still strongly characterized by informal employment relationships with low social protection.³⁸

Embracing more contractual complexity as an opportunity requires, however, requires enhanced institutional capacities to respond to the new challenges of fair risk-sharing at three levels: the legal, the financial and the organizational level. At the legal level, a new labour standard based on the idea of an effective right to

³⁷ See in particular tables 10 and 11 in Schmid, *Europa in Arbeit*, *supra* n. 4, at 68–72.

³⁸ See also ILO, *Non-standard Employment around the World: Understanding Challenges, Shaping Prospects*, ILO Publications (2016); Schmid, *Towards an Employment Strategy of Inclusive Growth*, *supra* n. 4, at 145–87.

decent work beyond formal employment might be the solution. At the financial level, social protection – in a digital economy – may rely less on wage-based contributions and more on general taxation (including capital gains, wealth and luxurious consumption). At the organizational level, negotiated flexicurity and effective labour market services are at the core, like smart-matching demand and supply, monitoring and evaluation, case management based on individualized assessment, continuous training and vocational education, co-financing implemented within modern governance structures such as co-determination and participation in investment decisions. Germany, as shown above, provides some good practices in this respect.

As far as the legal level is concerned, expanding the range of the labour contract to all forms of work, also including unpaid but socially highly valued work as proposed, for instance, by the Supiot Report Supiot,³⁹ seems to be the most radical and promising route for ensuring social protection to workers. The main aim of this proposal is the move from protecting jobs to protecting the employability of people, or from job security to labour market security. Social security linked to traditional employment relationships would be extended in the new standard to include income and employment risks related to transitions between various employment and labour market statuses. The legal core is the establishment of new social rights and new social obligations on both sides of the labour market.

The coverage of the social rights would be new in that they would include subjects that are unfamiliar to industrial wage-earners on which the traditional standard employment relationship is built: the right to regular employability assessment, to appropriate working hours including the right to request shorter or longer working hours, to occupational redeployment, retraining or vocational rehabilitation. Furthermore, a flexible job guarantee through the state would be an accompanying element.⁴⁰ In contrast to earlier job guarantees, this guarantee would be flexible in three respects: First, individuals would be free to choose a job offer by the state. Second, individuals could combine this right with various ‘non-standard’ forms of employment, e.g. involuntary part-time. Third, the guarantee could also take the form of subsidized employment in the (private) market sector.

The scope of social rights would also be new since they would include not only ‘standard’ wage-earners but also the ‘non-standard’ part-time workers, the self-employed or semi-self-employed, the temp-agency workers, the marginal

³⁹ Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe*, Oxford University Press (2016), second edition with a new preface in French by the author.

⁴⁰ Anthony B. Atkinson, *Inequality – What Can Be Done?*, Har. Univ. Press (2015).

workers, and even zero-hour contract workers. One example would be including the risk of reduced earnings capacity in a way analogue to short-time work (of full-time workers) covered by unemployment insurance. The income loss induced by reduced working time (due to, for example, care obligations) could be compensated by part-time unemployment benefits or – as in the German case – a wage-related parental leave allowance. Such a benefit would also be helpful when related to the increasing demand of care for the frail and elderly which, for example in Germany, in its majority (three-fourths) is still provided within the family and again predominantly by women.

The nature of social rights would be new because they often take the form of vouchers, social drawing rights or personnel accounts, which provide transition securities from one labour contract to another and allow workers to rely on solidarity within defined and perhaps collectively bargained limits when exercising their new freedom to act.

A good practice example of such coordinated flexibility is the German collective agreement established in the chemical industry in April 2008, setting up so-called demography funds. This overall framework agreement required all employers to contribute an annual sum of 300 Euro for each employee into a fund, which could be utilized after corresponding negotiations and deliberations at the firm level for various aims, among others for training or retraining, for buying occupational disability insurance or for early retirement, however, under the condition of building a bridge for young workers entering employment. In 2015, instead of bargaining for an aggressive wage increase, trade unions successfully fought for a stepwise increase of employers' contributions into this fund: 550 Euro in 2016 and 750 Euro in 2017, corresponding to an otherwise 0.9% wage increase.

To the extent that these new rights enhance the range of individual choices, a corresponding new field of individual responsibilities opens up. This dimension, strangely enough, is not covered in the Supiot Report. Amartya Sen, however, is quite outspoken in this respect: 'Freedom to choose gives us the opportunity to decide what we should do, but with the opportunity comes the responsibility for what we do – to the extent that they are chosen actions. Since a capability is the power to do something, the accountability that emanates from that ability – that power – is a part of the capability perspective, and this can make room for demands of duty – what can be broadly called deontological demands.'⁴¹

The coverage of social obligations arising from the extended room of individual freedom to act would be new in that they would include subjects unfamiliar in the traditional employment relationship: obligations to train and retrain both for

⁴¹ Sen, *supra* n. 35, at 19.

employees as well as for employers to maintain employability or proper management abilities; to actively search for a new job or accept a less well paid job under fair compensating rules; to sickness prevention and occupational rehabilitation; to reasonable workplace adjustments according to the capabilities of workers or to changing working times according to the needs either related to the individual life course or to volatile market demands of goods and services. A good example in this direction are the reforms of the German law for severely disabled people, which have been described above. It is evident that these kinds of adjustment duties require support through collective agreements or social pacts between firms and other key actors in the local or regional labour market with the support of modern labour market services, which are still underdeveloped in Germany.

The scope of social obligations would also be new since they would include not only certain categories of workers or employers but also the core workers in open-ended contracts and all firms regardless of size and function. The exemption of civil servants or the self-employed from contributing to social security (especially pensions and unemployment insurance) as, for instance, in Germany, would not be justified under the regulatory idea of an inclusive labour contract. A good practice example is the obligation to work-sharing in the event of cyclical troughs of demand if workers' representatives require this from the employer whereby, in turn, the law entitles them to ask employers to work-share as an instrument to maintain the employment relationship. The German scheme of short-time work (*Kurzarbeit*) demonstrates the usefulness of such a device for internal flexibility as well as the need to fine-tune the contractual arrangements.⁴²

The nature of social obligations would be new because they often take the form of 'voice', involving negotiations at individual, firm, regional and branch level in order to reach mutual agreements and to accept compromises in case of different interests, so-called negotiated flexicurity.⁴³ As many workers in NSE have a limited voice, it is important to include measures that can strengthen their ability to be heard and to negotiate effectively. Voice as an adjustment mechanism to structural change involving high uncertainty is known in the literature on industrial relations as legally acknowledged *learning communities*. Covenants are a good

⁴² See Joachim Möller, *The German Labor Market Response in the World Recession – De-mystifying a Miracle*, 42(4) ZAF (Zeitschrift für Arbeitsmarktforschung) 325–36 (2010); Donald Storrie, *Temporary Agency Work in the European Union*, Foundation for the Improvement of Living Conditions (2012); Schmid, *Sharing Risks*, *supra* n. 9, at 84–86.

⁴³ Günther Schmid, *Full Employment in Europe – Managing Transitions and Risks*, Edward Elgar 317–22 (2008).

practice case, which – for instance – are widely used as a governance instrument in the Netherlands.⁴⁴

4 SUMMARY AND CONCLUSIONS

This study considered the German labour market policy and labour law reforms under the perspective of inclusion. It provided, first, a comprehensive yet condensed and critical overview of the German reforms since they year 2000 structured along the lines of TLM and assessed in view of four normative principles of inclusion. Exploiting the European Labour Force Survey in an original way, the results of the German reforms could also be confronted with hard quantitative indicators of inclusion in form of labour market participation rates. The result is that the reforms promoted inclusion in a considerable way, in particular for women and elderly, but mainly in form of risky employment relationships leading to labour market segmentation, rising inequality and in-work poverty. To stem against this trend, new risks related to NSE have to be included into the institutional framework of labour market policy and social protection. At the legal level, the concept of ‘inclusive labour contract’ could serve as a regulatory idea to take fluid employment relationships over the life course as an opportunity rather than only as a danger.

New social rights and obligations under this systemic reorientation would increase in particular the internal flexibility of ‘standard’ employment as a functional equivalent to external flexibility which often ends up in a precarious NSE. But they would also include voluntary forms of NSE in a broader social protection framework as currently exists, for instance, by extending the conventional unemployment insurance to a system of employment insurance which also covers income risks other than unemployment, such as voluntary or involuntary part-time, short-time work, care and training leaves.

The establishment of new social rights and new social obligations according to the regulatory idea of an inclusive labour contract would also ensure the development of institutional capabilities that not only make workers fit to the market, but that also make the market fit to the workers. The employment strategy of inclusive growth should be based on the regulatory idea of a new labour standard which goes beyond employment and includes all kinds of work that are socially valued or even obligatory. The inclusive labour contract brings together the supply strategy

⁴⁴ A covenant is an undersigned written agreement, or a system of agreements, between two or more parties, at least one i.e. or represents a public authority, meant to effectuate governmental policy; see more in Ton Korver & Günther Schmid, *Enhancing Transition Capacities and Sustainable Transitions*, in *Renewing Democratic Deliberation in Europe: The Challenge of Social and Civil Dialogue* 23–55 (J. de Munck, C. Didry, I. Ferreras & A. Jobert eds, Peter Lang 2012).

of investments in human capabilities over the whole life course, and the demand strategy of inclusive growth through job creation by proper fiscal and monetary policies enhanced by the protected variability of labour contracts. This would also be an essential element of a global social policy⁴⁵ that aims at the prevention of a vicious cycle or cut-throat global competition, originally described by the socialist political activist, Ferdinand Lassalle, as the iron law of falling real net wages towards an existence minimum.⁴⁶

⁴⁵ Deeming & Smith, *supra* n. 4.

⁴⁶ Supiot, *supra* n. 39, at XXXVIII.