

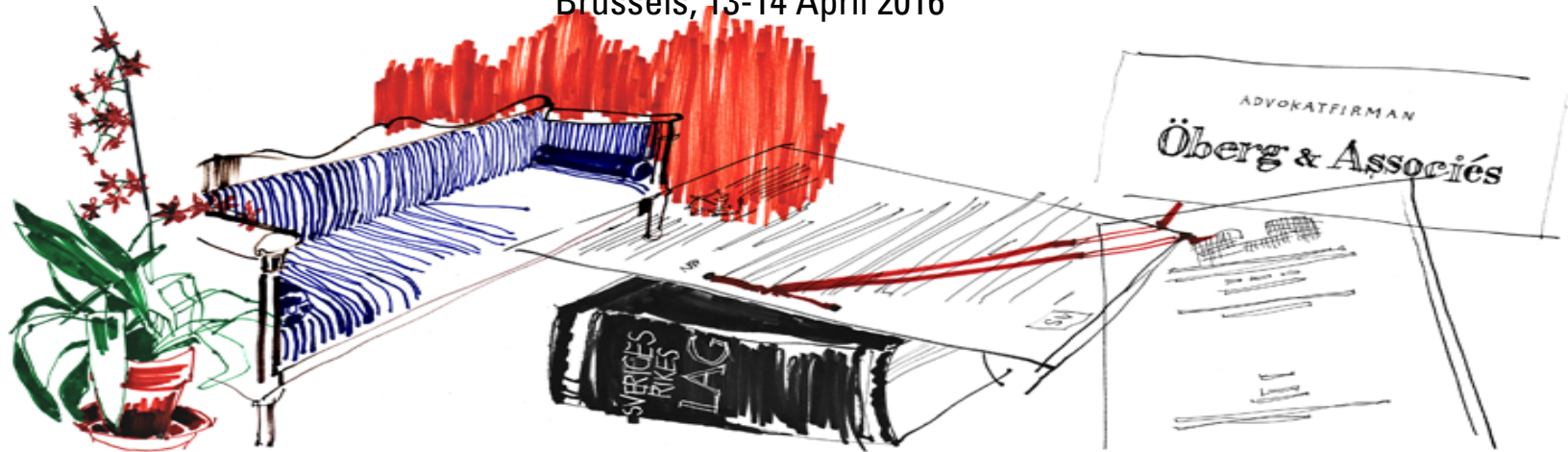
A D V O K A T F I R M A N

Öberg & Associés

“Europe: End Precarious Work Now! – Decent Work and Equal Treatment for All”

Advokat Ulf Öberg

Final Conference
Brussels, 13-14 April 2016



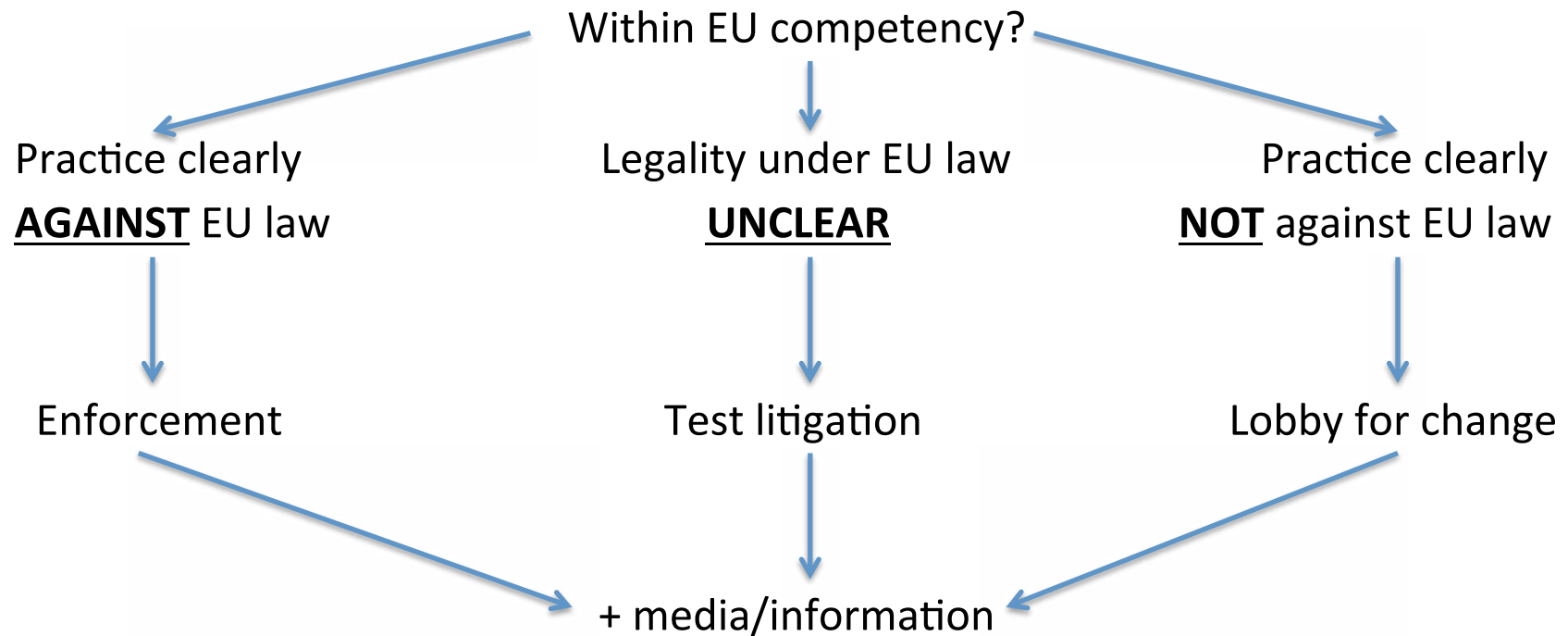
From cradle to grave: aspects of precariousness

- Denial of "worker" status (bogus self-employment)
- Hidden or unclear terms of employment contract
- Contract governed by law of state with less favourable protection for workers
- Contract with intermediary rather than "true" employer
- Limiting duration of contract so as to deny security and rights of longer-term workers
- Poor or no wages
- Working time (1): too much work without breaks or leave
- Working time (2): too little work whilst on call without pay (zero hours)
- Protection against/in event of termination
- Access to social protection
- Protection against wrongful/unfair termination
- Equal treatment of workers from outside EU

Some key conclusions

- Some good and fundamentally important steps have been taken
- BUT:
 - EU legislation can be unclear and/or complex
 - Legislative framework lagging behind developments on ground
 - Patchwork leaves gaps in material protection (even where regulated)
 - Tension, facilitation of atypical work or protection against effects?
 - Insufficient harmonisation of remedies and enforcement mechanisms
 - Scope to develop EU case law largely in hands of *national* courts
- How much is a result of the EU project and EU legal order itself?

How can legal analysis shape a trade union strategy?



Key conclusions

- 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.
- The definition of “precarious jobs” by the founding members of industriAll 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.

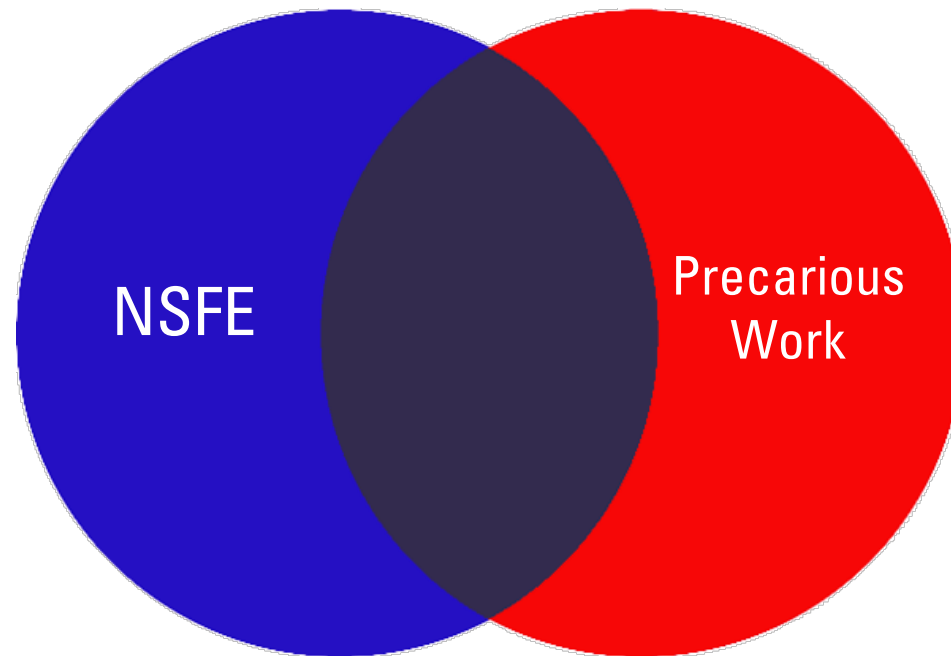
Tentative Definition of Precarious Work (2013)

- 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.



Professor Sonia McKay, in *Resocialising Europe in a Time of Crisis*,
Cambridge University Press

Precarious Work & Atypical Work/Non-Standard Forms of Employment (NSFE)



From sociological analysis to a legal concept

- 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.
- Our 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.

Are contracts of indefinite duration still the norm?



Are contracts of indefinite duration still the norm?

- 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.
- 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.
- It is still useful to maintain the ‘comparable permanent worker’ (FTE) as the relevant comparison and benchmark of precarious or atypical workers, when assessing whether the requirements of equal treatment have been met.

Law and Policy on Precarious Work

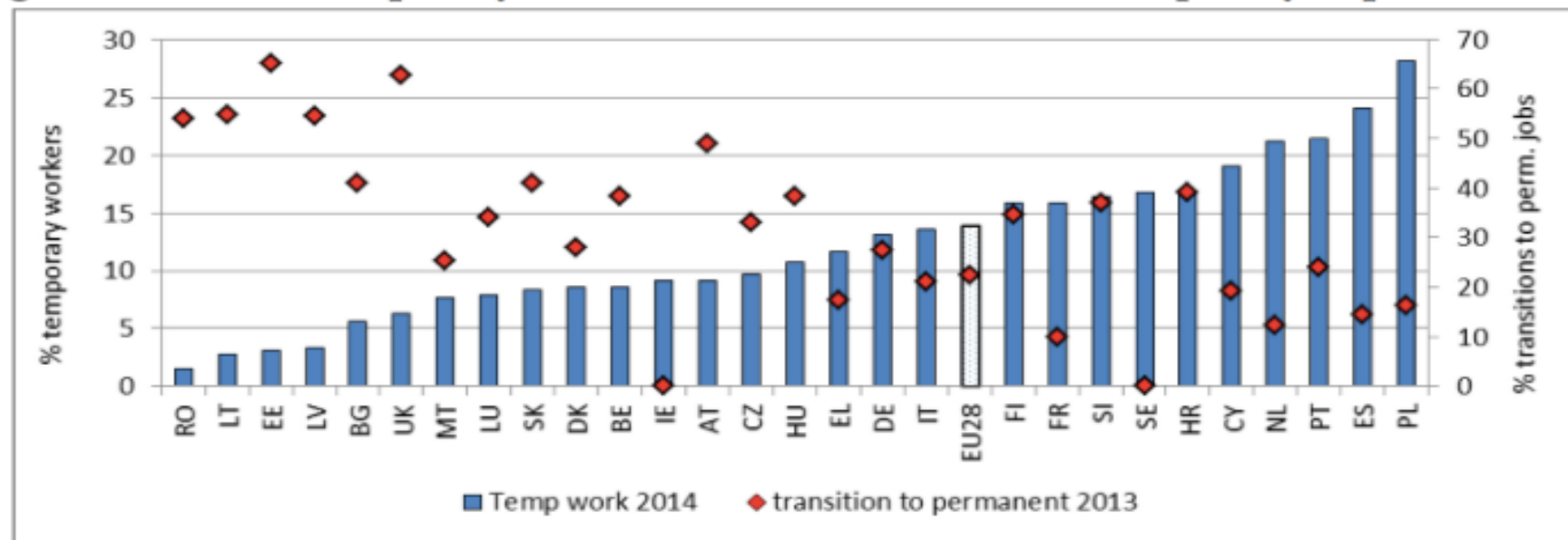
- As late as in 2013, the European Commission concluded that precarious work could be remedied through existing legislative measures.
- However, the European Commission has recently stated that the more general move towards more flexible labour markets should facilitate employment creation, **but should 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.**

Joint Employment Report from the Commission and the Council

“[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. (...)**

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.**

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.

There is a shared global and regional political objective to end or at least limit precarious work

- The UN guiding principles on extreme poverty and human rights
- The United Nation's 2030 Agenda for Sustainable Development
- Commission's Annual Growth Survey 2016 entitled *Strengthening the recovery and fostering convergence*
- Draft Joint Employment Report from the Commission and the Council accompanying the Communication from the Commission on the Annual Growth Survey 2016
- Speech of the President of the Commission Jean-Claude Juncker at the ETUC congress

Goal 8: Promote inclusive and sustainable economic growth, employment and decent work for all

By 2030, achieve 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

By 2020, substantially reduce the proportion of youth not in employment, education or training

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

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

**8 DECENT WORK AND
ECONOMIC GROWTH**



Juncker: "La précarité ne répond pas au modèle européen"



- Legislative proposal for a basic package of social rights in Spring 2016.
- The principle of equal pay for equal work at the same place of work should be applied throughout Europe.
- Precariousness does not correspond to the European model of a social market economy

"La précarité ne répond pas au modèle européen"

"**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 **conséquence l'économie sociale de marché doit rester le modèle social européen.**"

"Pour moi, vieux jeu, le **contrat de travail normal est un contrat de travail à durée indéterminée.**"

"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.**"

http://europa.eu/rapid/press-release_SPEECH-15-5741_en.htm

Regulatory neutrality v. regulatory competition

The Trade Unions' Constitutional Dilemma

- **Option I:** Maintaining the current status quo, by defending the respect for national labour models
 - will probably lead to negative harmonisation, greater regulatory competition and the destabilisation of national labour law regimes.
- **Option II:** Opting for minimum or partial harmonisation of the principles non-discrimination and of equal pay for equal work on the basis of Article 46 TFEU could secure trade unions' efforts, at national and the EU level, to achieve upward harmonisation and implement the EU Charter
- **Option III:** Article 137 (5) TFEU does not prevent a recast of the EU directives on atypical work, to secure the principles of equal pay for equal work and non-discrimination through recourse to the EU Social dialogue.

Turn the page of the conclusions from the Essen European Council meeting

The European Trade Union Movement should call on the the Heads of State and Government to formally turn the page of the conclusions from the Essen European Council meeting on 9 and 10 December 1994

- Cf. Mascellani, C-221/13, EU:C:2014:2286, para 20



Support the Codification of the Principle of Equal Pay for Equal Work or Work of Equal Value in a Binding Legal Act

- The principle of equal pay for equal work or work of equal value between workers as such – i.e. not only in respect to migrant workers within the EU or male and female workers – is not only a “principle of Community social law”, or ‘rules of EU social law of particular importance’.
- It constitutes the expression of a fundamental human right, which stems from the principles of equal treatment and non-discrimination.

Support the construction of collective rights as fundamental rights

- The construction of collective rights as fundamental human rights will have specific beneficial effects for precarious, atypical or non-standard workers.
- This 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.

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