

# Öberg & Associés

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Stockholm, 31 March 2106

## LEGAL OPINION

### PRECARIOUS WORK AND EUROPEAN UNION LAW

**UNDER TENDER SPECIFICATION “EUROPE: END PRECARIOUS WORK NOW! DECENT WORK AND EQUAL TREATMENT FOR ALL”; BUDGET HEADING 04.03.01.05; INFORMATION AND TRAINING MEASURES FOR WORKERS’ ORGANISATIONS; GRANT AGREEMENT VS/2014/0554**

#### I – INTRODUCTION AND EXECUTIVE SUMMARY

The trend away from the standard employment relationship of fixed, full time work has presented both risks and opportunities for workers. When arranged with care and consent, non-standard work practices can generate flexibility for a diversifying workforce wishing to balance other professional and/or personal obligations. However, non-standard work can also have a detrimental impact on individual worker’s lives and is tangibly linked to poverty, social exclusion, and inequality. It also undermines the efficacy of collective bargaining and union representation as a way of protecting fundamental rights of all workers.

Precarious work can encompass a variety of arrangements that undermine the certainty, security, and vitality of work. Often precarious work involves casual and/or fragmented working hours; diminished or no protection against dismissal and/or illness; and exclusion from the protections and privileges of union membership. Widespread concern, both within Europe and internationally, has pointed to the increasing deliberate application of casualized work arrangements to circumvent labour regulations

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and other obligations to provide certain conditions, pay, and protection to large sections of the workforce.

In light of these concerning trends, EFFAT and its project partners have asked Advokatfirman Öberg & Associés AB to give the current legal opinion, which should serve as a basis for a systematic review of how labour regulation and union strategy can be coordinated at the European and national level to combat the precarisation of work, and ensure better working conditions and social cohesion across the continent.

Our findings are in summary the following:

- The definitional challenges as to what constitutes “precarious work”, “precarious working conditions”, “atypical work”, “standard” or “non-standard forms of employment”, or for that matter “good jobs”, should not be overestimated. While the researchers involved in the 2004 ESOPE study, conducted for the European Commission on precarious work, were confronted with definitional questions so important as to eventually make the very question of ‘what is employment precariousness’ one of the key research questions in the project, this definitional conundrum should not deter the European trade union movement to push for stronger protection against precarious work and precarious working conditions, both at a European, national, sectorial and local level.
- The definition of “precarious jobs” by the founding members of industrial European Trade Union (EMF, EMCEF and ETUF-TCL) in its 2012 *Common demand for Collective Bargaining, For More Secure Employment, Against Precarious Work* could serve as a basis for a common definition of the concept “precarious work” and “precarious working conditions” by the project partners.
- Although the European Commission has emphasised, for its part, that ‘precarious work’ is not a legal concept in European union law, the concept of “precariousness” or *précarité* has already evolved into hard law in the labour law of some Member States, such as the French Code du Travail.

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- In recent EU policy papers on employment policy, there has been increasing emphasis not just on “more jobs” but on “quality jobs”, as well as a discussion of “labour force segmentation”. According to the European Commission, for instance, in order to tackle the issue of segmentation, employment protection legislation should be reformed to reduce overprotection of workers with permanent contracts, and provide protection to those left outside or at the margins of the job market. This is also the case in the context of the European Semester reports within the framework of the Europe 2020 strategy.
- As late as in 2013, the European Commission concluded that precarious work could be remedied through existing legislative measures. However, in its latest Annual Growth Survey 2016, the European Commission stated that the more general move towards more flexible labour markets should facilitate employment creation, but should also enable transitions towards more permanent contracts. To our knowledge, this is the first time the Commission has expressly set out the political and economic goal that this development should not result in more precarious jobs.
- In the light of Commission President Juncker’s recent announcement of a legislative package for spring 2016, designed to “offer a foundation of minimum social rights” based on the principle of equal pay for equal work at the same workplace, it seems that President Juncker’s Commission has in fact operated an unsuspected change of paradigm, and has departed from the previous President Barroso Commission’s insistence on regulatory competition in favour of regulatory neutrality. This may in fact be a turning point in a new general political direction and new priorities on employment, in particular regarding the transitions towards more permanent contracts and how to stop precarious work. The Conclusions of the Essen European Council on Employment from 1994, which has been relied upon by the European Court of Justice to promote atypical work, in particular in relation to part-time work, could be replaced with a new political agenda focussing on ending poverty, and on fighting inequality and injustice, in particular by ensuring the principle of equal pay for equal work or work of equal value.
- In its latest resolutions on respect for fundamental rights within the EU, the European Parliament has stressed the link between the current economic and financial crisis, the measures implemented

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to address it in some Member States, the impact of which is negatively affecting the living conditions of EU citizens. According to the European Parliament, the EU is undergoing a period of serious economic and financial crisis, the impact of which, in combination with certain measures, including drastic budget cuts, implemented to address it in some Member States, is negatively affecting the living conditions of EU citizens – increasing unemployment, poverty levels, inequalities and precarious working conditions, and limiting access to and quality of services – and the wellbeing of citizens. In its resolution, the European Parliament underlined that the EU institutions, as well as Member States which implement structural reforms in their social and economic systems, are always under an obligation to observe the Charter and their international obligations, and are therefore accountable for the decisions taken.

- At the United Nations Sustainable Development Summit on 25 September 2015, world leaders adopted the new 2030 Agenda for Sustainable Development, which includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by 2030. During the UN General Assembly in September 2015, decent work and the four pillars of ILO’s Decent Work Agenda – employment creation, social protection, rights at work, and social dialogue – became integral elements of the 2030 Agenda. Goal 8 of the 2030 Agenda calls i.a. for the promotion of sustained, inclusive and sustainable economic growth, full and productive employment, and decent work. The goal is to achieve by 2030 full and productive and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value and to protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment.
- On 27 September 2011 the United Nations Human Rights Council adopted, by consensus, the *Guiding Principles on extreme poverty and human rights* in resolution 21/11. The Human Rights Council encouraged Governments, relevant United Nations bodies, specialized agencies, funds and programmes, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations and non-State actors, including the private sector, to consider the guiding principles in the formulation and implementation of their policies and measures concerning persons affected by extreme poverty. On 20 December 2012, the UN General Assembly adopted a resolution on human rights and extreme poverty where it “[t]akes

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note with appreciation of the guiding principles on extreme poverty and human rights, adopted by the Human Rights Council in its resolution 21/11 as a useful tool for States in the formulation and implementation of poverty reduction and eradication policies, as appropriate”.

- According to paragraph 84 of those Guiding Principles, which were co-sponsored by the European Union, States should:
  - (a) Adopt rigorous labour regulations and ensure their enforcement through a labour inspectorate with adequate capacity and resources to ensure enjoyment of the right to decent working conditions;
  - (b) Ensure that all workers are paid a wage sufficient to enable them and their family to have access to an adequate standard of living;
  - (c) Ensure that legal standards regarding just and favourable conditions of work are extended to and respected in the informal economy, and collect disaggregated data assessing the dimensions of informal work;
  - (d) Take positive measures to ensure the elimination of all forms of forced and bonded labour and harmful and hazardous forms of child labour, in addition to measures that ensure the social and economic reintegration of those affected and avoid reoccurrence;
  - (e) Ensure that caregivers are adequately protected and supported by social programmes and services, including access to affordable childcare;
  - (f) Put in place specific measures to expand opportunities for persons living in poverty to find decent work in the formal labour market, including through vocational guidance and training and skills development opportunities;
  - (g) Eliminate discrimination in access to employment and training, and ensure that training programmes are accessible to those most vulnerable to poverty and unemployment, including women, migrants and persons with disabilities, and tailored to their needs;
  - (h) Respect, promote and realize freedom of association so that the identities, voices and representation of workers living in poverty can be strengthened in social and political dialogue about labour reforms.
  
- These *Guiding Principles on extreme poverty and human rights* co-sponsored by the European Union could serve as a minimum basis for the European trade union movement’s forthcoming strategy to combat precarious work and precarious working conditions. In any case, European trade union movement should frame the debate on precarious work within the framework of this debate on the protection of fundamental rights.

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- The legislative action of the European Union in the area of employment law today is still based on the fundamental premise that contracts of indefinite duration are the general form of employment relationship, even though the Court has recognised that atypical employment contracts are a feature of employment in certain sectors or in respect of certain occupations and activities. In the light of the profound structural modifications of the EU Member States' respective labour markets, "typical work" is increasingly becoming a normative reference point, infused within both regulation and social conception. While available statistics on fixed-term work, part-time work, temporary agency work and posting of workers – in particular regarding youth employment and the creation of new jobs – seem to challenge the fundamental theoretical premise that contracts of indefinite duration are the general form of employment relationship, it is still useful to maintain the 'comparable permanent worker' as the relevant comparison of precarious or atypical workers, when assessing whether the requirements of equal treatment have been met.
- The current legal opinion operates on the general assumption made by the International Labour Organization (ILO) that "atypical work" constitutes work that markedly deviates from the traditional standard employment relationship of full-time, indefinite, direct subordinate employment.
- The Charter of Fundamental Rights of the EU contains a number of provisions concerning the rights of the employed. However, there are some inherent limits to the applicability of the Charter which render it ineffective to provide safeguards against precarious work and precarious working conditions. The Court has for example declined jurisdiction to answer preliminary questions regarding probationary periods in atypical employment contracts as long as the EU legislature has not exercised its competence to legislate in the field. In order for a worker to be ensured protection under the Charter, it is therefore necessary, under the Court's current case law, that legislation in the field of labour law is sufficiently clear and precise so as to create rights for individuals. However, if precariousness were to be included in the definition of "dignity" under Article 31(1) of the Charter, much will have been achieved.
- From the outset of European integration and ever since the Spaak Report, it has been clear that the very foundation-stone, on which the social dimension of the European Union is built, is that

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structural competition on wages should be excluded, either by national legislation, or by industrial action undertaken by trade unions. As the Ohlin report pointed out, it is consistent with the interests of the trade union movement to promote and support action to put an end to unjustified differences in labour costs for the benefit of low wage groups. At that time, it was also common ground in Europe that wages and labour conditions are the outcome of collective bargaining by the social partners. In the terms of Ohlin report, there was "widespread agreement that government interference with the freedom of collective bargaining, if it becomes necessary at all, should be kept to a minimum." This means that ultimately, the Spaak and Ohlin reports presents an economic rationale governing non-discrimination.

- Without formal recognition of the principles of non-discrimination and the principle of equal pay for equal work as directly applicable legal norms which can be applied in proceedings between private parties, and in particular between , on the one hand, precarious and non-precarious workers (and/or their trade union representatives), and , on the other hand, employers, workers and trade unions in Europe are deprived of their primary tool for eliminating inequalities and promoting equality between European citizens and migrant workers from third countries alike.
  
- The definition of what actually constitutes a "worker" for the purposes of EU law is essential for understanding the scope of labour law protection available for precarious workers under EU law. While a "worker" is not defined in the EU Treaties, the Court's case law on free movement of workers under Article 45 TFEU has provided clarity on this issue. According to consistent case-law of the Court, the concept of 'worker' has a specific independent meaning under European union law and must not be interpreted narrowly. Thus, any person who pursues activities that are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person "performs services for and under the direction of another person in return for which he receives remuneration".
  
- The status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that persons acts under the direction of his employer as regards, in particular,

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his freedom to choose the time, place and content of his work, does not share in the employer's commercial risks, and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking.

- Although the fact that a person works for only a very limited number of hours in the context of an employment relationship may be an indication that the activities performed are marginal and ancillary, the fact remains that, independently of the limited amount of the remuneration for and the number of hours of the activity in question, the possibility cannot be ruled out that, following an overall assessment of the employment relationship in question, that activity may be considered by the national authorities to be real and genuine, thereby allowing its holder to be granted the status of 'worker' within the meaning of EU law. It is therefore likely that employees on so called "zero-hours contracts" come within the scope of "workers" under European union law.
- It is also clear from the Court's well-established case-law that the concept of 'worker' in EU law extends to a person who serves a traineeship or periods of apprenticeship in an occupation that may be regarded as practical preparation related to the actual pursuit of the occupation in question, provided that the periods are served under the conditions of genuine and effective activity as an employed person, for and under the direction of an employer. The Court has stated that that conclusion cannot be invalidated by the fact that the productivity of the person concerned is low, that he does not carry out full duties and that, accordingly, he works only a small number of hours per week and thus receives limited remuneration.
- There is an inherent tension on in the case-law of the Court regarding atypical and/or precarious work, whereby the Court, at one point or the other, will need to decide if the economic aim of *promoting* atypical work in European Union law is primary or secondary to the social aim pursued by the directives in question on fixed time work, part time work, posting of workers and temporary agency work.
- As has been pointed out by Steven Peers, the principle of equal treatment of (or non-discrimination against) atypical workers forms part of the general principle of equality recognized by EU law, and borrows from aspects of the case-law of the Court of Justice relating to sex discrimination law in particular. EU legislation and Court of Justice case-law also indicate that, to

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a significant extent, atypical workers should be guaranteed equal treatment as regards other employment rights and non-discrimination rights protected by EU law.

- Fixed-term workers, part-time workers, temporary agency workers, posted workers and other precarious workers on non-standard working arrangements, such as workers on zero-hour contracts and similar arrangements, bogus self-employed workers, youth entering the workforce on apprenticeship and traineeship programs and domestic migrant workers should therefore not be treated less favourably than a ‘comparable permanent worker’, in the absence of any objective justification, irrespectively whether or not there are any ‘comparable permanent workers’ at the workplace at issue or not.
- Indeed, a ‘comparable permanent worker’ has already been defined in clause 3(2) of the framework agreement on fixed-term work as ‘a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills. Where there is no comparable permanent worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement, or where there is no applicable collective agreement, in accordance with national law, collective agreements or practice’.
- The ‘comparable permanent worker’ for part-time workers in the host member state should therefore be extended to serve as the relevant comparator for fixed-term workers, temporary agency workers, posted workers and other precarious workers on non-standard working arrangements, such as workers on zero-hour contracts and similar arrangements, bogus self-employed workers, youth entering the workforce on apprenticeship and traineeship programs and domestic migrant workers.
- The European trade union movement should emphasise that the principles of equal treatment and of equal pay for equal work or work of equal value between workers *as such* – i.e. not only in respect of migrant workers within the EU or male and female workers – is not only a “principle of Community social law”, or an example of ‘rules of EU social law of particular importance’, but constitutes the *expression of a fundamental human right*, which stems from the principles of equal treatment and non-discrimination.

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- Moreover, as has already been thoroughly and convincingly argued by Valerio De Stefano, the construction of collective rights as fundamental human rights can undoubtedly have specific beneficial effects for precarious, atypical or non-standard workers that must be given adequate attention when reassessing restrictions to the right to collective bargaining and the right to strike in order to keep pace with the growth of the non-standard workforce.

## II – PRECARIOUS WORK; DEFINITIONS AND CONCEPTS

### A – Origins of the term

The notion of “precarious work” came into circulation within sociological and economic discourse in the 1960s. There seems to be a general agreement that the origins of the term “precarious” stems from French sociology, which, in the 1970s, began to link the term “*précarité*” (“precariousness”) to poverty, only later using the concept to describe work relationships.<sup>1</sup>

The references to precariousness or *précarité* in European union law are indeed scarce, both in the European union legislation<sup>2</sup> and in the case-law of the European Courts.

Indeed, there is no single definition of worker in European union law: it varies according to the area in which the definition is to be applied.<sup>3</sup>

Whereas the concept of *precariousness* or *précarité*<sup>4</sup> has evolved into hard law in the French Code du Travail,<sup>5</sup> in 2013 the European Commission emphasised, for its part, that ‘precarious work’ is not a

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<sup>1</sup> McKay, S., Jefferys, S., Paraksevpoulou, A., Keles, J., ‘Study on Precarious work and social rights’, Carried out for the European Commission (VT/2010/084), Working Lives Research Institute, London, 2012, p. 4.

<sup>2</sup> A search in the EU legislation in force in the Eur-lex database shows that the term of precarity (fr. “*précarité*”), in the few cases it has been used in non-binding legal acts, is currently linked to actions to combat poverty (Council Decision 85/8/EEC of 19 December 1984 on specific Community action to combat poverty, OJ [1985] L 2, p. 24); to the social inclusion of young people (Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, of 14 December 2000 on the social inclusion of young people OJ C 374, p. 5) as well as regarding “insecurity in relation to employment” (Council decision (89/457/EEC of 18 July 1989 establishing a medium-term Community action programme concerning the economic and social integration of the economically and socially less privileged groups in society OJ L 224, p. 10.

<sup>3</sup> *Martínez Sala*, C-85/96, EU:C:1998:217, paragraph 31.

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legal concept in European union law. According to the Commission, it arises from a ‘combination of factors’, including the welfare system in place and the worker’s family situation, and thus can affect workers with any form of employment contract.<sup>6</sup>

The Commission often refers to its work in tackling the issue of precarious work in the wake of its 2006 Green Paper. There have been a pilot project and a study, which show that the growth of non-standard forms of employment contributes to increasing the risk of precariousness for a significant number of workers.<sup>7</sup> The Commission has also referred to the Social Investment Package of 2013, which ‘outlines a strategy for structural reform of social policy to help Member States protect and invest in people better and consequently tackle the root causes of precariousness.’<sup>8</sup>

As Barbier has already pointed out, cross-national comparison of ‘employment precariousness’ is still in its infancy.<sup>9</sup> However, the definitional challenges as to what constitutes “precarious work”, “precarious working conditions”, “atypical work”, “standard” or “non-standard forms of employment”, or for that matter “good jobs”, should not be overestimated. Today, economists will tend to link the term precarious work to labour market flexibility and insiders and outsiders, and are

<sup>4</sup> The French dictionary Larousse defines the term *précaire* as: Qui n'existe ou ne s'exerce que par une autorisation révocable : *Poste précaire.*; Qui n'offre nulle garantie de durée, de stabilité, qui peut toujours être remis en cause : *Santé précaire. Emploi précaire.*; Qui est d'une sécurité douteuse : *Un abri précaire.* The entry in Le Petit Robert derives the adjective *précaire* from the latin term *precarius* (obtenu par la prière) as: 1. Don't l'avenir, la durée, la stabilité ne sont pas assurés. ->EPHÉMÈRE, INCERTAIN. *Une santé précaire;* -> FRAGILE. Travail, Emploi précaire. 2. dr. Révocable selon la loi. *Possession précaire, à titre précaire.* The Oxford English Dictionary lacks an entry for the term “precarity” but defines *precarious* (adj.) as “not securely held or in position; dangerously likely to fall or collapse: *a precarious ladder:* and dependent on chance; uncertain: *he made a precarious living as a painter.*”

<sup>5</sup> See i.a. Articles L1251-32, L1226-4-3, L2323-59, L1226-20 and L1243-8 of the French Code du Travail.

<sup>6</sup> Claudette Abela Baldacchino (S&D), Question for written answer to the Commission, 27 August 2013, P-009626/2013. See corresponding Answer given by Mr Andor on behalf of the Commission to written question P-009626/2013, 19 September 2013.

<sup>7</sup> Claudette Abela Baldacchino (S&D), Question for written answer to the Commission, 27 August 2013, P-009626/2013. See corresponding Answer given by Mr Andor on behalf of the Commission to written question P-009626/2013, 19 September 2013.

<sup>8</sup> Siôn Simon (S&D), Question for written answer to the Commission, 2 October 2014, E-007465/2014; Siôn Simon (S&D), Question for written answer to the Commission, 2 October 2014, E-007466/2014 ; and Siôn Simon (S&D), Question for written answer to the Commission, 13 October 2014, E-007858/2014. See corresponding Joint Answer given by Ms Thyssen on behalf of the Commission to written questions E-007858/14, E-007465/14, and E-007466/14, 1 December 2014.

<sup>9</sup> Jean-Claude Barbier, “A comparative analysis of ‘employment precariousness’ in Europe”, in Hantrais, McGregor and Mangen (eds.), *European Cross-National Research and Policy*, European Cross-National Research and Policy, European Research Centre (2005).

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more likely to define precariousness in terms of the form that an employment contract takes. For lawyers, precariousness is more generally associated with the absence of legal regulation or exclusion from the regulation that exists.<sup>10</sup> For trade unions and trade union representatives, the definition of “precarious work” will most likely depend on the sector at hand and the country at issue.

In a seminal work in the *International Labour Review* in 1964, Italian economist Sylos Labini defined precarious work as that which provides no stability of income and no guarantee of long-term security or improvement. Precariousness referred both to the nature of the work and to the social position it generates for the individual. Labini highlighted the correlation between precarious work and partial employment; work for very short periods; hidden unemployment in agriculture; and those with very low and unstable incomes such as peasants, small artisans, and traders.<sup>11</sup>

In the 1970s and 1980s, growing concern over the rise of non-standard work practices – such as short-term work, part-time work, and agency contracts – led to wider discussion within academic and policy circles of precarious working practices.

Gerry and Janine Rodgers (1989) described precarious work as a phenomenon that “goes beyond the form of employment to look at the range of factors that contribute to whether a particular form of employment exposes the worker to employment instability, a lack of legal and union protection and economic vulnerability.”<sup>12</sup>

Rodgers’ definition, therefore, sought to move past a formalistic definition based on certain contractual arrangements to discern common dimensions of precarious work that cut across different employment relationships. They suggested four key themes that can be summarised as follows:

- *temporal*: i.e. the amount of certainty over the timeframe of the employment
- *organisational*: workers’ individual and collective control over work in relation to working conditions, working time and shifts, work intensity, pay, health and safety

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<sup>10</sup> Sonia McKay, *Disturbing equilibrium and transferring risk: confronting precarious work*, in N. Countouris and M. Freedland (eds.), *Resocialising Europe in a Time of Crisis*, (Cambridge University Press, 2013), p. 199.

<sup>11</sup> P. Sylos Labini, “Precarious Employment in Sicily” (1964) in Nicola Countouris, *Strengthening the Protection of Precarious Workers: The Concept of Precarious Work*, ILO International Training Centre, 2011.

<sup>12</sup> Gerry Rodgers, “Precarious Work in Western Europe: The State of the Debate”, in G. Rodgers and J. Rodgers, *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (Brussels: International Institute for Labour Studies, 1989), p.1.

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- *economic*: adequacy of remuneration and appropriate salary progression
- *social*: access to social protections e.g. protection against unfair dismissal, discrimination, etc. as well as access to benefits protecting against illness, accidents, or unemployment.<sup>13</sup>

As already pointed out by Barbier, the researchers involved in the 2004 ESOPE study, conducted for the European Commission on precarious work, were confronted with definitional questions so important as to eventually make the very question of ‘what is employment precariousness’ one of the key research questions in the project.<sup>14</sup>

Fudge and Owens have used the four dimensions identified by Gerry and Janine Rodgers to offer a working definition of precarious work for the purposes of this study. They have defined precarious work as:

*a variety of forms of employment (e.g. temporary employment, underemployment, quasi self-employment, on-call work) established below the socially accepted normative standards (typically expressed in terms of rights, of employment protection legislation, and of collective protection) in one or more respects (the four dimensions) which results from an unbalanced distribution towards and amongst workers (towards workers vs. employers, and amongst workers, which leads to the segmentation of labour) of the insecurity and risks typically attached to economic life in general and to the labour market in particular.*<sup>15</sup>

Fudge and Owens identify precarious work as “work that departs from the normative model of the standard employment relationship (which is a full-time and year-round employment relationship for an indefinite duration with a single employer) and is poorly paid and incapable of sustaining a household”.<sup>16</sup> These authors noted that precarious work tends to be associated with “part-time employment, self-employment, fixed-term work, temporary work, on-call work, home working, and

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<sup>13</sup> Miguel Laparra Navarro et. al, *Precarious Employment in Europe*, 2004, p. 8. See also Diamond Ashiagbor, “Promoting Precariousness? The Response of EU Employment Policies to Precarious Work”, in J. Fudge and R. Owens (eds.), *Precarious Work, Women and the New Economy: The Challenge to Legal Norms*, (Oxford, Hart Publishing, 2006), p. 80.

<sup>14</sup> Jean-Claude Barbier, “A comparative analysis of ‘employment precariousness’ in Europe”, in Hantrais, McGregor and Mangen (eds.), *European Cross-National Research and Policy*, European Cross-National Research and Policy, European Research Centre (2005).

<sup>15</sup> Miguel Laparra Navarro et. al, *Precarious Employment in Europe*, 2004, p. 9.

<sup>16</sup> *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms 3* (Judy Fudge & Rosemary Owen eds., 2006).

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telecommuting, which are united more by their divergence from the standard employment relationship . . . than by any common features”.<sup>17</sup>

In comparison, Sonia McKay set up the following criteria in order to identify precarious work:<sup>18</sup>

- Individuals are unable to enforce employment rights
- Social insurance protection is absent
- Health and safety is at risk
- Work does not provide sufficient income to live decently
- There is an absence of job security
- Payments are made irregularly or where there is non-payment of wages
- There is an absence or only limited options of choice.

For Guy Standing, the descriptive term of the “precariat” consists of people who lack the seven forms of labour-related security, that social democrats, labour parties and trades unions have pursued as their “industrial citizenship” agenda after the Second World War. In Standing’s view, not all those in the precariat would value all seven forms of security, but they fare badly in all respects.<sup>19</sup>

### **Forms of labour security under industrial citizenship**

*Labour market security:* Adequate income–earning opportunities; at the macro–level, this is epitomised by a government commitment to "full employment".

*Employment security:* Protection against arbitrary dismissal, regulations on hiring and firing, imposition of costs on employers for failing to adhere to rules and so on.

*Job security:* Ability and opportunity to retain a niche in employment, plus barriers to skill dilution, and opportunities for "upward" mobility in terms of status and income.

*Work security:* Protection against accidents and illness at work, through, for example, safety and health regulations, limits on working time, unsociable hours, night work for women, as well as compensation for mishaps.

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<sup>17</sup> Precarious Work, Women, and the New Economy: The Challenge to Legal Norms 3 (Judy Fudge & Rosemary Owen eds., 2006).

<sup>18</sup> Sonia McKay, Disturbing equilibrium and transferring risk: confronting precarious work”, in N. Countouris and M. Freedland (eds.), Resocialising Europe in a Time of Crisis, (Cambridge University Press, 2013), p. 199.

<sup>19</sup> Guy Standing, The Precariat – The New Dangerous Class (Bloomsbury, 2014), p. 17.

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*Skill reproduction security:* Opportunity to gain skills, through apprenticeships, employment training and so on, as well as opportunity to make use of competencies.

*Income security:* Assurance of an adequate stable income, protected through, for example, minimum wage machinery, wage indexation, comprehensive social security, progressive taxation to reduce inequality and to supplement low incomes.

*Representation security:* Possessing a collective voice in the labour market, through, for example, independent trade unions, with a right to strike.

For its part, the founding members of IndustriAll European Trade Union (EMF, EMCEF and ETUF-TCL) have defined “precarious jobs” as follows in its *Common demand for Collective Bargaining, For More Secure Employment, Against Precarious Work*.<sup>20</sup>

A “precarious job” or precarious employment in effect means a job with not enough security to secure or maintain an acceptable living standard in society as a whole – hereby creating a sense of instability, a sense of insecurity as regards what the future may hold for you. Precarious employment is a very wide issue. The way you perceive it, the way you feel it, the way you experience it is very personal. It relates to the direct job situation in the plant, in the company (the kind of contract you received, the way you are paid, the information you obtain...) but also to your position in the wider society (how is your job looked upon, how well is it respected, how is it considered, etc.).

In any case, jobs can always be considered as precarious if they are jobs:

- with little or no job security
- with low and unsecured wages
- without or with insufficient access to social security (concerning pension, health insurance, unemployment payment)
- without control over the labour process, which is linked to the presence or absence of trade unions and relates to control over working conditions, wages, working time and the pace of work
- without any protection against dismissals
- without access to vocational training
- without career opportunities
- with little or no health and safety protection at work
- without legal or contractual protection
- with no trade union representation.

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<sup>20</sup> Document adopted by the 1st Meeting of the industriAll Europe Executive Committee, Luxembourg, 27th & 28th November 2012.

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## B – A nascent EU definition of precarious work

In the EU, precarious work has been defined as a combination of a low level of certainty over job continuity, poor individual control over work (notably working hours), a low level of protection (against unemployment or discrimination), and little opportunity for training and career progression. This has also been referred to as employment with ‘low quality’. Low quality jobs include, for example, ‘dead-end jobs’ and ‘low pay/low productivity jobs’. It includes temporary, seasonal, part-time, on-call, day hire, casual or short-term contracts; as well as self-employment, home working and multiple jobs. Precarious work can also include standard employment contracts where the workers are subjected to organisational change, such as: restructuring, downsizing, privatisation or outsourcing.<sup>21</sup>

A 2010 report by the European Parliament's Committee on Women's Rights and Gender Equality provided a working definition of precarious work as referring “to a type of ‘non-standard’ employment with any of the following characteristics... [l]ittle or no job security due to the non-permanent, often casual form of employment... [l]ow level of payment,... [l]ack of social protection rights and employment benefits, [n]o protection against discrimination”<sup>22</sup> once more equating precarious work to non-standard employment.

Wider and divergent definitions of precarious work have placed greater emphasis on non-wage work; work with distinctively high risks to psychological and physical health; social dimensions, especially from a gender and race perspective; and poorly paid jobs incapable of sustaining a household.<sup>23</sup> These definitions not only reflect the multidimensional and contested nature of precarious work as a concept, but also the considerable overlap with broader concepts of bad or low-quality work, dead-end jobs, and decent work.<sup>24</sup>

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<sup>21</sup> Aditya Jain and Juliet Hassard, Precarious work: definitions, workers affected and OSH consequences [https://oshwiki.eu/wiki/Precarious\\_work:\\_definitions,\\_workers\\_affected\\_and\\_OSH\\_consequences#cite\\_note-nine-9](https://oshwiki.eu/wiki/Precarious_work:_definitions,_workers_affected_and_OSH_consequences#cite_note-nine-9), EU-OSH Wiki, consulted on 11 January 2016.

<sup>22</sup> European Parliament, Report on precarious women workers (2010/2018(INI)), A7-0264/2010.

<sup>23</sup> For an overview of these divergent definitions, see the discussions of, *inter alia*, Vosko (2006), Evans and Gibb (2009), and Fudge and Owens (2006) in Nicola Countouris, Strengthening the Protection of Precarious Workers, pp.6-7. See also Virginia Mantouvalou, *Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labour*, UCL Labour Rights Institute On-Line Working Papers, LRI WP 2/2012, available online at <http://www.ucl.ac.uk/laws/lri/papers/VM%20precarious%20workers.pdf>, p.2.

<sup>24</sup> Illegal work, trafficking, certain forms of prostitution, and modern slavery are arguably the ultimate forms of precarious work, with individuals trapped in often inescapable cycles of destitution and exploitation, working

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Given the difficulty associated with empirically studying incidences of precarious work, analysing atypical working arrangements often serves as a useful indicator for understanding various precarious work practices. A focus on atypical working arrangements is especially relevant to the legal dimension of understanding precarious work, as these atypical forms of employment form the structural circumstances that can lead to systematic instances of precarious work.

There are, however, two important caveats that must be kept in mind when analysing atypical working arrangements. Firstly, to consider a form of work *atypical* inevitably presupposes a sense of what is “typical” in the first place.

As the 2004 ESOPE study on precarious work points out, there are important national differences throughout the European Union in what is considered to form a *typical working arrangement*. Whilst the legal and normative understanding of typical work in Germany and France, for instance, closely mirrors the “standard employment relationship” (i.e. full-time, indefinite, direct employment), the United Kingdom tends to consider a much wider ambit of working arrangements as constituting the norm, with part-time work, for example, considered much more of an acceptable and typical arrangement, especially for women.<sup>25</sup> What constitutes typical work in these cases is not an *empirical* question of, statistically speaking, what working arrangements are prevalent in each given country, although prevalence inevitably casts influence over local attitudes.

Rather, “typical work” is a *normative* reference point, infused within both regulation and social conception.<sup>26</sup> The finer distinctions in national conceptions of precariousness have been well documented by the ESOPE study and do not form the focus of this project. This opinion operates on the general assumption made by the International Labour Organization (ILO) that atypical work

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under terrible and even life-threatening conditions. These areas, however, are deserving of their own in-depth analysis, and while they form part of the background against which this study analyses precarious work practices, they are not the focus of its enquiry.

<sup>25</sup> Miguel Laparra Navarro et. al, *Precarious Employment in Europe*, 2004, pp.36-38, 42.

<sup>26</sup> G. Rodgers, “Precarious Work in Western Europe: The State of the Debate,” in G. Rodgers & J. Rodgers, eds., *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (Geneva: ILO, 1989), p. 1.

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constitutes work that markedly deviates from the traditional standard employment relationship of full-time, indefinite, direct subordinate employment.<sup>27</sup>

Secondly, one should not conflate atypical or non-standard work with precarious work. Not all atypical working arrangements, in all circumstances, should be considered precarious. The International Labour Organization (ILO) refers to certain forms of atypical work which are entered into voluntarily as falling outside the scope of precarious work. Others emphasise the extent to which the atypical working arrangement has the potential to form a genuine transition to full traditional employment as a key distinguishing factor. Of course, judging the extent to which a worker is truly “voluntarily” entering into atypical work is inherently problematic. For many workers, especially those within tough economic and personal circumstances, the “choice” as to which form of work to enter into may be entirely theoretical.

Perhaps the most appropriate distinguishing factors are that of allocation of risks and the general sense of autonomy: those in atypical working arrangements that have a high degree of autonomy over the nature of their working arrangements are less likely to fall into the category of precarious work. This may be derived from the economic and personal capacity to choose to work part time (for example, to balance family or study commitments), a substantial degree of control over the nature of work and working conditions (such as in the case of a self-employed specialist consultant), or even a high-level of remuneration and flexibility (for example, in relation to executive positions).

The problem of distinguishing atypical work from precarious work is diminished when precarious work is not considered as a duality (i.e. work is either precarious or not precarious) but as a feature existing on a contextually defined continuum (i.e. degree of precariousness).<sup>28</sup>

Finally, as pointed out by Valerio De Stefano, “[t]here has been a distinct growth of labour market policies professedly aimed at promoting the creation of employment through the use of non-standard work contracts, such as fixed-term and/or part-time employment or temporary agency work (TAW). In

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<sup>27</sup> “Non-Standard Forms of Employment”, Report for Discussion at the Meeting of Experts on Non-Standard Forms of Employment, Geneva, 16-19 February 2015, MENSFE/2015, International Labour Organization, p.1.

<sup>28</sup> Miguel Laparra Navarro et. al, *Precarious Employment in Europe*, 2004, p.48.

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most of the cases, these reforms neither significantly affected the open-ended, full-time standard contract of employment nor the relevant dismissal regulations.”<sup>29</sup> De Stefano points out:

This ‘flexibility at the margin’ approach has now been called into question even by those institutions that had previously advocated deregulation of non-standard and ‘flexible’ forms of employment:<sup>30</sup> the risk, it is now argued, is that workers, particularly young workers, or women or workers belonging to disadvantaged groups are ‘trapped’ in an endless series of precarious, instable working contracts for a considerable amount of their working lives. It is suggested, in particular, that facilitating the use of temporary work contracts, without reforming the open-ended employment relationship by loosening protections against dismissal, has been the cause of a damaging segmentation of the labour market. Additionally, strong dismissal protection, it is argued, incentivises employers to look for contractual arrangements granting the elimination or the reduction of termination costs. This process, it is suggested, generates ‘dualism’ of labour markets, namely a sharp division between the labour market of insiders, ‘protected’ workers with permanent contracts and protection against termination of employment, and the market of outsiders, the ‘non-protected’, forced into a prolonged and indefinite series of non-standard contracts characterised by high instability.<sup>31</sup>”

Since the debate about labour market segmentation began in the 1970s, the problem of dualism has been addressed in various labour law reform initiatives. Three broad types of reform can be identified, which roughly correspond to stages in the evolution of the regulatory response.<sup>32</sup>

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<sup>29</sup> De Stefano, Valerio, *A Tale of Oversimplification and Deregulation: The Mainstream Approach to Labour Market Segmentation and the Recent Responses to the Crisis in European Countries* (December 5, 2013). Bocconi Legal Studies Research Paper. Available at SSRN: <http://ssrn.com/abstract=2363932>; re-edited by request of the Author as WP CSDL E “Massimo D’Antona”.INT – 102/2013, available at [http://aei.pitt.edu/47413/1/20131219-111120\\_destefano\\_102-2013intpdf.pdf](http://aei.pitt.edu/47413/1/20131219-111120_destefano_102-2013intpdf.pdf).

<sup>30</sup> For instance, Directive 2008/104/EC and Directive 1999/70/EC indicate non-standard forms of employment as an effective way to, respectively “contribute to job creation’ and to ‘respond, in certain circumstances, to the needs of both employers and workers’. See also, *The OECD Jobs Study. Facts, Analysis, Strategies*, 1994. On this point, see N. Countouris and M. Freedland, “‘Labour regulation and the economic crisis in Europe: challenges, responses and prospects’, in J. Hayes, L. Rychly (eds.), *Labour Administration in Uncertain Times. Policies, Practices and Institutions* (Cheltenham: Edward Elgar 2013).

<sup>31</sup> See O. Blanchard and A. Landier, ‘The Perverse Effects of Partial Labor Market Reform: Fixed Duration Contracts in France’ (2012) 112 *Economic Journal* 214-244; T. Boeri and P. Garibaldi, ‘Two Tier Reforms of Employment Protection: a Honeymoon Effect?’ (2007) 117 *Economic Journal* 357-385; S. Bentolila, J. F., Jimeno and J. J. Dolado ‘Reforming an Insider-Outsider Labor Market: The Spanish Experience’ (2012) 01 Working Papers FEDEA (accessed 9 April 2014); R. Bouis, O. Causa, L. Demmou, R. Duval and A. Zdzienicka, ‘The Short-Term Effects of Structural Reforms: An Empirical Analysis?’, (2012) 949 *OECD Economic Department Working Papers* (Paris: OECD).

<sup>32</sup> Simon Deakin, *Addressing labour market segmentation : the role of labour law*; International Labour Office, Governance and Tripartism Department. - Geneva: ILO, 2013.

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- (i) changes to the personal scope of worker-protective laws, aimed at enlarging the definition of wage-dependent labour and lowering or removing wages and hours thresholds and minimum qualifying periods of service which had the effect of excluding atypical workers from protection;
- (ii) shifts in the substance of protection, in some cases involving a weakening of the rights of workers in the core, in others the establishment of a legal right to equivalent or pro-rata treatment for those in the periphery; and
- (iii) the conjoining of reforms to worker protective laws (including some deregulatory ones) with complementary mechanisms of intervention, including active labour market policy, fiscal law, social security law, and collective bargaining.

The major European trade union confederations have been attentive to the impact of precarious, atypical, non-standard and/or ‘flexible’ forms of employment on the workers they represent and the unions themselves. Precarious workers are often either overtly excluded from access to union representation and protection, or are more difficult to engage with due to their often volatile and detached work situation. This not only deprives individual workers of access to representation and support, but it also undermines the efficacy of trade union representation more generally.

According to the EU Annual Report on Human Rights and Democracy in the World in 2014,<sup>33</sup> the European Union attaches great importance to the interdependence of all human rights and to the indivisibility of civil and political rights and economic, social and cultural rights (ESCR), as fundamental tenets of international human rights law.

Within the global arena, the EU promotes economic and social rights in discussions in international forums, such as the G20. In 2014, the G20 leaders affirmed that raising global growth to deliver better living standards and quality jobs for people across the world is their highest priority. They reiterated their commitment to reducing youth unemployment, which is unacceptably high, by acting to ensure that young people are in education, training or employment. They also recognised the need to address informality, as well as structural and long-term unemployment, by strengthening labour markets and

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<sup>33</sup> Doc. nr. 10152/15, Luxembourg, 22 June 2015.

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having appropriate social protection systems. Improving workplace safety and health was mentioned among priorities. The G20 leaders asked their labour and employment ministers, supported by an Employment Working Group, to report to them in 2015.<sup>34</sup>

### **C – The global perspective: The discussion within the ILO on precarious and atypical work and non-standard forms of employment**

A recent ILO report noted that “[t]he definitions of ‘precarious’ and ‘atypical’ work overlap, but are not synonymous. ‘Precarious’ work refers to ‘atypical’ work that is involuntary – the temporary worker without any employment security, the part-time worker without any pro-rated benefits of a full-time job, etc.”<sup>35</sup> Arguably, to suggest that the element of choice could render an objectively precarious work relation into a subjectively stable and secure one is rather unsatisfactory and open to dispute.

The documented rise of precarious work worldwide has placed precarious work on the ILO’s agenda. Indeed, it is possible to view the ILO’s core “Decent Work Agenda” as an attempt to address precarious work by holding up its mirror image via the four pillars of employment creation, social protection, rights at work, and social dialogue.<sup>36</sup> Precarious work as a term has increasingly featured in policy publications and documents from the organisation, especially those involving the trade union sector.

The ILO’s Bureau for Workers’ Activities (ACTRAV) featured a symposium in 2011 on Policies and Regulations to Combat Precarious Work, to take stock of the global impact of precarious working practices on workers’ rights and the role of precarious work in the world economy.<sup>37</sup> Its Outcome

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<sup>34</sup> G20 Leaders’ Communiqué, November 16, 2014. See, i.a. Informality and the quality of employment in G20 countries, International Labour Organization, Report prepared for the G20 Labour and Employment Ministerial Meeting, Melbourne, Australia, 10-11 September 2014.

<sup>35</sup> Int’l. Lab. Conf., Employment Policies for Social Justice and a Fair Globalization 35 (2010) (along similar lines); see Eur. Comm’n, Employment in Europe 2007, at 47 (Directorate-General for Employment, Social Affairs and Equal Opportunities Unit D1, 2007).

<sup>36</sup> Kerry Rittich, “Rights, Risk, and Reward: Governance Norms in the International Order and the Problem of Precarious Work”, in ”, in J. Fudge and R. Owens (eds.), *Precarious Work, Women and the New Economy: The Challenge to Legal Norms*, (Oxford, Hart Publishing, 2006), p. 40.

<sup>37</sup> ACTRAV, Outcome Document to the Workers’ Symposium, p. 3.

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Document highlighted the multifaceted and context-specific nature of the concept of precarious work, but pointed to several underlying features.

These included the function of precarious work as a means to shift risks and responsibilities from employers to workers, and the work being characterised by a range of “objective (legal status) and subjective (feeling) characteristics of uncertainty and insecurity.”<sup>38</sup> ILO’s Bureau for Workers’ Activities have established a matrix of contractual *arrangements* (relating to both the duration and nature of the relationship) and working *conditions* (low wage, low or no protection or access to rights enforcement).<sup>39</sup> Crucially, the findings from the symposium highlighted precariousness not only in reference to the work itself, but to the nature of the life that ensues from being engaged in precarious work: precarious work leads to precarious lives.<sup>40</sup>

The ILO has recently opted in favour of using the phrase *non-standard forms of employment* when discussing the kind of atypical working arrangements that often give rise to incidences of precarious work.<sup>41</sup> This is undoubtedly a reflection of the institution’s delicate political balance between the different representatives of its tripartite membership. Across the gamut of member states, employers, and workers’ unions represented at the ILO lies a broad range of perspectives as to the proper role of atypical working conditions in the modern economy.

To navigate these divergent views and interests, the ILO convened a tripartite *Meeting of Experts on non-standard forms of employment* in February 2015. The Worker Vice-Chairperson identified the lack of political neutrality of the terminology used when discussing the issue, observing that the trade union movement has routinely employed “precarious work” to encapsulate their concerns, while employers have highlighted “flexibility”.

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<sup>38</sup> ACTRAV, Outcome Document to the Workers’ Symposium on Policies and Regulations to Combat Precarious Employment, International Labour Organization, 2012, p. 27.

<sup>39</sup> ACTRAV, Outcome Document to the Workers’ Symposium on Policies and Regulations to Combat Precarious Employment, International Labour Organization, 2012, p. 27.

<sup>40</sup> ACTRAV, Outcome Document to the Workers’ Symposium on Policies and Regulations to Combat Precarious Employment, International Labour Organization, 2012, p. 36.

<sup>41</sup> See, for example, International Labour Organization, “Non-Standard Forms of Employment”, <http://www.ilo.org/global/topics/employment-security/non-standard-employment/lang--en/index.htm>.

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Non-standard forms of employment (NSFE), therefore, constituted a more neutral term for stakeholders to discuss and agree on common objectives for reform and protection.<sup>42</sup> The meeting's recommendations called on the ILO to improve its monitoring and data collection, to consider innovative practices for worker protection, and to examine and address current barriers to protection. In particular, the ILO was recommended to assess gaps in current labour standards and evaluate the need for new ones.<sup>43</sup> These recommendations will help shape the forthcoming agenda for the ILO set by the Governing Body, and indicate at least the possibility of the ILO considering new labour standards specifically targeted at precarious work in the future.

### III – PRECARIOUS WORK AND EU POLICYMAKING

#### A – The 1980s and 1990s: Atypical Work and Minimum Standard Directives

The perceived lacunae in the common market and the economic crises and stagnation in the early 1980s led to an expansion of the competences of the EU in the field of labour law and the development of the social dimension. The major developments in EU labour and employment powers include the 1987 Single Economic Act; the 1992 Maastricht Treaty and the Protocol on Social Policy and Agreement on Social Policy; the 1996 revision of the European Social Charter; and the 1997 Treaty of Amsterdam and revised social chapter. Through these amendments the legal landscape continued to evolve and the social dimension of the EU started to take shape.

Examples of these developments can be found in the legislative agenda of the EU. In the 1980s there was a push from the Delors presidency for action on atypical work.

On 12 February 1987, Joseph Wresinski presented the first report on extreme poverty and economic and social precariousness ever drawn up by a Member State of the then EEC. His definition of poverty and social exclusion remains pioneering,<sup>44</sup> not only in so far as he highlighted the similarities and

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<sup>42</sup> International Labour Office, Conclusions of the Meeting of Experts on Non-Standard Forms of Employment, GB.323/POL/3, 12-27 March 2015, p. 8.

<sup>43</sup> International Labour Office, Conclusions of the Meeting of Experts on Non-Standard Forms of Employment, p. 52.

<sup>44</sup> Chronic Poverty and Lack of Basic Security, a report of the Economic and social council of France, by Joseph Wresinski (10 and 11 February 1987); available at [http://www.joseph-wresinski.org/IMG/pdf/Wres\\_JO87en.pdf](http://www.joseph-wresinski.org/IMG/pdf/Wres_JO87en.pdf)

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disparities between precariousness and extreme poverty, but also in that he linked the notion of precariousness to the issue of fundamental rights:

“...precariousness is the absence of one or several forms of security, particularly that of employment, which allows individuals and families to carry out their professional, family and social responsibilities and to enjoy basic rights. The resulting insecurity can vary in its extent and have consequences of varying gravity or finality. It leads to extreme poverty when it affects several areas of someone's existence, becomes persistent, compromises someone's chances of handling their responsibilities once more and reconquering their rights themselves in the foreseeable future.”<sup>45</sup>

This definition has also been highly influential within the former United Nations Commission on Human Rights, the predecessor to the current United Nations Human Rights Council.

One example was the proposal for a Council Directive supplementing measures to encourage improvement in the safety and health at work of temporary workers.<sup>46</sup> This attempt remained largely unsuccessful – it was not until the adoption of the Temporary Agency Work Directive in 2008 that this issue was regulated.

At the end of the Essen European Council meeting on 9 and 10 December 1994, the presidency concluded that it was necessary to create a more flexible organization of work in a way that fulfilled both the wishes of employees and the requirements of competition. In this process an important role would be played by dialogue between social partners and politicians in which everyone concerned would have to assume their responsibilities fully.<sup>47</sup>

The biggest impact came from the introduction of the employment provisions in the Treaty of Amsterdam in 1997. Employment became one of the priorities of the 1996/97 Intergovernmental Conference (IGC) of the European Union (EU) and an employment title was inserted into the

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<sup>45</sup> Economic and Social Committee of the French Republic, Grande pauvreté et précarité économique et sociale, 11 February 1987. “La précarité est l’absence d’une ou plusieurs des sécurités, notamment celle de l’emploi, permettant aux personnes et familles d’assumer leurs obligations professionnelles, familiales et sociales, et de jouir de leurs droits fondamentaux. L’insécurité qui en résulte peut être plus ou moins étendue et avoir des conséquences plus ou moins graves et définitives. Elle conduit à la grande pauvreté quand elle affecte plusieurs domaines de l’existence, qu’elle devient persistante, qu’elle compromet les chances de réassumer des responsabilités et de reconquérir ses droits par soi-même, dans un avenir prévisible”.

<sup>46</sup> COM(90) 228 of 29 June 1990.

<sup>47</sup> See Presidency Conclusions of the European Council meeting on 9 and 10 December 1994 in Essen. Available at: [http://www.europarl.europa.eu/summits/ess1\\_en.htm](http://www.europarl.europa.eu/summits/ess1_en.htm).

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Amsterdam treaty.<sup>48</sup> Use was made of the legislative process for consultation with the social partners, which finally led to the adoption of two framework agreements, the Part-Time Time Work Directive 97/81/EC, and the Fixed-Term Work Directive 1999/70/EC.

Moreover, the Commission became active in the field of employment and the Council adopted resolutions and decisions issuing guidelines for Member States' employment policies. These guidelines rested on four 'pillars': improving employability, developing entrepreneurship, encouraging adaptability of businesses and their employees, and, finally, strengthening equal opportunities for women and men. In 1997 and 2000, the Council encouraged Member States to "examine the possibility of incorporating... more adaptable types of contract, taking into account the fact that forms of employment are increasingly diverse".<sup>49</sup>

As recently as 2014 in its judgment *Mascellani*, the Court explicitly referred to the European Council Essen conclusions when interpreting Directive 97/81/EC, the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. Indeed, the Court stated that the objective of Directive 97/81 and the Framework Agreement is, *first*, to promote part-time work and, *second*, to eliminate discrimination between part-time workers and full-time workers.<sup>50</sup>

### **B – Lisbon and Beyond: Quality Jobs and Flexicurity**

The turn of the century saw the debate on employment policy in the EU continue. The new millennium started with the EU adopting the Lisbon Strategy in March 2000. The presidency's Conclusions of 23 and 24 March 2000 presented the strategy for making Europe "the most competitive and dynamic knowledge-based economy in the world" capable of sustainable economic growth with emphasis on "more and better jobs and greater social cohesion".

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<sup>48</sup> Karl Magnus Johansson, Tracing the employment title in the Amsterdam treaty: uncovering transnational coalitions, *Journal of European Public Policy* 6:1 March 1999: 85-101, p. 85.

<sup>49</sup> I.e. Council Resolution of 15 December 1997 on the 1998 Employment Guidelines EGT C 30, 28.1.1998 2000/228/EC; Council Resolution of 9 February 1999 on the 1999 Employment Guidelines OJ C 69, 12.3.1999, p. 2. Council Decision of 13 March 2000 on guidelines for Member States' employment policies for the year 2000 EGT L 72, 21.3.2000, s. 15.

<sup>50</sup> *Mascellani*, C-221/13, EU:C:2014:2286, paragraph 19 and 20; *Bruno and Others*, C-395/08 and C-396/08, EU:C:2010:329, paragraphs 24 and 77, and *Michaeler and Others*, C-55/07 and C-56/07, EU:C:2008:248, paragraph 21.

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Although the subsequent financial crisis shifted the focus away from the social dimension of the EU, there are a number of policy documents from the period 2005-2015 that deserve mention.

In 2006, *Green Paper - Modernising Labour Law to Meet the Challenges of the 21st Century* was published.<sup>51</sup> The document noted that the rigidity of the standard employment relationship contributed to diversification of non-standard employment relationships. It was suggested that this created a two-tier labour market of insiders and outsiders, where those with the “standard” employment were on the “inside”. The green paper found that the “outsiders” were especially those in precarious work who “occupy a grey area where basic employment or social protection rights may be significantly reduced, giving rise to a situation of uncertainty about future employment prospects and also affecting crucial choices in their private lives”.

In a 2007 Communication, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards Common Principles of Flexicurity: More and better jobs through flexibility and security*,<sup>52</sup> the findings of the 2006 green paper were elaborated. The Commission stated that it was not a question of simply coupling together two objectives. To take measures on flexibility and security in isolation can cancel one another out. Rather, a strategy was necessary for enhancing the agility of enterprises and workers to respond to economic demands. The communication emphasised employment security rather than job security. The solution would be to enable swifter transitions between jobs, without sacrificing social protection and life-long skills building.

The Lisbon Strategy has since been replaced by the *Europe 2020 Strategy*. It was adopted in 2010 to govern “smart, sustainable, inclusive growth”. A major goal is to raise the employment rate of the population aged 20–64 from the current 69% to at least 75%. The Europe 2020 Strategy saw the creation of the “European Semester”: an annual cycle of macro-economic, budgetary and structural

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<sup>51</sup> COM (2006) 708 final.

<sup>52</sup> COM (2007) 359 final.

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policy coordination.<sup>53</sup> In the discourse on EU level there has also been a shift from social expenditure as a cost to social expenditure as an investment.<sup>54</sup>

The latest *Integrated Guideline 7* of the “Europe 2020” agenda suggests that:

[M]easures to enhance flexibility and security should be both balanced and mutually reinforcing. Member States should therefore introduce a combination of flexible and reliable employment contracts, active labour market policies, effective lifelong learning, policies to promote labour mobility, and adequate social security systems to secure professional transitions accompanied by clear rights and responsibilities for the unemployed to actively seek work.

In recent policy papers on employment policy, there has been increasing emphasis not just on “more jobs” but on “quality jobs”, as well as a discussion of “labour force segmentation”.<sup>55</sup>

According to the European Commission, for instance, in order to tackle the issue of segmentation, “employment protection legislation should be reformed to reduce overprotection of workers with permanent contracts, and provide protection to those left outside or at the margins of the job market”.<sup>56</sup>

This is also the case in the context of the European Semester reports within the framework of the Europe 2020 strategy.<sup>57</sup> Youth unemployment has been highlighted through recommendations of the Council.<sup>58</sup> In the legislative field there has been focus on undeclared work. There has been a proposal in 2014 to enhance cooperation in the prevention and deterrence of undeclared work.<sup>59</sup>

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<sup>53</sup> See, for example, COM (2015) 28 final, “Country Report Spain 2015 - Including an In-Depth Review on the prevention and correction of macroeconomic imbalances”, 26 February 2015, p. 41.

<sup>54</sup> COM (2013) 83 final, “Towards Social Investment for Growth and Cohesion – including implementing the European Social Fund 2014-2020 European Social Investment Package”, 20 February 2013.

<sup>55</sup> OR 70005/15, Council of the European Union, Joint Employment Report 2015, 9 March 2015: “addressing the challenge of segmented labour markets, ensuring a proper balance between flexibility and security”.

<sup>56</sup> EU Commission, ‘Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of Regions, Annual Growth Survey: Advancing the EU’s Comprehensive Response to the Crisis’ COM (2011) 11 final. A similar approach is followed by OECD, *Economic Policy Reforms 2012: Going for Growth*, OECD Publishing.

<sup>57</sup> OR 13693/14, Social Protection Committee, *Europe 2020 Strategy: Mid-term review, including the evaluation of the European Semester*, 7 October 2014.

<sup>58</sup> Council Recommendation of 22 April 2013 on establishing a Youth Guarantee (OJ C 120, 26.4. 2013, pp. 1-6), point 16; 2013 Youth Guarantee, Council Recommendation of 10 March 2014 on a Quality Framework for Traineeships (OJ C 88, p. 1).

<sup>59</sup> COM (2014) 221 final. Proposal for a decision of the European Parliament and of the Council on establishing a European Platform to enhance cooperation in the prevention and deterrence of undeclared work, 9 April 2014.

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## **C – The awareness within the EU that more flexible labour markets should not result in more precarious jobs**

In recent years, there has been a significant increased focus from Members of the European Parliament on addressing the issue of precarious work.

The Commission initially concluded that precarious work can be remedied through existing legislative measures. According to the Commission, EU directives cover several types of non-standard employment relationships, notably in the field of part-time work, fixed-term work, temporary agency work and posting of workers. The Commission ‘monitors’ their implementation by the Member States and reviews them regularly to check whether they need to be ‘updated’.<sup>60</sup>

However, in its latest resolutions on respect for fundamental rights within the EU, the European Parliament has stressed the link between the current economic and financial crisis, the measures implemented to address it in some Member States, the impact of which is negatively affecting the living conditions of EU citizens:

X. ... whereas the EU is undergoing a period of serious economic and financial crisis, the impact of which, in combination with certain measures, including drastic budget cuts, implemented to address it in some Member States, is negatively affecting the living conditions of EU citizens – increasing unemployment, poverty levels, inequalities and precarious working conditions, and limiting access to and quality of services – and hence the wellbeing of citizens;

(...)

139. Stresses that the EU institutions, as well as Member States which implement structural reforms in their social and economic systems, are always under an obligation to observe the Charter and their international obligations, and are therefore accountable for the decisions taken; reiterates its call to align economic adjustment programmes with the EU objectives set out in Article 151 TFEU, including the promotion of employment and improvement of living and working conditions; reiterates the need to ensure that there is full democratic oversight through the effective involvement of parliaments over the measures taken by the EU institutions and Member States in reaction to the crisis;

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<sup>60</sup> Claudette Abela Baldacchino (S&D), Question for written answer to the Commission, 27 August 2013, P-009626/2013. See corresponding Answer given by Mr Andor on behalf of the Commission to written question P-009626/2013, 19 September 2013.

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In its latest Annual Growth Survey 2016 entitled *Strengthening the recovery and fostering convergence*, the European Commission states that the more general move towards more flexible labour markets should facilitate employment creation, but should also enable transitions towards more permanent contracts.<sup>61</sup> To our knowledge, the Commission has for the first time expressly set out the political and economic goal that this development should not result in more precarious jobs (our emphasis):

Member States should continue to modernise and simplify employment protection legislation, ensuring effective protection of workers and the promotion of labour market transitions between different jobs and occupations. Stable and predictable work relationships and in particular more permanent types of contracts induce employers and employees to invest more in skills and life-long learning. They allow individuals to plan for their future by providing sustainable prospects of career and earnings progression. In recent years, the increase in overall employment has been driven mainly by an increase in temporary contracts which is not unusual in the early stages of a recovery. The more general move towards more flexible labour markets should facilitate employment creation but should also enable transitions towards more permanent contracts. *It should not result in more precarious jobs.* Member States should also step up efforts to combat undeclared work.

In a draft *Joint Employment Report from the Commission and the Council accompanying the Communication from the Commission on the Annual Growth Survey 2016* the European executive branch has concluded:<sup>62</sup>

“[L]ooking at contract types, in line with expectations, over the past years employment has been most volatile for temporary contracts, and less so for permanent contracts or self-employment, which have remained more or less stable since 2011. From 2013 the increase in overall employment has been mainly driven by an increase in temporary contracts. The use of temporary contracts varies widely between Member States, with 2014 shares ranging from below 5% in Romania and the Baltic countries to more than 20% in the Netherlands, Portugal, Spain and Poland. Transition rates from temporary to permanent contracts also vary between countries, and it seems that transition rates are highest (lowest) for those countries where the share of temporary contracts is lowest (highest). Both the shares of temporary contracts and the transitions from temporary to permanent contracts are indicative of how flexible labour markets are. They also possibly reflect differences in employment protection legislation across countries and the extent to which national labour markets are characterised by insider-outsider effects. This is of particular concern in countries using temporary contracts on a wide scale, where temporary contracts often do not improve the chances of getting a permanent full-time job, as shown in Figure 2.

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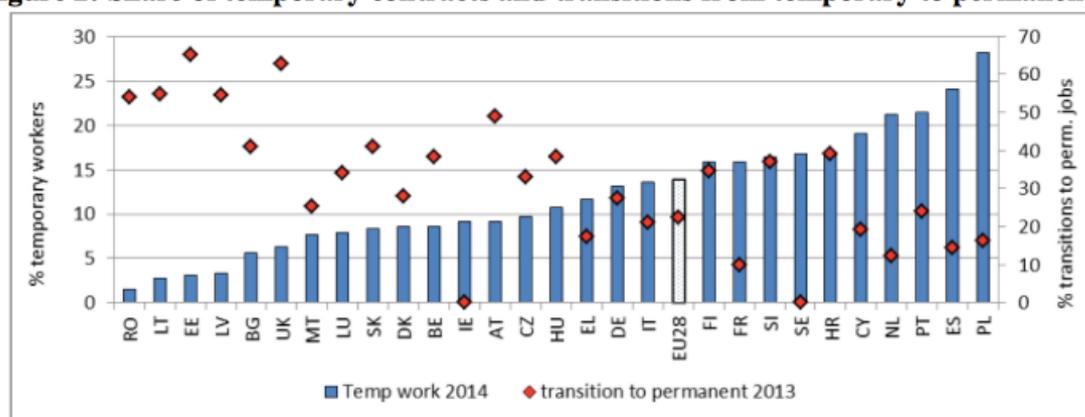
<sup>61</sup> COM(2015) 690 final.

<sup>62</sup> COM(2015) 700 final.

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Non-standard employment contracts are more prevalent among women, young people and non-routine manual work. These appear to be associated with a wage penalty and to be concentrated among low earners. Another facet of job precariousness is the extent of involuntary part-time work, which has increased from 16.7% to 19.6% of total employment and the spread and diversification of forms of casual working.

**Figure 2: Share of temporary contracts and transitions from temporary to permanent**



Source: Eurostat, LFS and SILC. Short description: Data on transitions for BG, EL, PT, HR refer to 2012, for AT to 2014. Data on transitions are not available for IE and SE.

In its *Commission Staff Working Document Employment and Social Developments in Europe 2014* the Commission has analysed occupations resilient to automation, and have stressed the importance of knowledge and creativity (human capital) in view of technology change. Indeed, digital applications have shown the ability to compete with and potentially undermine various traditional service providers such as taxis or hotels (e.g. ride-sharing app ‘Uber’ or ‘AirBnb’ flat rental and sharing). According to the Commission services, the non-routine jobs that are likely to resist automation in the foreseeable future are located at either the lower or higher end of the wage and skill spectrum.<sup>63</sup>

At the lower end, there are services such as hospitality, care, beauty, cleaning, customer service, construction, decorating and installation.<sup>64</sup>

<sup>63</sup> Commission Staff Working Document Employment and Social Developments in Europe 2014, p. 152.

<sup>64</sup> Commission Staff Working Document Employment and Social Developments in Europe 2014, p. 152.

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Despite their undisputed social utility, such non-routine, manual, low- to medium-skilled jobs often offer modest remuneration with precarious job arrangements and physically demanding working conditions. Likely reasons for this are the abundant labour supply, the possibility of using underpaid migrant workers and, in some cases, the threat to relocate some part of these tasks to low-wage countries (Standing, 2011). In this context, there is clearly a need to step up efforts to improve the working conditions in these jobs and to ensure the application of existing worker protection laws.

At the high end of non-routine and non-automatable jobs are those consisting of complex cognitive tasks and a high level of professional competence, usually combined with a long and versatile formal education (e.g. computer programmers, creative industries, engineers, managers, investment bankers, lawyers, doctors, teachers and scientists). According to the Commission services, Europe has great stakes in developing the knowledge-based economy, investing in high-end skills and assuring optimum job conditions for knowledge workers. Compared with low-skilled workers, knowledge workers already enjoy a more privileged position on the labour market, with more favourable working conditions and a higher pay.<sup>65</sup>

Moreover, as has been recently pointed out by the UNDP, market pressures transmitted through global value chains tend to be absorbed by workers – whether in wages (driven down by global competition), in increased informalization and contractual insecurity (through multiple subcontracting chains) or in layoffs (during downturns). Multinational corporations increasingly rely on a disenfranchised workforce, using a mix of fixed-term employees, temporary workers, independent contractors, project-based workers and outsourced workers to provide production flexibility and manage costs. Participation in value chains provides some with secure, decent jobs and others with more precarious work (even in the same country and sector), in a type of “labour dualism.”<sup>66</sup>

On 29 September 2015, the President of the Commission, Jean-Claude Juncker, announced a new legislative package for Spring 2016, that would be designed to “offer a foundation of minimum social rights, a safety net to protect the labour market” (our emphasis).<sup>67</sup>

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<sup>65</sup> Commission Staff Working Document Employment and Social Developments in Europe 2014, p. 152.

<sup>66</sup> Human Development Report 2015 (UNDP, 2015), p. 9.

<sup>67</sup> L'Europe sociale, réformes et solidarité / Discours du Président Juncker pour la Confédération européenne des syndicats, 13ème Congrès, 29 September 2015, SPEECH/15/5741.

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Il faut compléter la dimension sociale de l'Europe, qui est tristement et pauvrement meublée. Je ne dis pas que rien n'a été fait. J'étais pendant dix-sept ans de ma vie ministre du Travail. Pendant les années quatre-vingt, en matière de sécurité et de santé au travail, Madame Hidalgo vient d'y faire référence, beaucoup de choses ont été faites, notamment en matière d'égalité et de promotion des droits féminins, y compris au niveau de l'emploi. Mais cela ne suffit pas. *Nous avons proposé, nous la Commission européenne, au cours du printemps 2016, un socle de droits sociaux minimaux, un cordon sanitaire qui entourera, pour mieux le protéger, le marché du travail. Un socle de droits sociaux minimaux ne sera pas un socle minimal mais ce sera un socle qui déterminera les plafonds sociaux qu'on ne peut pas corriger vers le bas, et en le faisant nous apportons un plus de convergence au monde du travail en Europe.*

(...)

Nous devons jeter un nouveau regard sur les anormalités que nous observons. *Il n'est pas normal que les contrats de travail qu'à l'époque, nous appelions des contrats de travail atypiques -travail intérimaire, contrats à durée déterminée- aujourd'hui sont en train de devenir des contrats de travail typiques. Pour moi, vieux jeu, le contrat de travail normal est un contrat de travail à durée indéterminée. Oui, les entreprises ont besoin de prévisibilité mais les travailleurs aussi. Mon père était ouvrier à la sidérurgie. S'il avait dû vivre dans la crainte de ne plus voir son contrat de travail être renouvelé, après six mois, après six mois, après six mois, je n'aurais pas vu une faculté de droit de l'intérieur. Les gens modestes, ceux qui ont moins de moyens, les travailleurs ont besoin de prévisibilité et donc il faut plaider en faveur du contrat à durée indéterminée sans devoir se laisser insulter par ceux qui savaient toujours mieux, et qui nous ont conduits là où nous sommes, dans la précarité qui n'est pas acceptable parce qu'elle ne répond pas au modèle européen.*

(...)

La solidarité doit s'appliquer aussi dans d'autres domaines. En matière de droit du travail, il faudra en Europe que nous arrivons avec une dose de bon sens, sachant que le bon sens est distribué d'une façon très inégale en Europe, *nous devons nous mettre d'accord sur un principe simple: un même salaire, pour un même travail, au même endroit, c'est une règle, une norme, qu'il faudra que nous appliquons.* Et en matière de fiscalité d'entreprises, nous avons tous fauté, certains pêché. Il faudra que nous nous accordions sur le principe qu'un bénéfice doit être imposé là où ce bénéfice est réalisé. Stop au papillonnage fiscal. Et puis faisons en sorte que l'économie sociale de marché reste un mode d'organisation de nos sociétés qui ne peut pas être mis en question. Lors de la crise financière et économique, ce n'est pas l'économie sociale de marché qui n'a pas fonctionné, n'ont pas fonctionné ceux qui n'ont pas appliqué les vertus cardinales qui accompagnent l'économie sociale de marché. *Cette volonté féroce de tout vouloir flexibiliser, cette volonté d'imposer une flexibilité sans borne et sans gêne, tout cela doit s'arrêter parce que nous avons vu où l'absence de normes nous conduit, elle nous conduit dans le chaos, et par conséquent l'économie sociale de marché doit rester le modèle social européen.*

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This may be a tipping point in the new general political direction and the new priorities on employment, in particular regarding the transitions towards more permanent contracts and how to stop precarious work.

The Conclusions of the Essen European Council on Employment from 1994, which has been relied upon by the European Court of Justice to promote atypical work, in particular in relation to part-time work, should therefore be replaced with a new political agenda focussing on ending poverty, and on fighting inequality and injustice, in particular by ensuring the principle of equal pay for equal work or work of equal value.

### **D – The protection of precarious workers under the EU Charter of Fundamental rights**

The Charter of Fundamental Rights of the EU contains a number of provisions concerning the rights of the employed. However, there are some inherent limits to the applicability of the Charter which render it ineffective in some fields of labour law.

First, according to Article 51 of the Charter, it only applies when the EU institutions or the Member States apply EU law. This means that situations that fall outside the scope of EU law also fall outside the scope of the Charter. The most obvious reason for this is that the Charter should not, pursuant to Article 51(2) of the Charter, “extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”.

The right to protection in the event of unjustified dismissal in Article 30 of the Charter, as well as the other provisions concerning the protection of workers in the Charter, suffer from this weakness. Some of the rights in the Charter which are based on express secondary legislation, such as the right to a paid holiday in Article 31(2) which is based on Directive 93/104/EC concerning certain aspects of the organisation of working time. Concerning the right to a paid holiday the Charter has therefore by far eclipsed other instruments of international law that also contain these rights.<sup>68</sup> The same holds true of

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<sup>68</sup> Alan Bogg, “Art 31 Fair and Just Working Conditions” in Steve Peers et al (eds.), *The EU Charter of Fundamental Rights, A Commentary* (Hart, 2014), p. 846.

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Article 31(1) of the Charter which provides that every worker has the right to working conditions which respect his or her health, safety and dignity. This reasonably includes pay and dismissals.<sup>69</sup> The presence of secondary legislation in itself, however, is not sufficient to give effect to the protection under the Charter.

In *Association de médiation sociale*, Advocate General Cruz Villalón argued that both in EU Charter of Fundamental Rights and in the constitutional traditions of the Member States, “it is common to regard as ‘rights’ or ‘social rights’ that substantive content relating to social policy which, because it cannot create legal situations directly enforceable by individuals, operates only following action or implementation by the public authorities. They are (social) ‘rights’ by virtue of their subject-matter, or even their identity, and ‘principles’ by virtue of their operation”.<sup>70</sup>

In the judgment, the Court held that Article 3(1) of Directive 2002/14 establishing a general framework for informing and consulting employees in the European Community fulfils all of the conditions necessary to have direct effect. Although that directive grants the Member States a certain degree of discretion, in so far as it does not prescribe the manner in which the Member States are to take account of employees falling within its scope when calculating the thresholds of workers employed, that does not alter the precise and unconditional nature of the obligation in that article not to exclude from that calculation a specific category of persons initially included in the group to be taken into consideration.<sup>71</sup>

However, and in line with its case-law on the lack of horizontal direct effect of EU directives, the Court held that even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties.

The Court furthermore held that Article 27 of the Charter of Fundamental Rights of the European Union, by itself or in conjunction with the provisions of Directive 2002/14, must be interpreted to the

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<sup>69</sup> Alan Bogg, “Art 31 Fair and Just Working Conditions” in Steve Peers et al (eds.), *The EU Charter of Fundamental Rights, A Commentary* (Hart, 2014), p. 856.

<sup>70</sup> Conclusions in *Association de médiation sociale*, C-176/12, EU:C:2013:491, paragraph 45.

<sup>71</sup> *Association de médiation sociale*, C-176/12, EU:C:2014:2.

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effect that, where a national provision implementing that directive is incompatible with EU law, that article of the Charter cannot be invoked in a dispute between individuals in order to disapply that national provision contrary to EU law. According to the Court, it is clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in EU or national law. Accordingly, Article 27 of the Charter cannot, as such, be invoked in a dispute between individuals in order to conclude that a national provision which is not in conformity with Directive 2002/14 should not be applied.<sup>72</sup>

The Court has declined jurisdiction to answer preliminary questions regarding probationary periods in atypical employment contracts as long as the EU legislature has not exercised its competence to legislate in the field:<sup>73</sup>

40 As regards Article 151 TFEU, which sets out the objectives of the European Union and Member States in the field of social policy, that provision does not impose any specific obligation with respect to probationary periods in employment contracts. The same is true for the guidelines and recommendations in the field of employment policy adopted by the Council under Article 148 TFEU, as referred to by the referring court.

41 In that regard, it should be borne in mind that, when examining the French ‘new recruitment contract’, the Court held that, even though protection for workers in the event of the termination of the employment contract is one of the means of attaining the objectives laid down in Article 151 TFEU and even though the EU legislature has competence in this field in accordance with the conditions laid down in Article 153(2) TFEU, situations that have not been covered by measures adopted on the basis of those provisions do not fall within the scope of EU law (order in *Polier*, C-361/07, EU:C:2008:16, paragraph 13).

42 In addition, the fact that the employment contract of indefinite duration to support entrepreneurs may be financed by structural funds is not sufficient, in itself, to support the conclusion that the situation at issue in the main proceedings involves the implementation of EU law for the purposes of Article 51(1) of the Charter.

43 In the grounds for its decision, the referring court also refers to Articles 2.2(b) and 4 of Convention No 158 on the Termination of Employment, adopted at Geneva on 22 June 1982 by the International Labour Organisation, and the European Social Charter signed at Turin on 18 October 1961. It must be held that the Court has no jurisdiction under Article 267 TFEU to rule on the interpretation of provisions of

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<sup>72</sup> *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraphs 45 and 51.

<sup>73</sup> *Nisttahuz Poclava*, C-117/14, EU:C:2015:60.

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international law which bind Member States outside the framework of EU law (see judgments in *Vandeweghe and Others*, 130/73, EU:C:1973:131, paragraph 2 and *TNT Express Nederland*, C-533/08, EU:C:2010:243, paragraph 61; the order in *Corpul Național al Polițiștilor*, C-134/12, EU:C:2012:288, paragraph 14; and the judgment in *Qurbani*, C-481/13, EU:C:2014:2101, paragraph 22).

44 It follows from all the foregoing considerations that the situation at issue in the main proceedings does not fall within the scope of EU law. Consequently, the Court does not have jurisdiction to answer the questions put by the referring court.

In order for a worker to be ensured protection of the Charter, it is therefore necessary that any legislation in the field of labour law is sufficiently clear and precise so as to create rights for individuals. Such a legislative solution would be able to lift Article 30 of the Charter out of its obscurity and end what Jeff Kenner consequently calls its “enigmatic quality”.<sup>74</sup>

One question that remains is whether new legislation that gives effect to Article 30 of the Charter would be enforceable between individuals. While this to a certain extent is down to the character of any new legislation enacted on the basis of Article 151 TFEU, this issue remains open and subject to the interpretation of the ECJ. If the aforementioned judgments should provide any guidance on this point, the minimum is to ensure that the provisions have direct effect. In that case, Article 30 of the Charter will receive a similar effect and can be invoked by individuals in cases concerning their working conditions.

However, if precariousness could be included in the definition of “dignity” in Article 31(1) of the Charter, much will have been achieved. Some steps have been taken. Directive 2008/104/EC on temporary agency work expressly refers to Article 31 of the Charter. This means that the relevant supports precariousness as being a question of protection of worker’s dignity rather than against unjustified dismissal. Article 31 of the Charter has been called “the most precocious of the labour rights”.<sup>75</sup>

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<sup>74</sup> Jeff Kenner, “Art 30 – Protection in the event of unjustified dismissal”, in Steve Peers et al (eds.), *The EU Charter of Fundamental Rights, A Commentary* (Hart, 2014), p. 832.

<sup>75</sup> Alan Bogg, “Art 31 Fair and Just Working Conditions” in Steve Peers et al (eds.), *The EU Charter of Fundamental Rights, A Commentary* (Hart, 2014), p. 868.

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As a result, it can be concluded that the safest way to activate the protection of workers against precariousness is legislation that aims at the level of “dignity” of workers and preferably refers to Article 31 of the Charter. The temporary agency work directive shows that this is a possible path to choose and would create clarity and coherence in the approach against precariousness.

### **E – Global outlook: The increasing recognition of precarious work under international human rights law.**

On 27 September 2011 the United Nations Human Rights Council adopted, by consensus, the *Guiding Principles on extreme poverty and human rights* in resolution 21/11.<sup>76</sup> The Human Rights Council encouraged Governments, relevant United Nations bodies, specialized agencies, funds and programmes, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations and non-State actors, including the private sector, to consider the guiding principles in the formulation and implementation of their policies and measures concerning persons affected by extreme poverty.

The final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, stated among other things the following under the heading *Right to work and rights at work*:

In rural and urban areas alike, persons living in poverty experience unemployment, underemployment, unreliable casual labour, low wages and unsafe and degrading working conditions. Persons living in poverty tend to work outside the formal economy and without social security benefits, such as maternity leave, sick leave, pensions and disability benefits. They may spend most of their waking hours at the workplace, barely surviving on their earnings and facing exploitation including bonded or forced labour, arbitrary dismissal and abuse. Women are particularly at risk of abuse, as are groups affected by discrimination such as persons with disabilities and undocumented migrants. Women usually take on the bulk of unpaid care work in their households, making them more likely to engage in low paid and insecure employment, or preventing them from entering the labour market altogether.

According to paragraph 84 of those *Guiding Principles*, which were co-sponsored by the European Union, States should:

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<sup>76</sup> Draft A/HRC/21/L.20, adopted without a vote on 27 September 2012.

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- (a) Adopt rigorous labour regulations and ensure their enforcement through a labour inspectorate with adequate capacity and resources to ensure enjoyment of the right to decent working conditions;
- (b) Ensure that all workers are paid a wage sufficient to enable them and their family to have access to an adequate standard of living;
- (c) Ensure that legal standards regarding just and favourable conditions of work are extended to and respected in the informal economy, and collect disaggregated data assessing the dimensions of informal work;
- (d) Take positive measures to ensure the elimination of all forms of forced and bonded labour and harmful and hazardous forms of child labour, in addition to measures that ensure the social and economic reintegration of those affected and avoid reoccurrence;
- (e) Ensure that caregivers are adequately protected and supported by social programmes and services, including access to affordable childcare;
- (f) Put in place specific measures to expand opportunities for persons living in poverty to find decent work in the formal labour market, including through vocational guidance and training and skills development opportunities;
- (g) Eliminate discrimination in access to employment and training, and ensure that training programmes are accessible to those most vulnerable to poverty and unemployment, including women, migrants and persons with disabilities, and tailored to their needs;
- (h) Respect, promote and realize freedom of association so that the identities, voices and representation of workers living in poverty can be strengthened in social and political dialogue about labour reforms.

On 20 December 2012, the UN General Assembly adopted a resolution on human rights and extreme poverty where it “Takes note with appreciation of the guiding principles on extreme poverty and human rights, adopted by the Human Rights Council in its resolution 21/11 as a useful tool for States in the formulation and implementation of poverty reduction and eradication policies, as appropriate”.<sup>77</sup>

In February 2014, the 52nd session of the United Nations Commission for Social Development (CSocD) discussed the priority theme “Promoting empowerment of people in achieving poverty eradication, social integration and full employment and decent work for all”. In its resolution, the CSocD invited UN Member States to give due consideration to poverty eradication, social inclusion,

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<sup>77</sup> A/RES/67/164, paragraph 17.

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full employment and decent work for all in the forthcoming post-2015 development agenda. The Civil Society Forum urged governments to implement the ILO Recommendation No. 202 concerning the establishment of national floors of social protection and the Decent Work Agenda as an effective means to guarantee full and productive employment and income security.

At the United Nations Sustainable Development Summit on 25 September 2015, world leaders adopted the 2030 Agenda for Sustainable Development, which includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by 2030. During the UN General Assembly in September 2015, decent work and the four pillars of ILO's Decent Work Agenda – employment creation, social protection, rights at work, and social dialogue – became integral elements of the new 2030 Agenda for Sustainable Development.

Goal 8 of the 2030 Agenda calls for the promotion of sustained, inclusive and sustainable economic growth, full and productive employment, and decent work. The goal is to achieve by 2030 full and productive and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value; to take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms; and to protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment.

#### **IV – THE CONCEPT OF SOCIAL DUMPING WILL NOT PREVENT REGULATORY COMPETITION AND THE DESTABILISATION OF NATIONAL LABOUR LAW REGIMES**

As summarised by Ruth Dukes, at the outset of the creation of the common market in the 1950's, the orthodox economic view, as reflected in the ILO's Ohlin report of 1957 on Social Aspects of European Economic Co-operation report,<sup>78</sup> was that “objective, scientific analysis” revealed that even

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<sup>78</sup> ILO's Ohlin report of 1957 on Social Aspects of European Economic Co-operation.

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significant differences in labour costs between the member states should not, in the normal run of things, distort competition.<sup>79</sup>

The Ohlin report envisaged a common market constituted at two levels – national and supranational – by a plurality of legal and institutional frameworks. At the EEC level, the legal framework would ensure the removal of barriers to trade, guaranteeing the free movement of goods, capital, services and workers, and the prohibition of cartels and of corporations abusing their market power. At Member State level, national labour constitutions would continue to coexist, unaffected in their architecture by the creation of the common market, and functioning to ensure that any consequent increase in productivity resulted in terms and conditions of employment for workers that were proportionate and appropriate. Differences in labour standards – “labour costs” – between countries were characterized as unproblematic for low-cost and high-cost countries alike. The threat of negative integration – of “freer trade exerting pressure towards a levelling down” – was dismissed as negligible, and the case for positive harmonisation – for the deliberative coordination of labour standards at European level, was judged to be unpersuasive. The Ohlin report “noted the economic impact of differences in social legislation and benefits that might justify harmonisation in certain limited areas such as equal pay and working time”.<sup>80</sup>

Moreover, as the Ohlin report pointed out, it is consistent with the interests of the trade union movement to promote and support action to put an end to unjustified differences in labour costs for the benefit of low wage groups. At that time, it was also common ground in Europe that wages and labour conditions are the outcome of collective bargaining by the social partners. In the terms of Ohlin report, there was “widespread agreement that government interference with the freedom of collective bargaining, if it becomes necessary at all, should be kept to a minimum.”

From the outset of European integration and ever since the Spaak Report,<sup>81</sup> it is clear that the very foundation-stone, on which the social dimension of the European Union is built, is that structural competition on wages should be excluded, either by national legislation, or by industrial action undertaken by trade unions. In the terms of the Spaak report:

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<sup>79</sup> Ruth Dukes, *The Labour Constitution* (Oxford, 2014).

<sup>80</sup> *Ibid.*, p. 6.

<sup>81</sup> Brussels Report on the General Common Market of 1956.

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“... la troisième condition est relative aux salaires: si, d’une part, toute discrimination est effectivement interdite entre travailleurs nationaux et travailleurs immigrés, et si, par ailleurs, soit par une législation d’État, soit par l’action des syndicats, toute baisse de salaire est en principe exclue, les employeurs n’auraient aucune incitation à faire appel à plus de main-d’œuvre immigrée qu’ils n’en auraient effectivement besoin pour remplir les postes disponibles. De ce fait, toute pression sur les niveaux de rémunération est évitée et le marché de la main-d’œuvre tend à s’équilibrer de lui-même.”

This means that ultimately, the Spaak and Ohlin reports presented an economic rationale governing non-discrimination.<sup>82</sup>

However, as has already been correctly pointed out by Ruth Dukes, the Court of Justice in *Laval*, *Viking*, and in the subsequent case of *Rüffert*, reasoned contrary to Bertil Ohlin and Paul-Henri Spaak that “differences in labour standards between member states can give rise, in and of themselves, to restrictions of free movement. Where that is the case, such differences ought to be removed. And if they are not removed by means of upward harmonisation, then the Court is quite prepared to oversee the dismantling of established national standards. The fact that the national standards in question have the status of fundamental rights in the EU legal order will not prevent them figuring as unlawful restrictions of free movement, since fundamental rights have only to be protected ‘in accordance with Community law’”.<sup>83</sup>

Dukes correctly points out that “with the *Laval* and *Viking* decisions and subsequent jurisprudence, the Court of Justice has thus opened the door to ‘greater regulatory competition ... and the destabilisation of national labour law regimes’. Whether negative harmonization of national labour laws and labour constitutions will in fact result remains to be seen and is likely to depend both on the legislative responses of member states to the Court’s judgments, and on the continued willingness of the Court to find in favour of those who raise claims of breaches of their fundamental market freedoms.”<sup>84</sup>

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<sup>82</sup> See also Jari Hellsten, *On Social and Economic Factors in the Developing European Labour Law, Reasoning on Collective Redundancies, Transfer of Undertakings and Converse Pyramids*, (Stockholm: Elanders Gotab, 2005).

<sup>83</sup> Ruth Dukes, *The Labour Constitution* (Oxford, 2014).

<sup>84</sup> Ruth Dukes, *The Labour Constitution* (Oxford, 2014).

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The reason why this issue cannot be solved by recourse to the notion of social dumping has been thoroughly analysed by Alexandre Saydé in the following terms:<sup>85</sup>

By reversing the axis of equality, from host equality to home equality, the Court necessarily found that the application of host law to migrant workers amounted to a restriction to free movement, owing to the negative harmonisation conundrum. In this sense, *Laval* represents a radical departure from the host equality tradition ally applied to migrant workers under free movement.

(...)

In so ruling, the *Laval*-line of case law dismantled the natural bulwark formed by *Rush Portuguesa* to social dumping, by enabling employers to ‘import’ their home labour law when bringing workers from their home State:

*Laval* and the other cases make it clear that it does not amount to abuse of Union law to make use of free movement of services to exploit the comparative advantage of cheaper labour. Many would say hurrah to that

If the respective effects of *Rush Portuguesa* (host equality) and *Laval* (home equality) on social dumping are not questioned, the desirability of social dumping has proved highly controversial, as shown by the last quote. These controversies have led the Commission to propose a directive on the enforcement of Directive 96/71 in 2012, whose Article 3, entitled ‘Preventing abuse and circumvention’, seeks to prevent abusive relocations of undertakings seeking to elect a hospitable jurisdiction [footnote omitted].

The central submission of the present section is that the social dumping debate is yet another manifestation of the dialectic between regulatory neutrality and regulatory competition pervading the law of the internal market. On the one hand, the regulatory neutrality paradigm seeks to avoid competition among private businesses being distorted by national laws. Host equality creates a level playing field within the host State, thereby ensuring neutrality of labour law vis-à-vis businesses competing in the host State. In this context, social dumping distorts competition among employers and among workers, by enabling migrant workers to ‘export’ their home labour law. Accordingly, partisans of regulatory neutrality view ‘social dumping’ as an obstacle to a proper economic integration, and advocate a solution à la *Rush Portuguesa* (host equality):

(...)

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<sup>85</sup> Alexandre Saydé, *Abuse of EU Law and Regulation of the Internal Market* (Hart, 2014).

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On the other hand, the regulatory competition paradigm seeks to ensure the proper functioning of the competition among Member States. In that context, differentials of regulation are legitimate and businesses are encouraged to elect their preferred labour law, a process called regulatory arbitrage. As a result, supporters of regulatory competition view ‘social dumping’ as the natural functioning of economic integration, and therefore endorse a solution à la Laval (home equality):

(...)

In other words, just as the concept of abuse of law, the concept of social dumping simply does not exist under regulatory competition, for a process of competition among Member States is founded on the legitimacy of ‘social dumping’ strategies, otherwise called ‘regulatory arbitrage’. As a consequence, the social dumping debate can never be solved, for it reproduces a broader dialectic opposing the paradigms of regulatory neutrality and regulatory competition.

To sum up, the ambiguity of the free movement jurisprudence towards social dumping is yet another manifestation of the fundamental dialectic pervading the law of the internal market. Partisans of regulatory neutrality consider social dumping as an obstacle to a proper economic integration as it distorts competition among private businesses, and therefore advocate a solution à la Rush Portuguesa. Supporters of regulatory competition view social dumping as the natural functioning of economic integration understood as competition among Member States, and therefore endorse a solution à la Laval.

In the light of Commission President Juncker’s recent announcement of a legislative package for spring 2016, designed to “offer a foundation of minimum social rights” based on the principle of equal pay for equal work at the same workplace, it seems that the Juncker Commission has in fact operated an unsuspected change of paradigm, and has departed from the previous Barroso Commission’s insistence on regulatory competition in favour of regulatory neutrality.<sup>86</sup>

As Saydé has put it:<sup>87</sup>

Lastly, the dialectic between regulatory neutrality and regulatory competition might help to explain the emergence of controversies surrounding the law of the internal market, and in particular the Court’s case law—without however solving them, for the adherence to one or the other paradigm of economic integration largely depends on one’s faith in the proper functioning of a competition among regulations as propounded

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<sup>86</sup> L’Europe sociale, réformes et solidarité / Discours du Président Juncker pour la Confédération européenne des syndicats, 13ème Congrès, 29 September 2015, SPEECH/15/5741.

<sup>87</sup> Alexandre Saydé, *Abuse of EU Law and Regulation of the Internal Market* (Hart, 2014), pp 412-413.

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by Tiebout: regulation-supporters will be inclined to embrace regulatory neutrality, whereas market-believers will tend to favour regulatory competition.

(...)

Arguably, this framework could therefore be used to predict the emergence of a controversy in internal market law, which would arise whenever the Union institutions operate a change of paradigm—in particular in the direction of regulatory competition. But this last submission would be even more adventurous than the rest of this study.

## V – CASE LAW OF THE COURT RELEVANT FOR PRECARIOUS WORK

### A – ‘Self-employed persons’ under national law can be classified as workers or employees under EU law

The definition of what actually constitutes a “worker” for the purposes of EU law is essential for understanding the scope of labour law protection available for precarious workers under EU law. While a “worker” is not defined in the EU Treaties, the Court’s case law on free movement of workers under Article 45 TFEU has provided clarity on this issue.

Article 45(1) TFEU safeguards the free movement of labour – one of the four fundamental freedoms of the European Union – stating, “Freedom of movement for workers shall be secured within the Union”. Given the absence of any treaty-based definition for a “worker”, the Court has developed the notion of a worker through its case law.<sup>88</sup>

According to consistent case law of the Court, the concept of ‘worker’ has a specific independent meaning under European union law and must not be interpreted narrowly. Thus, any person who pursues activities that are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a ‘worker’. The essential feature of an employment relationship is, according to that case law, that for a certain period of time a person “performs services for and under the direction of another person in return for which he receives remuneration”.<sup>89</sup>

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<sup>88</sup> Catherine Barnard, *EU employment law*, 4th ed, 2012, p. 144.

<sup>89</sup> *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraphs 16 and 17; *Collins*, C-138/02, EU:C:2004:172, paragraph 26; *Trojani*, C-456/02, EU:C:2004:488, paragraph 15; *Neidel*, C-337/10, EU:C:2012:263,

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It follows that *subordination* and the *payment of remuneration* are constituent elements of all employment relationships, in so far as the professional activity at issue is *effective* and *genuine*.<sup>90</sup>

### *The criteria of subordination and self-employed status*

As has already been pointed out in the case law of the Court, and, most lately, by Advocate General Wahl in *FNV Kunsten Informatie en Media*,<sup>91</sup> one of the key features of any employment relationship is the subordination of the worker to his employer. This is, to a large extent, the defining criterion that will help distinguish a worker from a self-employed person.

In *FNV Kunsten Informatie en Media*, Advocate General Wahl expanded on this difference in the following terms (footnote omitted):

44. The employer is not only empowered to give instructions and direct the activities of his employees, but he may also exercise certain powers of authority and control over them. A self-employed person follows the instructions of his customers but, generally speaking, they do not wield extensive powers of supervision over him. Because of the absence of a subordinate relationship, the self-employed person has more independence when choosing the type of work and tasks to be executed, the manner in which that work or those tasks are to be performed, his working hours and place of work, as well as the members of his staff.

45. Furthermore, a self-employed person must assume the commercial and financial risks of the business, whereas a worker normally does not bear any such risk, being entitled to remuneration for the work provided irrespective of the performance of the business. It is the employer who, in principle, is responsible towards the outer world for the activities carried out by his employees within the framework of their work relationship. The higher risks and responsibilities borne by the self-employed are, on the other hand, meant to be compensated by the possibility of retaining all profit generated by the business.

46. Lastly, it is barely necessary to point out that, while self-employed persons offer goods or services on the market, workers merely offer their labour to one (or, on rare occasions, more) particular employer(s).

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paragraph 23; *Petersen*, C-544/11, EU:C:2013:124, paragraph 30 and *O*, C-432/14, EU:C:2015:643, paragraph 22.

<sup>90</sup> *Haralambidis*, C-270/13, EU:C:2014:2185, paragraph 29.

<sup>91</sup> Conclusions of the Advocate General in *FNV Kunsten Informatie en Media*, C-413/13, EU:C:2014:2215.

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Advocate General Wahl concluded that “it is inherent in the status of being self-employed that, at least if compared with workers, self-employed persons enjoy more independence and flexibility. In return, however, they inevitably have to bear more economic risks and will often find themselves in more unstable and uncertain working relationships. All these aspects seem to be closely interrelated”.<sup>92</sup>

Advocate General Wahl pointed out that “in today’s economy, the distinction between the traditional categories of worker and self-employed person is at times somewhat blurred.”<sup>93</sup> Citing, by way of example, *Allonby*<sup>94</sup> and *Haralambidis*,<sup>95</sup> Advocate General Wahl acknowledged that the Court, in fact, has already had to examine a number of cases in which the working relationship between two persons (or one person and one entity) did not — because of its peculiar features — fall neatly into one or other category, displaying features characteristic of both.

The Court agreed with Advocate General Wahl on this particular point, stating that “in today’s economy it is not always easy to establish the status of some self-employed contractors as ‘undertakings’”, such as the substitutes at issue in the main proceedings”.<sup>96</sup>

### *The distinction between the traditional categories of worker and self-employed person*

Provided that a person is a worker within the meaning of European union law, the nature of his or her legal relationship with the other party to the employment relationship is of no consequence in regard to the application of Union law.<sup>97</sup>

The Court has held that the classification of a ‘self-employed person’ under national law does not prevent that person being classified as an employee within the meaning of EU law if his independence is merely notional, thereby disguising an employment relationship.<sup>98</sup>

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<sup>92</sup> Conclusions of the Advocate General in *FNV Kunsten Informatie en Media*, C-413/13, EU:C:2014:2215, paragraph 47.

<sup>93</sup> Conclusions of the Advocate General in *FNV Kunsten Informatie en Media*, C-413/13, EU:C:2014:2215, paragraph 51.

<sup>94</sup> *Allonby*, C-256/01, EU:C:2004:18.

<sup>95</sup> *Haralambidis*, C-270/13, EU:C:2014:2185.

<sup>96</sup> *FNV Kunsten Informatie en Media*, C-413/13, EU:C:2014:2411, paragraph 32.

<sup>97</sup> See, in the context of free movement of workers, *Bettray*, 344/87, EU:C:1989:226, paragraph 16, and *Raulin*, C-357/89, EU:C:1992:87, paragraph 10, and in the context of the principle of equal pay for men and women, *Allonby*, C-256/01, EU:C:2004:18, paragraph 70.

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According to settled case-law, on the one hand, a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking.<sup>99</sup>

On the other hand, the term 'employee' for the purpose of EU law must itself be defined according to objective criteria that characterise the employment relationship, taking into consideration the rights and responsibilities of the persons concerned. In that connection, it is settled case-law that the essential feature of the employment relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration.<sup>100</sup>

It follows that the status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that person acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work,<sup>101</sup> does not share in the employer's commercial risks,<sup>102</sup> and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking.<sup>103</sup>

According to the case-law of the Court, it is certainly not inconceivable that, in the same way as employed persons, self-employed workers, such as service providers, may need specific measures to afford them a certain degree of social protection.<sup>104</sup> Thus, the social protection of service providers may, in principle, be one of the overriding requirements of public interest that may justify a restriction on the freedom to provide services.

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<sup>98</sup> *Allonby*, C-256/01, EU:C:2004:18, paragraph 71.

<sup>99</sup> *Confederación Española de Empresarios de Estaciones de Servicio*, EU:C:2006:784, paragraphs 43 and 44.

<sup>100</sup> *N.*, C-46/12, EU:C:2013:97, paragraph 40 and *Haralambidis*, C-270/13, EU:C:2014:2185, paragraph 28.

<sup>101</sup> *Allonby*, EU:C:2004:18, paragraph 72.

<sup>102</sup> *Agregate*, C-3/87, EU:C:1989:650, paragraph 36.

<sup>103</sup> *Becu and Others*, C-22/98, EU:C:1999:419, paragraph 26.

<sup>104</sup> With regard to freedom of establishment, see *Kemmler*, C-53/95, EU:C:1996:58, paragraph 13.

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## **B – Trainees may be regarded as workers**

It is clear from the Court’s well-established case-law that the concept of ‘worker’ in EU law extends to a person who serves a traineeship or periods of apprenticeship in an occupation that may be regarded as practical preparation related to the actual pursuit of the occupation in question, provided that the periods are served under the conditions of genuine and effective activity as an employed person, for and under the direction of an employer.

The Court has stated that that conclusion cannot be invalidated by the fact that the productivity of the person concerned is low, that he does not carry out full duties and that, accordingly, he works only a small number of hours per week and thus receives limited remuneration.<sup>105</sup>

It is also clear from the Court’s case-law that neither the legal context of the employment relationship under national law, in the framework of which the vocational training or internship is carried out, nor the origin of the funds from which the person concerned is remunerated and, in particular, the funding of that remuneration through public grants, can have any consequence in regard to whether or not the person is to be regarded as a worker.<sup>106</sup>

Hence, the Court has held that Article 1(1)(a) of Directive 98/59 (the Collective Redundancies Directive) must be interpreted as meaning that it is necessary to regard as a worker for the purposes of that provision a person who, while not receiving remuneration from his employer, performs real work within the undertaking in the context of a traineeship — with financial support from, and the recognition of, the public authority responsible for the promotion of employment — in order to acquire or improve skills or complete vocational training.

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<sup>105</sup> *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraphs 19 to 21; *Bernini*, C-3/90, EU:C:1992:89, paragraphs 15 and 16; *Kurz*, C-188/00, EU:C:2002:694, paragraphs 33 and 34, and *Kranemann*, C-109/04, EU:C:2005:187, paragraph 13.

<sup>106</sup> *Bettray*, 344/87, EU:C:1989:226, paragraphs 15 and 16; *Birden*, C-1/97, EU:C:1998:568, paragraph 28, and *Kurz*, C-188/00, EU:C:2002:694, point 34.

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## **C – Employees on zero-hours contracts are “workers” under European union law**

*Concerning zero-hour contracts* (also sometimes referred to as casual work/intermittent work, on-call work, etc.), the European Commission has followed the development of this form of working since around 2005, and noted that such contracts, along with other types of non-standard contractual arrangements, have become an established feature of European labour markets.

The Commission has expressed awareness that zero-hours contracts, under which workers agree to be available for work as and when required but no particular number of hours or working times are specified, can place the workers concerned in a vulnerable situation, especially since they cannot rely on a minimum income and may be excluded from certain rights and benefits entitlement which are subject to a minimum number of hours worked.

The Commission’s view is that although such contractual arrangements in many instances can be beneficial to both employees and employers, there can also be situations where the ‘zero-hour contracts’ are abused to the detriment of the workers. The Commission has noted that development of zero-hours contracts has already led to legislative action to address the risk of abuse in certain Member States, and in particular in Ireland and the Netherlands.

In some Member States, there are protective rules which guarantee workers under ‘zero-hour contracts’ a specific number of hours of work and pay per week, whereas in other Member States workers under ‘zero-hour contracts’ do not even fall within the scope of national labour law because of the definitions laid down at the national level. In 2005, the Commission did not envisage proposing to regulate zero-hour employment contracts at Community level at that stage. Moreover, it pointed out that, in accordance with Article 153(5) TFEU, the EU has no competence to legislate on matters of pay.<sup>107</sup>

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<sup>107</sup> Eluned Morgan (PSE) and Józef Pinior (PSE), Question for written answer to the Commission, 21 October 2005, E-3833/05. Answer given by Mr Špidla on behalf of the Commission to written question E-3833/05, 18 November 2005; Glenis Willmott (S-D), Question for written answer to the Commission, 15 September 2009, E-4338/09. Answer given by Mr Špidla on behalf of the Commission to written question E-4338/09, 19 October 2009.

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In later times, the tone has changed. The Commission still claims awareness that zero-hour contracts can place the workers concerned in a vulnerable situation, especially since they cannot rely on a minimum income and may be excluded from certain rights and benefits entitlement which are subject to a minimum number of hours worked. The Commission now submits that while there are no EU rules specifically regulating the issue of zero-hour contracts, the latter must comply with existing EU rules. Their health and safety at work must, in the view of the Commission, be guaranteed in accordance with European union law. Member States are free to lay down national rules banning the use and/or abuse of such contracts. In addition, they must ensure that, where they do allow such contracts, the latter comply with the relevant provisions of European union law. If they do not comply therewith, the Commission maintains that it will take appropriate action, including infringement procedures.

According to the Commission, since zero-hour workers fall, in principle, within the scope of EU labour law, so such workers are entitled, for instance, to paid annual leave in proportion to the time they have worked. The Commission has noted that in particular, zero-hour workers are entitled to paid annual leave on a proportional basis in accordance with Article 31(2) of the Charter of Fundamental Rights of the European Union and Article 7 of the Working Time Directive.

However, the Commission has made clear that it still does not plan to undertake specific action on this issue. Member States can introduce rules at national level to prevent the use and/or abuse of such contracts. In principle, EU law does not preclude zero-hour contracts, since neither of the two most relevant labour law Directives – the Working Time Directive and the Part-Time Work Directive – lay down a right to a minimum number of working hours.<sup>108</sup> According to the Commission, the ECJ in its

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<sup>108</sup> Roberta Metsola (PPE), Question for written answer to the Commission, 15 April 2014, E-004721/2014. Answer given by Mr Andor on behalf of the Commission to written question E-004721/2014, 5 June 2014; Vilija Blinkevičiūtė (S&D), Question for written answer to the Commission, 25 June 2015, E-010251/2015. Answer given by Ms Thyssen on behalf of the Commission to written question E-010251/2015, 25 August 2015; Catherine Stihler (S&D), Question for written answer to the Commission, 13 February 2014, E-001601-14. Answer given by Mr Andor on behalf of the Commission to written question E-001601-14, 7 April 2014; Catherine Stihler (S&D), Question for written answer to the Commission, 23 September 2013, E-010783-13. Answer given by Mr Andor on behalf of the Commission to written question E-010783-13, 11 November 2013; Nicole Sinclair (NI), Question for written answer to the Commission, 6 August 2013, E-009517-13. Answer given by Mr Andor on behalf of the Commission to written question E-009517-13, 19 September 2013.

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judgment in *Wippel*<sup>109</sup> held that a type of zero-hour contract was compatible with the Part-Time Work Directive and EU gender equality rules.

The Commission has also taken note of the recent research from the UK suggesting that substantially more UK workers than previously estimated are employed on zero-hour contracts. There is a need for more analysis of the impact of this form of employment and its advantages for, and its risks to, both employers and workers. The Commission awaits with interest the outcome of the UK Government's review. The Commission also noted that it saw is no evidence to suggest any relationship between Directive 2008/104/EC (the Temporary Agency Work Directive), or any other rules at EU level, and the use of zero-hour contracts. EU labour law lays down minimum common standards for the protection of workers across the Union. Member States are, of course, free to introduce rules at national level, where appropriate, to prevent the use and/or abuse of such contracts.

In this context, according to Adams, Freedland and Prassl, the current discourse in the United Kingdom surrounding these work arrangements is fundamentally flawed: there is no such thing as the Zero-Hours Contract as a singular category; the label serves as no more than a convenient shorthand for masking the explosive growth of precarious work for a highly fragmented workforce. According to the authors, the ongoing attempts in the United Kingdom at regulating Zero-Hours Contracts thus constitute a significant shift towards the normalisation of all but the most extreme forms of abusive employment arrangements, leaving a rapidly increasing number of workers without recourse to employment protective norms.<sup>110</sup>

According to consistent case-law of the Court, the concept of 'worker' has a specific independent meaning and must not be interpreted narrowly. Thus, any person who pursues activities that are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is,

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<sup>109</sup> *Wippel*, C-313/02, EU:C:2004:607, Joined Cases *Heimann and Toltschin*, C-229/11 and 230/11, EU:C:2012:693.

<sup>110</sup> Adams, Abi and Freedland, Mark R. and Prassl, Jeremias, The 'Zero-Hours Contract': Regulating Casual Work, or Legitimizing Precarity? (February 1, 2015). Oxford Legal Studies Research Paper No. 11/2015. Available at SSRN: <http://ssrn.com/abstract=2507693>.

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according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.<sup>111</sup>

Although the fact that a person works for only a very limited number of hours in the context of an employment relationship may be an indication that the activities performed are marginal and ancillary, the fact remains that, independently of the limited amount of the remuneration for and the number of hours of the activity in question, the possibility cannot be ruled out that, following an overall assessment of the employment relationship in question, that activity may be considered by the national authorities to be real and genuine, thereby allowing its holder to be granted the status of ‘worker’ within the meaning of EU law.<sup>112</sup>

According to the case-law of the Court, national courts are best placed to make the necessary determinations on an employment relationship and shall take into account factors relating not only to the number of working hours and the level of remuneration but also to any rights to paid leave, to the continued payment of wages in the event of sickness, and to a contract of employment which is subject to the relevant collective agreement, to the payment of contributions and, if this applies, to the nature of those contributions in order to establish whether an employment contract is such as to enable him to claim the status of ‘worker’ within the meaning of EU law.

It is therefore likely that employees on so called “zero-hours contracts” come within the scope of “workers” under European union law.

### **D – Precarious work and competition law.**

The Court has held that agreements entered into within the framework of collective bargaining between employers and employees and intended to improve employment and working conditions

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<sup>111</sup> *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraphs 16 and 17; *Collins*, C-138/02, EU:C:2004:172, paragraph 26; *Trojani*, C-456/02, EU:C:2004:488, paragraph 15; and *Neidel*, C-337/10, EU:C:2012:263, paragraph 23.

<sup>112</sup> *Gene*, C-14/09, EU:C:2010:57, paragraph 26.

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must, by virtue of their nature and purpose, be regarded as not falling within the scope of Article 101(1) TFEU.<sup>113</sup>

Interestingly, the ECJ came to this conclusion in the judgment *Albany* by rejecting the ideas put forward by Advocate General Jacobs, that collective agreements as such could be seen as restrictions on competition. Instead, the ECJ established a firm line between social policy and competition law, which has survived to this day. The idea that competition law and social policy pursue different aims and purposes has eroded only in the light of the financial crisis, as social concerns slowly start to have an impact on EU competition law, such as public procurement.

It follows from *Albany*, and from the later judgments which confirmed *Albany*, that it is for the competent authorities and courts to consider, in each individual case, whether the nature and purpose of the agreement in question and the social policy objectives pursued by it warrant its exclusion from the scope of Article 101(1) TFEU.<sup>114</sup>

It can be added that the ECJ with reference to *Albany* explained that the fact that an agreement or an activity are excluded from the scope of the provisions of the Treaty on competition does not mean that that agreement or activity also falls outside the scope of the Treaty provisions on the free movement of persons or services since those two sets of provisions are to be applied in different circumstances.<sup>115</sup>

In *FNV Kunsten Informatie en Media*, the Court held that EU law must be interpreted as meaning that a provision of a collective labour agreement which sets minimum fees for self-employed service providers who are members of contracting employees' organisations and perform for an employer, under a works or service contract, the same activity as that employer's employed workers, falls within the scope of Article 101(1) TFEU only if those service providers are 'false self-employed', in other

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<sup>113</sup> *Albany*, C-67/96, EU:C:1999:430, paragraph 60; *Brentjens*, Joined cases C-115/97, C-116/97 and C-117/97, EU:C:1999:434, paragraph 57; *Drijvende Bokken*, C-219/97, EU:C:1999:437, paragraph 47; *Pavlov and Others*, C-180/98 to C-184/98, EU:C:2000:428, paragraph 67; *van der Woude*, C-222/98, EU:C:2000:475, paragraph 22; *AG2R Prévoyance*, C-437/09, EU:C:2011:112, paragraph 29; and *FNV Kunsten Informatie en Media*, C-413/13, EU:C:2014:2411, paragraph 23.

<sup>114</sup> *van der Woude*, C-222/98, EU:C:2000:475, paragraph 23, *3F v. Commission*, C-319/07 P, EU:C:2009:435, paragraph 51.

<sup>115</sup> *The International Transport Workers' Federation and The Finnish Seamen's Union*, C-438/05, EU:C:2007:772, paragraph 53; *Meca-Medina and Majcen v. Commission*, C-519/04 P, EU:C:2006:492.

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words, they are in a situation comparable to that of those workers. It is for the national court to ascertain whether that is so.<sup>116</sup>

The Court also concluded that service providers such as musicians substituting for members of an orchestra, are, in principle, ‘undertakings’ within the meaning of Article 101(1) TFEU, for they offer their services for remuneration on a given market and perform their activities as independent economic operators in relation to their principal. That finding cannot, however, prevent such a provision of a collective labour agreement from being regarded also as the result of dialogue between management and labour if the service providers, in the name and on behalf of whom the trade union negotiated, are in fact ‘false self-employed’, that is to say, service providers in a situation comparable to that of employees. A service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter’s activity and operates as an auxiliary within the principal’s undertaking.

Moreover, the Court held that term ‘employee’ for the purpose of EU law must itself be defined according to objective criteria that characterise the employment relationship, taking into consideration the rights and responsibilities of the persons concerned. With that in mind, the classification of a ‘self-employed person’ under national law does not prevent that person being classified as an employee within the meaning of EU law if his independence is merely notional, thereby disguising an employment relationship. It follows that the status of ‘worker’ within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, as long as that person acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work, does not share in the employer’s commercial risks, and, for the duration of that relationship, forms an integral part of that employer’s undertaking, so forming an economic unit with that undertaking.<sup>117</sup>

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<sup>116</sup> For an analysis of the relationship between labour law and competition law, see S. McCrystal, P. Syrpis ‘Competition Law and Worker Voice: Competition Law Impediments to Collective Bargaining in Australia and the European Union’ in A. Bogg and T. Novitz (eds.), *Voices at Work: Continuity and Change in the Common Law World* (Oxford: Oxford University Press, 2014).

<sup>117</sup> *FNV Kunsten Informatie en Media*, C-413/13, EU:C:2014:2411.

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In other words, and as has already been commented by Valerio De Stefano<sup>118</sup>:

According to the ECJ only “false” self-employed workers would be able to bargain side-by-side with employees and to benefit from cooperating with established labour unions. Genuine dependent self-employed workers, a significant component of the nonstandard workforce<sup>64</sup>, would be prevented from doing so even if their weaker status in labour markets is recognised under the national regulation. In the ECJ’s perspective, this would also likely have significant effects on their ability to go on strike, as this right is mainly seen as functional to collective bargaining in the Court’s jurisprudence

Recognising the right to strike and the right to collective bargaining as human rights would also call to review this limitation, as it would not make sense to preclude access to a human right on the basis of an individual’s employment status. Once again, the rise of some forms of non-standard work seems to be at odds with traditional limitations on union rights such as the rights to collective bargaining and action.

### **E – State aid law and the role of trade unions**

When the European Commission takes a decision related to State aid – whether it is a decision to recover illegal State aid, or a decision to declare aid compatible with the internal market or even deciding not to open a formal investigation after a complaint – this decision can be appealed by persons concerned, according to Article 263 TFEU. Persons who are not covered by the rights enshrined in Article 263 TFEU are barred from bringing an action of annulment before the ECJ.

That the interest of trade unions is not merely a procedural issue but linked in substance to the working conditions of precarious workers is illustrated by the situation of the workers in the German meat industry. On 19 March 2013, the Belgian Ministers for Finance and Labour announced that they intended to file a complaint of social dumping against Germany with the Commission. The Ministers accused Germany of ‘undignified practices’, especially in the meat-processing sector, the majority of whose workers are ‘seconded’ via employment agencies mainly from Bulgaria, Romania and Ukraine and who work for EUR 3 per hour, 60 hours a week, with no social security benefits. The fact that the workers were ‘seconded’ meant that social contributions were negligible, something which gave the German meat industry a *de facto* subsidy.

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<sup>118</sup> Valerio De Stefano, Non-standard workers and freedom of association: a critical analysis of restrictions to collective rights from a human rights perspective, WP CSDLE “Massimo D’Antona”.INT – 123/2015.

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The Commission noted these issues itself in its document SWD(2012) 63, 21 March 2012. According to that document, trade unions have reported that the meat-processing industry has few regular workers and that most are seconded from other countries and work under below-par working conditions, with an increased workload and long working hours, for wages which are much lower than for domestic workers (EUR 3 per hour). The Commission document goes on to state that these practices date back to 2000 and that the lack of any sectoral agreements in the meat sector in Germany is hampering efforts to protect workers, which is why a minimum national wage is one of the basic demands of trade unions in the meat industry.<sup>119</sup> A minimum salary was introduced in 2014, with salaries increasing in steps until 2016. Other sectors which are characterised by tax breaks which may lead to an unfair advantage in competition is the fast-food sector, where tax evasion and the use of ‘zero hour’ contracts may help securing unfair advantages for multinational firms.

In the judgment *3F*, the ECJ found that trade unions can be considered ‘concerned’ parties in the meaning of Article 263 TFEU if a decision of the Commission concerns the interests of their members.<sup>120</sup> In that case, the court found that the appellant trade union as an organisation representing workers by definition was established to promote the collective interests of its members. Moreover, *3F* was an economic operator which negotiates the terms and conditions on which labour is provided to undertakings. In that case, *3F* claimed that the aid resulting from the fiscal measures at issue affected the ability of its members to compete with non-Community seafarers in seeking employment with shipping companies, in other words the recipients of the aid, and the appellant’s market position as such is therefore affected as regards its ability to compete in the market for the supply of labour to those companies, and consequently its ability to recruit members. The ECJ concluded that, unlike the *Albany* case, the present case concerned not the competition-restricting nature of the collective agreements concluded between the appellant or other trade unions and the shipowners who benefit from the aid resulting from the fiscal measures at issue but the question of whether the appellant’s competitive position in relation to those other trade unions was affected by the granting of that aid, so that it should be regarded as a party concerned within the meaning of Article 108(2) TFEU, in which case its action for annulment of the contested decision would be admissible. Since the ECJ found that *3F* was concerned in that meaning of the law, it was admissible for the trade union to lodge an appeal

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<sup>119</sup> Nikolaos Chountis (GUE/NGL), Question for written answer to the Commission, 12 April 2013, E-004208-13.

<sup>120</sup> *3F v. Commission*, C-319/07 P, EU:C:2009:435.

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against the decision of the Commission concerning the Danish fiscal measures in question. VI – The principle equal pay for equal work for precarious and atypical workers

### *Equal pay for equal work in EU law*

The President of the European Commission Jean-Claude Juncker has committed himself to present a new legislative package for the spring of 2016, which is designed to “offer a foundation of minimum social rights, a safety net to protect the labour market”. This legislative package is planned to rely on the simple principle of equal pay for equal work.<sup>121</sup>

Without formal recognition of the principles of non-discrimination and the principle of equal pay for equal work as directly applicable legal norms which can be applied in proceedings between private parties, and in particular between workers (and/or their trade union representatives) and employers, workers and trade unions in Europe are deprived of their primary tool for eliminating inequalities and promoting equality between European citizens and migrant workers from third countries alike.

In *Commission v France*,<sup>122</sup> the Court of Justice recognised that the principle of non-discrimination in Article 45 TFEU not only has the effect of allowing nationals of other Member States equal access to employment and to providing services in other Member State, but also of guaranteeing the State’s own nationals that they shall not suffer the unfavourable consequences which could result from the offer or acceptance by nationals of other Member States of conditions of employment or remuneration less advantageous than those obtaining under national law and collective agreements. Non-discrimination, therefore, is not only designed to benefit workers seeking access to employment in other Member States, but has a broader function of protecting native workers from being undercut by external wage competition.

In *Defrenne II*,<sup>123</sup> in which the Court of Justice established the direct effect of Article 157 TFEU, the Court highlighted this provision’s dual economic and social purpose. First, the Court stated, in light of

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<sup>121</sup> L’Europe sociale, réformes et solidarité / Discours du Président Juncker pour la Confédération européenne des syndicats, 13ème Congrès, 29 September 2015, SPEECH/15/5741.

<sup>122</sup> *Commission v France*, C-167/73, EU:C:1974:35.

<sup>123</sup> *Defrenne v Sabena*, C-43/75, EU:C:1976:56.

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the different stages of the development of social legislation in the various Member States at the time of the judgment, that the aim of Article 157 TFEU was to avoid a situation in which undertakings established in States which had actually implemented the principle of equal pay between men and women would suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which had not yet eliminated discrimination against women workers as regards pay. Second, the provision forms part of the objectives of the EU, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the preamble to the Treaties.

In *Schröder*<sup>124</sup> and in *Deutsche Post*,<sup>125</sup> the Court further expanded on the interrelationship and the hierarchy between the social and economic goals of the principle of equal pay for equal work set out in Article 157 TFEU. The Court, recalling that it had repeatedly held that the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure, concluded that the economic aim pursued by Article 157 TFEU, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right.

For reasons set out below, the same reasoning should be extended to the principle of non-discrimination of precarious, non-standard and/or atypical workers.

Arguably, there is an inherent tension on this particular point in the case-law of the Court regarding atypical and/or precarious work, whereby the Court, at one point or the other, will need to decide if the economic aim of promoting atypical work in European Union law is primary or secondary to the social aim pursued by the directives in question on fixed time work, part time work, posting of workers and temporary agency work.

As pointed out by Steven Peers, the principle of equal treatment of (or non-discrimination against) atypical workers forms part of the general principle of equality recognized by EU law, and borrows

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<sup>124</sup> *Schröder*, C-50/96, EU:C:2000:72.

<sup>125</sup> *Sievers*, C-270/97 and C-271/97, EU:C:2000:76, paragraph 57.

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from aspects of the case-law of the Court of Justice relating to sex discrimination law in particular. EU legislation and Court of Justice case-law also indicate that, to a significant extent, atypical workers are guaranteed equal treatment as regards other employment rights and non-discrimination rights protected by EU law.<sup>126</sup>

### *Equal treatment of fixed-time workers*

In *Del Cerro Alonso*, the Court held that, as is clear from clause 1 of the Framework Agreement on fixed-term work,<sup>127</sup> the objective of that agreement is not only to establish a framework to prevent abuse arising from the use of successive fixed-term work contracts or agreements, but also to ensure the application of the principle of non-discrimination as regards fixed-term work.

Having regard to the importance of the principle of equal treatment and non-discrimination, which is one of the general principles of Community law, the Court held that the provisions set out in that regard by Directive 1999/70 and the framework agreement for the purposes of ensuring that fixed-term workers enjoy the same benefits as those enjoyed by comparable permanent workers, except where a difference in treatment is justified by objective grounds, must be deemed to be of general application since they are *rules of Community social law of particular importance*, from which each employee should benefit as a minimum protective requirement.

In that regard, the Court recalled, first, that, according to clause 1(a) of the framework agreement, its objective is to ‘improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination’. Similarly, the preamble to the Framework Agreement states that it ‘illustrates the willingness of the Social Partners to establish a general framework for ensuring equal treatment for fixed-term workers by protecting them against discrimination.’ Moreover, recital 14 of Directive 1999/70 explains that the aim of the Framework Agreement is, in particular, to improve the quality of fixed-term work by setting out the minimum requirements in order to ensure the application of the principle of non-discrimination.

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<sup>126</sup> Steve Peers Steve Peers, “Equal Treatment of Atypical Workers: A New Frontier for EU Law?”, *Yearbook of European Law*, (2013), Vol. 32(1), pp. 30-56.

<sup>127</sup> Framework agreement on fixed-term work, concluded on 18 March 1999 (‘the framework agreement’), which is set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

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The Court drew the conclusion that “it follows that the framework agreement aims to apply the principle of non-discrimination to fixed-term workers in order to prevent an employer using such an employment relationship to deny those workers rights which are recognised for permanent workers.” That principle of Community social law cannot be interpreted restrictively.

In *Impact*,<sup>128</sup> the Court held that the framework agreement, in particular Clause 4, follows an aim which is akin to the fundamental objectives enshrined in the first paragraph of Article 151 TFEU as well as in the third paragraph of the preamble to the Treaty of the Functioning of the EU and Article 7 and the first paragraph of Article 10 of the Community Charter of the Fundamental Social Rights of Workers (to which Article 151 TFEU refers), and which are associated with the improvement of living and working conditions and the existence of proper social protection for workers, in the present case, for fixed-term workers.

Moreover, the first paragraph of Article 151 TFEU (which defines those objectives for which the Council may, in accordance with Article 155(2) TFEU, in respect of the matters covered by Article 153 TFEU, implement agreements concluded between social partners at Community level) refers to the European Social Charter signed at Turin on 18 October 1961, which includes at point 4 of Part I the right for all workers to a ‘fair remuneration sufficient for a decent standard of living for themselves and their families’ among the objectives which the contracting parties have undertaken to achieve, in accordance with Article 20 in Part III of the Charter.

The Court held, in the light of those objectives, that Clause 4 of the Framework Agreement must also be interpreted as articulating a principle of Community social law, which cannot be interpreted restrictively.

In *Valenza*,<sup>129</sup> the Court was confronted with the issue of the applicability of Directive 1999/70/EC and the Framework agreement in relation to the complete disregard of periods of service completed under fixed-term employment contracts. In its request for a preliminary ruling, the *Consiglio di Stato* noted that the Italian legislation at issue made it possible to recruit persons in precarious employment directly, in derogation from the general rule of competition for posts in the public sector, but with

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<sup>128</sup> *Impact*, C-268/06, EU:C:2008:223.

<sup>129</sup> *Valenza and others*, C-302/11 to C-305/11, EU:C:2012:646.

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those persons being placed on the permanent staff at the starting level of the pay scale category, without account being taken of the length of service accrued in fixed-term employment.

Before the Court, the Italian Government endorsed the view of the *Consiglio di Stato*, in its judgment No, 1138 of 23 February 2011, and submitted that clause 4 of the Framework Agreement was not applicable to the disputes in the main proceedings. It contended that this provision only prohibits any difference in treatment between permanent workers and workers in precarious employment during the fixed-term employment relationship. In essence, the Italian Government claimed that clause 4 of the framework agreement is not applicable to situations where the difference in treatment arises between an applicant subsequently under an employment contract of indefinite duration, with respect to other permanent workers.

The Court rejected the argument, and held that the mere fact that the applicants obtained the status of permanent workers does not mean that, in certain circumstances, they cannot rely on the principle of non-discrimination laid down in clause 4 of the framework agreement.<sup>130</sup> Since the discrimination contrary to clause 4 of the framework agreement, of which the applicants alleged that they were victims, concerns periods of service completed as fixed-term workers, the fact that they meanwhile became permanent workers was considered irrelevant.<sup>131</sup>

Regarding the *comparability of the situations in question* between fixed-term workers and career civil servants, the Court held that in the event that the duties performed by the applicants under fixed-term employment contracts did not correspond to those performed by a career civil servant belonging to the relevant category of that authority, the alleged difference in treatment concerning periods of service being taken into account upon the recruitment of the applicants as career civil servants would not be contrary to clause 4 of the framework agreement, as that difference in treatment would relate to differing situations.<sup>132</sup>

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<sup>130</sup> *Valenza and others*, C-302/11 to C-305/11, EU:C:2012:646, paragraph 34, citing *Rosado Santana*, C-177/10, EU:C:2011:557, paragraph 41, and *Huet*, C-251/11, EU:C:2012:133, paragraph 37.

<sup>131</sup> *Valenza and others*, C-302/11 to C-305/11, EU:C:2012:646, paragraph 35.

<sup>132</sup> *Valenza and others*, C-302/11 to C-305/11, EU:C:2012:646, paragraph 48.

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## *Equal treatment of part time workers*

The part-time work directive 97/81 was introduced using the procedure under Article 154 TFEU.<sup>133</sup> The Social Partners initiated negotiations and agreed on a European Framework on Part-time Work on 6 June 1997. The agreement was then submitted to the Commission and subsequently adopted by the Council. The Member States were to introduce the laws, regulations and administrative provisions necessary to implement the Directive not later than 20 January 2000. The directive effectively replaced the ‘equal treatment approach’ concerning part time work, applying the rules on indirect discrimination.<sup>134</sup>

The structure of Directive 97/81 differs from the traditional directives. The main part of the Directive is found in the Annex, where the Framework Agreement is reproduced. The provisions of the Framework Agreement are called “clauses” rather than “articles”, which may create certain confusion when referred to. The first three clauses determine the purpose, scope and definitions of the agreement. Clauses 4 and 5 contain the material provisions concerning part time work. The final clause regulates the implementation of the Agreement.

The purpose of the Agreement is:<sup>135</sup>

- to provide for the removal of discrimination against part time workers
- improve the quality of part time work
- facilitate the development of part time work on a voluntary basis
- contribute to the flexible organization of working time

Thus, in *Michaeler* and *Bruno and Others*, the ECJ stressed that the agreement pursues a twofold objective, namely, first, to promote part-time work by improving the quality of such work and, second, to eliminate discrimination between part-time workers and full-time workers.<sup>136</sup> In *Bruno and Others*, the ECJ addressed the elimination of discrimination and referred to the second paragraph of the

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<sup>133</sup> Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998, L 14, p. 9).

<sup>134</sup> Catherine Barnard, EU employment law, 4th ed, 2012, p. 429.

<sup>135</sup> Clause 1 of the Agreement.

<sup>136</sup> *Michaeler and others*, C-55/07 and C-56/07, EU:C:2008:248, paragraph 22, *Bruno and Others*, C-395/08 and C-396/08, EU:C:2010:329, paragraph 77.

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preamble to the Framework Agreement which states that the agreement ‘illustrates the willingness of the social partners to establish a general framework for the elimination of discrimination against part-time workers and to assist the development of opportunities for part-time working on a basis acceptable to employers and workers’. That objective is also stated in recital 11 in the preamble to Directive 97/81.<sup>137</sup> The ECJ concluded:

The Framework Agreement [...] thus pursues an aim which is in line with fundamental objectives enshrined in Article 1 of the agreement on social policy, which are set out in the first paragraph of Article [151 TFEU], the third recital in the preamble to the TFEU and paragraph 7 and the first subparagraph of paragraph 10 of the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council in Strasbourg on 9 December 1989, to which the abovementioned provision of the [TFEU] refers. Those fundamental objectives are associated with the improvement in living and working conditions and with the existence of proper social protection for workers. In particular, they are directed at improving working conditions for part-time workers and ensuring that they are protected from discrimination, as evidenced by recitals 3 and 23 in the preamble to Directive 97/81.<sup>138</sup>

Concerning the other purpose of the directive, flexibility, the ECJ in *Mascellani* found that national legislation also must respect the purpose to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner that takes into account the needs of employers and workers.<sup>139</sup>

The Agreement applies to part time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State.<sup>140</sup> Member States, after consultation with the social partners in accordance with national law, collective agreements or practice, and/or the social partners at the appropriate level in conformity with national industrial relations practice may, for objective reasons, exclude wholly or partly from the terms of this Agreement part-time workers who work on a casual basis. Such exclusions should be reviewed periodically to establish if the objective reasons for making them remain valid.<sup>141</sup>

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<sup>137</sup> *Bruno and Others*, C-395/08 and C-396/08, EU:C:2010:329, paragraph 29.

<sup>138</sup> *Bruno and Others*, C-395/08 and C-396/08, EU:C:2010:329, paragraph 30.

<sup>139</sup> *Mascellani*, C-221/13, EU:C:2014:2286, paragraph 25.

<sup>140</sup> Clause 2(1) of the Agreement.

<sup>141</sup> Clause 2(2) of the Agreement.

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In Clause 3 of the agreement a part time worker is defined as an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.<sup>142</sup> The term 'comparable full-time worker' means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills. Where there is no comparable full-time worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.<sup>143</sup>

Clause 4 of the Agreement establishes the principle of non-discrimination. It is intended to ensure respect for the principle of non-discrimination as regards the employment conditions of part-time workers, the framework of that agreement.<sup>144</sup> According to this provision, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds. Where appropriate, the principle of *pro rata temporis* shall apply.<sup>145</sup>

The concept of 'objective grounds' for the purposes of Clause 4 of the framework agreement on part time work must be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore capable, in that particular context, of justifying the use of successive fixed-term employment contracts. Those circumstances may result, in particular, from the specific nature of the tasks to be performed under such contracts and from the inherent characteristics of those tasks or, as the case may be, from pursuit of a legitimate social-policy objective of a Member State.<sup>146</sup>

In *Wippel*, the ECJ found that the prohibition on discrimination enunciated in Clause 4 of the agreement is a particular expression of a fundamental principle of EU law, namely the general principle of equality under which comparable situations may not be treated differently unless the

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<sup>142</sup> Clause 3(1) of the Agreement.

<sup>143</sup> Clause 3(2) of the Agreement.

<sup>144</sup> See the third paragraph in the preamble to the Framework Agreement.

<sup>145</sup> Clause 4(1) and (2) of the Agreement.

<sup>146</sup> *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, C-486/08, EU:C:2010:215, paragraph 43.

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difference is objectively justified.<sup>147</sup> In *Bruno and Others*, the ECJ found that Clause 4 of the Framework Agreement must be interpreted as articulating a principle of European Union social law that cannot be interpreted restrictively.<sup>148</sup> The term ‘employment conditions’, within the meaning of that clause, therefore includes financial conditions, such as those relating to remuneration and pensions, in order to avoid discrimination for the workers concerned by introducing a distinction based on the nature of their employment conditions, which is not in any way implicit in the wording of that clause.<sup>149</sup> Clause 4 prohibits a difference in treatment between part-time workers and full-time workers to be justified on the basis that the difference is provided for by a general, abstract norm. On the contrary, that concept requires the unequal treatment at issue to respond to a genuine need, be appropriate for achieving the objective pursued and be necessary for that purpose.<sup>150</sup>

Member States are under an obligation to ensure that the principle of non-discrimination is applied to part-time workers also in relation to pay, while at the same time taking account, where appropriate, of the principle of *pro rata temporis* in Clause 4(2) of the Agreement.<sup>151</sup> In *Cai Cugini and Yangwei* the Court found that Clause 4 does not prevent national rules that oblige employers to keep certain records, as long as it would not entail any discrimination.<sup>152</sup> In *Zentralbetriebsrat der Landeskrankenhäuser Tirols* the ECJ found that Clause 4 precludes a national provision, under which, in the event of a change in the working hours of a worker, the amount of leave not yet taken is adjusted in such a way that a worker who reduces his working hours from full-time to part-time suffers a reduction in the right to paid annual leave which he has accumulated but not been able to exercise while working full-time, or he can only take that leave with a reduced level of holiday pay.<sup>153</sup> If, according to the terms of the employment relationship, a worker is employed part-time, the

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<sup>147</sup> *Wippel*, C-313/02, EU:C:2004:607, paragraph 56.

<sup>148</sup> *Bruno and Others*, C-395/08 and C-396/08, EU:C:2010:329, paragraph 32.

<sup>149</sup> *Bruno and Others*, C-395/08 and C-396/08, EU:C:2010:329, paragraph 33; that pensions are covered was confirmed in *O'Brien*, C-393/10, EU:C:2012:110, paragraph 55; however the agreement excludes pensions “determined less by an employment relationship between worker and employer than by considerations of social policy”, *Elbal Moreno*, C-385/11, EU:C:2012:746, paragraph 22; and excludes “statutory social security pension”, confirmed in *Cachaldora Fernández*, C-527/13, EU:C:2015:215, paragraph 38.

<sup>150</sup> *O'Brien*, C-393/10, EU:C:2012:110, paragraph 64.

<sup>151</sup> *Bruno and Others*, C-395/08 and C-396/08, EU:C:2010:329, paragraph 38.

<sup>152</sup> *Orders Dai Cugini*, C-151/10, EU:C:2011:223 and *Yangwei*, C-349/11, EU:C:2011:826.

<sup>153</sup> *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, C-486/08, EU:C:2010:215, paragraph 35, *Brandes*, C-415/12, EU:C:2013:398, paragraph 33.

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calculation of a dependent child allowance in accordance with the principle of *pro rata temporis* is objectively justified, within the meaning of Clause 4.1 of the agreement, and appropriate within the meaning of Clause 4.2 thereof.<sup>154</sup>

There are limits to this principle. In *Wippel* the ECJ found that when all the contracts of employment of an undertaking make provision for the length of weekly working time and for the organisation of working time, they do not preclude a contract of part-time employment of workers of the same undertaking, under which the length of weekly working time and the organisation of working time are not fixed but are dependent on quantitative needs in terms of work to be performed determined on a case-by-case basis, such workers being entitled to accept or refuse that work.<sup>155</sup> In *Heimann and Toltschin* and *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, the ECJ has applied that rule to the grant of annual leave for a period of part-time employment, because for such a period, the reduction of annual leave by comparison to that granted for a period of full-time employment is justified on objective grounds.<sup>156</sup>

Clause 5 of the agreement regulates the opportunities for part-time work. According to Clause 5, the Member States on one hand, following consultations with the social partners in accordance with national law or practice, should identify and review obstacles of a legal or administrative nature which may limit the opportunities for part-time work and, where appropriate, eliminate them. The Social Partners, on the other, acting within their sphere of competence and through the procedures set out in collective agreements, should identify and review obstacles that may limit opportunities for part-time work and, where appropriate, eliminate them.<sup>157</sup> Employers should give consideration to certain needs of the employed.<sup>158</sup> According to Clause 5(2), a worker's refusal to transfer from full-time to part-time work or vice-versa should not in itself constitute a valid reason for termination of employment. However, as the ECJ established in *Mascellani*, this clause does not preclude legislation that allows an

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<sup>154</sup> *Österreichischer Gewerkschaftsbund*, C-476/12, EU:C:2014:2332, paragraph 20.

<sup>155</sup> *Wippel*, C-313/02, EU:C:2004:607, paragraph 66.

<sup>156</sup> *Heimann and Toltschin*, C-229/11 and C-230/11, EU:C:2012:693, paragraph 34, *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, C-486/08, EU:C:2010:215, paragraphs 33 and 34.

<sup>157</sup> Clause 5(1) (a) and (b) of the Agreement.

<sup>158</sup> Clause 5(3) of the agreement.

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employer to order the conversion of a part-time employment relationship into a full-time employment relationship without the consent of the worker concerned.<sup>159</sup>

One of the objectives of Clause 5 is to promote part time work.<sup>160</sup> Thus, the Clause precludes national legislation that requires that copies of part-time employment contracts be sent to the authorities within 30 days of their signature.<sup>161</sup> Clause 5, just like Clause 4, does not apply to statutory social security pension schemes. In *Cachaldora Fernández*, the ECJ found that an interpretation of ‘obstacles of a legal ... nature’, as referred to in Clause 5(1)(a) of the Framework Agreement, under which Member States would be forced to adopt, outside the area of employment conditions, measures relating to such pensions, would amount to imposing general social policy obligations on those Member States concerning measures that fall outside the scope of that Framework Agreement.<sup>162</sup>

The ‘significant feature’ of the directive is that part time workers no longer have to rely on indirect discrimination to make their case.<sup>163</sup> Nevertheless it must be borne in mind that direct discrimination can be objectively justified. It should be noted that while there is some case law on Clause 4 of the agreement, there is much less on Clause 5. This may be because Clause 5 is more of an invitation to remove obstacles than an actual obligation to do so.<sup>164</sup> It is also questionable whether Clause 5 of the Agreement actually creates an enforceable right to part time work.<sup>165</sup>

Finally, Clause 6 of the agreement sets out the provisions on implementation of the agreement. In this regard it is most important to note that it constitutes a minimum level of protection.<sup>166</sup> It is subsidiary to the EU principle of equal treatment.<sup>167</sup>

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<sup>159</sup> *Mascellani*, C-221/13, EU:C:2014:2286, paragraph 24.

<sup>160</sup> *Mascellani*, C-221/13, EU:C:2014:2286, paragraph 23.

<sup>161</sup> *Michaeler and others*, C-55/07 and C-56/07, EU:C:2008:248, paragraph 30. Conformed in Orders *Dai Cugini*, C-151/10, EU:C:2011:223 and *Yangwei*, C-349/11, EU:C:2011:826.

<sup>162</sup> *Cachaldora Fernández*, C-527/13, EU:C:2015:215, paragraph 39.

<sup>163</sup> Catherine Barnard, *EU employment law*, 4th ed, 2012, p. 436.

<sup>164</sup> Catherine Barnard, *EU employment law*, 4th ed, 2012, p. 437.

<sup>165</sup> Philippa Watson, *EU Social and employment law*, 2009, p. 280.

<sup>166</sup> Clause 6(1) of the agreement.

<sup>167</sup> Clause 6(4) of the agreement.

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## *Equal treatment of temporary workers*

The Agency Work Directive applies to workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction.<sup>168</sup> The Directive applies to public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities whether or not they are operating for gain.<sup>169</sup> Member States may, after consulting the social partners, provide that the Directive does not apply to employment contracts or relationships concluded under a specific public or publicly supported vocational training, integration or retraining programme.<sup>170</sup>

For the purposes of the Agency Work Directive<sup>171</sup>

- (a) ‘worker’ means any person who, in the Member State concerned, is protected as a worker under national employment law;
- (b) ‘temporary-work agency’ means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction;
- (c) ‘temporary agency worker’ means a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction;
- (d) ‘user undertaking’ means any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily;
- (e) ‘assignment’ means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction.

Under Article 3(2) of the Agency Work Directive, the Directive shall be without prejudice to *national law* as regards the definition of pay, contract of employment, employment relationship or worker. Besides, Member States shall not exclude from the scope of this Directive workers, contracts of employment or employment relationships solely because they relate to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary-work agency.

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<sup>168</sup> Article 1 of the Temporary Agency Work Directive.

<sup>169</sup> Article 1(2) of the Temporary Agency Work Directive.

<sup>170</sup> Article 1(3) of the Temporary Agency Work Directive.

<sup>171</sup> Article 3 of the Temporary Agency Work Directive.

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In *Della Rocca*,<sup>172</sup> the Court stressed the two-fold employment relationship of a temporary agency worker, stating that “the supply of temporary workers is a complex situation which is specific to labour law, involving, as evidenced by paragraphs 32 and 37 of this judgment, a two-fold employment relationship between, on the one hand, the temporary employment business and the temporary worker and, on the other, the temporary worker and the user undertaking, as well as a relationship of supply between the temporary employment business and the user undertaking.”<sup>173</sup>

The CJEU has also defined the concept of temporary agency work in the context of the application of the posting of workers directive. In *Vicoplus*, the Court stated that:<sup>174</sup>

The hiring-out of workers, within the meaning of Article 1(3)(c) of Directive 96/71, is a service provided for remuneration in respect of which the worker who has been hired out remains in the employ of the undertaking providing the service, no contract of employment being entered into with the user undertaking. It is characterised by the fact that the movement of the worker to the host Member State constitutes the very purpose of the provision of services effected by the undertaking providing the services and that that worker carries out his tasks under the control and direction of the user undertaking.

This definition was further elaborated on in *Martin Meat*,<sup>175</sup> where the Court added to the definition that:

In order to determine whether that contractual relationship must be classified as a hiring-out of workers, within the meaning of Article 1(3)(c) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, it is necessary to take into consideration each element indicating whether the movement of workers in the host Member State is the very purpose of the supply of services on which the contractual relationship is based. In principle, evidence that such a movement is not the very purpose of the supply of services at issue are, inter alia, the fact that the service provider is liable for the failure to perform the service in accordance with the contract and the fact that that service provider is free to determine the number of workers he deems necessary to send to the host Member State. By contrast, the fact that the undertaking which receives those services checks the performance of the service for compliance with the contract or that it may give general instructions to the workers employed by the service provider does not, as such, lead to the finding that there is a hiring-out of workers.

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<sup>172</sup> *Della Rocca*, C-290/12, EU:C:2013:235, paragraph 42.

<sup>173</sup> *Della Rocca*, paragraph 40.

<sup>174</sup> *Vicoplus and others*, C-307/09, C-308/09 and C-309/09, EU:C:2011:64.

<sup>175</sup> *Martin Meat*, C-586/13, EU:C:2015:405.

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These further statements on the definition of temporary agency work will also be of relevance for future interpretations of the Agency Work Directive.

Due to the original principles of free movement in the EU treaties being focused on prohibitions against unequal treatment on grounds of *nationality* and the lack of legislative measures, the case-law of the CJEU as regards temporary agency work has evolved around the prohibition on restrictions against the provision of services. Thus, the CJEU stated early in *Webb* that the provision of temporary work constitutes a service within the meaning of Article 57 TFEU.<sup>176</sup> However, the Court added that Article 57 TFEU did not preclude a Member State from requiring that service providers from other Member States should comply with a national licence requirement, provided that the application procedure did not entail any distinctions based on nationality and that account was taken of evidence and guarantees already produced by the provider of the services for the pursuit of his activities in the Member State of establishment.<sup>177</sup>

Some 20 years later, the CJEU confirmed that, for the purposes of the application of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version codified by Council Regulation (EEC) No 2001/83 of 2 June 1983, an undertaking engaged in providing temporary personnel which, from one Member State, makes workers available on a temporary basis to undertakings based in another Member State normally carry on its activities in the first State, i.e. the Member State of establishment.<sup>178</sup> This means that temporary agency workers who are posted to other Member States, remain covered by the social regulation in the Member State from which they are posted and not the host Member State.

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<sup>176</sup> *Webb*, C-279/80, EU:C:1981:314, “Where an undertaking hires out, for remuneration, staff who remain in the employ of that undertaking, no contract of employment being entered into with the user, its activities constitute an occupation which satisfies the conditions laid down in the first paragraph of Article 60 of the EEC Treaty. Accordingly they must be considered a ‘service’ within the meaning of that provision”.

<sup>177</sup> Article 59 of the Treaty does not preclude a Member State which requires agencies for the provision of manpower to hold a licence from requiring a provider of services established in another Member State and pursuing such activities on the territory of the first Member State to comply with that condition even if he holds a licence issued by the State in which he is established, provided, however, that in the first place when considering applications for licences and in granting them the Member State in which the service is provided makes no distinction based on the nationality of the provider of the services or his place of establishment, and in the second place that it takes into account the evidence and guarantees already produced by the provider of the services for the pursuit of his activities in the Member State in which he is established.

<sup>178</sup> *FTS*, C-202/97, EU:C:2000:75.

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First in 2002, the CJEU was again given the opportunity to have its say as regards national restrictions to the provision of temporary work services. The Court found that by requiring undertakings engaged in the provision of temporary labour which are established in other Member States to maintain their registered office or a branch office on Italian territory, and to lodge a guarantee of ITL 700 million with a credit institution having its registered office or a branch office on Italian territory, the Italian Republic had failed to fulfil its obligations under the Treaty Articles on freedom of establishment and provision of service.<sup>179</sup>

Along the same lines, the CJEU stated in 2014 that Article 56 TFEU precludes national legislation, under which companies established in one Member State using workers employed and seconded by temporary employment agencies established in another Member State, but operating in the first Member State through a branch, are obliged to withhold tax and to pay to the first Member State an advance payment on the income tax due by those workers, whereas the same obligation is not imposed on companies established in the first Member State which use the services of temporary employment agencies established in that Member State.<sup>180</sup>

In this connection, the Court refuted the argument that, in particular as concerns international hiring of workers, there should be numerous cases of tax evasion and avoidance justifying the requirement of withholding tax. The Court stated that:

56 However, the Court has also stated that a general presumption of tax avoidance or evasion based on the fact that a service provider is based in another Member State is not sufficient to justify a fiscal measure which compromises the objectives of the Treaty (see, to that effect, *Centro di Musicologia Walter Stauffer*, C-386/04, EU:C:2006:568, paragraph 61; *Commission v Belgium*, EU:C:2006:702, paragraph 35; and *Commission v Spain*, C-153/08, EU:C:2009:618, paragraph 39).

57 First, the contentions of the Czech Republic concerning numerous cases of tax evasion and avoidance in connection with the international hiring of workers are vague, inter alia concerning the specific situation of temporary employment agencies established in other Member States with a branch registered in the Czech Republic.

58 Secondly, the fact that the branch concerned in Case C-80/13 is responsible for the administrative tasks which enable the withholding tax at issue in the main

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<sup>179</sup> *Commission v. Italy*, C-279/00, EU:C:2002:89.

<sup>180</sup> *Strojírny Prostějov and ACO Industries Tábor*, C-53/13, EU:C:2014:2011.

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proceedings to be deducted and paid make it possible to doubt the validity of such a general presumption.

59 In those circumstances, the application of the withholding tax at issue in the main proceedings cannot be justified as being necessary for the prevention of tax evasion and avoidance.

The Court has thus acknowledged that temporary agency work constitutes an economic sector like every other and does not require any particular restrictions as regards international relations. Thus, all national legislation on temporary agencies must apply in the same way to national and other EU-undertakings.

### *The Agency Work Directive*

The purpose of the Agency Work Directive is expressly two-fold, as stated in Article 2:

- to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and
- by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.

In addition to the problems of very disparate national regulations in the sector and of balancing modern undertakings' needs for flexible workforce and the protection of temporary agency workers, the Agency Work Directive also falls squarely within the problems of labour law regulation, i.e. whether protection of workers should be carried out by legislation or by collective and other agreements between the social partners.

The Directive allows for a number of exceptions to its basic rules. Thus, the fundamental principle of *equal treatment* stated in Article 5 (that the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job) may be subject to the following exceptions:

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- Article 5(2): As regards *pay*, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph 1 where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments.
- Article 5(3): Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding *collective agreements* which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1.
- Article 5(4): Provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either *no system in law for declaring collective agreements universally applicable* or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment. The arrangements referred to shall be in conformity with Community legislation and shall be sufficiently precise and accessible to allow the sectors and firms concerned to identify and comply with their obligations. In particular, Member States shall specify, in application of Article 3(2), whether occupational social security schemes, including pension, sick pay or financial participation schemes are included in the basic working and employment conditions referred to in paragraph 1. Such arrangements shall also be without prejudice to agreements at national, regional, local or sectoral level that are no less favourable to workers.

In our eyes, the exceptions made possible by paragraphs 3 and 4 in particular are critical to the protection of temporary agency workers, to the extent the social partners do not agree on a high and serious level of protection.

In addition to the principle of equal treatment of temporary agency workers, Article 6 of the Directive on *access to employment, collective facilities and vocational training* prescribes that temporary agency

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workers shall be informed of vacant posts in the user undertaking in order to give them the opportunity to find permanent employment.

Also, under Article 6(2), Member States shall ensure that there are no legal obstacles to the temporary agency worker being employed by the user undertaking after the temporary assignment. This provision does not preclude temporary agencies receiving recompense for services rendered to user undertakings for the assignment, recruitment and training of temporary agency workers. However, temporary work agencies may not charge workers any fees for allowing them to be recruited by user undertakings, article 6(3).

Furthermore, temporary agency workers shall be given access to the amenities or collective facilities in the user undertaking, in particular any canteen, child-care facilities and transport services, under the same conditions as workers employed directly by the undertaking, unless the difference in treatment is justified by objective reasons.

Lastly, under Article 6(5), Member States shall take suitable measures or shall promote dialogue between the social partners, in accordance with their national traditions and practices, in order to:

- (a) improve temporary agency workers' access to training and to child-care facilities in the temporary-work agencies, even in the periods between their assignments, in order to enhance their career development and employability;
- (b) improve temporary agency workers' access to training for user undertakings' workers.

Article 7 of the Directive on *representation of temporary agency workers* prescribes that agency workers shall count, under conditions established by the Member States, for the purposes of calculating the threshold above which bodies representing workers provided for under Community and national law and collective agreements are to be formed at the temporary-work agency.

Under article 7 (2), Member States may provide that, under conditions that they define, temporary agency workers count for the purposes of calculating the threshold above which bodies representing workers provided for by Community and national law and collective agreements are to be formed in the user undertaking, in the same way as if they were workers employed directly for the same period of time by the user undertaking. Those Member States which avail themselves of the option provided for in paragraph 2 shall not be obliged to implement the provisions of paragraph 1.

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Pursuant to Article 8 of the Directive on *information of workers' representatives*, the user undertaking must provide suitable information on the use of temporary agency workers when providing information on the employment situation in that undertaking to bodies representing workers set up in accordance with national and Community legislation.

So far, the CJEU has only been presented with one case concerning the interpretation of the Agency Work Directive. However, the *AKT* case<sup>181</sup> carried exclusively on the extent of the possible harmonisation of the conditions for temporary work agencies, and not on the protection of agency workers. In a very brief judgment, the Court stated that Article 4 of the Directive

- is addressed only to the competent authorities of the Member States, imposing on them an obligation to review in order to ensure that any potential prohibitions or restrictions on the use of temporary agency work are justified, and, therefore,
- does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions on the use of temporary agency work which are not justified on grounds of general interest within the meaning of Article 4(1).

### *Equal treatment of posted workers*

Article 56 TFEU requires the elimination of any discrimination on grounds of nationality against providers of services who are established in another Member State, as well as the abolition of any restriction which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services.<sup>182</sup>

As is the case with freedom of establishment, this wide definition means that many different types of measures are liable to fall under the scope of Article 56 TFEU, even measures not directly intended to regulate the provision of services.

Article 52 TFEU applies to both establishment and the provision of services, and consequently, Member States may invoke grounds of public security, public order and public health to justify any

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<sup>181</sup> *AKT*, C-533/13, EU:C:2015:173.

<sup>182</sup> Inter alia *Finalarte and others*, C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, EU:C:2001:564, paragraph 28 and the case-law cited there.

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restrictions, including directly discriminatory measures. For measure that are not directly discriminatory, i.e. which do not discriminate on the basis of nationality, the Court of Justice has identified overriding requirements of public interests in its case law, that may also justify restrictions.

All measures that can be justified must still be proportionate in order to be compatible with Article 56 TFEU.

It follows from the Court's ruling in *Rush Portuguesa*<sup>183</sup> that the freedom to provide services includes the right to temporarily move your workforce to another Member State. EU law does not prohibit Member States from applying their legislation to any person who is employed, even temporarily within their territory.<sup>184</sup> However, such legislation must be compatible with EU law. This can lead to conflicts between the interests of the domestic workers and the service provider. For a foreign service provider, fulfilling two sets of rules can be very cumbersome, and can deter the service provider from offering his or her services in another Member State. At the same time, domestic service providers and employees have a legitimate interest in preserving conditions on their labour market. The EU legislature has attempted to tackle this problem through adopting the Posted Workers Directive, and the Court of Justice has had many opportunities to give guidance on how to strike the balance between the freedom of services and protection of workers rights under Article 56 TFEU.

In *Finalarte*,<sup>185</sup> the Court of Justice ruled on the compatibility of German law required temporary construction workers to make contributions to a scheme to finance holiday entitlement of construction workers with Article 56 TFEU. The Court of Justice found these rules to constitute a restriction, and stated that if the aim of the rules was to protect national businesses, this would not qualify as a justification. However, if the rules were intended to pursue the objective of protecting the foreign workers, this could constitute a legitimate justification. Much like in *Inasti*, the Court held that any rules purporting to confer a benefit to workers must confer a *genuine* benefit to the workers and *significantly* add to their social protection. It stated that the national court must balance the

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<sup>183</sup> *Rush Portuguesa*, C-113/89, EU:C:1990:142.

<sup>184</sup> *Seco v EVI*, Joined Cases C-62/81 and 63/81, EU:C:1982:34 and *Portugaia Construções*, C-164/99, EU:C:2002:40.

<sup>185</sup> *Finalarte and others*, C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, EU:C:2001:564.

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administrative and economic burdens that the rules imposed against the increased social protection they confer on workers compared with that guaranteed by law in their home Member State.

In *Bundesdruckerei*<sup>186</sup> the Court of Justice found that by imposing a requirement within the framework of a tender, that a service provider had to ensure that its subcontractor paid its workers German minimum wage, when the services provided by the subcontractor would be provided solely in Poland, was contrary to Article 56 TFEU.

Much of the case law of the Court of Justice on the issue of balancing the interests of domestic workers and service providers pertains to the Posted Workers Directive. In *Laval*,<sup>187</sup> a Latvian construction company that had signed collective agreements with Latvian trade unions were contracted to do construction work in Sweden. None of their employees were members of a Swedish trade union. Swedish trade unions started negotiations with Laval to sign collective agreements with them and accepting, inter alia, certain pay rates. Negotiations were not successful and the Swedish trade unions took collective action, including a blockading of goods, picketing and prohibiting Latvian workers from entering the work site. Laval brought proceedings before the Swedish Labour Court who referred several questions to the Court of Justice.

Advocate-General Mengozzi, in his opinion, concluded that the Posted Workers Directive and Article 56 TFEU should not be interpreted as preventing trade unions from taking collective action to compel a foreign service provider to subscribe to a pay determined in accordance with a domestic collective agreement, as long as the collective action was motivated by public interest objectives and not disproportionate. The Advocate-General stated that when examining the proportionality of the collective action, the national court would have to consider whether the conditions involved a real advantage significantly contributing to the social protection of posted workers and did not duplicate any identical or essentially comparable protection available in the home state.<sup>188</sup>

The Court of Justice noted that the Posted Workers Directive had not harmonised the contents of mandatory rules for minimum protection listed in the Directive. This was therefore up to the Member

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<sup>186</sup> *Bundesdruckerei*, C-549/13, EU:C:2014:2235.

<sup>187</sup> *Laval un Partneri*, C-341/05, EU:C:2007:809.

<sup>188</sup> Opinion of Advocate-General Mengozzi in *Laval un Partneri*, C-341/05, EU:C:2007:291.

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States to define. In Sweden, the task of setting wage rates has been entrusted to the parties of the labour market. Just like in *Viking*, the Court acknowledged that the right to take collective action is a fundamental right. It also recognised that protecting workers is a ground of justification. However, while Member States are allowed to require undertakings to comply with national rules on minimum pay – as prescribed by the Posted Workers Directive – collective action cannot be justified with reference to protection of workers when national legislation lacks provisions of any kind on minimum wage. Such collective action was therefore incompatible with Article 56 TFEU.

### *Equal treatment of migrant workers from third countries.*

Migrant workers from third countries are all those workers who do not have nationality of an EU member state. Due to disparities in the labour market and living standards between the EU states and many third countries, and the relative lack of security of most third country nationals to live permanently in the EU, many third country workers could be viewed by employers as cheap and readily expendable sources of labour. Not only does this open up third country workers to a particular risk of exploitation. It also risks a worsening of European labour standards as employers seek to reduce costs to remain competitive, effectively encouraging a race to the bottom to the detriment of EU national workers.

Migrant workers from third countries do not have a treaty right to freedom of movement within the EU. This means that not only do they lack a treaty right to access the EU labour market, they have no right flowing from article 45 TFEU to *equal treatment* when taking up work in an EU member state. Nor does the EU Charter on Fundamental Rights, as such, create an enforceable right for third country workers to access the EU labour market on equal terms to EU nationals<sup>189</sup>. While article 15(3) of the Charter<sup>190</sup> contains an obligation to ensure that third country workers who have been authorised to work in the territories of the member states must be guaranteed working conditions equivalent to EU nationals, this is of course a qualified rather than an absolute obligation (article 52(1) of the Charter), which is addressed primarily to the EU institutions (article 51(1) of the Charter), to whom article 153

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<sup>189</sup> While article 15(1) of the Charter states the "Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation", this cannot conceivably entail a right for the entire global population specifically to enter and work in the EU.

<sup>190</sup> "Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union."

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TFEU makes clear that legislation containing minimum standards to improve working conditions should be implemented gradually. Any obligation under article 15(3) of the Charter extends to the member states only when they are implementing EU law (article 51(1) of the Charter). The rights of third country nationals to access the EU labour market, and their rights within that labour market as workers, thus derive essentially from secondary EU legislation.

As to *access* to the territory and the labour market, as a starting point under international law, it is up to each individual member state to regulate to which third country nationals it will grant a right to enter the state and work there. However, the EU has regulated substantive rights to access the EU territory and its labour market by the adoption of essentially three kinds of legislation. First, the EU has adopted what can be called pure immigration legislation (not primarily concerned with labour issues) which harmonises and regulates e.g. the right of refugees and others in need of international protection<sup>191</sup>, or certain of their family members<sup>192</sup>, to remain or enter in the EU and work here once present.

Second, the EU has in recent years gradually adopted a series of Directives which are specifically concerned with entry into the EU (for limited periods of time) for the purposes of work: specifically the EU Blue Card Directive 2009/50/EC<sup>193</sup> (concerning the right to residence and work permits for highly skilled third country nationals, which member states were required to implement by 19 June 2011), the Seasonal Workers' Directive 2014/36/EU (to be implemented by member states by 30 September 2016) and the Directive on Intra-corporate Transferees (Directive 2014/66/EU, to be implemented by member states by 29 November 2016). By specifying conditions for the grant or refusal of residence and work permits to each of the concerned class of third country applicants (e.g. in

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<sup>191</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9). In the UK and Ireland, the previous version of that Directive applies (Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12; corrigenda OJ 2005 L 204, p. 24, and OJ 2011 L 278, p. 13). The Directives do not apply in Denmark.

<sup>192</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12) (not applicable in the UK, Ireland and Denmark).

<sup>193</sup> Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (OJ 2009 L 155, p. 17).

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the case of highly skilled workers seeking a Blue Card, a minimum pay threshold of at least 1.5 time the gross annual salary in the member state concerned, to be determined from state to state), these Directives seek to ensure a degree of *ex ante* regulation of the minimum working conditions to which the third country workers in question will be entitled if and when they do take up work in the EU.

Third, the EU has adopted Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents. In short, this provides that various classes of third country nationals who have been lawfully and continuously resident in a given member state for a period of five years – even on the basis of temporary permits, so long as these were not granted for the purpose of activity which is temporary in nature, and so long as national legislation entitles the third country national to renew these temporary permits or qualify for permanent residence on the basis of them (case C-502/10 *Singh*<sup>194</sup>) – are entitled on application to secure long-term residence status in that state (article 4). This in turn confers a right to reside and work permanently in that member state. The Directive also provides for a mechanism by which the third country national who has already acquired long-term residence status in a given member state may transfer that status to a different member state (and also for the conditions under which long-term residence may be lost altogether).

As to *working conditions* for third country workers who do find themselves working in the EU, it has been previously argued that the fact that Article 153 TFEU lists “conditions of employment for third country nationals legally residing in the Union” as a separate area for legislative action from e.g. “working conditions” and “improvement in particular of the working environment to protect workers’ health and safety”, that EU legislation which seeks to improve the latter do not apply to third country workers at all (unless the legislation in question in question specifically says so). However, the Court of Justice has resisted such an interpretation. In case C-311/13 *Tümer*,<sup>195</sup> the Court of Justice held that Directive 80/987/EEC on protection for workers in the event of the employer’s insolvency applied not just to third country workers who are lawfully present in a given member state, but even third country workers who are present in a given member state without a lawful basis under national law – so long as the third-country national under the national law in question has the status of “employee” with an entitlement to pay which could be the subject of an action against his or her employer before the

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<sup>194</sup> *Singh*, C-502/10, EU:C:2012:636.

<sup>195</sup> *Tümer*, C-311/13, EU:C:2014:2337,

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national courts. In the *Tümer* case, Advocate General Bot had essentially reasoned that EU legislation which is aimed at the improvement of working conditions for workers and which does not specifically exclude third country nationals from its scope will apply to third country workers lawfully present in the EU too; and, depending upon the intent of the legislation in question, *may* even be applicable even to third country workers who are unlawfully present in a member state. Similar reasoning ought to apply to other *issue-specific* EU labour Directives (e.g. on working time), meaning that except where they expressly exclude third country nationals (or give member states the discretion to do so), the minimum standards required under these Directives should be applied at least to those third country workers who are lawfully present in a given member state and who fulfil the criteria for status as “workers” or “employees” under national (civil) law.

The position is likely to be different in respect of the right to equal treatment. In the absence of a *treaty* basis for obliging member states to guarantee third country workers equal treatment compared with EU nationals (or nationals of the specific member state in which they are working), it appears likely that such a right to equal treatment can only be found in legislation which *explicitly* confers it upon third country workers. For its part, the EU legislator has felt moved to include specific provisions on equal treatment of the relevant class of third country national in its legislation that specifically regulates their rights to enter and remain in a given EU member state. Subject to some variations, the general pattern in e.g. the Directives on Blue Cards, Seasonal Workers and Intra-Corporate Transferees, is to oblige member states to guarantee that the third country worker who is granted permission to enter a member state in line with that Directive shall enjoy equal treatment with nationals of the member state issuing the residence/work permit in question as regards various matters including working conditions (including pay and dismissal, as well as health and safety), freedom of association and affiliation of a trade union, and certain pension rights upon leaving the EU. Depending on the Directive, such equal treatment rights can extend even to matters such as education and vocational training, and social security (albeit that qualifications to these rights may be permitted).

In what is usually called the Single Permit Directive 2011/98/EU (but whose full title makes clear it is concerned not just with unifying formal procedures for granting or refusing residence and work permits for third country workers within the EU, but equally with establishing “*a common set of rights for third-country workers legally residing in a Member State*”), the EU-legislator has now essentially extended a similar right to equal treatment to *all* third country workers who are not already covered by

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the other Directives mentioned (other than au pairs, posted workers, self-employed workers, and seafarers who are or will be working in any capacity on board of a ship registered in or sailing under the flag of a Member State), provided they have been admitted to the territory of a Member State (for certain purposes, including work) in accordance with Union or national law, and are legally residing and allowed to work in the context of a paid relationship in that Member State in accordance with national law or practice. The equal rights provision under art. 12 of the Single Permit Directive extends to education and vocational training, social security and other matters (albeit on a qualifiable basis).

The introduction of equal treatment rights guarantees for third country workers under these Directives should be seen as a major step forward. However, quite apart from the uncertainty introduced by the power for member states to qualify equal rights for third country workers in various respects, questions marks, gaps and some difficulties of interpretation still remain. First, as to coverage: the UK, Ireland and Denmark have exercised their opt-out in relation to the Blue Card Directive, the Seasonal Workers' Directive, the Directive on Intra-Corporate Transferees, the Directive on Long-term Residents, and the Single Permit Directive, which thus have no application in those states.

Second, the linking of equal treatment rights under the Single Permit Directive to lawful *residence in and admission to* a given member state may leave questions unanswered about the application of these rights to mobile workers in particular. The Court of Justice has made clear that as a starting point, it is for member states to define the circumstances in which third country nationals are to be considered “resident” in (as opposed to e.g. visiting) the state in question (see *Singh*, above), and there are certain categories of mobile worker (e.g. air crew) who may be entitled to enter if not the entire EU then at least the member states within the Schengen area for certain purposes without needing to possess a visa or to receive a formal *decision* on admission<sup>196</sup>. Depending on how one interprets the Directive, it might be argued that e.g. certain mobile workers from third countries may find that they cannot establish “residence” in or “admission to” any member state, so as to establish a right to equal treatment with that state’s nationals, even if the mobile worker in question lawfully spends much or all

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<sup>196</sup> See e.g. the Annex VII point 2 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (the Schengen Borders Code). See also article 4(1)(b) of the Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

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of their time when mobile within the EU, and much or all of their time when not mobile in a given EU member state. While it is to be hoped that the Court would adopt a broad and purposive interpretation of the Directive (as it has done, e.g. when ruling that the Directive on Insolvent Employers applies even to certain unlawfully resident third country workers<sup>197</sup>, and when ruling on the conditions for acquiring Long-Term Resident status<sup>198</sup>), it is currently not clear how the Court would interpret these provisions of the Directive: the implementation deadline for the Single Permit Directive is still fairly recent (25 December 2013) and no questions have yet been referred to the Court of Justice on its interpretation.

Finally, the value of the equal treatment rights to be guaranteed under these Directives is limited in practice by the lack of any clear provisions in them as to minimum standards, rights or procedures in respect of *enforcement*. In their absence, member states have – subject to two qualifications – procedural autonomy to decide which courts or tribunals will have jurisdiction to give effect to EU rights, and to prescribe the procedural conditions necessary for their enforcement (e.g. limitation periods, rules of evidence, conditions for recovering damages, extent of entitlement to back pay etc.). The two qualifications are that national rules must not render the exercise of the rights conferred by EU law virtually impossible to achieve or excessively difficult to access (the principle of effectiveness), and national rules must not be less favourable than those governing comparable actions of a domestic nature (the principle of equivalence).<sup>199</sup> A third-country national who is left to invoke general EU principles of effectiveness and equivalence in a local court of a member state in an attempt to safeguard his or her right to equal treatment under EU secondary legislation risks being in a far more precarious position than if he or she could point to a specific remedy or minimum procedural guarantee spelled out on the face of the Directive and then transposed into national law. Moreover, the ability to rely on the principles of effectiveness and equivalence (even assuming they are correctly understood applied by the local court) does not result in the harmonisation of enforcement mechanisms, procedures or remedies for breaches of rights between the member states.

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<sup>197</sup> *Tümer*, cited above.

<sup>198</sup> *Singh*, C-502/10, EU:C:2012:636.

<sup>199</sup> See e.g. article 19(1) TEU, *Rewe-Zentralfinanz and Rewe-Zentral*, 33/76, EU:C:1976:188; *Comet*, 45/76, EU:C:1976:191; and Case *Levez*, C-326/96, EU:C:1998:577.

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## *Objective justifications of derogations from the principle of equal treatment*

If employers are treated in an unequal way, the employer can justify this if the unequal treatment is due to objective justifications. Catherine Barnard has analysed the use of this derogation from the principle of equal treatment.<sup>200</sup> According to Barnard, this derogation is of great importance to employers. It is increasingly used by the ECJ where the discrimination is indirect and more generally when the ECJ applies the principle of equal pay without considering issues of discrimination.<sup>201</sup>

In *Enderby and JämO*,<sup>202</sup> the ECJ established that where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be deprived of the means of securing compliance with the principle of equal pay before national courts if evidence establishing a prima facie case of discrimination did not have the effect of imposing on the employer the onus of proving that the difference in pay is not in fact discriminatory.

Barnard identifies three factors that can be put forward to justify unequal pay. These are personal factors, market forces and collective bargaining. Personal factors that are accepted as objective justifications include seniority, training, productivity, the quality of the work done, the difference between permanently established workers and secondees, and where better paid employees are moved to a less paid position with their original salary. The ECJ has also recognised the needs of the market forces, such as the economic needs of the state or undertakings. For the state the ECJ has recognised the encouragement of recruitment as a legitimate aim of social policy. As far as the undertakings are concerned, the ECJ has accepted that full time workers are better paid than part-time workers in order to encourage full time work and that some candidates may receive a higher salary if the market indicates that such workers are in short supply. However, the ECJ has struck down on employers who pay part time workers less simply because they work part time, and does not accept discrimination on the ground that non-discrimination would cost more. It is also impermissible for the state to argue that public utilities should not bear excessive costs.

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<sup>200</sup> Catherine Barnard, *EU Employment Law*, 4th Ed., Oxford University Press, 2012, p. 317.

<sup>201</sup> Catherine Barnard, *EU Employment Law*, 4th Ed., Oxford University Press, 2012, p. 317.

<sup>202</sup> *JämO*, C-236/98, EU:C:2000:173, paragraph 53; *Enderby*, C-127/92, EU:C:1993:859, paragraph 18.

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As for collective bargaining, the ECJ has delivered two judgments of interest. In short, it follows from the judgments *Enderby*, *Prigge*, *Hennigs* and *Kenny* that the social partners must respect the principle of equal treatment. However, in *Dansk Industri* ECJ found that the fact that the rates of pay have been determined by collective bargaining or by negotiation at local level may be taken into account by the national court as a factor in its assessment of whether differences between the average pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex.

Barnard has identified three levels of scrutiny applied by the ECJ in matters relating to the objective justification of unequal treatment. She has identified a sliding scale of intensity. First, there is a strict test of indirect discrimination by employers. Second, there is a weaker test for discriminatory employment legislation. Lastly, there is a wide margin of appreciation for social security legislation.<sup>203</sup> This means that “employers cannot rely on the more lenient test of justification available to the state”.<sup>204</sup>

Proportionality has always been an integral part of the test for objective justification. A measure that is claimed to be objectively justified must be apt or suitable to achieve the aims pursued and it may not go beyond the necessary to attain the objectives it aims to achieve.<sup>205</sup>

### **VI – CONCLUSION: THE PRINCIPLE OF EQUAL TREATMENT AND OF EQUAL PAY FOR EQUAL WORK OR WORK OF EQUAL VALUE SHOULD BE A CORNERSTONE OF A EUROPEAN TRADE UNION STRATEGY AGAINST PRECARIOUS WORK**

The European trade union movement should question President Juncker’s suggestion that the principle of equal pay for equal work or work of equal value in the announced forthcoming legislative package should necessarily be restricted to workers *in the same workplace*.

According to Advocate General Spuznar in his Opinion in *AKT*, “the legislative action of the European Union in the area of employment law is based on the fundamental premise that contracts of indefinite

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<sup>203</sup> Catherine Barnard, *EU Employment Law*, 4th Ed., Oxford University Press, 2012, p. 322.

<sup>204</sup> Catherine Barnard, *EU Employment Law*, 4th Ed., Oxford University Press, 2012, p. 326.

<sup>205</sup> Catherine Barnard, *EU Employment Law*, 4th Ed., Oxford University Press, 2012, p. 326.

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duration are the general form of employment relationship.”<sup>206</sup> While available statistics on fixed-term work, part-time work, temporary agency work and posting of workers – in particular regarding youth employment and the creation of new jobs – seem to challenge this fundamental theoretical premise, it is still useful to maintain the ‘comparable permanent worker’ as the relevant comparison when assessing whether the requirements of equal treatment have been met.

Fixed-term workers, part-time workers, temporary agency workers, posted workers and other precarious workers on non-standard working arrangements, such as workers on zero-hour contracts and similar arrangements, bogus self-employed workers, youth entering the workforce on apprenticeship and traineeship programs and domestic migrant workers should therefore not be treated less favourably than a ‘comparable permanent worker’, in the absence of any objective justification, irrespectively whether or not there are any ‘comparable permanent workers’ at the workplace at issue or not.

Indeed, a ‘comparable permanent worker’ has already been defined in clause 3(2) of the framework agreement on fixed-term work<sup>207</sup> as ‘a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills. Where there is no comparable permanent worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement, or where there is no applicable collective agreement, in accordance with national law, collective agreements or practice’.

The ‘comparable permanent worker’ for part-time workers in the host member state should therefore be extended to serve as the relevant comparator for fixed-term workers, temporary agency workers, posted workers and other precarious workers on non-standard working arrangements, such as workers on zero-hour contracts and similar arrangements, bogus self-employed workers, youth entering the workforce on apprenticeship and traineeship programs and domestic migrant workers.

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<sup>206</sup> Citing recital 15 in the preamble to Directive 2008/104 and paragraph 7 of the general considerations to the framework agreement put into effect by Council Directive 1999/70 and Opinion of Advocate General Jääskinen in *Jansen*, C-313/10, EU:C:2011:593, paragraph 57.

<sup>207</sup> Framework agreement on fixed-term work, concluded on 18 March 1999 (‘the framework agreement’), which is set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175 p. 43).

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The European trade union movement should therefore emphasise that the principle of equal treatment and equal pay for equal work or work of equal value between workers *as such* – i.e. not only in respect of migrant workers within the EU or male and female workers – is not only a “principle of Community social law”, or an example of ‘rules of EU social law of particular importance’, but constitutes the *expression of a fundamental human right*, which stems from the principles of equal treatment and non-discrimination.

Moreover, as has already been thoroughly and convincingly argued by Valerio De Stefano, the construction of collective rights as fundamental human rights can undoubtedly have specific beneficial effects for precarious, atypical or non-standard workers that must be given adequate attention when reassessing restrictions to the right to collective bargaining and the right to strike in order to keep pace with the growth of the non-standard workforce.<sup>208</sup>

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Magnus Schmauch  
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<sup>208</sup> Valerio De Stefano, Non-standard workers and freedom of association: a critical analysis of restrictions to collective rights from a human rights perspective, WP CSDLE “Massimo D’Antona”.INT – 123/2015.