Flexicurity, employability and changing employment protection in a global economy. A study of labour law developments in Sweden in a European context

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FLEXICURITY, EMPLOYABILITY AND CHANGING EMPLOYMENT PROTECTION IN A GLOBAL ECONOMY

A study of labour law developments in Sweden in a European context

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ABSTRACT

In the wake of increasing globalisation and economic and financial crisis, the balance between flexibility and security – flexicurity – is central to European employment policies and the modernisation of EU labour law in the different Member States of the EU. Common principles of flexibility have been adopted and integrated into the European Employment Strategy and the Europe 2020 Strategy (including its Agenda for New Skills and Jobs), and different pathways to flexicurity have been outlined. The aim of this paper is to critically analyse developments in the Swedish employment protection regulation – with a special focus on dismissals for reasons of redundancy – in a European context and in light of the EU law flexicurity discourse. The notions of employability and equal treatment come to the fore. Central research questions involve the design and content of employment protection regulation and employment protection and employability within collective bargaining and the industrial relations system. What are the recent changes and developments in legislation, case law and collective bargaining – and is employment protection being deregulated? This paper integrates labour law and industrial relations approaches, and encompasses analyses of legal materials at different levels (EU law regulation, national legislation, employment contracts and case law) as well as industrial relations aspects (collective bargaining and actors, processes and governance within the industrial relations system).

1. Introduction

In the wake of increasing globalisation and economic and financial crisis, the balance between flexibility and security – flexicurity – is central to European employment policies and the modernisation of EU labour law, as well as the regulation of income and employment security in the different Member States of the EU. Common principles of flexibility have been adopted and integrated into the European Employment Strategy and the Europe 2020 Strategy (including its Agenda for New Skills and Jobs), and different pathways to flexicurity have been outlined. The role of social partners and social dialogue is emphasised. The aim of flexicurity is to reduce labour market segmentation, but also to increase economic growth and Europe's competitiveness in a global perspective.

The aim of this paper is to critically analyse developments in the Swedish employment protection regulation – with a special focus on dismissals for reasons of redundancy – in light of the EU law flexicurity discourse. The notions of employability and equal treatment come to the fore.[1]

[1] This research is performed within the research project 'Flexicurity – a study of Swedish employment regulation in a comparative context', financed by the Swedish Council for Working Life and Social Research (FAS). This paper is a continuation and development of labour law and industrial relations discussions and analyses presented in M. Rönnmar, Flexicurité et règlementation de l'emploi suédois, *Bulletin de droit compare du travail et de la sécurité sociale 2010*, Université Montesquieu-Bordeaux 2010, pp. 43–70, M. Rönnmar, Flexicurity the notion of equal treatment and labour law, In: M. Rönnmar (ed.), *Labour Law, Fundamental Rights and Social Europe*, Swedish Studies in European Law, Vol. 4, Hart Publishing, Oxford 2011, pp. 153–181 and A. Numhauser-Henning and M. Rönnmar, M., Det flexibla anställningsskyddet, *Juridisk Tidskrift*, 2010–11, No 2, pp. 382–411. – Mia Rönnmar and Ann Numhauser-Henning are both members of the Norma Research Programme at the Faculty of Law at Lund University, see www.jur.lu.se/norma.

Central research questions involve the design and content of Swedish employment protection regulation – with a special focus on dismissals for reasons of redundancy – and employment protection and employability within collective bargaining and the industrial relations system. What are the recent changes and developments in legislation, case law and collective bargaining – and is employment protection being deregulated?

The Swedish labour law and industrial relations system builds on self-regulation, co-operation between the social partners, and autonomous collective bargaining. The trade unionisation rate is about 70 percent and the collective bargaining rate is about 90 percent.[2] Wages and other terms and conditions of employment are generally set by collective bargaining. Collective bargaining is accompanied by strong mechanisms for and well-developed regulation of information, consultation and co-determination. Workers' influence is channelled solely through trade unions in a so-called single-channel model.

In the 1970s, there was an increase in legislative activity, and since then legislation in most areas of labour law is very frequent in Sweden. Membership of Sweden in the European Union since 1995 has added to this legislation. A characteristic feature of Swedish labour law legislation – including legislation on employment protection – is its 'semi-compelling' character, which allows for deviations, both to the advantage and detriment of employees, from the statutory provisions by means of a collective agreement entered into by the employer and the trade union. In this way, flexible modifications to accommodate the needs of specific industries and sectors or companies can be achieved. Generally, these collective agreement provisions may also be applied to unorganised employees, or employees who are members of a trade union which is not a signatory party to the collective agreement.[3]

Theories regarding labour market flexibility, flexicurity and transitional labour markets are points of departure. This paper integrates labour law and industrial relations approaches, and encompasses analyses of legal materials at different levels (EU law regulation and policy, national legislation, employment contracts and case law) as well as industrial relations aspects (collective bargaining and actors, processes and governance within the industrial relations system). Using this 'labour law in context' approach means analysing the interplay between legislation and collective bargaining, labour law and industrial relations, and national labour law regulation and EU law regulation.

The outline of the paper is as follows. Section 2 provides an account of the EU law flexicurity discourse and its relationship to employment protection. Section 3 discusses the general outline of the Swedish employment protection regulation and regulation of fixed-term work, and recent debates on legislative reforms, case law developments and collective bargaining developments – with a special focus on dismissals for reasons of redundancy. Lastly, Section 4 contains an analysis of the Swedish employment protection regulation in light of the EU law flexicurity discourse, as well as some concluding remarks.

[2] See Medlingsinstitutet, *Avtalsrörelsen och lönebildningen 2011. Medlingsinstitutets årsrapport,* Stockholm 2011, pp. 33 ff.

[3] See, for example, section 2 of the (1982:80) Employment Protection Act and section 4 of the (1976:580) Co-determination Act.

2. The EU Law Flexicurity Discourse and Employment Protection[4]

The 1997 Green Paper on a new organisation of work,[5] the 1998 Employment Guidelines, and the Part-Time Work and the Fixed-Term Work Directives[6] can be said to constitute the early developments of the EU law flexicurity discourse. Prominent national examples of successful flexicurity strategies and policies (often put forward by the OECD and the European Commission) include the 1999 Dutch Flexibility and Security Act and the Danish 'Golden Triangle of Flexicurity'.[7]

The flexibilisation of work is described as an increase in adaptability and allocative flexibility, and has often been discussed in terms of labour market segmentation and the legal 'tension' between permanent employment, linked to employment protection on the one hand, and on the other hand, more precarious atypical, and flexible, employment. – In this paper interest is also directed at the flexibility inherent in the employment protection regulation, especially as regards dismissal for reasons of redundancy. – Frequently mentioned background reasons for this flexibilisation process include the increasing globalisation of the economy and commerce, new technology, and improved communications. The development in EU law can be understood as a shift from opposition to acceptance of flexible work.

Flexicurity relates to Atkinson's model of *the flexible firm*, often referred to in labour market flexibility research. The flexible firm is made up of three different labour force segments: the *core group of workers* with firm-specific skills, typically offered high-quality working conditions and employment protection; the *peripheral group of workers* with a looser connection to the firm, often employed on fixed-term or part-time employment contracts; and the *external group of workers*, workers who are utilised, but not employed by the firm, such as self-employed persons or temporary agency workers. The employer typically makes use of different flexibility strategies with regard to these labour force segments. *Numerical flexibility* relates to both the form and duration of the employment contract and to working-time arrangements, and primarily serves the purpose of achieving greater flexibility in the number of workers employed. *Functional flexibility* is a matter of adaptability and versatility within permanent employment relationships, and it primarily affects the so-called core group of workers. The aim of functional flexibility is to vary the content of work in relation to the changing demands of production. Finally, *financial flexibility* is concerned with making wages more adaptable to circumstances, such as the profits of the business or the employee's knowledge and efficiency. Another aspect of the labour market flexibility – and

[4] This section draws heavily on M. Rönnmar, Flexicurity the notion of equal treatment and labour law, In: M. Rönnmar (ed.), *Labour Law, Fundamental Rights and Social Europe*, Swedish Studies in European Law, Vol. 4, Hart Publishing, Oxford 2011, pp. 151–181, which contains an exploration and critical discussion of the different notions of equal treatment inherent in the EU law flexicurity discourse.

[5] See COM(1997) 128 final.

[6] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and ETUC and Council Directive 99/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by the ETUC, UNICE and CEEP.

[7] See e.g. European Commission, *Employment in Europe 2006*, 2006, pp. 77 ff, OECD, *OECD Employment Outlook 2004*, 2004, pp. 97 ff. and European Expert Group on Flexicurity, T. Wilthagen (rapporteur), *Flexicurity Pathways. Turning hurdles into stepping stones*, Bryssel 2007. – The Dutch system represents a flexible regulation of temporary agency work and fixed-term work, combined with legal protection for these groups (also in social security terms), limiting the consecutive use of fixed-term contracts, eliminating administrative obstacles for temporary agency work, and providing a regulatory framework for flexible work. The Danish system builds on a rather weak employment protection, active labour market policies, and a generous unemployment benefit system.

flexicurity – discussion concerns the forms or methods used to achieve flexibility. *Substantive flexibility* refers to the number of alternative solutions offered in any given situation, while procedural flexibility (generally seen as the more effective method of the two) refers to a rule system's inherent mechanisms for achieving variation in accordance with different needs. Collective bargaining and information, consultation and negotiation with workers' representatives are important mechanisms for achieving procedural flexibility.[8]

Previous studies have shown, for example, that the Swedish labour law and industrial relations system provides a rather wide scope for functional flexibility and favourable conditions for the implementation of functional flexibility strategies. This is owing to the employee's extensive obligation to work, the employer's free right in principle to direct and allocate work and right of transfer, and an industrial relations system built on collectivism, social partnership, and mechanisms for information, consultation and co-determination.[9]

The influential flexicurity research by Wilthagen starts from theories on a flexibility-security nexus and transitional labour markets. Wilthagen discusses flexibility, following Atkinson's model, in terms of external numerical flexibility, internal numerical flexibility, functional flexibility and flexible pay, and security in terms of job security, employment security/employability security, income security and combination security.[10] A starting point for the theory on transitional labour markets is that 'the borders between the labour market and other social systems – private households, unemployment, training and education and retirement – have to become and are indeed more open to transitory states between gainful employment and productive non-market activities'.[11] Thus, transitional labour market regimes aim at creating conditions for successful and gainful transitions between different jobs, but also between jobs, unemployment, training and retirement.

The much-debated 2006 Green Paper on the modernisation of labour law discussed the role labour law could play in promoting growth and jobs, and advancing flexicurity. In 2007, following a report by the European Expert Group on Flexicurity (led by Wilthagen), the Council adopted Common Principles of Flexicurity to be integrated into the European Employment Strategy and the Lisbon Strategy for Growth and Jobs, and now into the Europe 2020 Strategy.[12]

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[8] See J. Atkinson, Manpower Strategies for Flexible Organisations, *Personnel Management*, Vol. 28, 1984. The model of the 'flexible firm' and its related concepts can be used as 'ideal types' to discuss different functions from a flexibility perspective, see e.g. M. Rönnmar, The Managerial Prerogative and the Employee's Obligation to Work: Comparative Perspectives on Functional Flexibility, *Industrial Law Journal*, Vol. 35, No 1, 2006, pp. 56–74.

[9] See M. Rönnmar, The Managerial Prerogative and the Employee's Obligation to Work: Comparative Perspectives on Functional Flexibility, *Industrial Law Journal*, Vol. 35, No 1, 2006, pp. 56–74.

[10] See T. Wilthagen, *The Flexibility-Security Nexus: New approaches to regulating employment and labour markets*, Flexicurity research paper FXP 2003-2, OSA/Institute for Labour Studies, Tilburg University, Tilburg, 2002 and European Commission, *Employment in Europe 2006*, 2006.

[11] T. Wilthagen, *The Flexibility-Security Nexus: New approaches to regulating employment and labour markets*, Flexicurity research paper FXP 2003-2, OSA/Institute for Labour Studies, Tilburg University, Tilburg, 2002, p. 6. Compare also G. Schmid, Transitional labour markets and the European social model: towards a new employment compact, In: G. Schmid and B. Gazier (eds), *The Dynamics of Full Employment: Social Integration Through Transitional Labour Markets*, Edward Elgar, Cheltenham 2002, pp. 393–435.

[12] See European Commission, Green Paper. *Modernising labour law to meet the challenges of the 21st century*, COM(2006) 708 final, European Expert Group on Flexicurity, T. Wilthagen (rapporteur), *Flexicurity Pathways. Turning hurdles into stepping stones*, Bryssel 2007, and European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the

Flexicurity is described at EU level as an integrated strategy to enhance, at the same time, flexibility and security in the labour market, and contains the following components: flexible and reliable contractual arrangements; comprehensive life-long learning; effective active labour market policies; and modern social security systems. Member States are to utilise different pathways to flexicurity dependent on their respective labour law, industrial relations, and social security systems.[13] Furthermore, the importance of involving social partners – for example through collective bargaining and information and consultation – is highlighted.[14] The aim of flexicurity is to reduce labour market segmentation, but also to increase economic growth and Europe's competitiveness in a global perspective.

The EU law flexicurity discourse (particularly as expressed in the Green Paper on the modernisation of labour law) has been criticised, most clearly by the trade union movement but also by academics, for focusing merely or predominately on labour market *flexibility* and deregulation.[15]

Until now, probably the most articulated legal expressions of the EU law flexicurity discourse are the Part-Time, Fixed-Term and Temporary Agency Work Directives.[16] The Green Paper on the modernisation of labour law (focusing *inter alia* on the employee notion, temporary agency work, working time and undeclared work) has not yet resulted in any other explicit legal proposals from the European Commission, linked to the flexicurity discourse. The integration of the Common Principles of Flexicurity into European employment policy and the European Employment Strategy, the Lisbon Strategy for Growth and Jobs, and now the Europe 2020 Strategy, by way of soft law and the open method of coordination, is the recent and clearest expression of the EU law flexicurity discourse.[17]

The new Europe 2020 Strategy puts forward three mutually reinforcing priorities: smart growth, sustainable growth and inclusive growth. As regards inclusive growth – a high-employment economy delivering economic, social and territorial cohesion – a new flagship initiative 'An agenda for new skills and jobs' is introduced. Here, the Commission will work together with the European social partners to define and implement the second phase of the flexicurity agenda and to reinforce the four components of flexicurity. At national level, Member States will proceed to implement their national pathways for flexicurity to reduce labour market segmentation and facilitate transitions.[18] [19]

Committee of the Regions. *Towards Common Principles of Flexicurity: More and better jobs through flexibility and security*, COM(2007) 359 final.

[13] Compare COM(2007) 359 final. The pathways are: pathway 1, tackling contractual segmentation; pathway 2, developing flexicurity within the enterprise and offering transition security; pathway 3, tackling skills and opportunity gaps among the workforce; and pathway 4, improving opportunities for benefit recipients and informally employed workers.

[14] Compare COM(2007) 359 final, and European social partners, *Key Challenges Facing European Labour Markets: A Joint Analysis of European Social Partners*, 2007.

[15] See European Foundation for the Improvement of Living and Working Conditions, *Flexicurity and industrial relations*, European Foundation for the Improvement of Living and Working Conditions, Dublin 2009, pp. 10 ff.

[16] Compare also the autonomous Telework Agreement from 2002, resulting from the European Social Dialogue.

[17] See the *Joint Employment Report 2008/2009*, p. 7. Compare also M. De Vos, European Flexicurity and Globalisation: A Critical Perspective, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 25, No 3, 2009, pp. 209–235 and S. Sciarra, *Is Flexicurity a European Policy?*, URGE Working Paper 4/2008, URGE, Turin 2008, on the European Globalisation Adjustment Fund, and its possibilities to promote flexicurity.

[18] See European Commission, Communication from the Commission, *Europe 2020. A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 and COM(2010) 682 final.

Flexible and reliable contractual arrangements (through modern labour laws, collective agreements and work organisation) aim at reduced labour market segmentation and equal treatment of permanent employees, fixed-term workers and other flexible workers. Such equal treatment can be achieved through principles of non-discrimination and equal treatment proper and reforms to the regulation of employment protection and fixed-term work. These latter reforms relate to a new balance between numerical and functional flexibility, deregulation of employment protection and the creation of a 'tenure track' approach, progressive employment protection, and an increased focus on employability.[20] In this context, the notions of internal flexicurity, transitions and adjustments within an enterprise, and external flexicurity, transitions from job to job between enterprises and between employment and self-employment, are also discussed.[21]

As regards the balance between numerical and functional flexibility, (external) numerical flexibility – designed to achieve greater flexibility in the number of workers employed – has often been at the centre of attention in the labour market flexibility debate, as has flexible work. Functional flexibility – a matter of adaptability and versatility within permanent employment relationships – is in turn closely linked with employability.

A *new* balance between numerical and functional flexibility implies an increased focus on functional flexibility. In the new flagship initiative Agenda for New Skills and Jobs, emphasis is put on the importance of functional flexibility and working time (and pay) flexibility (phrased here as internal flexibility), not least in times of economic pressures and crisis. It is argued that '[w]hile both internal and external flexibility are important over the business cycle, internal flexibility can help employers adjust labour input to a temporary fall in demand while preserving jobs which are viable in the longer term. Employers can thus retain the skills of firm-specific workers which would be at a premium when recovery takes hold. Forms of internal numerical flexibility [and functional flexibility, my comment] include the adjustment of work organisation or working time (e.g. short-time working arrangements)'.[22]

When it comes to deregulation of employment protection, and creation of a 'tenure track' approach and progressive employment protection, one of the interests at hand is the need to provide 'stepping-stones' for 'outsiders' and fixed-term workers to move into stable contractual arrangements (instead of getting 'trapped' in fixed-term and flexible contractual arrangements).[23] This notion of equal treatment between permanent employees and fixed-term workers is potentially 'revolutionary', and at the very heart of employment protection regulation. It relates to (permanent) open-ended employment contracts as the main rule, and the crucial functional relationship between open-ended employment contracts and fixed-term employment contracts. In principle, an open-ended employment contract is concluded for an indefinite period of time, and can be terminated only by means of dismissal – and then the employer must have just cause for dismissal.

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[19] See *Proposal for a Council Decision on guidelines for the employment policies of the Member States. Part II of the Europe 2020 Integrated Guidelines*, COM(2010) 193 final.

[20] Compare COM(2007) 359 final.

[21] Compare also the European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An Agenda for new skills and jobs: A European contribution towards full employment*, COM(2010) 682 final, commenting on the extent of internal and external flexicurity, *inter alia* in light of the economic crisis in 2008 and onwards.

[22] See COM(2010) 682 final. Compare also P. Auer, What's in a Name? The Rise (and Fall?) of Flexicurity, *Journal of Industrial Relations*, Vol. 52, No 3, 2010, pp. 371 –386.

[23] See COM(2007) 359 final, and European Expert Group on Flexicurity, T. Wilthagen (rapporteur), *Flexicurity Pathways. Turning hurdles into stepping stones*, Bryssel 2007.

In Sweden, for example, the regulation of fixed-term employment contracts first became an important issue in the beginning of the 1970s. Statutory employment protection, first established through the (1974:12**)** Employment Protection Act, required regulation of fixed-term employment contracts to prevent circumvention of the employment protection linked to permanent open-ended employment contracts. In the Preamble to the Fixed-Term Work Directive/Framework Agreement on Fixed-Term Work, the parties recognise that 'contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers' (but also that 'fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers'). This is also articulated in recent policy documents – not least in response to the frequent criticism of the 'deregulatory agenda' of the flexicurity strategy. For example, it is held that '[i]t is sometimes claimed that flexicurity seeks to abolish employment protection legislation. This is not the case. Flexicurity promotes an appropriate design of EPL'.[24]

Pathway 1, 'Tackling contractual segmentation', developed *inter alia* in the report by the European Expert Group on Flexicurity, aims precisely to redesign the open-ended contract to include a progressive build-up of job protection, and redesign rules for economic dismissals. A possible future deregulation of employment protection is sketched in the following way: 'workers would have an open-ended contract from the very beginning of the employment relationship with their employer and would no longer, as is now often the case, start with a series of fixed-term or agency contracts. The open-ended contract would be redesigned to include a progressive build-up of job protection. It would start with a basic level of job protection and protection would build up progressively with job tenure, until "full" protection is achieved. This "tenure track approach" would guarantee automatic progress into better contractual conditions; the risk of getting "stuck" in less protected contracts would thus be reduced.'[25]

Reforms of the employment protection regulation related to economic dismissals (in the Swedish context, dismissals for reasons of redundancy) are proposed in order to address bureaucracy and length of procedure, improve transparency, and make the process more reliable.[26] The Commission discusses the regulation of economic dismissals also in relation to the influential – but highly controversial – employment protection indicators developed by the OECD, and the OECD studies of the strictness of employment protection regulation in different countries.[27]

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[24] COM(2007) 359 final.

[25] COM(2007) 359 final.

[26] See COM(2007) 359 final. Compare also the report by the European Expert Group on Flexicurity, where the idea is considered to '[make] standard contracts more attractive by introducing a unitary contract, based on "tenure track". These contracts would be permanent contracts but specific elements of protection (on top of the basics) can be built up progressively as the working relationship continues. These may concern notification periods, the amount of severance pay and the procedural aspects of dismissal protection. From the start, there should be an adequate though basic level of protection, under the law and/or collective agreements, which expands automatically and stepwise as the working relationship continues. At the same time, the (consecutive) use of fixed-term contracts should be limited and undeclared work should be reduced as rapidly as possible, notably by increasing effective inspections', see European Expert Group on Flexicurity, T. Wilthagen (rapporteur), *Flexicurity Pathways. Turning hurdles into stepping stones*, Bryssel 2007, p. 23.

[27] See e.g. COM(2007) 359 final, with further references. Compare also the critical debate on the OECD employment protection indicators, and the attempt by Deakin *et al.* to develop a more nuanced system of labour law regulation evaluation; see e.g. S. Deakin, P. Lele and M. Siems, The evolution of labour law: Calibrating and comparing regulatory regimes, *International Labour Review*, Vol. 146, Nos 3–4, 2007, pp. 133–162, and S. Deakin and P. Sarkar, Assessing the long-term economic impact of labour law systems: a theoretical reappraisal and analysis of new times series data, *Industrial Relations Journal*, Vol. 39, No, pp. 453.

In the Agenda for New Skills and Jobs, the Commission presents different proposals to reinforce the four components of flexicurity, and argues that 'in highly segmented labour markets, one possible avenue for discussion could be to extend the use of open-ended contractual arrangements, with a *sufficiently long probation period* and a gradual increase of protection rights, access to training, life-long learning and career guidance for *all* employees [emphasis added]. This would aim at reducing the existing divisions between those holding temporary and permanent contracts'.[28] Thus, these ideas are put forward again here and, we would argue, taken one step further. Here, all open-ended employment contracts would include a sufficiently long probation period (during which employment protection is absent).

> From the French horizon, Gaudu has critically discussed the failed attempt in 2005 to introduce a similar open-ended *single employment contract* – replacing the fixed-term contract and the open-ended contract. Gaudu argues that 'it is not possible to radically deregulate economic dismissals under the banner of a "single employment contract" that would replace the dualism of the fixed-term contract/open-ended contract'.[29]

However, it is important to remember that outside the realm of the European Employment Strategy, the Europe 2020 Strategy and the open method of co-ordination, the flexicurity strategy has not yet resulted in any new legal proposals linked to employment protection. In general, employment protection as such is only partly regulated at EU level (cf. Article 153(1) TFEU, 'With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: … (d) protection of workers where their employment contract is terminated', and Article 30 of the EU Charter of Fundamental Rights, 'Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices'), *inter alia* through the Fixed-Term Work Directive and the 'restructuring' Directives on Transfers of Undertakings (2001/23/EC)[30] and Collective Dismissals (1998/59/EC).[31] [32]

The Fixed-Term Work Directive was adopted in 1999, as a result of the European social dialogue. The purpose of the Directive is twofold: to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination, and to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships (cf. clause 1). When it comes to measures to prevent abuse arising from the use of successive fixed-term employment contracts or relationships – linked to the

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[28] See COM(2010) 682 final, p. 5.

[29] F. Gaudu, *Collective Redundancies for economic motives: convergences and controversies. Part II*, Keynote Paper on the occasion of the 3rd Annual Legal Seminar European Labour Law Network (2010) p. 1. – Compare in this respect the work of economist Cahuc, for example, P. Cahuc, *For a unified contract*, Keynote Paper on the occasion of the 4th Annual Legal Seminar of the European Labour Law Network, 2011. Cf. also Cahuc's economic analysis of the Swedish employment protection regulation in cases of dismissal for reasons of redundancy along the same lines within the framework of the Governmental Inquiry Report SOU 2011:11, Långtidsutredningen, i.e. P. Cahuc, *Det svenska anställningsskyddet*, Bilaga 6 till LU 2011.

[30] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

[31] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

[32] See also Article 24 of the revised Social Charter of the European Council and ILO Convention No 158 Termination on Employment Convention 1982.For comparative and European perspectives on employment protection, see also, for example, B. Hepple, European Rules on Dismissal Law?, Comparative Labor Law Journal, Vol. 18, 1997, pp. 204–228, B. Hepple and B. Veneziani (eds), The Transformation of Labour Law in Europe. A Comparative Study of 15 Countries 1945–2004, Hart, Oxford 2009, and N. Bruun, Protection Against Unjustified Dismissal (Article 30), In: B. Bercusson (ed.), European Labour Law and the EU Charter of Fundamental Rights, Nomos, Baden-Baden 2006, pp. 337–355.

'tenure track' approach and progressive employment protection – and where there are no equivalent legal measures to prevent abuse, the Member States shall introduce, in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures: objective reasons justifying the renewal of such contracts or relationships; the maximum total duration of successive fixed-term employment contracts or relationships; or, the number of renewals of such contracts or relationships (cf. clause 5). Thus, the Directive does not introduce any requirement for objective reasons for the parties' first entry into a fixed-term employment contract.[33]

In addition, the EU law flexicurity discourse focuses on *employability* and labour market transitions, and thus implies a shift of emphasis from job security and traditional employment protection to security by way of employability in relation to the entire labour market.[34] The focus on employability links employment protection and security for employees in crucial ways to the other flexicurity components, namely comprehensive lifelong learning, active labour market policies, and modern social security systems.

3. Swedish Employment Protection Regulation

3.1. General outline of employment protection regulation and regulation of fixed-term work

The (1982:80) Employment Protection Act applies to all employees, whether in private or public employment, from the first day of employment.[35] Small companies are not exempted. The employer may dismiss a permanent employee for personal reasons or for reasons of redundancy. The employer must have just cause (or objective grounds) for dismissal (cf. section 7 of the (1982:80) Employment Protection Act).[36] [37] [38] Coupled with this basic just cause requirement are different rules obliging the employer (depending on whether the

[33] Compare A. Numhauser-Henning, Fixed-term Work in Nordic Labour Law, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 18, No 3, 2002, pp. 429 and Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

[34] Compare Wilthagen and the concept of employment security/employability security, see T. Wilthagen, *The Flexibility-Security Nexus: New approaches to regulating employment and labour markets*, Flexicurity research paper FXP 2003-2, OSA/Institute for Labour Studies, Tilburg University, Tilburg, 2002. – Auer has criticised this conceptual framework, and argued that 'the definitions used by the Commission (following on Wilthagen and Tros 2004) for job and employment security are questionable. Job security is defined as a job with a single employer and employment security as the potentiality to hold jobs with multiple employers, i.e. employability security rather than employment security. … one has to use correct definitions: in line with the usage of the term in industrial relations and labour economics, *job security* is related to the probability of workers retaining employment in their current *job*, and *employment security* to retaining a job with their current *employer*', see P. Auer, What's in a Name? The Rise (and Fall?) of Flexicurity, Journal of Industrial Relations, Vol. 52, No 3, 2010, pp. 380 f. – Traditional concepts used in used in Swedish labour law (*befattningsskydd* and *anställningsskydd*/*skydd mot friställningar*, respectively) coincide best with the definitions advocated by Auer.

[35] Some minor groups of employees, such as employees in an upper management position and the employer's family members, are, however, excluded (cf. section 1 subsection 2 of the (1982:80) Employment Protection Act).

[36] Statutory employment protection in the (1974:12) Employment Protection Act, and later in the 1982 Act, was preceded first by the unilateral right of the employer to dismiss employees and later a limited, collectively bargained, employment protection.

[37] Summary dismissal may be used in case of grave breaches of the employment contract (cf. section 18 of the (1982:80) Employment Protection Act).

[38] Cf. *inter alia* Källström and Malmberg who highlight the protection against 'arbitrary' dismissal as a basic function in Swedish employment protection regulation, see K. Källström and J. Malmberg, *Anställningsförhållandet. Inledning till den individuella arbetsrätt*, 2 ed., Iustus, Uppsala 2009, p. 130.

dismissal relates to personal reasons or reasons of redundancy) *inter alia* to negotiate with trade unions, to give notice, to provide the employee with alternative work, to warn the employee, to retrain the employee, to apply seniority rules, and if necessary conditions are met, to re-employ dismissed employees. Thus, in line with an *ultima ratio*-principle, the employer must make an effort to avoid dismissing employees by first taking less radical measures. In comparison with many other countries, Swedish employment protection is traditionally viewed as relatively strong.[39] – In the Swedish debate, the question has often been whether or not the existing statutory employment protection is actually too strong, and in this regard seniority rules have often been at the centre of attention.

Principally, the employment protection regulation assigns individual employees strong and legally enforceable rights. However, in line with the 'semi-compelling' nature of the (1982:80) Employment Protection Act, even important individual rights such as seniority rules and the priority right to re-employment can be deviated from by means of a collective agreement entered into by the employer and a trade union.

In Sweden, the latest reform of the regulation of fixed-term work entered into force on 1 July 2007.[40] The reform aimed at simplifying and clarifying the regulation of fixed-term employment contracts, but also at meeting the need for security and involvement of employees within a flexible and efficient labour market, and at increasing the possibilities for employers to make use of fixed-term employment contracts. In part, the reform represents a new stance towards fixed-term employment contracts. A long 'catalogue' of fixed-term contracts has been replaced by a new form of fixed-term contract – 'general fixed-term employment' (cf. section 5 of the (1982:80) Employment Protection Act), supplemented only by temporary substitute employment, seasonal employment, fixed-term contracts for employees above the age of 67 years, and probationary employment.[41] Consequently, the legal scope for fixed-term employment contracts is now broader.

> The employer is free to enter into general fixed-term employments, and there is no requirement for objective reasons. However, when an employee has been employed – in a general fixed-term employment *or* as a temporary substitute – by one employer for a total of two years during the last five years, the contract is automatically converted into an indefinite permanent employment contract (cf. section 5 subsection 2 of the (1982:80) Employment Protection Act). The periods of employment spent in general fixed-term and temporary substitute employment are non-cumulative. An employee can therefore be employed for a total of four years (within a five-year period; seasonal and probationary employment may, in principle, by added to this).

[39] Cf., for example, van Peijpe who argues that Sweden represents an *inclusive-protective model*, offering strong and general employment protection, supported by comprehensive rules regarding information, consultation and co-determination, T. van Peijpe, Employment Protection under Strain (Sweden, Denmark, The Netherlands), In: R. Blanpain (ed.), *Bulletin of Comparative Labour Relations*, Vol. 33, Kluwer Law International, The Hague, 1998. Originally Sweden was ranked by the OECD (1994) as one of the countries in the world with the strongest employment protection. In 2009 (after *inter alia* the 2007 reform of the regulation of fixed-term work, but also changes to the OECD employment protection indicators themselves, taking greater account of collective bargaining regulation), Sweden was ranked 21 out of 30, where 1 represents the strongest employment protection; see, for example, OECD, *Employment Outlook 2004*, OECD, Paris 2004 and J. Malmberg, *Vad handlar arbetsrättslig reglering om? En essä om arbetsrättens uppgifter*, Working Paper 2010:9, Uppsala Faculty of Law, Uppsala 2010.

[40] For further details and a more in-depth analysis of the regulation of fixed-term work, see M. Rönnmar, Labour Policy on Fixed-Term Work. Sweden, In: T. Araki and H. Nakakubo (guest eds), R. Blanpain (ed.), *Bulletin of Comparative Labour Relations*, Kluwer Law International, Alphen aan den Rijn 2010, pp. 157–173.

[41] See further M. Rönnmar, Labour Policy on Fixed-Term Work. Sweden, In: T. Araki and H. Nakakubo (guest eds), R. Blanpain (ed.), *Bulletin of Comparative Labour Relations*, Kluwer Law International, Alphen aan den Rijn 2010, pp. 157–173. See also Governmental Bill Prop. 2006/07:111.

> An employee with a fixed-term contract (except for probationary employment), who has been employed in total for more than twelve months during the last three years with the employer, and whose employment has been terminated for reasons of redundancy, has a priority right of re-employment during nine months after the expiry of the employment contract (cf. section 25 of the (1982:80) Employment Protection Act).[42]

In 2007 the Swedish Confederation for Professional Employees (TCO) made a formal complaint to the European Commission as regards the Swedish State's failure to correctly implement the Fixed-Term Work Directive. TCO criticised the content of the 2007 reform of the regulation of fixed-term employment contracts, *inter alia* the vast scope for general fixed-term employment without any need for objective reasons, and the effects on the non-cumulative calculation of the periods of employment spent in general fixed-term employment and temporary substitute employment. In March 2010, the European Commission made a formal notification to the Swedish government regarding the insufficient implementation of the Directive.[43] In June 2011 the Government presented a Governmental Inquiry Report,[44] regarding clarifications of the prohibition of abuse of successive fixed-term employment contracts in the (1982:80) Employment Protection Act. According to the proposal, a fixed-term employment contract can be declared by a court as an indefinite permanent employment contract, if fixed-term employment contracts regulated in sections 5 and 6 of the Act (i.e. general fixed-term employment, temporary substitute employment, seasonal employment, fixed-term contracts for employees above the age of 67 years, and probationary employment) have been combined in a way that constitutes abuse of successive fixed-term employment contracts (cf. the proposed revised section 5 of the Act, referring to section 36 of the Act). The aim of the proposal is to clarify the existing legal situation, and to make sure that it clearly follows from the legislative text that an abuse of successive fixed-term employment contracts is prohibited.

3.2. Statutory employment protection and recent debates on legislative reform

There have been no recent statutory reforms of employment protection aimed at deregulation or redesign of employment protection within permanent employment contracts. However, there are important ongoing debates on legislative reforms of certain elements of the employment protection regulation, as well as Governmental Inquiries in progress.

Ever since the 1970s and the emergence of statutory employment protection, questions regarding fixed-term work and seniority rules have been much debated. These rules have also been reformed several times. Currently the primary debate revolves around the need for reform of the seniority rules, a reform advocated by the employers' organisations and some centre and liberal political parties, with an aim, for example, to replace the *last-in-first-out* principle with an emphasis on employees' qualifications, to introduce more extensive exemptions from the seniority rules for small- or medium-sized companies – or most far-

[42] See K. Källström and J. Malmberg, *Anställningsförhållandet. Inledning till den individuella arbetsrätt*, 2 ed., Iustus, Uppsala 2009, p. 118. Specific time limits apply for seasonal employment, cf. s 25 of the (1982:80) Employment Protection Act.

[43] Compare TCO, *Anmälan mot Konungariket Sverige på grund av att nya regler om visstidsanställningar i Sverige innebär ett bristande genomförande av Direktiv 1999/70/EG om ramavtalet om visstidsarbete undertecknat av EFS, UNICE och CEEP* (Stockholm, 2007-06-20) and S. Engblom, Fixed-Term-at-Will: The New Regulation of Fixed-term Work in Sweden, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 24, No 1, 2008.

[44] See Governmental Inquiry Report Ds 2011:22.

reaching, to deregulate the entire statutory employment protection to a large degree.[45] The stance of the conservative party, leading the current centre-right government (formerly often advocating labour law reforms in deregulatory fashion), is to preserve the 'Swedish Model' and to maintain the statutory employment protection, including the seniority rules (see further Section 3.3 regarding collective bargaining developments in this area).[46] [47]

In September 2011, a Governmental Inquiry regarding the procedural rules relating to disputes over dismissal was appointed. The Governmental Inquiry shall analyse the existing rules (including how disputes regarding dismissal are handled in practice and the problems that arise), and present proposals on how to reduce costs for employers connected to disputes on dismissal. One aim of the Governmental Inquiry, and the legislative proposals to be presented, is to promote employment, and the Governmental Inquiry shall evaluate possible consequences of the legislative proposals for the employers' will to hire.[48]

> Today, as a main rule, if a dispute arises concerning the validity of a dismissal, the employment shall not terminate as a consequence of the dismissal prior to the final adjudication of the dispute. Nor may the employee be suspended from work as a consequence of the circumstances that caused the dismissal, in the absence of special reasons for such suspension. The employee shall be entitled to pay and other benefits under for the duration of the employment, cf. section 34 of the (1982:80) Employment Protection Act.
>
> A dismissal lacking just cause can be declared null and void, cf. section 34 of the (1982:80) Employment Protection Act. This is not the case, however, if there is only a violation of the seniority rules. In addition, financial and punitive damages can be paid, cf. section 38 of the (1982:80) Employment Protection Act. Where an employer refuses to comply with a court order that a dismissal is null and void, the employment relationship shall be deemed to have been dissolved. As a consequence of the employer's refusal to comply with the court order, the employer shall pay (additional) damages to the employee (up to a maximum of 32 months of pay), cf. section 39 of the (1982:80) Employment Protection Act.[49]

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[45] Perhaps surprisingly, the potentially, indirectly age-discriminatory character of the last-in-first-out principle has not been the subject of much discussion in Sweden, cf., however, for example, A. Numhauser-Henning, Åldersdiskriminering och några anställningsskyddsrelaterade frågor, In: K. Ahlberg (ed.), *Vänbok till Ronnie Eklund*, Iustus, Uppsala 2010, pp. 469 f. and Governmental Bill Prop. 2007/08:95, p. 183.

[46] See, for example, *Lag & Avtal*, No. 3, 2009, and S. Nycander, *Sist in först ut, LAS och den svenska modellen*, SNS Förlag, Stockholm 2010. Nycander advocates a collectively bargained solution for the problem of seniority rules. In the collective agreement, the parties could undertake, in each particular case, to weigh the interests of production against the interests of employment security, and disputes could be solved through a mediation and arbitration procedure.

[47] The debate regarding seniority rules has also touched upon the current problem of high youth unemployment in Sweden, and the disputed links between seniority rules and the last-in-first-out principle and youth unemployment.

[48] The Governmental Inquiry shall take EU labour law and Sweden's obligations according to international Conventions etc. into account, and also include a comparative labour law perspective, by studying corresponding rules in a selection of other countries, cf. Instructions for the Governmental Inquiry, Kommittédirektiv Dir. 2011:76, *Översyn av regelverket kring tvister i samband med uppsägning*.

[49] The statutory sickness insurance regulation and unemployment insurance regulation have been reformed in recent years, in order to enable an easier return to work. There is discussion about possible future implications of these controversial reforms for dismissals for reasons of sickness. However, there have been no legislative changes to the employment protection regulation in this area, see further, for example, P. Norberg, In: M. Rönnmar (ed.), *Labour Law, Fundamental Rights and Social Europe*, Swedish Studies in European Law, Vol. 4, Hart Publishing, Oxford 2011, pp. 199–226. – The vulnerability of older workers has characterised the formation of the employment protection regulation. The seniority rules are important, but so is the significance of the lack of qualifications and the general rule that sickness and ageing do not constitute grounds for dismissal. As a general rule, sickness is not just cause for dismissal. The employer has extensive obligations to habilitate the employee and to adjust the working environment and the job duties ortasks. An employee can be dismissed first when such measures have been taken, and the employee can no longer perform work of any importance for the employer. If the employee is incapable of performing the work for other reasons, the employer has obligations to train, educate and warn the employee etc. before dismissing the employee. – Compare also, in this respect, the

3.3. Dismissals for reasons of redundancy and recent case law developments[50]

In Sweden, an employee is dismissed either for personal reasons or for reasons of redundancy. Regulation on dismissals for reasons of redundancy is most clearly linked to the EU law flexicurity discourse and globalisation, restructuring, and changing labour market conditions requiring employee adaptability.[51] Swedish employment protection is marked by a 'conceptual dichotomy', and two partly different systems of employment protection apply, depending on whether the employee is dismissed for personal reasons or for reasons of redundancy. These systems also offer rather different levels of protection. In cases of dismissal for personal reasons, the just cause-requirement is strict, and the *ultima ratio*-principle and the employer's obligation to try to avoid dismissal by first taking less radical measures are far-reaching. There is, however, no priority right to re-employment in these cases. In contrast, in cases of dismissal for reasons of redundancy, employment protection regulation is more flexible and leaves further room for the managerial prerogative, however, also integrating rules such as the ones on seniority and re-employment.[52]

Redundancy and personal reasons are concepts of a legal-technical character. They are exhaustive concepts in the sense that a dismissal must be classified *either* as based on redundancy *or* as based on personal reasons.[53] Redundancy (often also referred to as *shortage of work*) is defined in relation to personal reasons. Any reasons that are not related to the employee personally are viewed as redundancy. Redundancy is a broad concept, encompassing different (and quite disparate) reasons of an economic, organisational or other business-related character. It may concern the closing down of a business, the hiring in of manpower or the reorganisation and restructuring of activities. Redundancy does not presuppose compelling financial reasons.[54]

In line with the managerial prerogative, the employer has a right to determine which line of business to pursue (and how), and what number of employees to employ. The legislator and the courts give the employer a unilateral right to decide when and if there is a redundancy situation. The Swedish Labour Court has made clear in numerous legal cases that it is not prepared to question or try the employer's business and economic considerations.[55] The

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new research environment in Elder Law, initiated within the Norma Research Programme at the Faculty of Law at Lund University, see www.jur.lu.se/elderlaw.

[50] This section draws upon – but also updates – the discussion and analysis in A. Numhauser-Henning and M. Rönnmar, Det flexibla anställningsskyddet, *Juridisk Tidskrift*, 2010–11, No 2, pp. 382–411.

[51] In addition, the absolute majority of dismissals effected in Sweden result from redundancy. Cf. also flexicurity pathway 1, implicating redesigning rules for economic dismissals for open-ended contracts, addressing bureaucracy, length of procedures, improving transparency of outcomes and making the process more reliable, cf. COM(2007) 359 final.

[52] Cf. M. Rönnmar, Redundant Because of Lack of Competence? Swedish Employees in the Knowledge Society, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 17, No 1, 2001, pp. 117–138.

[53] However, it is not always easy to make a clear-cut distinction between redundancy and personal reasons, especially when only one or a few employees are involved in a dismissal situation, cf., for example, Labour Court judgements AD 1993:61, AD 1994:122, AD 1995:40 – In cases where the employer dismisses one or a couple of employees for reasons of redundancy, but the true basis for the dismissal is personal, so-called 'mock redundancy' (*fingerad arbetsbrist*), the court may 'see through' the motives given by the employer and try the dismissal as a dismissal for personal reasons, cf., for example, Labour Court judgements AD 2004:52, AD 2005:53, AD 2006:68 and AD AD 2012:11.

[54] See Government Bill Prop. 1981/82:71, pp. 64 f., and, for example, Labour Court judgements AD 1984:26, AD 1985:79, AD 1993:101, AD 1994:122 and AD 2000:35.

[55] See for example Labour Court judgements AD 1993:61 and AD 1993:101.

employer must be able to show (and to prove) just cause for dismissal (cf. section 7 of the (1982:80) Employment Protection Act). However, redundancy *per se* amounts to just cause.[56]

Before making a decision, the employer has a duty to conduct primary negotiations with a trade union to which the employer is bound by a collective agreement, in regard to important alterations in business activities – such as dismissals for reasons of redundancy (cf. section 11 of the 1976 Co-determination Act, cf. section 29 of the (1982:80) Employment Protection Act).

The statutory seniority rules imply that the priority and selection of employees is to be made according to the last-in-first-out principle, i.e. according to each employee's total period of employment with the employer (and in the event of equal periods of employment giving priority to senior age, cf. section 22 of the (1982:80) Employment Protection Act). In principle, the order of dismissals encompasses all employees of the same production unit and covered by the same collective agreement (redundancy unit). – The redundancy unit is very important. Only those employees who are affected by the redundancy, meaning that they are included in the redundancy unit affected by the redundancy, may be dismissed.

However, the seniority rules are 'semi-compelling' and the employer and the trade union may, in virtually all respects, deviate from the statutory rules when determining the order of dismissals. The principal restriction is that the decided order of dismissals must not go against so-called *good labour market practice*, which in principle means that the order cannot be blatantly discriminatory or offensive.[57] An employer with at most ten employees may, before the order of dismissals is determined, exempt at most two employees who in the opinion of the employer are of particular importance for the future activities, cf. section 22 subsection 2 of the (1982:80) Employment Protection Act.[58]

In order for a dismissal to be objectively justified, the employer must have tried and ruled out the possibility of providing the employee with alternative work (cf. section 7 subsection 2 of the (1982:80) Employment Protection Act). This duty is restricted to available positions. However, in the competition for available positions within the redundancy unit, an employee with better priority can be provided with alternative work performed by a fellow employee with an inferior priority, which may result in the dismissal of the latter (cf. section 22 of the (1982:80) Employment Protection Act).

If the employee is actually dismissed, he has a priority right to re-employment. Any employment opening within nine months from the expiry of the former employment should be offered to employees dismissed by redundancy (and some fixed-term workers, cf. section 3.1), on the condition that the employees are sufficiently qualified and have been employed in total for more than twelve months during the last three years with the employer. The order of employees being offered employment is decided in accordance with the last-in-first-out principle.

A common denominator of these legal rules is the important role played by the employee's qualifications and *employability*.[59] The employer's duty to provide the employee with alternative work is qualified by the employee possessing sufficient qualifications, as is the priority right to re-employment.

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[56] Cf., for example, Labour Court judgements AD 1993:101 and AD 1995:152.

[57] See Labour Court judgements AD 1983:107, AD 1996:114 and AD 2002:37.

[58] See Government Bill Prop. 1999/2000:144 and Labour Court judgement AD 2005:32.

[59] Cf. M. Rönnmar, Redundant Because of Lack of Competence? Swedish Employees in the Knowledge Society, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 17, No 1, 2001, pp. 117–138.

> The starting-point is that the employer himself, by virtue of his managerial prerogative, decides the qualifications needed for a certain work. An express parallel is made to the employer hiring a new employee. The employer is not allowed to demand anything different, as regards qualifications, of the employee, facing dismissal, than he is from the newly hired employee. A range of factors is included in the concept *qualifications*, such as formal qualifications, experience, practical training and personal qualities.[60]

An important complement to this statutory employment protection regulation relating to dismissals for reasons of redundancy are collective agreements – so-called *Employment Security* or *Transition Agreements* (*trygghets-* or *omställningsavtal*), concluded by the social partners and covering large parts of the labour market; they also emphasise employability. These agreements give employees facing dismissal for reasons of redundancy different rights to severance pay, economic compensation and support, and possibilities for job-searching, training and re-education etc. In an original legal and empirical study of these agreements, Sebardt concludes that most of these agreements have shifted focus towards the realisation of the individual's employability on the open labour market.[61]

Important recent controversial case law from the Swedish Labour Court – Labour Court judgement AD 2009:50 (followed by Labour Court judgements AD 2011:30 and AD 2012:11) related to dismissals for reasons of redundancy, the seniority rules and the employer's obligation (and, as it turns out, opportunity) to offer alternative work – underlines the great respect for the managerial prerogative inherent in the statutory employment protection regulation.

This case law goes to the heart of the Swedish statutory employment protection. No doubt, Labour Court judgement AD 2009:50 is very informative as regards the inherent flexibility of Swedish employment protection. Even if the arguments and statements made there (and in the following Labour Court judgements AD 2011:30 and AD 2012:11) are not necessarily new, the comprehensive picture that evolves is in stark contrast with traditional notions of a 'strong' Swedish employment protection.

An analysis – and understanding – of this case law must take account of the overall design and content of the employment protection regulation, including adjacent legal rules and principles, and the coherence and logic of the system of employment protection.

According to a traditional view, the rules on dismissals for reasons of redundancy, especially the seniority rules, imply that an employee with a longer period of employment, not against his or her will, should have to accept being provided with other work – being transferred – merely so another employee with a shorter period of employment can be offered work that he or she is sufficiently qualified for, i.e. that one really is protected by the seniority rules.[62]

The dispute in Labour Court judgement AD 2009:50 concerned a company in the heating, ventilation and sanitation industry, which conducted its business at several different locations. The copmany unit in one location lost about half of its employees (from 20 to 8) when contracting operations were shut down and the work was instead focused on service activities. The company had available alternative work to offer at other locations nearby. Two employees, who had longer periods of employment than several of the other employees turned

[60] Cf. Government Bill Prop. 1973:129, p. 159, Government Bill Prop. 1981/82:71, pp. 56 f., and Labour Court judgements AD 1993:104, AD 1993:197, AD 1995:59, AD 1996:42 and AD 2005:75.

[61] These agreements cover some 50 per cent of employees; see Eurofound 2009, p. 21. Cf. Government White Paper SOU 2002:59 and G. Sebardt, *Redundancy and the Swedish Model. Swedish Collective Agreements on Employment Security in a National and International Context*, Iustus förlag, Uppsala 2005.

[62] See L. Lunning and G. Toijer, *Anställningsskydd. En lagkommentar*, 10 ed., Norstedts Juridik, Stockholm 2010, p. 648.

down offers to transfer to such alternative work, and were therefore dismissed for reasons of redundancy. The questions in the dispute were *inter alia* if the company had been obliged to provide the offers regarding alternative work to meet requirements of the seniority rules and the last-in-first-out principle, and what the legal consequences should be of the employees' turning down the offers.

The Labour Court dismissed the claims by the employee side about a breach against the seniority rules and the rules on just cause for dismissal. The Court stated that a transfer to available alternative work according to section 7 subsection 2 of the (1982:80) Employment Protection Act should take place before the employer ranks the employees in accordance with the seniority rules and the last-in-first-out principle in section 22 of the (1982:80) Employment Protection Act, in order to execute dismissals. When the employer transfers an employee in accordance with section 7 subsection 2 of the (1982:80) Employment Protection Act, there is no obligation to allocate the available work to the employees in accordance with the seniority rules and the last-in-first-out principle. Moreover, if you turn down a reasonable offer for alternative work, this in itself constitutes just cause for dismissal – The judgement was not unanimous; the two judges representing the employee side presented dissenting opinions.

The Labour Court first dealt with the question of whether the company had been obliged to provide the offers of alternative work according to section 7 subsection 2 of the (1982:80) Employment Protection Act, in accordance with the seniority rules and the last-in-first-out principle, as argued by the employee side. Thus, what was the relationship between the employer's obligation to offer the employee alternative work (section 7 subsection 2) and the seniority rules (section 22)? Different interpretations as to the content of the legal rules had been put forward in the legal doctrine, but the dominant view seemed to be that the relationship between these two rules was unclear. The Labour Court emphasised that transfers according to section 7 subsection 2 required that such a transfer could be made without any other employee being dismissed. It related to *available* work, and section 7 subsection 2 contained no rules on seniority. The Court emphasised that the aim of the (1982:80) Employment Protection Act was to create protection against *actual* dismissals, not job security.

The Labour Court therefore found –if the issue was brought to a head – that an employer was first obliged to attempt to offer an employee alternative work in accordance with section 7 subsection 2 before he was obliged to rank the employees in accordance with the seniority rules in section 22. There was no obligation to provide the offers for alternative work according to section 7 subsection in accordance with the seniority rules and the last-in-first-out principle. Instead the employer could fulfil his obligations according to section 7 subsection 2 based on his own evaluation of what was in the best interest of the business. If the employer found that a certain employee was more appropriate for some tasks or work, there was no hindrance for the employer, in line with the managerial prerogative, to place 'the right person at the right place', as long as he did not act against good labour market practice or non-discrimination legislation. In addition, such a transfer – in cases of possible redundancy – may well go outside the scope of the initial employment contract/duty to perform work.[63]

[63] According to established case law a transfer or change in work duties that goes beyond the employment contract and the duty to work is placed on an equal footing with a dismissal, and can be tried against the 1982 Employment Protection Act and its requirement for just cause, see, for example , Labour Court judgements AD 1001:114, AD 2003:76 and AD 2008:63.

The Labour Court referred to early writings in the preparatory works to the Employment Protection Act, stating that if an employee turned down an offer of alternative work without an acceptable reason, the employer was, in general, not obliged to provide the employee with any further offers.[64] If an employee affected by redundancy turned down a reasonable offer of alternative work, the employer was therefore to be seen as having fulfilled his obligation to provide the employee with alternative work and having just cause for dismissal of that employee.

The Labour Court went on to scrutinise the reasonableness of the offers of alternative work and found that the offers were reasonable, and that the two employees had not had any acceptable reasons for turning them down.[65]

Finally, the Labour Court dealt with the question of a potential breach against the seniority rules. The Court stated that the seniority rules in section 22 were applicable only in a situation when it was necessary to choose between different employees, i.e. when several employees competed for the work still remaining with the employer.[66] An employee could not turn down an offer that was reasonable in principle, for alternative work in order to wait for a more appealing offer. The Labour Court concluded that the company had had other reasonable work to offer in the redundancy situation at hand. Therefore, the company had no reason to apply the seniority rules, and therefore not been in breach of them. A 'final' redundancy situation would never have had to occur, given the fact that all employees had been offered alternative work.

We find (in line with the dissenting judges in this case) that this interpretation of the employment protection rules in cases of dismissals for reasons of redundancy is not the only possible one. Especially the legal consequence of turning down an early offer of alternative (and reasonable) work – the existence of just cause for dismissal – is dubious. An alternative solution would be to respect the seniority rules, still giving preference to continued employment within the redundancy unit in accordance with the seniority rules, provided that work remained and the employee in question was sufficiently qualified for this. Such an alternative solution would provide sufficient respect for the managerial prerogative in situations of transfers in accordance with section 7 subsection 2, at the same time giving employment protection in redundancy cases a real content. (To turn down an offer of alternative work would still carry some risks for the employee, taking into consideration the possibility of lacking sufficient qualifications for remaining work and possible collective agreements on deviations from the seniority rules.)

Following Labour Court judgement AD 2009:50, the employment protection in cases of dismissals for reasons of redundancy could in principle be limited to (1) that you can be affected only if you belong to the redundancy unit affected by the redundancy and (2) the seniority rules and the last-in-first-out principle mean that you cannot be dismissed before employees ranked 'worse' than you, as long as you have sufficient qualifications for remaining work within the redundancy unit, at same time as (3) the position in this ranking of

[64] See Governmental Bill Prop. 1973:129, p. 243.

[65] The Labour Court emphasised that the offers concerned work of the same kind. It was actual and serious offers, the employees had been provided with some time to think and were deemed to be aware of the redundancy situation and that the offers of alternative work were provided in order to avoid dismissals. The Labour Court also discussed if the offers were reasonable given the employees personal circumstances, and in this respect highlighted that the transfers were made within the 'large Stockholm area', that it would be able to commute daily and that the family situation of one of the employees did imply some difficulties, but that these difficulties were not of such a kind as to view the offers for alternative work as unreasonable.

[66] The Labour Court referred here to Labour Court judgements AD 2005:57 and AD 2006:15.

employees according to the seniority rules can be replaced by any reasonable offer of alternative work (and at almost any time). You do not have the right to wait for your turn, i.e. to demand that the employer first offer available alternative work to the employees ranked worse than you. A certain protection (4) exists, however, in the scrutiny of what constitutes a reasonable offer of alternative work.

As for (1) of course a natural and important point of departure from a flexibility perspective is that it is a question for the employer to decide when and where there is a redundancy situation.

Furthermore, (2 and 3) the seniority rules and the last-in-first-out principle only apply on the condition that you have not already turned down a reasonable offer of alternative work. In a situation of potential redundancy and dismissals, you have very limited protection against far-reaching changes regarding your working conditions and employment relationship. A long period of employment (and being older) is no protection against far-reaching transfers – and this applies whether or not the offer of alternative work lies within or outside the initial employment contract/the duty to work, or within or outside the redundancy unit. The seniority rules first offer protection when a dismissal is actually realised, and to turn down a reasonable offer of alternative work sets aside the employment protection. As the dissenting judges pointed out, this may result in an employee with a long period of employment having seemingly less protection than a recently employed employee, not receiving such an offer of alternative work.

The requirement for a 'reasonable' offer of alternative work (4) can of course offer a real protection. However, when it comes to large reorganisations and redundancies, the employer's freedom is great.

Later on, two cases have added to these interpretations.

In Labour Court judgement AD 2011:30 the situation was slightly different than in AD 2009:50.[67] A company in the technology industry conducted business at two different locations. The business at one of the locations was decreased, all manufacturing was moved to the other location, and only the service operations were retained. The Labour Court discussed the situation in terms of a hypothetical example: an employer conducts business in two production units, one in location A and one in location B. The employer decides to reduce business activities at location A, and to do so through redundancy and dismissals. At the same time, the employer decides to expand the business in location B. The employer is then obliged to offer employees at location A work at location B, where new work is created, before he dismisses employees. However, is the employer obliged to provide the offers of available alternative work to the employees who are best ranked according to the seniority rules and the last-in-first-out principle? Or can the employer, in principle, freely decide, considering what is best for business according to the employer?

The Labour Court referred to their conclusions in Labour Court judgement AD 2009:50, that an employer was first obliged to try and offer an employee alternative work in accordance with section 7 subsection 2 before he was obliged to rank the employees in accordance with the seniority rules in section 22. There was no obligation to provide the offers for alternative work according to section 7 subsection in accordance with the seniority rules and the last-in-first-out principle. Instead the employer could fulfil his obligations according to section 7 subsection 2 based on his evaluation of what was in the best interest of the business. Though

[67] This judgement was only a partial judgement, wherefore not all questions related to redundancy, the employer's obligation to provide alternative work and the seniority rules analysed above were discussed and answered here.

the situation in the present case was different, the Labour Court confirmed their earlier conclusions, and held them to be equally relevant here, not least for reasons of legal coherence.[68]

Thus, the Labour Court confirmed the arguments and conclusions made in AD 2009:50, but in contrast to the situation in AD 2009:50, it was clear here that several employees were actually to be dismissed for reasons of redundancy. The employer's use of the obligation to provide employees with alternative work was not sufficient in order to avoid dismissals. Thus, it was considered acceptable to transfer the freely selected employees to alternative work at location B, before dismissing the remaining workers at location A. Moreover, it was also considered acceptable not to execute these transfers until after the notice periods had expired, and the business activities at location A had actually been closed down. This puts the seniority rules – or rather, the disregard of them – even more in focus.

In Labour Court judgement AD 2012:11 a full-time employee was, faced with a redundancy situation, offered alternative work on part-time basis (50 percent of full-time), with a clearly reduced wage. The Labour Court found this, taking these circumstances into consideration, to be a reasonable offer of alternative work and the employee's refusal of the offer to constitute just cause for dismissal, setting the otherwise applicable seniority rules aside.

Thus, there is no doubt that in a case of 'redundancy' an employer has an, in principle, unlimited right to make transfers (and offers of alternative work) within the business – within and outside the duty to work – in order to solve the situation. The limit is first set at discrimination and other decisions against good labour market practice. When it comes to larger reorganisations and redundancies, the principles of 'mock' redundancy and provoked dismissal do not place any limits on the managerial prerogative.[69] Considering the freedom provided for the employer within the employment protection, a future increased 'pressure' towards the prohibitions of discrimination and good labour market practice can be expected in labour disputes – as a way of attacking redundancy-related transfers and dismissals with a clear personal and arbitrary element.

3.3. Dismissal for reasons of redundancy and recent collective bargaining developments

We have seen that in the Swedish context, collective bargaining – existing so-called Transition Agreements – emphasise the importance of employability, and put forward different measures in support of employability for the employee in case of dismissal for

[68] The employee side compared the situation in this case with a transfer of an undertaking, when a business or part of a business is transferred from one employer to another. They argued that Swedish employment protection must now be interpreted in the light of the Transfers of Undertakings Directive, implemented in Swedish law (requiring *inter alia* that the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee, and that the transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee). For reasons of legal coherence, the employee side argued, employees facing a situation such as in this case, should not be put in a less fortunate position than employees facing a transfer of an undertaking, occurring under similar circumstances. – The Labour Court, however, rather briefly, concluded that the legal change brought about by the Transfers of Undertakings Directive could not be attributed any importance for the application of the basic rules on the employer's obligation to provide alternative work and seniority rules in redundancy situations, which have been in force in the Employment Protection Act since 1974.

[69] A resignation by the employee (or even the situation before the employee actually resigns) may be considered by the courts as a concealed dismissal by the employer, so-called provoked dismissal, if the behaviour – for example, a transfer – by the employer was in conflict with good labour market practice.

reasons of redundancy (Section 3.2). In addition, recent years have witnessed interesting collective bargaining developments.

Irreconcilable differences of opinion as regards the seniority rules and the regulation of industrial action (especially the right to sympathy action, following the controversial case law of the ECJ in *Laval* and *Viking*[70]) were the main reasons for the failed negotiations in March 2009 for a new, historical basic agreement, replacing the Saltsjöbaden Agreement from 1938 (on *inter alia* industrial action), between the central labour market organisations.

Recently, the social partners, the Swedish Trade Union Confederation (LO) (representing blue-collar workers) and the Confederation of Swedish Enterprise (Svenskt Näringsliv) have had talks on the seniority rules. In June 2011, they presented a unique common report on actual practical consequences of the seniority rules in the (1982:80) Employment Protection Act and collective agreements. The main difference between employers and trade unions as regards the seniority rules relates to the application of the seniority rules and the ways in which an employee's personal characteristics should be taken into consideration. The employers want great emphasis to be put on the employee's personal characteristics – in order to be able to maintain the employees with the best competence and qualifications – while the trade unions want these qualities to be taken into consideration only to a very limited extent – in order to limit the scope for arbitrariness. – This report may form the basis for new negotiations on collectively bargained reforms of the seniority rules.[71]

At about the same time, a similar common report presenting the actual practical consequences of the seniority rules was presented by the Council for Negotiation and Cooperation (PTK, a joint organisation of trade unions, representing white-collar workers and professional employees) and the Confederation of Swedish Enterprise. – These parties have now declared that in April 2012, they will enter into negotiations on a reformed and developed Transition Agreement, including changes to the seniority rules – possibly replacing the last-in-first-out principle with an emphasis on employees' qualifications – and to provisions on severance payment and other supportive measures. PTK has emphasised that from their perspective, future seniority rules must fulfil requirements for security, transparency and legal certainty.[72] – Thus, in line with the tradition of self-regulation and collective bargaining within the Swedish industrial relations system, the debated issue of reform of the seniority rules may find a solution here outside the legislative sphere, and within collective bargaining.

In the spring of 2009 and in the wake of the global economic crisis, trade unions and employers' organisations at central national level concluded collective agreements – crisis agreements – enabling companies and trade unions to conclude local collective agreements 'trading' employment protection (and the avoidance of dismissals for reasons of redundancy) for reduced working hours and lower wages. Following the first crisis agreement at the end of 2009 between the Association of Swedish Engineering Industries and IF Metall, about 400 local collective agreements had been concluded in this sector, encompassing both blue-collar and white-collar workers. In general, these crisis agreements resulted in an 18 percent reduction in working time and a 13 percent cost reduction. – These agreements were rather

[70] Cf. Case C-341/05 [2007] ECR I-11767 and Case C-438/05 [2007] ECR I-10779, and M. Rönnmar, M., Free movement of services vs national labour law and industrial relations systems: understanding the Laval case from a Swedish and Nordic perspective, In: C. Barnard (ed.), *Cambridge Yearbook of European Legal Studies*, Vol. 10, 2007–2008, Hart Publishing, Oxford, pp. 493–523.

[71] See S. Rudeberg and J. Ingelskog, *Faktiska konsekvenser av turordningsreglerna i LAS och avtal – en rapport av Svenskt Näringsliv och LO*, 2011.

[72] See S. Rudeberg and H. Hedlund, *Faktiska konsekvenser av turordningsreglerna i LAS och avtal. En rapport av Svenskt Näringsliv och PTK*, 2011.

unorthodox in relation to traditional Swedish trade union priorities of never agreeing to a reduction of wages.[73] However, the social partners have continued on this path. In October 2011, they presented a common report on short-time work in important competitor countries.[74] On the basis of this report, the social partners have negotiated and come a long way towards a collective agreement on short-time work in times of temporary economical difficulty. In February 2012, they delivered a proposal to the government on how such a system could be designed. The social partners will conclude such an agreement only on the condition that the state will also take responsibility for these issues.

An important issue in the large collective bargaining round in the spring of 2010 was the use of temporary agency work as a circumvention of employment protection regulation, especially the priority right to re-employment following dismissal for reasons of redundancy. It follows from controversial case law from the Swedish Labour Court (Labour Court judgements AD 2003:4 and AD 2007:72) that an employer may dismiss employees for reasons of redundancy, and thereafter, even during the time period when former employees have a priority right to re-employment, make use of temporary agency work. The priority right of re-employment is relevant only when the employer *hires* employees – not when the employer engages temporary agency workers. In the collective bargaining round in 2010, provisions on a re-enforced priority right to re-employment and restrictions on the employer's possibilities to use temporary agency work following dismissals for reasons of redundancy were introduced in some collective agreements, for example in the collective agreement concluded between IF Metall, the Association of Swedish Engineering Industries (Teknikföretagen) and Industriarbetsgivarna.[75]

4. Analysis and Concluding Remarks

The aim of this paper is to critically analyse developments in the Swedish employment protection regulation – with a special focus on dismissals for reasons of redundancy – in light of the EU law flexicurity discourse.

The EU law flexicurity discourse implies a shift of emphasis from employment law to employment policy.[76] The most articulated legal expressions of the EU law flexicurity discourse so far are the Part-Time, Fixed-Term and Temporary Agency Work Directives. The EU law flexicurity discourse and flexible and reliable contractual arrangements relate to reduced labour market segmentation, equal treatment of permanent employees and flexible workers, a new balance between numerical and functional flexibility, deregulation of employment protection, progressive employment protection and employability – all aspects reflected in different ways in the Swedish employment protection regulation.

Equal treatment of permanent employees and fixed-term workers implies both increased protection for fixed-term workers, and challenges, reforms and deregulation of employment

[73] See Medlingsinstitutet 2009, pp. 118 ff.

[74] See *Korttidsarbete. Systemen i viktiga konkurrentländer*, En partsgemensam rapport från Gruvornas Arbetsgivareförbund, IF Metall, Industri- och Kemigruppen, Stål och Metall Arbetsgivarförbundet, Sveriges Ingenjörer, SVEMEK, Teknikarbetsgivarna och Unionen, 2011.

[75] Cf., for example, *Lag & Avtal*, No 4, 2010, p. 24. Compare in this context also the Govermental Inquiry Report SOU 2011:5 on the implementation of the Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

[76] Compare M. De Vos, European Flexicurity and Globalisation: A Critical Perspective, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 25, No 3, 2009, pp. 209–235.

protection. This is potentially 'revolutionary', and at the very heart of employment protection regulation and the protective principle of the permanent, open-ended employment contract as the main rule. Here the recent vague proposals in the Agenda for New Skills and Jobs seem to imply a far-reaching 'reformulation' of the open-ended employment contract, which remains to be followed and further analysed. However, the EU law flexicurity discourse is also said to entail a new balance between numerical and functional flexibility, and increased focus on functional flexibility, i.e. the achievement of flexibility *within* the framework of permanent employment relationships and employment protection. Similarly, a 'tenure track' approach and progressive build-up of rights (for example, measures to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, regulated in the Fixed-Term Work Directive) can be seen as expressions both of deregulation and of protection and redistribution.

However, outside the realm of the European Employment Strategy, the Europe 2020 Strategy and the open method of co-ordination, the flexicurity strategy has not yet resulted in any new legal proposals linked to employment protection.

The focus on employability and labour market transitions links employment protection and security for employees in crucial ways to the other flexicurity components, namely comprehensive lifelong learning, active labour market policies, and modern social security systems. The EU law flexicurity discourse could be said to entail an emphasis of labour law and social security law as complementary systems.[77] At the same time, critics would argue as it currently stands the EU law flexicurity discourse puts too much emphasis on labour law providing flexibility, and social security law (together with lifelong learning and active labour market policies), providing security.

Swedish employment protection has traditionally been viewed as relatively strong, with a statutory requirement for objective grounds for dismissal, seniority rules and extensive rights to information and consultation for trade unions. However, in relation to fixed-term work and dismissals for reasons of redundancy, the statutory employment protection (and accompanying collective bargaining) leaves much room for the managerial prerogative – the employer has a principal right to decide when reorganisation and reduction of the workforce is needed, as well as to rearrange things much to his own liking – and the possibility to flexible adjustment of the number of workers, and thus for both functional and numerical flexibility.

The Swedish regulation on fixed-term work is in line the EU law flexicurity discourse. Fixed-term employment contracts for a short duration are normalised, and employers are offered increased numerical flexibility by way of general fixed-term employment and temporary substitute employment. Employees are provided with security through upper limits for maximum duration of successive fixed-term employment contracts, and the conversion of these fixed-term employment contracts into permanent employment contracts. In addition to this, there is a progressive build-up of rights and employment protection in the form of information, consultation and priority rights to re-employment. – The result of the European Commission's formal notification regarding the implementation of the Fixed-Term Work Directive remains to be followed. However, the element of security would be somewhat strengthened by the new provision (now proposed) on a clarification of the prohibition of abuse of successive fixed-term employment contracts in the (1982:80) Employment Protection Act.

[77] See A. Christensen, Normativa grundmönster i socialrätten, Vol. 78, *Retfaerd*, 1997, pp. 69.

There have been no recent statutory reforms of employment protection aimed at deregulation or a redesign of employment protection within permanent employment contracts, though the debate on seniority rules has been intensive. – However, the ongoing Governmental Inquiry regarding the procedural rules relating to disputes on dismissal contains some deregulatory elements. The aim is to reduce costs for employers connected to disputes on dismissal, and to promote employment by evaluating possible consequences of the legislative proposals on the employer's will to hire.

In addition, recent developments in case law and collective bargaining reflect the EU law flexicurity discourse.

Recent controversial case law from the Swedish Labour Court – Labour Court judgement AD 2009:50 (followed by Labour Court judgements AD 2011:30 and AD 2012:11) dealing with dismissals for reasons of redundancy and the relation between seniority rules and the employer's obligation (but also opportunity) to offer alternative work – highlights the great respect for the managerial prerogative inherent in the statutory employment protection regulation. Employers have vast possibilities to reorganise and arrange the process leading up to transfers, redundancy and dismissals – thereby from the individual employee's perspective, practically setting aside the seniority rules and the last-in-first-out principle.

As a result, the managerial prerogative is stronger and the protection against 'arbitrary' dismissals weaker than one would have expected in general since the emergence of the Employment Protection Act. Consequently, as soon as the employer has identified a 'redundancy situation', an employee has reason to accept any offer of alternative work, and a refusal of such a reasonable offer may lead to the loss of employment protection, and dismissal. This implies that the employment protection and the seniority rules to a great extent are subordinate to the managerial prerogative. This also limits the employment protection of the individual employee in a way which is in stark contrast both to the whole idea of the seniority rules and to the view on the employer's obligation to offer alternative work according to section 7 subsection 2 of the (1982:80) Employment Protection Act as an 'extra protection of the employment'.[78] This in turn undermines the function of employment protection as a protection against 'arbitrary' dismissals.[79] Thus, the rules have been interpreted in a way which can be said to conflict with the basic aim of several of the fundamental rules of employment protection. – An important 'explanation' for this is the fact that the (1982:80) Employment Protection Act aims primarily to create employment security and protection against actual dismissals.[80]

The Swedish Labour Court's interpretation of the employment protection in redundancy situations – as limited to a protection against actual dismissals – can be seen at the same time as a clear expression of flexicurity, and is in line with an emphasis on employability as the future core of employment protection.[81] Thus, even if employment protection, when it comes to dismissals for reasons of redundancy, has not (yet; compare the discussion above on the Governmental Inquiry on dismissal disputes) been statutorily reformed – and it is therefore

[78] Cf. Governmental Bill Prop. 1973:129, p. 122.

[79] Cf. here Källström and Malmberg, who emphasise that when it comes to dismissals for reasons of redundancy, the seniority rules function mainly as a protection against arbitrariness, see K. Källström and J. Malmberg, *Anställningsförhållandet. Inledning till den individuella arbetsrätt*, 2 ed., Iustus, Uppsala 2009, p. 131.

[80] Compare the earlier discussion on the different meanings of the concepts of job security and employment security, and the arguments made by Auer in this context, cf. P. Auer, What's in a Name? The Rise (and Fall?) of Flexicurity, *Journal of Industrial Relations*, Vol. 52, No 3, 2010, pp. 371 –386.

[81] See further *inter alia* A. Numhauser-Henning, Flexible qualification – a Key to Labour Law?, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 17, No 1, 2001, pp. 101–116.

not a question of a legislative and deliberate deregulation of the employment protection in the wake of the EU law flexicurity discourse, our analysis shows that employment protection within permanent employment contracts is clearly limited here.

As we have seen, Swedish law provides, in principle, for a rather large scope for numerical flexibility, by way of the employer's possibilities to adapt the size of the workforce to the changing demands of the business and to actually dismiss employees for reasons of redundancy. The employer controls the redundancy situation, and decides how many employees are to be dismissed, and in what parts of the business – and redundancy always constitutes objective grounds for dismissal.

This scope for numerical flexibility in redundancy situations now turns out to be larger than one would have expected, since the seniority rules do not provide protection against far-reaching transfers to alternative work in these situations. Thus, dismissals for reasons of redundancy also relate to functional flexibility, and the employer's possibilities to utilise his employees for different kinds of work in line with the changing demands of production and business. Here, functional flexibility is expressed through the managerial prerogative, and the application of the employer's obligation to provide the employee with alternative work, and the seniority rules in order to be able to place the right person in the right place. From a flexibility perspective we seem to be dealing with some kind of a 'borderline case' of functional and numerical flexibility – a close to full scope for functional flexibility as transfers are concerned, may turn into a numerical flexibility strategy should the employee turn down the employer's offer of alternative work. Thus, the scope for functional flexibility is large not only within the employment relationship, but also within employment protection. Earlier conclusions about a large scope for functional flexibility in Swedish law are thereby confirmed.[82]

In addition, the argumentation of the Swedish Labour Court and its application of the rules on employment protection in the (1982:80) Employment Protection Act as regards dismissals for reasons of redundancy in Labour Court judgement AD 2009:50 (and Labour Court judgements AD 2011:30 and AD 2012:11) can also be said to contribute to a further 'blurring' of the boundary between redundancy and personal reasons. Earlier, and in other settings,we have questioned this 'conceptual dichotomy' traditionally characterising Swedish employment protection.[83] Thus, two partly different systems of employment protection apply, depending on whether the employee is dismissed for personal reasons or for reasons of redundancy. These systems also offer rather different levels of protection. While an employee who is practically incompetent and unable to do his work must be dismissed for personal reasons, and as a result can depend on the employer's extensive obligations to inform, warn and eventually educate him, another employee (also with a long period of employment and an impeccable record of loyal and good performance) faced with redundancy may easily be found to have insufficient qualifications and in danger of losing his job – or to be offered a far-reaching (even if reasonable) transfer to alternative work, despite a good position in a possible future ranking according to the seniority rules and the last-in-first-out principle

Finally, much indicates that the protection for individual employees in the future can be found first and foremost in non-discrimination legislation. Thus, protection against discrimination

[82] See M. Rönnmar, *Arbetsledningsrätt och arbetsskyldighet. En komparativ studie av kvalitativ flexibilitet i svensk, engelsk och tysk kontext*, Juristförlaget i Lund, Lund 2004, pp. 343 ff.

[83] See inter alia M. Rönnmar, Redundant Because of Lack of Competence? Swedish Employees in the Knowledge Society, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 17, No. 1, 2001, pp. 117–138 and A. Numhauser-Henning, Flexible qualification – a Key to Labour Law?, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 17, No 1, 2001, pp. 101–116.

appears – also in the employment protection area – as an increasingly evident pattern within labour law.

The role of the social partners and the importance of procedural flexibility, by way of the European Social Dialogue (cf. *inter alia* the Part-Time and Fixed-Term Work Directives), collective bargaining at different levels and information, consultation and negotiation with workers' representatives, are central to the EU law flexicurity discourse.[84] – The 'semi-compelling' character of the (1982:80) Employment Protection Act and the scope for collective bargaining as regards fixed-term work and employment protection, for example seniority rules, Transition Agreements and the recent crisis agreements, are all expressions of the strong element of procedural flexibility inherent in the Swedish labour law and industrial relations system.

In recent years, collective bargaining negotiations and collective agreements that have been concluded have both strengthened flexibility (crisis agreements and ongoing negotiations on a reform of seniority rules and the last-in-first-out principle) and security (agreements on the use of temporary agency work following dismissals for reasons of redundancy).

In line with the EU law flexicurity discourse, existing Transition Agreements emphasise the importance of *employability* and put forward different measures in support. Furthermore, the employee's qualifications – and employability – play a vital role in statutory employment protection; for example, as regards the employer's duty to provide the employee with alternative work and the priority right to re-employment. Thus, what is increasingly important for the future – both for the EU law flexicurity discourse and Swedish labour law – is the development of strategies for, but also individual rights to, lifelong learning, training and education.

[84] Cf. COM(2007) 359 final and European social partners, *Key Challenges Facing European Labour Markets: A Joint Analysis of European Social Partners*, October 2007.