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Constitutional Affairs

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Petitions

Temporary contracts, precarious employment, employees' fundamental rights and EU employment law

STUDY FOR THE PETI COMMITTEE



DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

PETITIONS

Temporary contracts, precarious employment, employees' fundamental rights and EU employment law

STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Petitions, was prepared to assess the nature and extent of employment precariousness in the framework of EU fundamental rights and employment law. The analysis focuses on two broad areas, namely atypical forms of employment and franchising. The report identifies a number of 'protective gaps' at various levels of regulation and puts forward policy recommendations that are informed by the need to adopt holistic and comprehensive action for addressing what emerges as a constantly moving target.

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LIST OF ABBREVIATIONS

ABVV/FGTB General Federation of Belgian Labour ACLVB/CGSLB General Confederation of Liberal Trade Unions of Belgium **AG** Advocate General **CFREU** Charter of Fundamental Rights of the European Union **CJEU** Court of Justice of the European Union **CSC-ACV** Confederation of Christian Trade Unions **CRD** Collective Redundancies' Directive **EC** European Commission **EP** European Parliament **EU** European Union **EWC** European Works' Council **EWCD** European Works' Council Directive **FCJ** Flexi-Job Contract FTC Fixed-Term Contract **HORECA** Hotel/Restaurant/Café **ICD** Information and Consultation Directive **NGHC** No Guaranteed Hours Contract **ONS** Office for National Statistics **SER** Standard Employment Relationship **TEU** Treaty on European Union **TFEU** Treaty on the Functioning of the European Union **TUD** Transfer of Undertakings' Directive **UK** United Kingdom **ZHCs** Zero-Hours Contracts

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Case C-22/71 Béquelin Import v GL Import-Export [1971] ECR 949

Case **C-4/73** J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities. [1974] ECR 491

Case **C-15/74** Centrafarm BV et Adriaan de Peijper v Sterling Drug Inc. [1974] ECR 1147

Case C-53/81 D.M. Levin v Staatssecretaris van Justitie [1982] ECR 1035

Case **C-14/83** Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen [1984] ECR 1891

Case **C-105/84** Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar, in liquidation [1985] ECR 2639

Case **C-161/84** Pronuptia de Paris GmbH v Pronuptia de Paris Ermgard Schillgalis [1986] ECR I-353

Case C-66/85 Deborah Lawrie-Blum v Land Baden-Württemberg [1986] ECR 2121

Case **C-109/88** Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss [1989] ECR 3199

Case *C-41/90* Klaus Höfner and Fritz Elser v Macrotron GmbH. [1991] ECR I-1979

Case **C-449/93** Rockfon A/S v Specialarbejderforbundet i Danmark [1995] ECR I-4291

Case **C-84/94** United Kingdom of Great Britain and Northern Ireland v Council of the European Union (Working Time Directive) [1996] ECR I-5755

Joined Cases C**-253 to C-258/96** Helmut Kampelmann and Others v Landschaftsverband Westfalen-Lippe, Stadtwerke Witten GmbH v Andreas Schade and Klaus Haseley v Stadtwerke Altena GmbH [1997] ECR I-6907

Case C-185/97 Belinda Jane Coote v Granada Hospitality Ltd. [1998] ECR I-5199

Case **C-173/99** The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) [2001] ECR I-4841

Case C-350/99 Wolfgang Lange v Georg Schünemann Gmbh [2001] ECR I-1061

Case **C-62/99** Betriebsrat der bofrost Josef H. Boquoi Deutschland West GmbH & Co. KG v Bofrost Josef H. Boquoi Deutschland West GmbH & Co. KG. [2001] ECR I-02579

Case **C-438/99** *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* [2001] ECR I-6915

Case **C-440/00** Gesamtbetriebsrat der Kühne & Nagel AG & Co. KG v Kühne & Nagel AG & Co. KG [2004] ECR I-787

Case **C-256/01** Allonby v Accrington and Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment. [2004] ECR I-873

Case **C-349/01** ADS Anker (Betriebsrat der Firma ADS Anker GmbH v. ADS Anker GmbH [2004] ECR I-6803

Case C-313/02 Nicole Wippel v. Peek & Cloppenburg GmbH [2004] ECR I-9483

Case **C-14/04** Abdelkader Dellas and Others v Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité [2005] ECR I-10253

Case **C-53/04** Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate [2006] ECR I-7213

Joined Cases **C-131/04 and C-257/04** *C. D. Robinson-Steele v R. D. Retail Services Ltd Michael Jason Clarke v Frank Staddon Ltd and J. C. Caulfield and Others v Hanson Clay Products Ltd* . [2006] ECR I-2531

Case **C-144/04** *Mangold v Helm* [2005] ECR I-9981

Case **C-212/04** Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG) [2006] ECR I-6057

Case **C-484/04** Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland [2006] ECR I-7471

Case **C-124/05** Federatie Nederlandse Vakbeweging v Staat der Nederlanden [2006] ECR I-03423

Case **C-307/05** Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud [2007] ECR I-7109

Case **C-268/06** Impact v Minister for Agriculture and Food and Others. [2008] ECR I-2483

Case **C-306/07** Ruben Andersen v Kommunernes Landsforening [2008] ECR I-10279

Case C-361/07 Olivier Polier v Najar EURL [2008] ECR I-6

Joined cases **C-378/07 to C-380/07** *Kiriaki Angelidaki and Others v Organismos Nomarchiakis Autodioikisis Rethymnis. Charikleia Giannoudi v Dimos Geropotamou and Georgios Karabousanos and Sofoklis Michopoulos v Dimos Geropotamou* [2009] ECR I-3071

Case **C-444/09** Gavieiro Gavieiro Rosa María Gavieiro Gavieiro (C-444/09) and Ana María Iglesias Torres (C-456/09) v Consellería de Educación e Ordenación Universitaria de la Xunta de Galicia [2010] I-14031

Case **C-555/07** Kücükdeveci v. Swedex GmbH & Co KG [2010] ECR I-00365

Joined Cases **C-395/08 and C-396/08** Instituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini and Daniela Lotti and Clara Matteucci ECR I-5119

Case **C-44/08** Akavan Erityisalojen Keskusliitto AEK ry and Others v Fujitsu Siemens Computers Oy. [2009] I-8163

Case C-88/08 David Hütter v Technische Universität Graz [2009] ECR I-5325

Case **C-486/08** Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol [2010] ECR I-3527

Case C-109/09 Deutsche Lufthansa AG v Kumpan [2011] ECR I-1309

Case C-232/09, Dita Danosa v LKB Līzings SIA [2010] ECR I-11405

Case **C-242/09** Albron Catering BV v FNV Bondgenoten and John Roest [2010] ECR I-10309

Joined Cases **C-250/09** and **C-268/09** Vasil Ivanov Georgiev v Tehnicheski universitet - Sofia, filial Plovdiv [2010] ECR I-11869

Case C**-428/09** Union syndicale Solidaires Isère v Premier ministre and Others [2010] ECR I-9961

Joined Cases **C-444/09** and **C-456/09** Rosa María Gavieiro Gavieiro and Ana María Iglesias Torres v Consellería de Educación e Ordenación Universitaria de la Xunta de Galicia. [2010] ECR I-14031

Case **C-151/10**, Dai Cugini NV v Rijksdienst voor Sociale Zekerheid [2011] ECR I-54

Case **C-214/10** KHS AG v Winfried Schulte. [2011] ECR I-11757

Case **C-273/10** David Montoya Medina v Fondo de Garantía Salarial and Universidad de Alicante. [2011] I-32

Case **C-393/10** Dermod Patrick O'Brien v Ministry of Justice, (Judgment of 1 March 2012) ECLI:EU:C:2012:110

Case **C-586/10** Bianca Kücük v Land Nordrhein-Westfalen (Judgement of 26 January 2012) ECLI:EU:C:2012:39

Joined Cases **229/11** and **230/11** Alexander Heimann and Konstantin Toltschin v Kaiser GmbH (Judgment of 8 November 2012) ECLI:EU:C:2012:693

Case **C-256/11** Murat Dereci and Others v Bundesministerium für Inneres [2011] ECR I-11315

Case **C-283/11** Sky Österreich GmbH v Österreichischer Rundfunk (Judgment of 22 January 2013) ECLI:EU:C:2013:28

Joined Cases **C-302/11 to C-305/11** Rosanna Valenza and Others v Autorità Garante della Concorrenza e del Mercato (Judgment of 18 October 2012) ECLI:EU:C:2012:646

Case **C-176/12** Association de médiation sociale v Union locale des syndicats CGT and Others (Judgment of 15 January 2014) ECLI:EU:C:2014:2

Case **C**-**361/12** Carmela Carratù v Poste Italiane SpA (Judgment of12 December 2013) ECLI:EU:C:2013:830

Joined Cases **C-22/13, C-61/13 to C63/13** and **C-418/13** Raffaella Mascolo and Others v Ministero dell'Istruzione, dell'Università e della Ricerca and Comune di Napoli (Judgment of 26 November 2014) ECLI:EU:C:2014:2401

Case **C-38/13**, Małgorzata Nierodzik v Samodzielny Publiczny Psychiatryczny Zakład Opieki Zdrowotnej im. dr. Stanisława Deresza w Choroszczy (Judgment of 13 March 2014) ECLI:EU:C:2014:152

Case **C-311/13**, O. Tümer v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Judgment of 5 November 2014) ECLI:EU:C:2014:2337

Case **C-316/13** Gérard Fenoll v Centre d'aide par le travail "La Jouvene" and Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon (Judgment of 26 March 2015) EU:C:2015:200

Joined Cases **C-362/13, C-363/13** and **C-407/13** *Maurizio Fiamingo, Leonardo and Francesco Rotondo and Others v Rete Ferroviaria Italiana SpA* (Judgment of 3 July 2014) ECLI:EU:C:2014:2238

Case **C-117/14,** Grima Janet Nisttahuz Poclava v Jose María Ariza Toledano (Taberna del Marqués), (Judgment of 5 February 2015) ECLI:EU:C:2015:60

Case **C-152/14**, AEEG v Antonella Bertazzi and Others (Request for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 1 April 2014)

Case C-177/14, María José Regojo Dans v Consejo de Estado (Judgment of 9 July 2015) ECLI:EU:C:2015:450

Case **C-238/14** European Commission v Grand Duchy of Luxembourg (Judgment of 26 February 2015) ECLI:EU:C:2015:128

Case **C**- **16/15**, *María Elena Pérez López v Servicio Madrileño de Salud (Comunidad de Madrid*) (Judgment of 14 September 2016) ECLI:EU:C:2016:679

Case **C-201/15** AGET Iraklis v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis (Judgment 21 December 2016)

Case **C-216/15** Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH (Judgment of 17 November 2016) ECLI:EU:C:2016:883

Case **C-143/16** Abercrombie & Fitch Italia Srl v Antonino Bordonaro (Judgment of 19 July 2017) ECLI:EU:C:2017:566

National Courts

Constitutional Court, Decision 107/2017 of 28 September 2017 (Belgium)

Carmichael v National Power plc [1999] UKHL 47(United Kingdom, House of Lords) Jivraj v Hashwani [2011] UKSC 40 (United Kingdom, Supreme Court)

Saha v Viewpoint Field Services Ltd [2014] UKEAT/0116/13/DM, 23 (United Kingdom, Employment Appeal Tribunal)

National Labour Relations Board, Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, and FPR-II, LLC, d/b/a Leadpoint Business Services, and Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, Petitioner Case 32–RC–109684 (USA).

EXECUTIVE SUMMARY

Background

In recent decades, the rapidly-changing landscape of employment practices manifested in the rise of variable working hours' arrangements, atypical work in the form of fixed-term and part-time contracts in conjunction with new organisational practices favouring fragmentation and public policy measures designed to reduce the 'rigidity' of employment protection legislation have prompted calls for combating the precarisation of work. Precariousness is increasingly recognised as a social and economic problem in EU official public discourse and as a term in CJEU decisions. This study examines precariousness in the framework of EU's fundamental rights and employment law by identifying a range of 'protective gaps' that are found at different levels of the EU regulatory framework. It focuses on two areas, namely atypical forms of employment, in particular fixed-term, zero-hours' contracts and flexi-jobs, and franchising as a prevalent form of business fragmentation.

Main concepts

Precariousness is a multi-faceted and multi-factorial phenomenon. Rather than a duality, precariousness exists on a contextually defined continuum (i.e. degree of precariousness) (Oberg and Associes, 2016: 18). To examine the developments, the report adopts the now classic definition of precarious work provided by Rodgers: "What makes work precarious? There is a tendency to regard regular, permanent wage work as secure, and to consider other forms of work as precarious insofar as they deviate from this norm. But there are several dimensions to precariousness...The concept of precariousness involves instability, lack of protection, insecurity and social or economic vulnerability...Not that this eliminates ambiguity; an unstable job is not necessarily precarious. It is some combination of these factors which identifies precarious jobs, and the boundaries around the concept are inevitably to some extent arbitrary" (Rodgers, 1989: 3). In this context, the legal system may exhibit a Janus-faced function (on EU law, see Barbier and Colomb, 2015): progress in one dimension (e.g. the legal system acting to disable the risk of precariousness in respect of employment protection coverage) may be counterbalanced by movement in the opposite direction in other dimensions (e.g. limiting the regulatory function of collective bargaining). Consequently, there is a need for a holistic and comprehensive action for addressing what emerges as a constantly moving target.

Precariousness is a normatively (and constitutionally) problematic practice as evaluated against the EU's scheme of fundamental social rights. A systematic reading of fundamental social rights, as especially orientated around Article's 31(1) CFREU asking for dignity-respecting conditions of employment, establishes a constitutional foundation in favour of fundamental rights. One major consequence of this reading is the normative priority assigned to a **rights-based approach**, which in turn requires the workers' treatment in accordance with autonomy and equality along with the provision of decent and fair remuneration. Primary law establishes a **pro-active and holistic duty to tackle precariousness, or at least shield workers from its rights-violating consequences.** This duty, exercised within the framework of competences, should be recognised in the context of a **broader recognition of precariousness as a fundamental rights issue of enormous weight and significance within the EU's normative order**.

Drawing partly on the recent work by the ILO (ILO, 2016) and Grimshaw et al. (2016) to identify a range of gaps that may reproduce and/or reinforce a process of precarisation of work, the study introduces a novel taxonomy of inter-linked and mutually

constitutive 'protective gaps' categorised as employment protection, representation and enforcement gaps. Our study's contribution is three-fold. First, the gaps are situated at different levels in order to reflect the legal/regulatory polycentric design of the EU (primary EU law, secondary EU law, EU Member State legislation). Secondly, the analysis focuses mainly on the legal characteristics of work relations. Thirdly, it incorporates explicitly the salience of voice and representation in the operationalisation of precarious work, which until hitherto was traditionally overlooked in studies about precarious work.

The individual dimension of precariousness: The case of atypical work

The analysis in chapter 2 deals with the individual dimension of precariousness. It charts the developments in terms of the use of atypical forms of work, namely part-time, including on-call work, and fixed-term work. The review of empirical evidence allows us to draw a number of conclusions. The first concerns the fact that there has been a significant use of variable working hours' arrangements across a number of EU Member States. This is then coupled with the continuing and even more expansive reliance on more traditional forms of atypical employment, that is fixed-term work, as seen, for instance, in the case of Italy. The second issue concerns the fact that some groups such as women and younger workers are more affected by such changes in the labour markets.

The analysis then explores in greater detail two specific cases of atypical of employment, which were the subject of petitions to the Committee on Petitions of the European Parliament; these relate to the case of Zero-Hours Contracts (ZHCs) in the UK and that of Flexi-Job Contracts (FJCs) in Belgium (European Parliament, 2016c and 2016b). In both cases, the report identifies links with precariousness owing to a number of legal determinants (Kountouris, 2012). These include, among others, issues around employment status due to the lack of mutuality of obligations; differences in treatment in respect of working conditions, including, among others, regarding pay, annual leave and working time; and lack of a basic right to written information on terms and conditions of employment or even, if this exists, there is an employer-determined interpretation of the terms.

The report then explores how the **principle of equal treatment of** (or non-discrimination against) **atypical workers** forms part of the general principle of equality recognised by EU law (Peers, 2013). At the same time, given that the concept of precarious work may explain in a holistic manner social exclusion, attention is paid to the **role of inclusive labour standards in EU primary law**, focusing in particular on the role of the CFREU. It is on this basis that the analysis then **benchmarks EU secondary and national legislation** related to different forms of atypical work. It is argued that while EU secondary legislation and the CJEU case law have certainly made advances towards ensuring labour standards inclusivity and the equal treatment of atypical workers, protective gaps still exist as a result of **deficiencies in EU secondary law**, the exercise of **self-restraint by the CJEU**, which is in contradiction to the 'explicit competences' and to an evolved EU primary law (Jimena Quesada, 2017), and of the **limited effectiveness of EU law** due to inadequate transposition and enforcement of labour standards at EU Member State level.

The collective dimension of precariousness: The case of franchising

The report deals in chapter 3 with a major issue concerning the collective dimension of precariousness. It considers the **implications of franchising**, a form of business fragmentation used especially by multi-national and national businesses in the fast-food sector (Royle, 2010), **for workers' collective representation rights secured by primary**

and secondary EU law. It advances two main theses. First, it argues that franchising should be considered as a high-risk driver of representational precariousness only to the extent that law fails to sufficiently prevent business fragmentation from turning into voice fragmentation. Secondly, it identifies the major 'protective gaps' as mainly located in secondary EU law but also arising from the problematic asymmetry generated by the exclusion of competences in areas of freedom of association and industrial action and the application of fundamental rights. These gaps create 'loopholes' that could be exploited for undermining the 'effective and 'inclusive' nature of workers' representation standards.

The analysis is divided in four parts. The first part looks at the business architecture of franchising which rests upon the paradoxical combination of legal independence and business fragmentation with strong economic integration and control. Subsequently, the second part examines the labour architecture of franchised networks and maps its potential negative implications for workers' voice. The third part reviews the primary and secondary EU law for its application to franchised networks by identifying the relevant protective gaps. The final part illustrates the problematic asymmetry generated by the exclusion of competences in areas of freedom of association and industrial action and the application of fundamental rights.

The interplay between different policy measures

The reduction of precarious work in Europe is more likely to be achieved in societies where more inclusive, equal and effective labour standards are upheld. In turn, this means that there are strong interactions across different policy instruments; initiatives designed to fill in gaps in one area may not be successful if they are not supported by complementary policies and reinforcing mechanisms in other areas (Rubery and Koukiadaki, 2016). Against this context, interactions based on complementary policy approaches may reinforce outcomes for precarious work in either negative or positive directions.

The report examines in chapter 4 the interactions between different policy mechanisms that affect specific forms of precarious work, as identified in the petitions to the Committee on Petitions of the European Parliament. The analysis identifies three main domains of interaction. The first is in respect of the **links between working time and precariousness**. The growth of variable working hours' arrangements, encompassing issues of predictability and control over the allocation and scheduling of working time, is directly constructed by regimes of working time regulation (Bogg, 2016: 278). In this respect, the Working Time Directive deems that **individuals will be workers** regardless of whether the contractual arrangement is fixed-term or part-time, and irrespective of whether there is 'mutuality of obligation', which is required in British labour law but may be absent in certain forms of casual work. However, the **absence of minimum working hours** is directly linked to the irregularity of future work and ultimately to the employer's unilateral control over working time schedules.

Secondly, on the basis that the provision of information to employees about the main terms of their employment is a fundamental aspect of social policy (Clark and Hall, 1992: 106), the analysis concentrates on the **relationship between atypical forms of work and the regulation of the employee's right to know of the conditions applicable to their contract or employment relationship.** The report identifies three rationales: (i) a moral rationale, namely that awareness of the main terms of their employment is intrinsically linked with the notion of personal autonomy and dignity; (ii) an economic rationale, namely that the provision of information can be associated with market efficiency, and (iii) an

effectiveness rationale, namely enhancing the ability of individuals but also that of public institutions and other parties to monitor and enforce compliance with labour standards.

Drawing on the fast-food sector, the third domain of interaction concerns the **mutually** reinforcing interaction between business fragmentation in the form of franchise agreements, atypical employment and representational precariousness. By its logic, franchising could operate as a significant enabler of atypical forms of employment and noncompliance with labour standards, an effect achieved in combination with sector-specific characteristics. This is because the economic logic of franchising may enable the adoption of atypical work through cost minimization strategies, though by no means franchising should be considered the sole factor. The prevalence of atypical forms of employment, in turn, may enable representational precariousness to the extent that it leads to deprivation of effective workers' voice. Finally, representational precariousness itself may be an enabler of atypical forms of employment and hence of franchising as a cost reduction business structure.

Conclusions and policy recommendations

Labour law and industrial relations systems in the EU are increasingly characterised by the transfer of risk from employers to the workforce. If the problem of a transfer of risk from employers to the workforce is a pervasive one and applies at all levels of the labour market (including also in respect of the erosion of the SER), this raises **serious questions for EU social policy.** What is more, regulation to tackle the transfer of risk to the workforce would require **the EU to work holistically across boundaries within EU law** (on this, see Davies, 2013).

This chapter identifies different domains where policy reforms could be developed to counter the rise of precarious work in the forms identified in the report. In doing this, the report puts forward as a central argument that the socially-progressive goal of reducing precarious work in the EU should be pursued on the basis of three main principles: those of **inclusive**, **equal and effective labour standards**. New initiatives, which would provide the basis for a push against precarious work, should be identified promoting labour standards' inclusivity and effectiveness alongside the principle of equality between standard and non-standard workers. Four main policy areas are identified:

- Extending employment protection coverage through the adoption of a broader and EU definition of the notion of 'worker' that applies across all EU labour law Directives and promoting the role of multi-level collective bargaining;
- Addressing the temporal and organisational control dimensions of precariousness (Kountouris, 2012), through the revision of the focus of both the Atypical Work Directives and the Working Time Directive;
- Developing more holistic mechanisms for ensuring the effectiveness of labour standards, including improved access to information regarding employment conditions, including in the case of franchise networks, and access to justice;
- Protecting the inclusiveness and effectiveness of workers' voice in franchise networks by addressing the law's failure to adequately prevent business fragmentation from turning into voice fragmentation and recognise franchising as a high-risk enabler of representational precariousness.

In putting forward these proposals, we are aware of two main objections that could be raised. The first concerns the fact that the call for coordinated action across many interconnected domains presents particular **political challenges for the EU Member States but also the**

social partners. However, given than curtailing precarious work is not a fixed but a constantly moving target and even the current level of decent labour standards is at risk, there is a strong argument for being attentive to the interactions between different policy mechanisms that affect specific forms of precarious work. The second challenge concerns the fact that effective regulation to tackle the transfer of risk to the workforce would have to cut across the **boundary between EU and national competence** (Davies, 2013). Given the increasing evidence suggesting a strong relationship between precarious work and health and safety and the direct relevance of working conditions with precariousness, the legislative competence under Articles 153(1)(a) and (b) TFEU in respect of improvements in particular of the working environment to protect workers' health and safety and working conditions, which covers in principle the whole labour field of labour law, would be appropriate legal bases.

1. INTRODUCTION¹

KEY FINDINGS

Precariousness is a multi-faceted and multi-factorial phenomenon. To examine the developments, the report adopts the now classic definition of precarious work provided by Rodgers and Rodgers: "The concept of precariousness involves instability, lack of protection, insecurity and social or economic vulnerability" (Rodgers, 1989: 3). In this context, the legal system may exhibit a Janus-faced function (Barbier and Colomb, 2015): progress in one dimension (e.g. the legal system acting to disable the risk of precariousness in respect of employment protection coverage) may be counterbalanced by movement in the opposite direction in other dimensions (e.g. limiting the regulatory function of collective bargaining). Consequently, there is a need for a holistic and comprehensive action for addressing what emerges as a constantly moving target.

Precariousness is a normatively (and constitutionally) problematic practice as evaluated against the EU's scheme of fundamental social rights. A systematic reading of fundamental social rights, as especially orientated around Article's 31(1) CFREU asking for dignity-respecting conditions of employment, establishes a constitutional foundation in favour of fundamental rights. One major consequence of this reading is the normative priority assigned to a rights-based approach, which requires the workers' treatment in accordance with autonomy and equality along with the provision of decent and fair remuneration. Primary law establishes a pro-active and holistic duty to tackle precariousness, or at least shield workers from its rights-violating consequences. This duty, exercised in the framework of competences, should be recognised in the context of a broader recognition of precariousness as a fundamental rights issue of enormous weight and significance within the EU's normative order.

Drawing partly on the recent work by the ILO (ILO, 2016) and Grimshaw et al. (2016) to identify a range of gaps that may reproduce and/or reinforce a process of precarisation of work, the study introduces a novel taxonomy of **inter-linked and mutually constitutive 'protective gaps' categorised as employment protection, representation and enforcement gaps**. Our study's contribution is three-fold. First, the gaps are situated at **different levels** in order to reflect the legal/regulatory polycentric design of the EU (primary EU law, secondary EU law, compliance by EU Member States). Secondly, the analysis focuses mainly on the **legal characteristics of work relations**. Thirdly, it incorporates explicitly the **salience of voice and representation** in the operationalisation of precarious work, which until hitherto was traditionally overlooked in studies about precarious work.

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1.1. Defining precarious work

There is growing evidence that the world of work is changing: technological transformations, the financial and sovereign debt crisis, structural and demographic developments have, it is argued, resulted in the deterioration of the 'Standard Employment Relationship' (SER) and the set of institutions and work practices that served to underpin this relationship (Rodgers, 2016: 5). The latter is becoming increasingly unstable in many industrialised countries, including in Europe, and this instability undermines the regulatory regimes that organised and governed labour markets and employment relationships for much for the twentieth century (Stone and Arthurs, 2013: 1). These transformations have set in motion a process of 'de-mutualisation', consisting of the shifting of the bearings of costs of risks away from a set of entities (i.e. the state and employers) back to the individual workers (Countouris and Freedland, 2013; Crouch, 2015), increasing in turn the risk of labour market segmentation and precariousness. The term 'precariousness' has become rather conventional in describing the increasing insecurity and vulnerability of workers in contemporary societies in Europe and also elsewhere in the world. The rise of variable working hours' arrangements, atypical work in the form of fixed-term and part-time contracts in conjunction with new organisational practices favouring fragmentation and public policy measures designed to reduce the 'rigidity' of employment protection legislation have prompted calls for combating the precarisation of work.

Before we can discuss about precarious work, we must though first clarify the **meaning of the SER**, since this has been the norm for assessing the notion of precariousness. The traditional SER has been defined as:

"a stable, socially protected, dependent, full-time job ... the basic conditions of which (working time, pay, social transfers) are regulated to a minimum level by collective agreement or by labour and/or social security law" (Bosch, 1986: 165).

The full-time nature of the job, its stability, and the social standards linked with permanent full-time work have been the key elements in this definition. It is true that in EU Member States, the SER, as a long-term attachment to a single employer and accompanying wage and benefit expectations, takes different forms in its details and has different legal components in different countries. Some elements of the SER are contractual, that is part of a bargain between employers and employees, whether individually or collectively negotiated. Some are regulatory requirements layered on top of the individual contract of employment (Freedland, 2013). Irrespective of these differences, the founding premise of the SER has been that only full-time employment guarantees a family wage and an adequate level of social protection, while a stable job places the relations between employer and employee on a long-term footing (for an analysis, see Bosch 2004).

At the same time, it is important here to distinguish between a factual and legal/conceptual understanding of the SER notion. From a **factual perspective**, there is evidence, as we shall see later, to suggest that there is a growing percentage of workers employed on the basis of atypical contacts of employment, including but not limited to part-time work, fixed-term work and subcontracting. Equally importantly, while the share of the workforce engaged in a SER contract has remained relatively stable across all EU Member States, 'the norms of fairness, redistribution, and job security associated with the post-war social contract (through which the SER was realised) have to an extent been hollowed out (Grimshaw et al., 2016: 161, see also Trif et al., 2016).

But even from a **legal/conceptual perspective**, the function of the SER has been called into question from two opposing directions. On the one hand, for mainstream economists, the preferential treatment by employers to labour market 'insiders' to the detriment of 'outsiders' (Lindbeck and Snower, 1988), who are then trapped into bad jobs or are

unemployed, is primarily attributed to the distinction between 'temporary employment' and 'open-ended employment' (Auer and Cazes, 2000). On the other hand, the SER has been subject to criticism from progressive scholars, for whom the increase in 'working on the margins' (Vosko, 2010) or the rise of the 'precariat' (Standing, 2011) are associated with the problem of narrowing of the segment of the population covered by traditional employment regulation and social protection (Stone and Arthurs, 2013, Vosko 2010) and the consequent growth in dualism (Palier and Thelen, 2010) (for a review of the different arguments, see Rubery, 2015).

Against this context, our starting point for the analysis at present is that **the SER 'does not itself cause labour market dualism or segmentation** (Fudge, 2017: 13). It has been long established that it is employers' selection, investment and retention decisions create segmented or divided labour markets (Osterman, 1994; Rubery, 1978, 2007). This is even more so in times of crisis when the initiative in industrial relations, due to higher unemployment and labour deregulation policies, tends to shift to employers (Strauss, 1984; Streeck, 1987; Trif et al., 2016). Our approach is consistent with the work of academics that view the SER as still constituting a normative point of reference in the construction of systems of labour market regulation through collective bargaining and labour law (see, among others, Bosch, 2004; Deakin and Mückenberger, 1992; Rubery, 2015; Grimshaw et al. 2016).

The second issue that is worth defining at present is **the notion of employment precariousness** itself. In his detailed exposition of the evolution of the notion in a historical and comparative perspective, Barbier (2011) puts forward that there is no such thing as 'precariousness', 'a-typicality' or 'non-standard' employment per se, but rather that these have to be embedded into the wider perspective of social protection systems and political cultures. It is the case certainly that **different, though not necessarily mutually exclusive, approaches to conceptualising employment precariousness have been developed in the recent decades.** An analysis of the debates in the area reveals the existence of different perspectives on the definitional reach of employment precariousness. These differences reflect first the different disciplinary standpoints and secondly the diverse and multiple values that can be attributed to the concept of employment precariousness.

From a disciplinary perspective, sociology and institutional economics (including industrial relations) have associated the notion of precariousness to labour market segmentation, with attention being paid to employers' strategies to differentiating the workforce. This was later expanded and complemented by analyses highlighting the various processes of flexibilisation driven by labour cost competition and the role of macro-economic developments (Barbier, 2011: 7-12). Within the legal discipline, calls have been made increasingly for a new construction of labour law around the idea of precarious work (see, for instance Fudge and Owens, 2006 and Kountouris, 2012). The relationship between precarious work and social rights was brought into sharp focus in a 2012 comparative report covering a number of EU Member States (McKay et al., 2012). There, the **association between precarious work and the absence of social rights** was argued to be irrefutable: "individuals in precarious work are more likely to be excluded from social rights, such as to decent housing, medical care, pensions and education, while exclusion from these social rights pushes individuals into precarious work. Work precariousness thus feeds into other situations that cement individuals into precarious lives" (McKay et al., 2012: 5).

The starting points of distinct disciplinary perspectives have then different implications for the definitional remit of precarious work. As Kountouris (2012: 24) identifies, it is possible to distinguish between three main approaches to precariousness: "A first one that sees precariousness as essentially dominating particular sectors of the labor market. A second approach that associates precariousness with nonstandard work. And a third one that focuses more on the dimensions and contexts of precariousness, as a potentially applying beyond

atypical work relations." An increasing number of reviews of precarious work tend to adopt the third approach, i.e. **delinking precarious work from the type of contract, when examining the evolution of the notion of precariousness** (e.g. ILO 2016; Grimshaw et al., 2016; McKay et al., 2012; Trif et al., 2016). It is there argued that precariousness can be found within both standard and non-standard employment. At the same time, just as standard jobs can be precarious, it is also the case that non-standard jobs are not necessarily precarious. As the ILO report stresses (2016: 18), non-standard is about a contractual form, whereas precariousness refers to the attributes of the job'.

The lack of a precise definition of precarious work is also reflected at EU policy level. Until recently, there was little explicit mention of precarious work itself. Instead, the main proxies for precarious work and its social consequences were traditionally 'quality' in employment and 'social inclusion' (Ashiagbor, 2006). The issue of employment precariousness was predominantly couched in the 'insider-outsider' rhetoric, leading to calls for the adaptation of the SER and the simultaneous increase in the level of flexibility afforded by reducing employment protection in line with the 'flexicurity' paradigm. The rare reference to precariousness or *précarité* in EU law took place against the adoption of a range of Directives in the field of atypical work (Öberg and Schmauch, 2016: 10). On its part, the European Commission has stressed that 'precarious work' is not a legal concept in EU 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.

However, there is evidence to suggest that **the term 'precariousness' has slowly acquiring significance in the EU public policy and discourse.** In a recent report, the EP (2017: 9) understood precarious employment 'to mean employment which does not comply with EU, international and national standards and laws/and or does not provide sufficient resources for a decent life or adequate social protection'. But the language of both the European Commission and the Council of the European Union seems also to be shifting towards emphasising the need to deal with the issue of labour market segmentation. In its latest Annual Growth Survey 2017, the European Commission explicitly acknowledged that "precariousness, segmentation of the labour market and their impact on productivity growth need to be addressed in this context to reduce their negative impact on internal demand and productivity growth" (European Commission, 2016a). These developments can be read in conjunction with the 'European Pillar of Social Rights' initiative, put forward by the President of the Commission, Jean-Claude Juncker (European Commission, 2016b). Under Chapter II, entitled 'Fair working conditions', principle 5 states:

"Regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to social protection and training. The transition towards open-ended forms of employment shall be fostered.

In accordance with legislation and collective agreements, the necessary flexibility for employers to adapt swiftly to changes in the economic context shall be ensured.

Innovative forms of work that ensure quality working conditions shall be fostered. Entrepreneurship and self-employment shall be encouraged. Occupational mobility shall be facilitated.

Employment relationships that lead to precarious working conditions shall be prevented, including by prohibiting abuse of atypical contracts. Any probation period should be of reasonable duration."

It is not only the Commission and the Council that seem to have acknowledged the implications of the changes in the world of work for labour standards and working conditions.

A search in the Curia database suggests that the term 'precariousness' with reference to employment conditions has increasingly being used by the CJEU in the area of social policy as well. As table 1 indicates, the use of the term, albeit still limited, has been more frequent in the recent years and has concerned predominantly the interpretation of key Directives in the area of atypical work, including Directives 91/533 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship and Directive 99/70/EC on Fixed-term Work.

Table 1: References to precariousness in CJEU case law in the area of social policy

Case number/Name of the parties	Document	Subject matter
C-143/16, Abercrombie & Fitch Italia Srl v Antonino Bordonaro	Opinion ECLI:EU:C:2017:235	Principles of equal treatment and non-discrimination on grounds of age — Directive 2000/78/EC — Equal treatment in employment and occupation — Article 6(1) — National legislation providing for on-call working contracts with persons under the age of 25
Case C-16/15, María Elena Pérez López v Servicio Madrileño de Salud (Comunidad de Madrid)	Judgment ECLI:EU:C:2016:679	Directive 1999/70/EC – Clauses 3 to 5 — Successive fixed-term employment contracts within the public health service — Measures to prevent the abusive use of successive fixed-term employment relationships — Penalties — Reclassification of the employment relationship — Right to compensation
C-238/14, Commission v Luxembourg	Judgment ECLI:EU:C:2015:128	Directive 1999/70/EC — Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP — Occasional workers in the entertainment arts — Successive fixed-term employment contracts — Clause 5(1) — Measures to prevent the abusive use of successive fixed-term contracts — Concept of 'objective grounds' justifying such contracts
Joined Cases C-302/11 to C-305/11, Valenza v Autorità Garante della Concorrenza e del Mercato	Judgment ECLI:EU:C:2012:646	Directive 1999/70/EC – Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP — Clause 4 – Fixed-term employment contracts in the public sector — National Competition Authority — Stabilisation procedure — Recruitment of workers employed for a fixed term as career civil servants without a public competition — Determination of length of service — Complete disregard of periods of service

completed under fixed-term employment contracts — Principle of non-discrimination C-313/10, Land Nordrhein-Westfalen Opinion Directive 1999/70/EC - Framework agreement on fixed-term work - Clause 5(1) - Measures to ECLI:EU:C:2011:593 v Sylvia Jansen prevent the abusive use of successive fixed-term contracts - 'Objective reasons' justifying the renewal of such contracts - Taking into account of the number or accumulated length of successive fixed-term contracts - Justification reserved to the public sector – Justification based on budgetary funds provided for fixed-term employment - Clause 8(3) - Reduction in the general level of protection afforded to workers -Interpretation in conformity with European Union law C-250/09, Vasil Ivanov Georgiev v Tehnicheski universitet **Judgment** Directive 1999/70/EC – Framework agreement on fixed-term work - Clause 5(1) - Measures to - Sofia, filial Ploydiv ECLI:EU:C:2010:699 prevent the abusive use of successive fixed-term contracts - 'Objective reasons' justifying the renewal of such contracts - Taking into account of the number or accumulated length of successive fixed-term contracts – Justification reserved to the public sector – Justification based on budgetary funds provided for fixed-term employment - Clause 8(3) - Reduction in the general level of protection afforded to workers -Interpretation in conformity with European Union law C-306/07, Ruben Andersen v Kommunernes Landsforening **Judament** Directive 91/533/EEC - Article 8(1) and (2) -ECLI:EU:C:2008:743 Scope - Employees 'covered' by a collective agreement - Concept of 'temporary' contract or employment relationship

Case C-267/06, Tadao Maruko v Versorgungsanstalt der	Opinion	Payment of a survivor's pension under a
deutschen Bühnen	ECLI:EU:C:2007:486	compulsory occupational pension scheme -
		Refusal to pay on the grounds that the partners
		had not married - Same-sex couples - Directive
		2000/78/EC - Scope - Exclusion of social security
		benefits - Definition of pay - Discrimination based
		on sexual orientation
C-173/99, The Queen and Secretary of State for Trade and	Judgment	Protection of the health and safety of workers -
Industry, ex parte: Broadcasting, Entertainment,	ECLI:EU:C:2001:356	Directive 93/104/EC - Entitlement to paid annual
Cinematographic and Theatre Union (BECTU)		leave - Condition imposed by national legislation -
		Completion of a qualifying period of employment
		with the same employer
C-234/98, G.C. Allen and Others v Amalgamated	Opinion	Safeguarding of employees' rights in the event of
Construction Co. Ltd	ECLI:EU:C:1999:383	transfers of undertakings - Transfer within a group
		of companies
C-154/92, Van Cant v Rijksdienst voor Pensionen	Opinion	Directive 79/7 on the progressive implementation
	ECLI:EU:C:1993:213	of the
		principle of equal treatment for men and women in
		matters of social security
C-184/83, Hofmann v Barmer Ersatzkasse	Opinion	Interpretation of Council Directive 76/207 on the
	ECLI:EU:C:1984:231	implementation of the principle of equal treatment
		for men and women as regards access to
		employment, vocational training and promotion,
		and working conditions

Against this context, our approach to the notion of precarious work for the purposes of the report draws on the now classic definition of precarious work provided by Rodgers and Rodgers: ""What makes work precarious? There is a tendency to regard regular, permanent wage work as secure, and to consider other forms of work as precarious insofar as they deviate from this norm. But there are several dimensions to precariousness...The concept of precariousness involves instability, lack of protection, insecurity and social or economic vulnerability...Not that this eliminates ambiguity; an unstable job is not necessarily precarious. It is some combination of these factors which identifies precarious jobs, and the boundaries around the concept are inevitably to some extent arbitrary" (Rodgers, 1989: 3). Instead thus of considering precarious work as a duality (i.e. work is either precarious or not precarious), it is seen here as a feature existing on a contextually defined continuum (i.e. degree of precariousness) (Öberg and Schmauch, 2016: 18). This then implies, as we will discuss later in this chapter, that the notion of precariousness needs to be explored in a multi-dimensional perspective, examining the process of precarisation on the basis of various facets of work. Finally, in emphasising the notion of **de-mutualisation** of risks and vulnerability, our approach provides a useful corrective to the tendencies on both sides (i.e. proponents of labour market flexibility and protective labour standards), to emphasise the economic and social processes, which affect the labour market, and to neglect consequently the individuals affected by the institutions (Rodgers, 2016: 3; Countouris and Freedland, 2013).

The relationship between **fragmentation**, as a process leading to extensive changes in the conventional organisational models and the nature of employment, and precarious work is central to our analysis. From an organisational perspective, fragmentation reflects the organisational practice of breaking down a whole business process into its constituent elements and their scattering across different spaces and time zones. On the one hand, such practices may be interpreted as being intrinsic to the freedom to conduct business, the latter being the subjective right to engage in economic activity in a regime of free competition (Everson and Correia Gonçalves 2014: 447). On the other hand, however, the freedom to conduct business is not absolute and inviolable, but can be subject to limits deriving from principles set down by the legislator (e.g. the 'social finality clause' in the Italian Constitution) or by industrial relations rules and practices delineating, for instance, employee co-determination rights (e.g. in Germany and Sweden) (Iossa, 2017). Without the establishment and effective operation of such limits, organisational fragmentation may be directly linked to the emergence of the so-called 'fissured workplace', in the form of multilayered contracting, outsourcing, franchising and supply chains, and ultimately precarious work (Weil, 2014: 8, emphasis added).

"During much of the twentieth century, the critical employment relationship was between large businesses and workers. Large businesses with national and international reputations operating at the top of their industries... [Lead businesses] continue to focus on delivering value to their customers and investors. However, most no longer directly employ legions of workers to make products or deliver services. Employment has been actively shed by these market leaders and transferred to a complicated *network of smaller business units...*This creates *downward pressure on wages and benefits*, murkiness about *who bears responsibility for work conditions*, and increased *likelihood that basic labor standards will be violated*. In many cases, *fissuring* leads simultaneously to a rise in profitability for the lead companies who operate at the top of industries and increasingly *precarious working conditions* for workers at lower levels'.

From an **employment perspective** as well, fragmentation acts as a useful analytical concept for understanding, in particular, the developments in respect of atypical work. Again here, the issue can be approached from two angles. The conventional understanding, on the basis of the freedom of contract, suggests that workers make a conscious choice to accept atypical

employment, or it may be the outcome of a voluntary and explicit agreement between an employer and the individual. However, the **falsity of the idea of the contract of employment as one of parity between the parties** has traditionally been emphasised by labour law scholars (see, among others, Freedland, 2016). Calls have been made for attention to the one-side bargain due to the superior bargaining power of the employer, especially in the recent years with the decline of trade union strength and collective bargaining coverage. Empirical evidence is consistent with the debunking of this myth. The majority of European countries have seen an increase in the incidence of involuntary part-time work in the last decades (for a review of the evidence, European Parliament, 2016a). In turn, this impacts upon the quality of atypical work itself, as it has been found that the latter depends considerably on whether engagement in it is voluntary (ILO, 2016).

But it is not only that fragmentation characterises now both organisational practice and the nature of employment itself. Our analysis in chapter 4 will highlight how **whilst both aspects of fragmentation are distinct, they can be simultaneously inter-related.** This is because "the fragmentation of the enterprise as an organisation and the decline of hierarchy in the organisation of internal markets have led to more complex employment relationships that do not fit with the conception of employment along the SER model" (Fudge, 2006: 616). There is thus the need to go beyond "this polarisation of the 'employment' and 'organisation' dimensions of work" so as to provide an integrated analysis that appreciates the interaction of the two dimensions (Grimshaw et al., 2004a: 10). As figure 1 highlights, the variations in the employment relationship occur not only along the x-axis, which represents the variations in internal labour markets and the SER, but also along the y-axis, which represents the extent to which the employment contract is under the influence of a single employing organisation or is the subject to control or influence by multiple employing entities.

Self-Multi-employers employment Secondment; TUPE **Temporary** transfer; joint agency ventures/part workers; nerships; zero-hours franchises; contract outsourced workers; services casual workers Pseudo selfemployment; Single employer Standard long-term temps employment **Employees** Non-employees

Figure 1: The relationship between organisational and employment fragmentation

Source: adapted from Grimshaw (2005).

Against this context, the **role of the legal system**, including at EU level, in respect of shaping working conditions can be considered as **Janus-faced (Barbier and Colomb, 2015)**. Just like the old Roman god Janus, guardian of gates and doors, beginnings and ends, with two faces, one on the front and the other at the back of his head, the constituent features of the legal system, including primarily legislation and the judiciary, may respond to

the rise of precarious work in two main ways (on this, see also Trif et al. 2016). The first consists of adopting in essence a **constraining approach to employment precariousness** by developing attempts to fill in the gaps left from changes in economic, demographic, technological and organisational practice. The second and alternative scenario would be for the legal system to constitute **an enabler of precarious work** through normalising, for instance, the resource to atypical forms of employment without establishing safeguards against abuse. In line with the Janus-faced function of the legal system, progress in one dimension (e.g. the legal system acting to disable the risk of precariousness in respect of employment protection coverage) may be counterbalanced by movement in the opposite direction in other dimensions (e.g. limiting the regulatory function of collective bargaining). This then implies that employment precariousness itself should not be understood as a static but as a **dynamic process** that is subject to multiple pressures and influences.

1.2 EU fundamental social rights: The constitutional foundation against precarious employment

This part argues that 'precarious employment' is a **normatively (and constitutionally) problematic practice** as evaluated against the EU's scheme of fundamental social rights. This scheme finds its main expression in the CFREU, vested with primary law status by Lisbon Treaty (Art.6(1) TEU). Considering the elevated role of fundamental rights within the EU's normative order as a general principle of EU Law,² founding value with concrete legal effect (Art.2 TEU; and for the co-constitutive relationship of fundamental rights with rule of law rule and democracy, see Carrera et al., 2013) and objective (Art.3 TEU) (see Dorsemmont, 2012), this assessment is – or, at least should be- of major significance for the legitimacy of precariousness.

Driven by the indivisibility and equal status of social/economic and civil/political rights (see Kenner, 2003 and Maduro, 2003; for a defence of social rights as fundamental human rights see Hare, 2003), the Charter secures the following social rights at work: a right to 'fair and just working conditions', encompassing a right to working conditions which respect the worker's health, safety and dignity' (Article 31 par. 1) and a right to certain working time entitlements, i.e maximum working hours, daily/weekly rests and annual leave (Article 31 par.2); a right to reconcile family and professional life (Article 33(2); a right against unjustified dismissal (Article 30); the right of information and consultation 'at appropriate levels' (Article 27); a right to collective negotiations and collective action (Article 28); a right to join and form a trade union as part of freedom of association (Article 12(1); prohibition of child labour and protection of young people at work (Article 32).

This complex of rights benefits from its operation within a broader socially-orientated framework of Treaty-provided values and objectives (Art.2-3 TEU). Pursuant to this framework, the Union should seek to promote the 'values and the well-being of its people' within a 'highly competitive social market economy', aiming at 'full employment and social progress'. The social values of solidarity and justice along with the objective of social justice are also duly mentioned. Additionally, it should be noted that in its preambles and explanatory notes the Charter refers to the European Convention on Human Rights, European Social Charter and the Community Charter of Fundamental Rights (both in the preamble and explanatory notes) as sources. The latter two sources are also referred in the 5th recital of the TEU and Article 151 TFEU.

To be sure, the Charter makes no explicit reference to precariousness or, conversely, to standard employment. This does not entail, though, a neutral position towards precariousness. The opposite is true for two reasons. First, all rights contribute essential

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² C-11/70 International Handelsgesellschaft para. 4; C-4/73 Nold para.13.

components of a non-precarious employment relationship by recognising some level of security in terms of 'voice' (right to organise, collective bargaining, collective action, information and consultation) or dismissal protection. Secondly, on closer inspection Article 31 on fair and just working conditions could be read as establishing a clear foundation against precariousness. What makes this right acting as a 'grundnorme of the other labour rights in the Solidarity Chapter' and of 'significant normative weight' (Bogg, 2014:846) is its dignity-shaped formulation, expressed in the form of a right to conditions respecting worker's health, safety and 'dignity'. Indeed, Article 31(1) is the one of only two instances³ of Charter's reference to dignity outside Article 1, the latter declaring the inviolable status of human dignity accompanied with an injunction to be respected and protected. Bercusson has characteristically praised the Article 3(1) on the basis that it transforms the entire purpose of labour law, i.e promoting justice and fairness, into a subjective fundamental social right whilst also noting that the dignity's reference 'characterises the development of growing sensibility in employment relations towards the need to protect not only physical safety and psychological well-being, but the whole personality of the worker' (Bercusson, 2009:380).

Prior to examining Article 31's broader implications, engaging with the content of 'dignity' is important. This task is far from simple. Dignity has the reputation of being a notoriously elusive concept, with some arguing that it is essentially contested (for the diversity of definitions to dignity and its role as placeholder see McCrudden, 2008; for the thesis that dignity is essentially contested see Rodriguez, 2015). Following Freedland and Kountouris's seminal work on perceivity dignity as an 'amalgam of autonomy and equality' (Freedland and Kountouris, 2011: 372-376) dignity is seen here as amalgam of autonomy, equality, decent and fair remuneration. Autonomy refers to the 'worker's ability to take decisions about the life to pursue (including of course, one's working life), and the possibility of doing so in the absence of any undue constraints' (ibid 374), which crucially in our account covers not only 'voice' but also the 'stability' of the employment relationship. Equality refers to the egalitarian dimension of dignity, registered in a duty of equal respect for all workers qua human persons and not qua factors of production or commodities. The decent and fair remuneration captures what Ben-Israel calls 'social dignity', which mandates the guaranteeing of 'some threshold of material well-being in order to enable the employee to function as a full member of society and enjoy both the self-respect and esteem of others' (Ben-Israel, 2001:2).

Here we should note that for us the Chapter's failure to explicitly address the *remunerative* dimension in Article is not determinative. Receiving a stable, predictable and decent remuneration is a necessary precondition for the exercise of worker's autonomy and for enjoying what Marshall called a right 'to a 'minimum standard of civilised living' (Marshall, 1950). This link is supported by multiple international human rights instruments. The Universal Declaration of Human Rights (a human rights instrument drawn in the aftermath of World War II) makes a rare reference to dignity in the context of remuneration by the recognition 'of a right to just and favourable remuneration ensuring for [the worker] and his family an existence worthy of human dignity'. Similar references are made by all other main human rights instruments, i.e the European Social Charter, Community Charter of

³ The other reference is Article 25 [The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life].

⁴ Art 23(3). Besides Article 1 stating that 'all human beings are born free and equal in dignity and rights' only Article 22 on social security refers to dignity.

⁵ Article 1(4) of the Revised ESC ['All workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families'].

Fundamental Social Rights of Workers,⁶ International Covenant on Economic, Social Cultural Rights.⁷

The fairness of remuneration, meaning that the wage is equitable and not exploitative, requires an equivalence between the work and the remuneration. From this, it is also implied that there must be an equivalence between employee's rights and obligations. Due to power imbalances and the subordination of the employee to the employer, the employment relationship poses an obvious risk to human dignity. Hence what interests us here is what McCrudden calls 'the relational claim of dignity' (2008:679). Based on previous findings, this claim could be formulated as one demanding from the employer the treatment of workers in accordance with autonomy and equality along with the provision of decent and fair remuneration.

Moreover, the dignitarian basis of Article 31(1) produces some important consequences in respect of the approach and scope of social rights at work. First, it grants absolute priority to a rights-based approach over an economic or market one (for the human rights and economic perspectives of labour law see Davies, 2010). Such priority results from the relationship of Article 31 with Article 1 on human dignity and Article 3 on physical and mental integrity, with which it shares a vital common foundation (Bogg, 2014: 836). Indeed, a relatively uncontroversial aspect of human dignity is its axiomatic commitment to the absolute priority of 'person'. With regards to Article 1, Dupré notes that it 'places human beings at the top of the EU normative pyramid and prescribes that the power balance between human beings and the EU is tipped in favour of the former, so that none of the EU (economic and financial) activities may breach human dignity' (Dupré, 2014: 20). Consequently, Article 31 should be regarded as bringing this priority at the employment relationship. This in turn is not a technical matter. A rights-based perspective entails the categorical rejection of a 'contingent' legitimation of social rights, that is as means to achieve other (economic) ends in favour of one 'based on their inherent value' Hunt, 2003: 56-**57) for the worker**. This instrumentalisation of labour to be disposed according to business imperatives is traditionally regarded as the basic peril of the employment relationship, and acts as a main source of justification of precariousness in the guise of market necessity.

Articles 2-3 TEU also strengthen this rights-based prioritisation. Unlike human dignity and human rights, the internal market features only as a means for the attainment of the objectives and in a heavily qualified manner as part of a 'social market economy'. Secondly, Article 31(1) implicitly acknowledges the workplace as a site of **heightened vulnerability** to mistreatments against human dignity. By doing so, it recognises the limits of contractual autonomy, and by extension the necessity of labour regulation. Employment law scholarship has traditionally traced this vulnerability to the systematic inequalities and subordination of the employee by the employer (Kahn-Freund, 1977; on the concept of vulnerability see Rodgers, 2016). Thirdly, Article 31(1) rejects a narrow version of health and safety as accident and disease prevention for an open-ended standard against any conditions failing

⁷ Article 7 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions. See also the United Nations Economic and Social Council (ECOSOC 2016) general comment prescribing a duty of States to 'combat all forms of unequal treatment arising from precarious employment relationship' (para. 53) and paragraph 18 stating that 'remuneration must be sufficient to enable the worker and his or her family to enjoy other rights in the Covenant, such as social security, health care, education and an adequate standard of living, including food, water and sanitation, housing, clothing and additional expenses such as commuting costs'.

⁶ Article 5 stating that 'workers shall be assured of an equitable wage, i.e. a wage sufficient to enable them to have a decent standard of living'.

to respect worker's health, safety and dignity (Bogg, 2014: 850-852). Thus it captures in its ambit all working conditions that 'may affect human dignity' (Bercusson, 2009: 381), including precarious arrangements.

This broad conception finds also confirmation in the Temporary Agency Work Directive's reference to Article 31(1),8 to the extent that the Directive does not address narrowly conceived health and safety issues but an instance of precarious employment. Fourthly, Article 31(1) and Article 1 should be viewed as having a mutually constitutive relationship. Not only Article 31(1) concretises Article 1 but it also helps clarifying the type of 'personhood' underpinning the Charter. By embracing what Ben-Israel calls a 'social dignity' model, which ensures that 'work is not measured by its market value only', (Ben-Israel, 2001:2) the person assumed by the Charter is that of a situated relational social individual rather than an abstract economic participant. It is a human being that lives in a scheme of power relations across the political, economic and spheres which necessitate his protection. Finally, it is important to take notice of the partial nature of worker's dignity under Article 31(1) compared to other social rights at work. It is partial in two ways. On the one side, the essence of other social rights, albeit addressing what human dignity means in practice, is not reducible to dignity. Values such as justice or worker's solidarity can develop their own independent normative significance along with dignity. But, on the other side, Article 31(1) is only partially implemented by other rights. The specific rights do not exhaust its normative force. Understood in this sense, dignity at work should be as a 'framework right', meaning that is 'based upon generality [and] [i]t has an open range of application' (Barak, 2015: 156). Consequently, this openness allows for precarious work arrangements to fall within its scope even when no conflict with other fundamental social rights at work arises.

The insecurities borne out by precarious work are hard to reconcile with fundamental social rights, especially under Article 31. Working under uncertain (e.g. casual work) or limited hours (part-time work) or for a limited duration (fixed-term work) coupled with low income could curtail the worker's ability to plan his life as a human person across the entire web of his family, community and civic relationships. Moreover, the 'demutualisation' (Freedland and Kountouris, 2011: Concluding Chapter) of risks towards the worker, as most notably in zero-hour contracts where the employee bears the full risk of reduced economic demand, establishes a profoundly unfair asymmetry between employee's rights and obligations, and thereby conflicts with the fair remunerations and fair working conditions broadly conceived. Besides these issues, precarious work is a multiplying source of risk potentially preventing the worker from the enjoyment of other fundamental rights. These rights include the following: the right to physical and mental integrity (Moscone et al., 2016; Vives et al., 2013; McKee et al., 2017), with studies having associated nonstandard work, especially temporary work, with 'in-work poverty' (Eurofound, 2017); right to social security and social assistance (Art.34 CFREU) to the extent that they are tied to a specific employment status; the right to family and professional life in as much as uncertain hours may impact the ability of the worker to plan and spend time with his family (Art.33 CFREU). The risk can extend to the well-being of the children of these households and impact the rights of the child (Article 24 CFREU). Indeed, this multiplying effect of insecurity in the employment relationship could account at a normative systematic level for why 'dignity' was expressed in Article 31. Finally, the consequences of 'precarity' in terms of its 'expressive nature' should not be ignored. Khaitan has argued that dignity is an expressive norm (Khaitan, 2012). Indeed, when the employer treats its staff unequally in terms of conditions, for instance by renewing repeatedly a fixed-term contract of an employee without offering an open-ended contract despite the fact that he covers fixed and permanent needs of the

 $^{^8}$ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work L/327/9 Recital 1.

business, this could be regarded as expressing a dignity-injuring disrespect for those workers as of lesser significance.

We are aware that the interpretation of precariousness as incompatible with EU's fundamental rights, centred upon dignity, may attract at least four objections. The first two are normative. One may wish to claim that precarious employment, either as atypical work (e.g temporary work) or as business fragmentation (e.g franchising), is essentially a manifestation of the freedom to conduct business quaranteed under Article 16 of the Charter and the contractual autonomy of the parties. After all, this view would argue, the Charter's explanatory note states that the essence of all rights is human dignity. How is then possible for an arrangement based on dignity under Article 16 to be against human dignity? This thesis lacks adequate support in EU law. To start with, the very recognition of social rights and workplace as a site of potential breaches of human dignity can only be explained as a rejection of a mere freedom of contract approach to the employment relationship. The CJEU has also repeatedly stated that the freedom to conduct business is not absolute but 'must be viewed in relation to its social function'.9 Furthermore, the Charter prescribes that 'none of the Charter rights may be used to harm the dignity of another person'.10 The second critique would object to our 'broad reading' of 'fair and just working conditions' on the basis that the explanations refer for the notion of 'dignity at work' to Article 26 of the revised European Social Charter which concerns only sexual harassment and negative and offensive action at the workplace. However, whereas explanations may function as aid to interpretation, they are not legally binding and certainly they are not exclusive in the sense of excluding issues that are not mentioned. The third critique may caution against the trivialisation (EU Network of Independent Experts on Fundamental Rights, 2006) of human dignity. If everything is included in the dignity, then it may be deprived of its role of as marker of opprobrium of serious violations, such as torture and slavery. While it is important to acknowledge this danger, it is clear from the previous discussion that the Charter rightly considered dignified working conditions as of enormous significance for the personhood of worker.

Starting from a different perspective, the fourth objection may point to the lack of congruence between the position advocated here and the practice of the EU institutions. Williams has talked about the general lack of 'institutional ethos' of fundamental rights within the EU, noting that 'at every turn we can see enthusiasm and rhetorical flourish but in practice human rights are undermined by an institutional incapability to make them truly fundamental' (Williams, 2010: 153). Indeed EU's 'institutional ethos' with regards to social rights is at best ambivalent, at worst unbalanced towards precariousness. The so-called 'flexicurity' agenda' (Fredman, 2004) is linked with a certain de-normalisation of the employment relationship (Freedland and Kountouris, 2011: 386-390). And more recently EU's policy is implicated in austerity reforms calling for more flexible contracts within a broader agenda of Memorandaimposed structural reforms favouring the de-collectivisation, flexibilisation and deregulation of the employment relation even in a manner impervious to strong domestic constitutional labour constraints as exemplified by the case of Greece (Katsaroumpas, 2017). On the other hand, the social policy directives (e.g Part-Time, Fixed-Term Work, Temporary Agency Work) attempted to provide for some partial normalisation in terms of equal treatment of nonstandard workers and preventing abuse of non-standards type of contracts. Rather than ignoring the ambivalent stance of the EU in precariousness, our argument urges for a reorientation of the actual policy with the fundamental rights as a matter of normative right rather than policy discretion.

⁹ C-283/11, Sky Österreich, para.45 and C-201/15, AGET Iraklis, para. 85

¹⁰ Article 1 of the Charter. Explanatory notes.

The preceding discussion developed the argument that fundamental social rights, especially Article 31(1) offer a clear foundation against precarious work. So, what are the practical implications of this position? The most significant is that it gives rise to a pro-active and holistic duty to tackle precariousness, or at least shield workers from its rightsviolating consequences. This duty results from the recognition of precariousness as a fundamental rights issue of enormous weight and significance in the EU's normative order. To quote Kountouris and Freedland, '[r]egulation will still have to make sure that work relations do not arise or develop in ways that harm the personal dignity of the worker (and this regardless of the ways in which they may, or may not, quarantee a certain protection and enhancement of the workers' capabilities, and regardless of their inherent stability)' (2011: 376). In practical terms, precariousness can be detrimental to fundamental rights in two ways. First, by depriving workers of the enjoyment of social rights afforded by primary and secondary law through excluding workers from their personal scope. Secondly, and more broadly, national practices of precariousness can conflict with fundamental social rights, especially Article 31(1). So, it is evident that if the Charter is to act as a 'a substantive point of reference for those involved - members, institutions, natural and legal persons- in the Community content', then the EU institutions should actively strive to limit the use of precariousness, or at least shield workers from its detrimental consequences.

1.3. Protective gaps, precarious work and EU law

In light of the difficulties associated with the concepts of the SER and precarious work, the identification of the **determinants of precarious work** varies depending on the conceptual and disciplinary standpoint as well as the different national socio-economic and legal contexts (see table 2 for examples of studies on precarious work and its determinants/indicators).

Table 2: Identifying precarious work indicators/determinants – main examples

Precarious work	Indicators/determinants of precarious work
European	In-work poverty and low pay
Parliament (2016)	Limited access to social security and labour rights
	Increased risk of stress and ill-health
	Limited access to career development and training
	Low levels of collective rights
European	Little or no job security owning to the non-permanent nature of the work
Parliament (2010)	Rudimentary protection from dismissal and lack of sufficient social protection in case of dismissal
	Insufficient remuneration for a decent living
	No or limited social protection rights or benefits
	No or limited protection against any form of discrimination
	No or limited prospects for advancement in the labour market or career development and training
	Low level of collective rights and limited right to collective representation
	A working environment that fails to meet minimum health and safety standards
International	Employment insecurity
Labour	Earnings insecurity
Organisation (2016)	Hours insecurity
(2010)	Occupational health and safety insecurity
	Social security coverage insecurity
	Training insecurity
	Representation and other fundamental principles and rights at work insecurity
Keller and Seifert	Wage that is less than two-thirds of the median hourly wage
(2013)	Lack of or limited employment security
	Lack of or limited employability (including access to training and the acquisition of additional qualifications)
	Lack of or limited integration into the different branches of social security (pension, health and unemployment insurance)

Kallenberg (2001)	Decline in attachment to employers
	Increase in long-term unemployment
	Growth in perceived job insecurity
	Growth of non-standard work arrangements and contingent work
	Increase in risk-shifting from employers to employees
Kountouris (2012-	Immigration status precariousness
2013)	Employment status precariousness
	Temporal precariousness
	Income precariousness
	Organisational control precariousness
McKay et al. (2012)	Job insecurity – this can be as a result of time (length of contract);
	Uncertainty (unpredictability);
	Pay – low pay; lack of opportunity to improve pay;
	Sub-ordinate employment – exclusion from social and welfare rights; exclusion from employment protection laws
	Absence of rights to representation – no coverage by collective bargaining;
	Difficulty in accessing legal rights
Olsthoorn (2014)	Insecure employment (e.g. fixed-term contract, temporary agency work);
	Unsupportive entitlements (i.e. few entitlements to income support when unemployed);
	Vulnerable employees (i.e. few other means of subsistence, such as wealth or a partner with a significant income).
Pitrou (1978)	Scarcity or absence of labour market skills;
	Absence of career prospects;
	Scarce and irregular finances;
	Unstable/unsatisfactory housing;
	Health problems;
	Uncertainty about family size;
	Lack of social contact
Standing (2011)	Labour market insecurity

	Employment insecurity
	Job insecurity
	Work insecurity
	Skill reproduction insecurity
	Income insecurity
	Representation insecurity
Trif et al. (2016)	Income security: lower than two-thirds of the median wage;
	Job security: short dismissal periods, repeated fixed-term employment without a perspective of regular long-term employment contracts, increase of probation periods, uncertainty related to outsourcing/insourcing in case of temporary agency work (TAW) or other forms of contracts;
	Social security: limited access or lack of pension rights, full sickness leave rights, maternity payment rights, rights for unemployment benefits, the reference income for social security entitlements;
	Working time (e.g. excessive/unpaid overtime, exposure to irregular working hours, variable working hours);
	Collective voice: limited representation by workers' representatives

On the basis of our review on precarious work and the constitutional foundation against precarious work at EU level that emphasises the need to understand precarious work as a dynamic process, encompassing different degrees of exposure to precarious work, we propose that a **rights-based approach against precarious work in the EU** has to be assessed on the basis of protective gaps located at different levels of regulation. In doing this, we draw partly on the recent work by the ILO (ILO, 2016) and Grimshaw et al. (2016) to identify a range of gaps that may reproduce and/or reinforce a process of precarisation of work. It is important to stress here that the framework does not propose deterministic or causal relationships, but rather **the elements are inter-linked and mutually constitutive**. In this respect, protective gaps are said to encourage exclusive labour markets where not all workers enjoy the benefits of decent employment standards, while the narrowing of gaps encourages more inclusive labour markets (Grimshaw et al., 2016; Rubery, 2015). As such, the emphasis on protective gaps is also intrinsically linked with the **identification of legal/institutional strategies at EU level to address the rise of precarious work** and its link to inequality and segmentation in labour markets in Europe.

The novel taxonomy proposed in this report departs from other conceptualisations of precarious work in three main ways: a) it situates the operation of a range of **protective gaps** (i.e. employment protection, representation and enforcement) **at different levels** (i.e. EU primary law, EU secondary law and EU Member State level) in order to reflect the legal/regulatory polycentric design of the EU; b) it focuses mainly on the **legal characteristics of work relations**, as regulated in EU law, that contribute to the latter being or becoming precarious (on this, see also Kountouris, 2012); and c) it incorporates explicitly the **salience of voice and representation** in the operationalisation of precarious work, which until hitherto was traditionally overlooked in studies about precarious work.

The first dimension of precarious work concerns the **types of protective gaps** (see table 3).¹¹ In this respect, the first gap concerns the issue of **employment protection** (Grimshaw et al., 2016). Depending on the legal system in question, the factors that can contribute to employment protection gaps are various. Of primary importance here is employment status precariousness, which, according to Kountouris (2012: 28), is 'the most radical legal determinant of precariousness' but also one of the most country specific determinants of precariousness. In line with the definition of employment protection gaps by Grimshaw et al. (2016), this category also incorporates an examination of the inclusiveness of minimum standard rules (e.g. on maximum hours and minimum wages) as well as that of worker integration in the case of organisational fragmentation (e.g. due to franchise).

The second gap relates to **representation**. Historically, full-employment policies discouraged precarious/non-standard work by increasing the bargaining power of labour, especially when aligned with regulatory regimes that encourage unions and collective determination of working conditions (Quinlan, 2012). Again here, it is possible to distinguish a number of sub-categories: a) institutional gaps in the form of lack of unions, works councils at workplace and/or social dialogue at sector/supply chain level; b) eligibility gaps, related to lack of access to institutions due to employment status, contract, hours and location) and finally c) involvement gaps, related to lack of organising efforts or efforts to involve in institutions or access to managers (Grimshaw et al., 2016). From a legal/regulatory perspective, of particular importance here is the resilience of institutional mechanisms through which collective autonomy, including the exercise of the rights to collective bargaining and industrial action, is safeguarded.

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¹¹ The analysis in the report does not consider the 'social protection gaps' category identified by Grimshaw et al. (2016) in their study, as it is not directly linked to the petitions submitted to the European Parliament's Committee on Petitions.

Finally, the third gap deals with the issue of enforcement: differences in enforcement regimes give rise to particular problems, such as awareness gaps, power gaps and coverage gaps (Grimshaw et al., 2016: 8), increasing in turn the risk of exposure to employment precariousness.

Table 3: Protective gaps shaping precarious employment

Type of gap	Indicators
Employment protection gaps	Minimum standard gaps: minimum wages, maximum hours, paid holidays, sick pay, pension
	Eligibility gaps: employment status, age, length of job, hours or income thresholds
	Upgrading gaps: regulated pay progression in line with cost of living
	Integration gaps: fragmentation due to outsourcing: limited rights to move to stable contracts or change hours
Representation gaps	Institutional gaps: lack of unions, works councils at workplace, social dialogue at sector or inter-firm contracting
	Eligibility gaps: lack of access to institutions due to employment status, contract, hours, location
	Involvement gaps: lack of organising efforts or efforts to involve in institutions or access to managers as agents of the employer
Enforcement gaps	<i>Mechanism gaps:</i> gaps in access, process, inspections, sanctions, whistle-blower protection
	Awareness gaps: gaps in knowledge about rights, gaps in transparency
	Power gaps: fear of loss of job or residency rights, fear of exclusion from unemployment support, lack of access to employer
	Coverage gaps: extent of unregistered workplaces, information and illegal employment

Source: Grimshaw et al. (2016).

The second dimension of the analytical framework concerns the **levels** at which the gaps identified above. i.e. employment protection, representation and enforcement, are situated. 12 The first level concerns **EU primary law** itself. Of primary interest here are the Treaties, including the emerging EU fundamental rights framework and primarily the CFREU, which since the Lisbon Treaty has been accorded the status of primary law. Three issues should be considered here. The first concerns the acknowledgement that whilst the emphasis in the analysis is on the provisions that directly relate to EU employment law (e.g. the title on 'Social Policy'), attention is paid also at the interplay between these provisions and other areas of EU law that may affect indirectly the extent and nature of protective gaps (e.g. regulation of EU freedoms). The second issue relates to the operation of the subsidiarity principle (art 5 TEU), that is that apart from those areas which fall under the EU's exclusive competence, it does not take action unless this would be more effective than action taken at

¹² Other initiatives that may relevant here include the EU's Europe 2020 strategy, the European Semester Process, and the Mutual Learning Programme. The focus of these initiatives is on themes such as segmentation of the labour market and quality of work (further on this, see European Parliament, 2016a).

national, regional or local level. The third deals with the question of EU competence in the sphere of social policy.¹³ In this respect, whilst there are certain excluded areas (Article 153 TFEU), the fact that various limits to EU competence only apply in relation to the specific legal basis to which they directly relate, and not to action undertaken on other legal bases or outside the Treaties, may mean that the European integration of areas of Member State autonomy remains still possible (on this, see Garben, 2017).

The second level is in respect of **EU secondary law**. The main focus at this level is in respect of the role of EU employment law directives in reproducing, reducing or reinforcing the existence of different types of protective gaps. In this respect, it is recognised that EU employment law has dealt with a number of legal determinants of protective gaps, the prime example here being the EU policy response over the years to the growth of atypical work, including but not limited to fixed-term employment, part-time employment and temporary agency work. All Directives adopted in this area are "premised on the progressive idea of equal treatment between atypical workers and comparable 'standard' workers with bilateral, full-time and open-ended contracts of employment" (Kountouris, 2012: 37). However, the effectiveness of these measures in reducing the risk of precariousness of workers in non-standard employment depends on the legal/institutional design of EU secondary law, including the ability of these instruments to deal, for instance, with eligibility and minimum standard gaps.

The third level concerns the EU Member States' level. As in many other areas of EU policy making, EU social policy is characterised by devolving responsibility for the application of the provisions of the Treaty and EU secondary law to the EU Member States. Departing from the traditionally narrow focus of the literature on the sphere of transposition of EU directives, the analysis will incorporate as much as feasibly issues of application and enforcement of EU secondary law in social policy. Compliance here is conceptualised as encompassing three individual aspects: (1) incorporating the policy provisions of EU directives into domestic law within the specified deadline and in a correct manner, i.e., so that domestic law conforms to the standards laid down in the respective EU directive (transposition); (2) guaranteeing that the norm addressees actually behave in a way that is in line with the legal norms laid down in the directives in question (application); and (3) providing for judicial and administrative mechanisms to ensure that non-compliant behaviour by addressees may be detected and non-compliers can be forced to change their behaviour with a view to respecting the norms (enforcement) (Treib, 2014: 17). The advantage of this approach lies in the identification of different points of dissonance between the EU rules and national legislation, impacting in turn upon the nature and extent of protective gaps.

To summarise, we put forward a legal/regulatory model that anchors precariousness in both the types of protective gaps that may reproduce, recreate or reduce the risk of exposure to precarious work (i.e. employment protection, representation and enforcement gaps) and the levels at which these types of gaps may operate (i.e. EU primary law, EU secondary law and EU Member State). Informed by this understanding of

¹³ The present status quo of EU competences in the field of employment is structured as follows: Article 153 TFEU includes the central competence in the field of social policy. It is supplemented by the rules on participation of management and labour in EU legislation pursuant to Article 154 sq. TFEU (social dialogue). Further competences for individual areas of regulation in employment or with relevance to employment law are bestowed: to bring about freedom of movement for workers (Art 46 TFEU), to ensure application of the principle of equal opportunities of men and women (Art 157(3) TFEU), to combat discrimination (Art 19(1) TFEU), to enhance and intensify judicial cooperation in civil matters (Art 67(4) and 81(2)(c) TFEU, to approximate laws which have as their object, or directly affect, the establishment and functioning of the internal market (Art 114 and 115 TFEU) and a supplementary competence (Art 352 TFEU),

¹⁴ Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable on the contract or the employment relationship, Directive 97/81/EC on Part-time Work, Directive 99/70/EC on Fixed-term Work and Directive 2008/104/EC on Temporary Agency Work.

precarious work, the structure of the report is as follows. Chapter 2 makes use of the analytical framework on multi-level protective gaps to highlight the **individual dimension of precariousness**: here, the focus is on variable working hours' arrangements and other forms of atypical work as denial of security and continuity. Chapter 3 then explores the **collective dimension of precariousness**: the analysis here is focused on the (strategic) use of organisational fragmentation and its implications for the representation gap, i.e. lack or limited access to employee voice. Chapter 4 then deals with the **implications for employment precariousness from the interplay between different policy measures**; the focus is on the interaction between atypical work, working time regulation, the workers' right to know about their employment relationship and employer fragmentation. Chapter 5 then concludes with an assessment of the state-of-play in respect of precarious work, EU employment law and fundamental rights and puts forward recommendations for policy makers and relevant stakeholders.

2. THE INDIVIDUAL DIMENSION OF PRECARIOUSNESS: THE CASE OF ATYPICAL WORK

KEY FINDINGS

The analysis in chapter 2 deals with the individual dimension of precariousness. It charts the developments in terms of the use of atypical forms of work, namely part-time, including on-call work, and fixed-term work. The review of empirical evidence allows us to draw a number of conclusions. The first concerns the fact that there has been a significant use of variable working hours' arrangements across a number of EU Member States. This is then coupled with the continuing and even more expansive reliance on more traditional forms of atypical employment, that is fixed-term work. The second issue concerns the fact that some groups such as women and younger workers are more affected by such changes in the labour markets.

The analysis explores then in greater detail two specific cases of atypical of employment, which were the subject of petitions to the Committee on Petitions of the European Parliament; these relate to the case of **Zero-Hours Contracts (ZHCs) in the UK** and that **of Flexi-Job Contracts (FJCs) in Belgium**. In both cases, the report identifies **links with precariousness owing to a number of legal determinants**. These include, among others, issues around employment status due to the lack of mutuality of obligations; differences in treatment in respect of working conditions, including, among others, regarding pay, annual leave and working time; and lack of a basic right to written information on terms and conditions of employment or even, if this exists, there is an employer-determined interpretation of the terms.

The report then explores how the **principle of equal treatment of** (or non-discrimination against) **atypical workers** forms part of the general principle of equality recognised by EU law (Peers, 2013). At the same time, given that the concept of precarious work may explain in a holistic manner social exclusion, attention is paid to the **role of inclusive labour standards in EU primary law**, focusing in particular on the CFREU. It is on this basis that the analysis then **benchmarks EU secondary and national legislation** related to different forms of atypical work. It is argued that while EU secondary legislation and the CJEU case law have made certainly advances towards ensuring labour standards inclusivity and the equal treatment of atypical workers, protective gaps still exist as a result of **deficiencies in EU secondary law**, the exercise of **self-restraint by the CJEU**, which is in contradiction to the 'explicit competences' and to an evolved EU primary law (Jimena Quesada, 2017), and the **limited effectiveness of EU law** due to inadequate transposition and enforcement of labour standards at EU Member State level.

2.1. Developments in atypical work

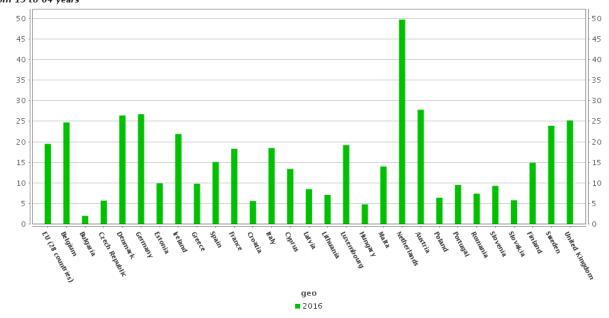
2.1.1. Part-time work

The dichotomy between full-time employment under a contract of indefinite duration (the SER) and atypical employment in the form of part-time has long characterised the labour markets of EU Member States. Part-time work has become 'the most pervasive form of 'non-standard' work in Europe' (Horemans and Marx, 2013: 169). Since national legislation varies in defining the full-time working week, for comparative statistical purposes 'part time' is commonly defined as a specified number of hours, with the threshold for part-time workers

usually set at around 30–35 hours per week (ILO, 2016: 76). In the last decades, statistical evidence suggests that part-time work has gradually increased and at present, around a fifth of all employment is being done on a part-time basis (figure 2).

Figure 2 : Persons employed part-time in EU Member States – Percentage of total employment (2016)

Persons employed part-time - Total % of total employment From 15 to 64 years



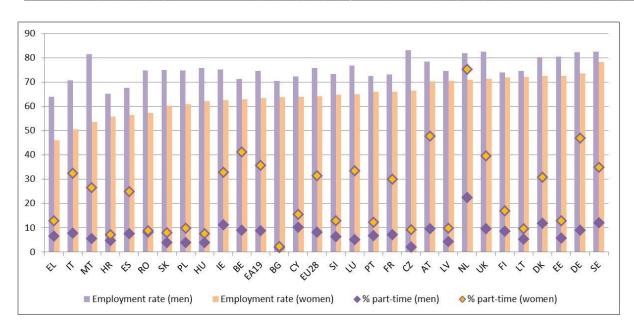
Source: Eurostat.

While part-time work is not homogeneous, it has several typical characteristics (Horemans and Marx, 2013: 170-171). First, part-time work is more common in **female-dominated service sectors**, such as education, health and social work (for a review of evidence, see ILO, 2016). Secondly and relatedly, notwithstanding its recent growth, working part-time remains dominated by **women** (see figure 3).

Figure 3: Employment rate of the population aged 20-64 and percentage of parttime workers by gender in 2015^{15}

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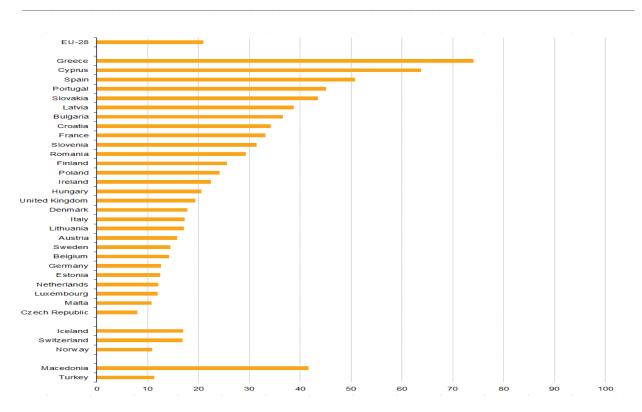
 $^{^{15}}$ Share of part-time workers over the total working population in each gender group. Countries ordered by increasing values of female employment rate.



Source: Eurostat.

Thirdly, the recent growth of part-time work masks the fact that a significant percentage of this is attributed to the rise of the so-called 'involuntary part-time work', that is where individuals are 'looking, but unable to find a full-time job'. Figure 4 shows how many of the part-time workers in each country are involuntarily working part-time. There is a correlation between the extent of involuntary atypical work and precariousness. A 2010 ILO report noted that: 'The definitions of "precarious" and "atypical" 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. (ILO, 2010: 35). Recent research conducted for the European Parliament identified a range of key risk indicators for part-time work, including low pay and low job security, lack of career progression and lack of training (European Parliament, 2016a). Similarly, the ILO (2014), using a range of international data sources, notes that part-time work exhibits many characteristics that can be seen to increase the risk of precariousness. These include lack of equal treatment, inferior pay and social protection coverage, a negative impact on career progression due to reduce access to training and promotion and limited opportunities to resume full-time employment.

Figure 4: Underemployed part-time workers, persons aged 15-74, all countries and EU-28, annual average, 2016 (% of part-time workers)



Source: Eurostat.

Fourthly, data suggests that **young people** were affected the most by involuntary part-time work (figure 5). Moreover, for all age groups the share of women in involuntary part-time employment exceeded that of men. The gender gap widened with age, from 4 percentage points for 15 to 20 year olds to 5.1 percentage points for the 50 to 64 age group (Eurostat, 2017a).

Figure 5: Involuntary part-time employment, by age group, EU-28, 2008 and 2016

Source: Eurostat.

Nicte: Date for 2008 have low reliability

The developments in involuntary part-time are coupled with an increase in so-called 'marginal part-time employment' and 'on-call' work (for a review of the evidence see ILO, 2016). 'Marginal part-time employment' is characterised by very short hours of work – usually less than 15 or 20 hours per week (e.g. the case of 'mini-jobs' in Germany). In the case of on-call work, the employer is not obliged to regularly provide the worker with work, but has the flexibility to call on them when needed. This form of work is thus characterized

by variable and unpredictable hours – from zero hours to full-time work – and overlaps not only with casual work but also with part-time work (on the examples of zero-hours contracts in the UK and flexi-job contracts in Belgium, see analysis below). A 2015 Eurofound study found that such forms of work are the ones that raise most concerns. They are characterised by low levels of job and income security, poor social protection, little access to human resource policies, and in many cases, dull or repetitive work. The high degree of flexibility might be valued by some workers but may be too much for the majority of these categories of workers who would prefer more continuity. What is striking is the considerable lack of representation of workers engaged in such forms of work. This might be attributed to the enhanced flexibility, resulting in a rather fragmented workforce from the perspective of workers' representatives, making it difficult for them to properly represent their interest, taking into account their limited resources (Eurofound, 2015; see also the analysis in ILO, 2016).

2.1.2. Fixed-time work

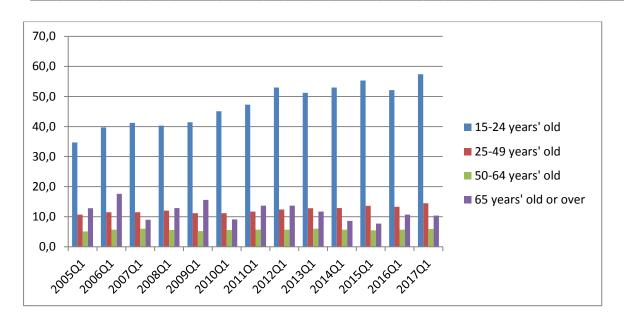
Fixed-term work, which is a significant form of non-standard employment not only for its relevance in numerical terms but also because the regulation governing it, is often used at the national level as a reference for other non-standard forms of employment (ILO, 2016: 20). In broad terms, fixed-term work is an employment arrangement whose end is implicitly or explicitly tied to conditions such as reaching a particular date, the occurrence of a certain event or the completion of a specific task or project. FTCs have been used in many EU Member States (among others, Italy), often initially as transitory measures – in the hope of counteracting the negative employment consequences of the slowdown in economic growth and of boosting employment. De la Porte and Emmenegger argue that fixed-term is inherently precarious due to the low or inexistent dismissal protections and limited access to other labour rights, such as training and career development (De la Porte and Emmenegger, 2017).

According to 2017 data from Eurostat, 13.3% of employees aged 20 to 64 in the EU were working on a FTC in 2016. It was most widespread among **young people**, with 43.8% of 15 to 24 year olds working on a time-limited contract. Temporary employment was much lower among 25 to 54 year olds at 12.1% and for older people aged 55 to 64 at 6.7% (Eurostat, 2017a). The case of Italy is exemplary in this respect. Although the share of temporary employment, including fixed-term but also temporary agency work, was close to the EU-15 average, it was more than 10 percentage points higher among young workers (figure 6).

Figure 6: Temporary employment¹⁶ in Italy as a percentage of the total employment, per age groups (2005-2017)

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 $^{^{16}}$ Please note that the data from Eurostat include directly hired employees but also workers engaged by an employment agency with limited duration.



Source: Eurostat.

In addition to differences between countries and age groups, differences between occupations existed. For most of the EU Member States, managers were the least likely to have limited duration contracts and lower status employees were the most likely to have it. The considerable range in the propensity to use limited duration contracts between EU Member States may, at least to some degree, reflect national practices, the supply and demand of labour, employer assessments regarding potential growth/contraction and the ease with which employers can hire and fire (Eurostat, 2017b).

For many people a FTC, rather than a permanent one, is not always a personal choice. In this respect, data on involuntary temporary employment provides a better insight into the overexploitation of FTCs (Eurostat, 2017a). In 2016, 8.7% of employed 20 to 64 year olds were involuntarily working on temporary contracts (see Figure 7). Again, the share was much higher for young people aged 15 to 24, at 16.0%. Despite some fluctuations, the overall trend since 2006 indicates growing use of involuntary FTCs. Although such contracts could act as a stepping stone for young graduates to permanent jobs, there is also the risk that young people stay trapped in a series of temporary contracts (European Commission, 2012: 91).

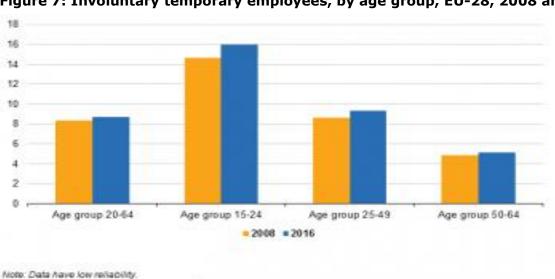


Figure 7: Involuntary temporary employees, by age group, EU-28, 2008 and 2015

Source: Eurostat.

Further, evidence confirms that it was mostly **women** that were employed on the basis of temporary contracts (figure 8). Statistical evidence in the case of Italy shows that divergence was particularly pronounced in the 2007-2008 period, where around 12% of women were employed on the basis of temporary contracts; this was in comparison to almost 8% of men. Evidence suggests that during the crisis, especially since 2010 and onwards, there has been a convergence in terms of the extent to which men and women were employed on the basis of temporary contracts.

14,0 12,0 10,0 8,0 6,0 4,0 2,0 0,0 2008 2009 2012 2007 2010 2011 2013 2014 2015 2016 Males (From 20 to 64 years) Females (From 20 to 64 years)

Figure 8: Temporary employment in Italy as percentage of the total employment: men and women (2007-2016)

Source: Eurostat.

2.1.3. The relationship between atypical work and health and safety

Employment that does not conform to the SER, including part-time, fixed-term and casual work, has long been considered by proponents of labour market flexibility as providing a stepping stone into the labour market for workers who may otherwise not have been employed. This is along the lines of the dictum by Layard (2004) that '(almost) any job is better than no job'. Such arguments have been particularly influential in policy debates around labour market reforms. Among others, Taylor, who led an independent review of modern working practices in the UK (Taylor, 2017a), commented that 'the worst work status for health is unemployment' (Taylor, 2017b). This may thus include even working in a job that does not pay well and in which workers have little control over their working conditions, including on working hours. However, as argued by Bogg (2017: 398) the economic power that the employer may have 'to allocate work and to enter into contractual arrangements...is a source of private domination that can have corrosive effects on the wellbeing and self-respect of precarious workers.'

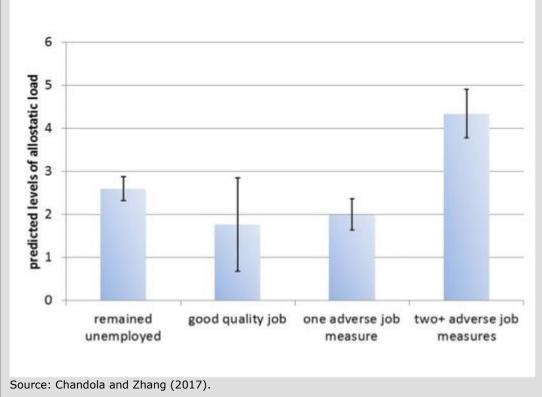
This is increasingly supported by empirical evidence, which shows that employment conditions heavily influence **health inequalities** (Benach et al., 2014). A comprehensive review of the empirical evidence suggests the existence of links between non-standard work, including part-time, fixed-term and subcontracting, and poorer occupational health and safety outcomes, including injury rates, poor physical health and hazard exposures as well as poorer psychosocial working conditions (Quinlan 2015; see also ILO 2016). A recent UK study tested the assumption that any job is better than no job in relation to physical and mental health outcomes as well as chronic stress-related biomarkers and found evidence suggesting that people's levels of stress are more affected by having a poor quality job than

by being unemployed (Chandola and Zhang, 2017; see box 1 below). Research findings from Belgium also confirm that part of the reported health associations could be explained by the precarious social environment of individuals in unfavourable labour market positions (Van Aarden et al. 2017).

Box 1: Re-employment, job quality, health and allostatic load biomarkers

There is little evidence on whether becoming re-employed in poor quality work is better for health and well-being than remaining unemployed. The authors examined associations of job transition with health and chronic stress-related biomarkers among a population-representative cohort of unemployed British adults. Those who found work in good quality jobs had a big improvement in their mental health. Moreover, those with any job, whether it is a good or bad job, had a bigger increase in their household incomes than those who remained unemployed. However, contrary to the "any job is better than no job" assumption, we found that the improvements in the mental health of formerly unemployed adults who became reemployed in poor quality work (with two or more adverse job measures) were not any different from their peers who remained unemployed. More significantly, as shown in the figure below, those who were working in poor quality work actually had higher levels of allostatic load (chronic stress-related biomarkers) than their peers who remained unemployed.





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The next section goes on to examine two specific cases of atypical forms of employment that are the subject of petitions to the Committee on Petitions of the European Parliament; these relate to the case of Zero-Hours Contracts (ZHCs) in the UK and that of Flexi-Job Contracts (FJCs) in Belgium (European Parliament 2016c and 2016b).

2.1.4. The case of Zero-Hours Contracts (ZHCs) in the UK

In the UK, the relationship between atypical work and employment precariousness has manifested around the case of Zero-Hours Contracts (ZHCs). 17 In contrast to the case of flexi-job contracts in Belgium (as shall be detailed below), ZHCs have not developed out of any new initiative or new legislation in the UK with respect to either labour law or social security but have long been a feature of the British labour market. As Kenner (2017: 153) notes, 'there is no single typology' of ZHCs and as such, the term is best understood as encompassing a 'wide spectrum' of casual work contracts. A generally accepted definition of a ZHC is that it concerns an employment contract between an employer and a worker, which means the employer is not obliged to provide the worker with any minimum working hours and the worker is not obliged to accept any of the hours offered. According to the Small Business, Enterprise and Employment Act 2015, which introduced a definition of a ZHC, this is a contract of employment or other worker's contract under which: (a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker; and (b) there is no certainty that any such work or services will be made available to the worker. However, this definition of ZHCs suggests that an individual can have a contract of employment where there is no mutuality of obligation (i.e. where the employer does not offer the individual work and the individual is not obliged to accept any work offered), which is contrary to established case law in the area (see analysis below). 18

The use of ZHCs is argued by both the UK government and employers to be beneficial for both employers and workers, providing employers with flexibility¹⁹ and offering workers a stepping stone into permanent employment and the ability to balance their work and caring commitments. However, the risk of precariousness for individuals on ZHCs has been brought to attention in many studies (for a review, see Rubery and Grimshaw, 2014). Zero-hours workers face firstly significant hurdles in respect of **employment protection**: the prime issue here is in respect of *denying employee status due to the absence of mutuality of obligation*. As Barnard (2016) explains, many individuals on ZHCs may be workers or even employees²⁰ under 'spot' contracts when they are actually working, but the gaps between the individual contracts may serve to break the 'continuity of employment' which is necessary to accrue in order to access key rights. Recent research by the CIPD (2015) highlighted how the complexity and inconsistency in the rules on employment status is linked to significant

¹⁷ There is no straightforward equivalent of the ZHC in other European systems, but it is similar to a widely acknowledged category sometimes referred to as 'on-call' contracts (Deakin, 2016).

¹⁸ See, among others, *Carmichael v National Power (1999)*. For an alternative definition, see Adams and Deakin (2014): they define a ZHC as 'a contract under which an employer agrees to pay for work done but makes no commitment to provide a set number of hours per day, week or month'.

¹⁹ The Resolution Foundation identified four main reasons for the attractiveness of ZHCs for employers. The first is that they allow employers to maximise the flexibility of their workforce to more easily adjust to variations in demand. Secondly, ZHCs allow employers to better manage costs, keeping wages down and reduce risk. Thirdly, recruitment and training costs are reduced and fourthly, employers may be able to avoid employment obligations, including maternity leave and redundancy pay (Resolution Foundation, 2013).

²⁰ UK legislation distinguishes between the notion of 'employee' and 'worker'. The term 'employee' refers means 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment' (section 230(1) of the Employment Rights Act 1996); a range of common law tests have been developed in this respect, including the so-called 'mutuality of obligation' test. The statutory term 'worker', which is an intermediary category between an employee and a self-employed individual, is defined in section 230(3)(b) of the Employment Rights Act 1996 to include contracts where 'the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or undertaking carried out by the individual'. Workers have access to a limited range of labour rights, including the right to be paid the National Minimum Wage, paid holidays and limits on working hours, and protection against unauthorised pay deductions. Those in 'employment', who have a 'contract personally to do work' are also protected under the Equality Act 2010 against discrimination on the grounds, inter alia, of age, sex, racial or ethnic origin, religion or belief, disability or sexual orientation. A broad conception of 'worker' will encompass many zero-hours arrangements, including intermittent work, as long as there is an obligation on the part of the worker to perform work or services for another person on each occasion when they accept an offer of work (for an analysis of the relevance of worker status for ZHCs, see Kenner, 2017).

levels of confusion amongst employers and workers about individuals' employment status and their entitlement to employment rights.

This is intrinsically linked to the **inequality of bargaining power between the parties**. As the Regulatory Policy Committee report stated, "if employers did not have market power, then employees - if they wished - would presumably, for example, be able to negotiate a move to guaranteed hours contracts without government intervention. This might also explain why employees with zero-hours contracts accept clauses like exclusivity which disadvantage them." It is workers in lower-level occupations that are less likely to have the bargaining power to negotiate their working schedules, or indeed any autonomy and control over their schedules (ILO, 2016: 14). The risk of precariousness can moreover be high for some individuals if they are in need of guaranteed hours of work and income levels (European Parliament, 2016a: 14). In this context, concerns exist in respect of management using ZHCs as a 'command and control' tool, e.g. by cutting hours offered to individuals who are not available when required and imposing exclusivity clauses, which tie individuals to a particular employer even though the employer has no work to offer. 21 This leads to a situation that Kenner (2017: 180) describes as 'a twilight zone of employment status hovering somewhere between 'employee' and 'worker' with cases falling either side of the distinction based on the weight given to particular facts gleaned from the contractual documentation, the labels used by employer to describe the relationship, and the conduct of the parties'.

One area where the existence of ZHCs may negate access to employment protection relates to *unfair dismissal and redundancy payment*: on the one hand, an individual may not be able to establish the necessary qualifying period of two years' continuous employment so as to claim unfair dismissal. But even if they are able to satisfy the 2-year rule by linking together a series of contracts and relying on the rule on temporary cessations, there may be uncertainty over whether a temporary cessation, with no further work being offered, amounts to a 'dismissal' in law.²² Even *the basic right to written information on terms and conditions of employment* is not available to many ZHC workers because of the rule that once continuity is broken, accrued service is lost (Adams and Deakin, 2014). But, even if they are entitled (as employees or workers) to a statement of written particulars of employment, the statement is 'no more than a reflection of the employer's interpretation of the terms and conditions contractually agreed between the parties' (Kenner, 2017: 170) whilst there is *no requirement that the contract be in writing*.²³

Further, individuals on ZHCs are entitled, when they are working, to the National Minimum Wage at an hourly rate, a limit on their maximum weekly working hours, rest periods and paid holidays calculated on a pro-rate basis. However, in contrast to the situation in other EU Member States, ZHCs in the UK are not subject to *specific minimum standards' requirements* to protect workers. The absence of a guaranteed number of hours undermines in turn the purpose of the minimum wage, namely to provide a basic income (Kenner, 2017). What's more, while under the legislation 'on-call workers' who are required to be at, or close to, the

²¹ The Small Business, Enterprise and Employment Act 2015 introduced a provision banning the use of exclusivity clauses in contracts, which do not guarantee any ours (see section 27A(3) of the Employment Rights Act 1996). Regulation 2 of Statutory Instrument 2015/2012 makes provision for individuals on a ZHC not to be unfairly dismissed or subjected to a detriment for a reason relating to a breach of a provision of a ZHC. Regulations 3 and 4 provide remedies for individuals, including compensation, by way of proceeding in employment tribunals. However, as Barnard (2016) notes, the introduction of these amendments does not add much, as common law already provides such protection because the enforcement of exclusivity clauses, especially where there is no contract, may well be in restraint of trade.

²² As Kenner (2017: 170) explains, "it is possible for the termination of a fixed-term contract to be deemed a 'dismissal', but it would be relatively straightforward for the employer to show that such a dismissal is 'fair' in the absence of compelling evidence that he or she has acted unreasonably when compared to the standard of the 'reasonable employer'.

²³ ERA 1996, s 108.

workplace are entitled to be paid to the NMW and the same holds true for traveling time while on business, evidence points to a range of practices involving lack of payment for travelling time, costs and/or waiting (Rubery and Grimshaw, 2014).

Table 4, developed by Rubery and Grimshaw (2014), provides a summary of entitlements to employment rights according to employment status drawing on the information provided by the government (BIS, 2013) and by the CIPD (Lewin Silkin 2013). Many depend on whether the person is an employee or only a worker - though as already discussed above employers may treat staff as employees when working but not between assignments, which will mean they do not have the continuous employment relationship required to gain access to most of these rights that only apply to employees. The final arbitration as to what rights they are entitled can only be determined in court. Thus this ambiguity leaves staff open to the interpretation of rights used by their specific employer (Rubery and Grimshaw, 2014).

Table 4: Comparison of employment rights for employees, workers and the self-employed

Employment right	Eligibility	Employment right	Eligibility
National minimum wage	E W	Right not to be unfairly dismissed (after two years' service except for automatically unfair reasons such a discrimination)	Е
Protection from unlawful deduction from wages	EW	Right to written statement terms and conditions	Е
Paid annual leave	EW	Itemised payslip	Е
Maternity, paternity, Adoption leave and pay	Е	Pension auto-enrolment	EW
Part-time status - no less favourable	EW	Right to be accompanied at a disciplinary/grievance hearing	EW
Fixed-term status - no less favourable	E	Rights under data protection legislation	E W SE
Rest breaks	EW	Whistleblowing protection	E W SE (possibly)
Right to request flexible working	E	Statutory sick pay	E W (possibly)
Right to request time to train	E	Unpaid time off to care for dependants	Е
Protection from discrimination	E W SE	Time off for ante natal care	Е
Minimum notice periods	E	Time off for trade union activities	Е
Collective redundancy consultation	E	Health and safety in the workplace	E W SE
Statutory redundancy pay	E	Transfer of undertakings protection	Е

Notes: E- employee; W - worker; SE - self-employed.

Source: Rubery and Grimshaw (2014) on the basis of BIS (2013a) Lewis Silkin (2013).²⁴

Note Professor Deakin's view is that it is only health and safety at the workplace rights that apply to independent subcontractors who are self-employed; all other rights probably only apply to workers but the categories have been reproduced from the two sources as published (Rubery and Grimshaw, 2014).

Statistical evidence on the use of ZHCs

There is evidence to suggest that the use of ZHCs in the UK has expanded in recent years (figure 9). The latest estimate from the LFS shows that 883,000 people reported that they were on a ZHC in the period April to June 2017, representing 2.8% of people in employment;²⁵ this was slightly reduced from 2016, when it stood at 903,000 or 2.9% of people in employment.

1000 900 800 700 600 500 400 300 200 176 156 124 108 119 147 166 143 189 168 190

Figure 9: Number (thousands) of people in employment reporting they are on a zero hours contract (2000 to 2017)

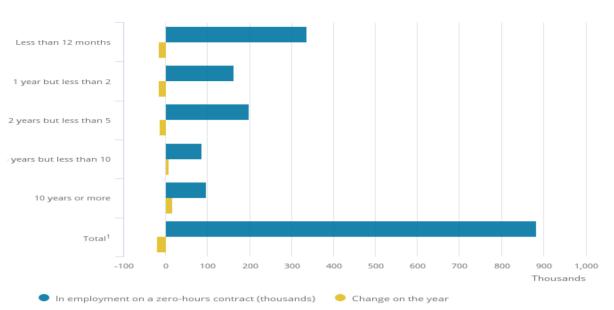
Source: Official for National Statistics.

When looking at the length of time in current job, figure 10 shows that the fall in ZHCs on the year was driven by a fall in the number of people being in their job for less than 5 years. The fall in the three categories (less than 12 months, 1 year but less than 2 and 2 years but less than 5) comprising people in employment in their job for less than 5 years was only partially offset by increases on the year in the number of people who were in their job over 5 years (5 years but less than 10 years and 10 years or more).

Figure 10: Number (thousands) of people on ZHCs by length of time with current employer (2016 and 2017)

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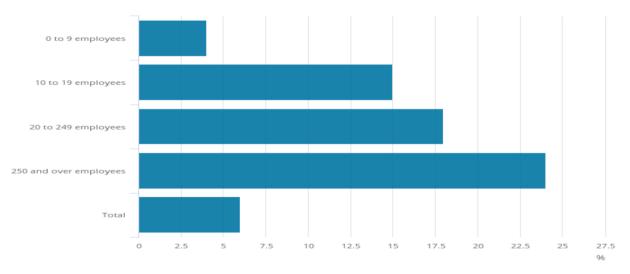
²⁵ Importantly, the people identified by the LFS as being on a "zero-hours contract" will be those in employment who are aware that their contract allows for them to be offered no hours. As such, the number of people who are shown as on a zero hours contract at any point in time will be affected by whether people know they are on a zero hours contract and will be affected by how they are aware of the concept.



Source: Office for National Statistics.

The Office for National Statistics (ONS) business survey for May 2017 asked a sample of 5,000 businesses how many people were employed on No Guaranteed Hours Contracts (NGHCs). Figure 11 shows the share of businesses using NGHCs by size. 24% of businesses with employment of 250 and over made some use of NGHCs compared with around 4% of businesses with employment of less than 10.

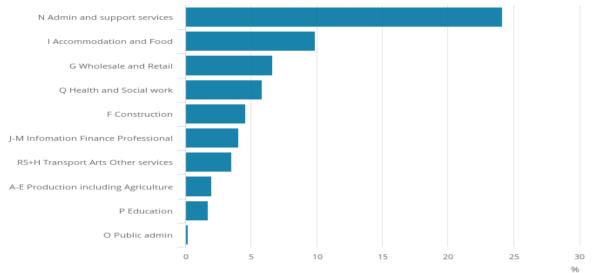
Figure 11: Percentage of businesses making some use of contracts that do not contain a minimum number of hours by size of business (May 2017)



Source: Office for National Statistics.

The share of total employees on NGHCs across industries varied considerably (figure 12). In administration and support services just under a quarter of employees (24.1%) were on a NGHCs in May 2017, compared with public administration where only 0.2% of employees were on NGHCs.

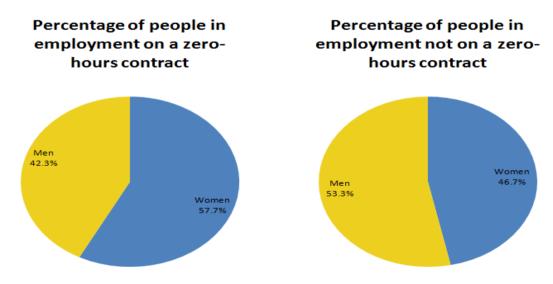
Figure 12: Percentage of all employees on contracts that do not guarantee a minimum number of hours by industry (2017)



Source: Office for National Statistics.

When examining the data on the basis of the type of people who reported that they were employed on a ZHC compared with other people in employment, there were differences in the type of people on ZHCs and the industries in which they worked. It is important to stress here that most of these characteristics have shown little change over recent years. For the April to June 2017 period, empirical evidence suggests that women made up a bigger share of those reporting working on ZHCs (57.7%), compared with their share in employment not on ZHCs (46.7%) (figure 13).

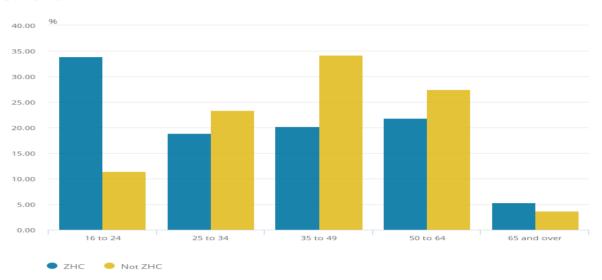
Figure 13: Comparison of percentages (%) of people who are in employment on a "zero-hours contract" and who are not on a "zero-hours contract" by sex, April to June 2017



Source: Office for National Statistics.

Further, individuals who reported being on a ZHC were more likely to be at the youngest end of the age range. 33.8% of people on ZHCs were aged 16 to 24, compared with 11.4% for all people in employment not on a ZHC (figure 14).²⁶

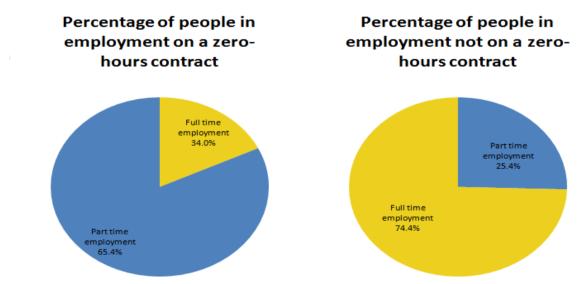
Figure 14: Comparison of percentages (%) of people who are in employment on a "zero-hours contract" and who are not on a "zero-hours contract" by age, April to June 2017



Source: Office for National Statistics.

65.4% of people on ZHCs were working part-time when compared with 25.4% of people who were in employment not on a ZHC (ONS, 2017) (figure 15).

Figure 15: Comparison of percentages (%) of people who are in employment on a "zero-hours contract" and who are not on a "zero-hours contract" on full-time and part-time basis, April to June 2017

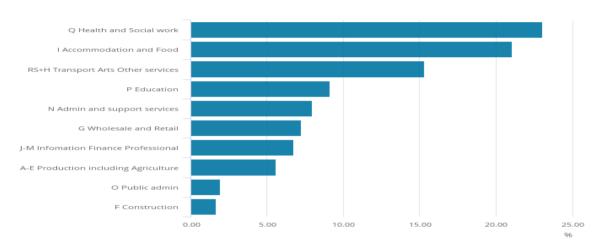


Source: Office for National Statistics.

²⁶ In the same period, 17.9% of people on "zero-hours contracts" were in full-time education, compared with 2.4% of other people in employment (ONS, 2017).

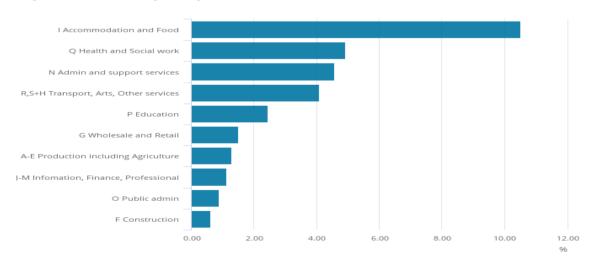
Finally, in terms of sectoral distribution, 23.1% of people in employment on a ZHC were in the health and social service industry, 10.5% of people employed in the accommodation and food industry were on the same type of contracts (figures 16 and 17). One of the companies that reportedly relied heavily on ZHCs in the accommodation and food industry was the fast food chain McDonald's, with almost 83,000 of its UK workforce, 90% of the total, on these contracts (Farrell, 2015). Burger King employed all 20,000 workers in its restaurants on zero-hours contracts, while 20,000 staff of Domino's Pizza had these contracts (Neville, 2013). Following worker mobilisation that targeted the employment status of workers, pay and union recognition at McDonald's, the company announced in April 2017 that it would offer its workers the opportunity to switch from ZHCs to fixed-hours ones (Ruddick, 2017).

Figure 16: Percentage of people on a ZHC by industry, ranked highest to lowest (2017)



Source: Office for National Statistics.

Figure 17: Percentage of people in each industry in employment on a ZHC, ranked highest to lowest (2017)



Source: Office for National Statistics.

2.1.5. The case of flexi-job contracts (FJCs) in Belgium

In November 2015, legislation on flexi-job contracts (FJCs) in the hotel and catering sector was adopted. The 16.11.2015 legislation promotes more flexible employment contracts as a form of compensation for the implementation of another regulation, the so-called 'white-cash deck'. The latter is a measure to combat fiscal fraud – more specifically, fraud on social contributions on working hours. The legislation covers employers that are members of the Joint Committee no. 302 of hotel and catering and those of Joint Committee No. 322 on temporary work in so far as the user comes under the joint committee of the hotel and catering (HORECA) industry.

Under the 16.11.2015 legislation, a FJC worker is an individual who provides employment at least 4/5th time with an employer A and performs a complementary activity, the flexi-job, for an employer B. The legislation requires that employers A and B are different; employees are allowed to combine FJCs with several employers. Prior to the implementation of the first FJC, a framework agreement stipulating certain issues, including wage level, expected duties as well as the duration of the FJC, needs to be concluded between the parties.²⁸ Subsequently, a specific employment contract should be concluded for each period of employment.²⁹ The contract, which should always be fixed-term, may be written or oral. The employer is obliged to keep the framework agreement and the FJC employment contract at the place of employment of the worker.³⁰

The FJC worker is paid by a flexi-wage which must be minimum 8.82 Euros per hour (indexed), to which the employer should add 7.67% flexi-paid leave pay.³¹ The minimum remuneration for a FJC worker is therefore 9,50 Euros per hour. A FJC provides social security rights (sickness, unemployment, pension, etc.) to the worker and the flexi-salary is tax-free: there is no tax or personal contribution, only a special 25% contribution paid by the employer.³² Whereas under Belgian legislation, the daily hours of work in the case of variable part-time work schedules shall be made known to the workers at least five days in advance by posting a notice on the premises of the company, this is not applicable in the case of part-time FJCs.³³ In respect, finally, of overtime working hours, in case of an exceptional increase of work and unforeseen circumstances, if the employee chooses not to take compensating rest periods, the legislator introduced the following innovations:³⁴

- a. the maximum limit of overtime work has been raised in the HORECA sector from 143 to 300 hours per calendar year; the threshold is even 360 hours for catering businesses that make use of the 'certified white cash desk';
- if the employee is employed full-time, overtime work can be performed if the gross salary equals the net salary; no income tax and social security contributions should be deducted from overtime pay;
- c. the employer has no obligation to pay an overtime allowance for overtime work performed within the limitation.

A number of issues have been identified in respect of the FJCs legislation. The National Labour Council was concerned about the limitation of the arrangements to the HORECA sector. In its opinion, in spite of the justification given in the explanatory memorandum for the limitation of the scope of the scheme, questions were raised in respect of the compatibility of the

²⁷ Loi portant des dispositions diverses en matière sociale, 16.11.2015.

²⁸ Article 6.

²⁹ Article 8.

³⁰ Article 12.

³¹ Article 91 of the program law (I) of 26 December 2015.

³² Article 16.

³³ Article 11.

³⁴ Section 6, Articles 31-35.

sector-specific legislation with equality and non-discrimination equality (Conseil National du Travail, 2015). The legislation was challenged by the three trade unions recognised in the sector, the Confederation of Christian Trade Unions (CSC-ACV), the General Federation of Belgian Labour (FGTB-ABVV) and the General Confederation of Liberal Trade Unions of Belgium (CGSLB-ACLVB), before the Belgian Constitutional Court and a decision was issued in September 2017.

The first issue relates the difference in treatment regarding the employment conditions applicable in respect of FJC workers³⁵ vis-à-vis those employed in the sector under standard employment contracts. In this respect, a specific difference concerns the case of holiday pay. On the basis of Article 5 of the 16.11.2015 legislation, workers on FJCs only receive a simple holiday allowance and are excluded from the right to a double holiday pay, which is provided to other workers in the sector. A further difference in treatment arises from the obligation to conclude beforehand a framework contract, which contains the reference to flexi-salary;³⁶ in the case of typical workers in the sector, the salary can only be determined once the employment contract is concluded. In addition, the flexi-salary is lower than the wage a comparable worker in the sector is entitled under the sectoral collective agreement. Moreover, the flexi-salary does not take either into account criteria that determine the level of the salary, such as the position held and seniority. In this context, the difference in treatment is also in respect of the exclusion of the flexi-salary from the notion of remuneration,³⁷ impacting in turn upon the basis for calculating both basic social security contributions and other contributions (e.g. for the financing of paid annual leave entitlements). Due to the exclusion of the flexi-salary from the notion of remuneration, there are also concerns in respect of whether FJC workers are entitled to the end-of-year bonus.

Further, trade unions argue that a difference in treatment exists in respect of the requirements regarding notification and monitoring of working hours. Article 11 of the 16.11.2015 legislation excludes FJC workers on part-time contracts from the notification and monitoring of working hours requirements that are applicable to regular workers in the HORECA sector working on a partly variable schedule. It is therefore possible that they are obliged to work outside fixed working hours. The removal of these obligations also severely limits, according to the unions, the monitoring of part-time work, even though such monitoring is essential in the fight against undeclared work. Finally, the difference in treatment concerns the basis for the calculation of benefits, including incapacity, unemployment and pensions: this is not the gross salary, but the flexi-salary, ³⁸ and as such would be lower for workers on FJCs.

The decision by the Constitutional Court rejected all claims put forward by the trade unions.³⁹ Following the decision, analysed below where relevant, the Belgian government announced its intention to extend the scope of the legislation from 1st January 2018 to cover individuals in retirement as well as other sectors. The extension will cover the following: Joint Committee of food commerce (CP 119); Joint Committee of independent retail trade (CP 201); Joint Committee of employees in the food retail trade (PC 202); Sub-joint Committee of medium-sized food companies (SCP 202.01); Joint Committee of large retail companies (CP 311); Joint Committee of department stores (CP 312); Joint Committee of hairdressing and beauty care (CP 314); pastry bakeries under the Social Fund and bakery, pastry and consumer shows

³⁵ Article 4.

³⁶ Article 6.

³⁷ Articles 14 and 15.

³⁸ Articles 17 to 20.

³⁹ Constitutional Court, Decision 107/2017 of 28 September 2017.

created within the joint committee of the food industry (CP 118). The analysis below concentrates on the issues of direct relevance to EU law.

Statistical evidence on FJCs40

Recent empirical evidence suggests that 5.223 employers used flexi-workers in the fourth quarter of 2016, representing slightly more than 21% of employers in the sector. 9,4% of all employment in the sector were FJCs (table 5).

Table 5: Prevalence of FJCs in the HORECA sector

	Rate (in thousands)	Rates (in %)
Employers	5223	21,4%
Employment posts during the 4 th trimester	16831	9,4%
Equivalent in full-time	1905	2,3%

Source: ONSS, Analysis: Guidea.

Table 6 below shows the distribution of employers, on the basis of size, who occupied flexijob workers. 52% of flexi-employers employed fewer than 5 workers and 77% fewer than 10 workers. The proportion of employers resorting to the use of atypical work in the form of FJCs and occasional work was positively associated with employer size. The growth in the number of employers resorting to flexible work, as compared to 2016Q3, was caused almost exclusively by the growth of employers with fewer than 5 employees (2,349> 2,702).⁴¹

Table 6: Breakdown of employers per number of flexi-job and occasional ("extra")⁴² workers

Employers	Flexi-jobs	Occasional work	Flexi-jobs	Occasional work	Flexi-jobs	Occasional work
Fewer than 5 workers	2702	4679	52%	56%	37%	63%
5 to 9 workers	1312	1973	25%	24%	40%	60%
10 to 19 workers	779	1104	15%	13%	41%	59%
20 to 49 workers	327	441	6%	5%	43%	57%
50 workers or more	103	103	2%	1%	50%	50%
Total	5223	8300	100%	100%	39%	61%

Source: ONSS, Analysis: Guidea.

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⁴⁰ This section draws predominantly on the Guidea report on the use of FJCs in Belgium (2017).

⁴¹ Evidence also suggests that the percentage of FJCs through temporary work agencies increased. In 2016Q4 the number of flexi-jobs rose to 19,064 and 2,233 out of these or nearly 12% took place through a temporary work agency.

⁴² The occasional work system ("extra") in HORECA offers the opportunity to hire staff with occasional contracts of maximum 2 days. An "extra" is a casual worker engaged for a maximum of 2 consecutive days with the same employer and bound for this occupation by a fixed-term employment contract or by a contract of employment concluded for a clearly defined work. This possibility exists alongside the scope for occupying staff in the HORECA on the basis of FJCs. The conditions set for each system are different, as well as their social and fiscal treatment.

Table 7 indicates that the number of FJCs continued to rise compared to previous quarters, while the share of standard employment contracts in the sector stagnated compared to the previous quarters.

Table 7: Evolution of employment posts in the HORECA sector (2015-2016)

CP 302	Standard contract	Occasional work	Flexi-jobs
2015Q4	82%	16,5%	1,5%
2016Q1	78,4%	15,9%	5,7%
2016Q2	76,5%	15,8%	7,7%
2016Q3	77%	13,9%	9.1%
2016Q4	77,4%	13,3%	9,4%

Source: ONSS, Analysis: Guidea.

In 2016Q4, the average gross compensation per FJC was 612 Euros for blue-collar workers and 719 Euros for employees. On the basis of the full-time equivalent (FTE), this amounted to 5,527 Euros for workers and 6,144 Euros for employees. Both categories of earnings were lower than the FTE for individuals on standard contracts. The gross average hourly earnings of workers on a FJC were 11.56 Euros and that of employees stood at 12.58 Euros (tables 8 and 9).

Table 8: Trimestral remuneration per type of contract (worker) in the HORECA sector

Worker	Remuneration per employment post	Remuneration per full-time equivalent
Standard contract	€ 3298	€ 6245
Occasional work	€ 283	€ 3 298
FJC	€ 612	€ 5 527

Source: ONSS, Analysis: Guidea.

Table 9: Trimestral remuneration per type of contract (employee) in the HORECA sector

Employee	Remuneration per employment post	Remuneration per full-time equivalent
Standard contract	€ 7374	€ 9312
Occasional work	€ 381	€ 3167
FJC	€ 719	€ 6144

Source: ONSS, Analysis: Guidea.

In terms of age breakdown, evidence suggests that 56% of FJCs were occupied by individuals between 25 and 39 years old. When compared to those in occasional work, the latter were particularly popular in the under 25s group: 39% of all occasional work posts were occupied by individuals under 25 years' old in comparison to only 12% of flexi-jobs (table 10).

Table 10: Distribution of FJCs and occasional work on the basis of age groups

Age group	FJCs	Occasional work	FJCs	Occasional work
Less than 25	12%	39%	19%	81%
years' old				

25-39	56%	36%	55%	45%
40-49	21%	12%	58%	42%
50-64	12%	11%	45%	55%
65 or more	0%	3%	1%	99%
Total	100%	100%	44%	56%

Source: ONSS, Analysis: Guidea.

In terms of distribution of FJCs on the basis of organisational size, 53% of all FJCs were found in companies with fewer than 10 workers (table 11). The highest percentage of atypical work (in terms of both FJCs and occasional work) was found in companies with more than 50 employees.

Table 11: Distribution of FJCs and occasional work on the basis of organisational size

Organisational size	FJCs	Occasional work	FJCs	Occasional work
Fewer than 5 employees	32%	40%	38%	62%
5-9 employees	21%	24%	41%	59%
10-19 employees	18%	18%	43%	57%
20-49 employees	13%	12%	47%	53%
50 employees or more	16%	5%	69%	31%
Total	100%	100%	44%	56%

Source: ONSS, Analysis: Guidea.

2.1.6. Concluding remarks

The review of empirical evidence allows us to draw a number of conclusions. The first concerns the fact that there has been a significant increase of very atypical forms of employment, including ZHCs in the UK and FJCs in Belgium. This is then coupled with the continuing and even more expansive reliance on more traditional forms of atypical employment, that is fixed-term work, as seen in the case of Italy. As indicated in chapter one, the intersection between such forms of work and EU law may be found at different levels, including EU primary law but also secondary EU law, including, primarily the Atypical Work Directives. The second issue concerns the fact that some groups such as women and younger workers are more affected by employment precariousness than others. This then means that it is important to consider the role that EU equality law at both primary and secondary levels can play in combating precariousness. The next section goes on to examine these issues by identifying the range of protective gaps across all levels. In doing this, it pays particular attention to the types of gaps that affect the inclusiveness and effectiveness of labour standards as well as the principle of equality.

2.2. The relationship between EU primary law and atypical work

The central tenet of this section is that EU primary law could be interpreted as being consistent with a **general principle of equality and inclusive labour standards**. These issues are intrinsically linked with the range of protective gaps identified in chapter one of the report. **Employment protection gaps** can arise from the exclusion of specific groups or types of workers, including atypical workers, who are not covered by employment

standards. **Representation gaps** may arise from eligibility gaps related to lack of access to worker representation institutions due to employment status, contracts, hours and/or location.⁴³ Finally, **enforcement gaps** are related to challenges related to the effectiveness of mechanisms to monitor compliance with legislation, including, in this instance, EU law (Grimshaw et al., 2016).⁴⁴

2.2.1. Equality between atypical and standard workers as a general principle of EU law

Equality is an essential prerequisite for placing limits on the growth of precarious work (McCann, 2014). In turn, the reduction of precarious employment is a condition for substantive equality and it has long been recognised that **regulatory measures to tackle precariousness should be at the heart of the equality project** (Fudge and Owens, 2006). Within the EU legal system, one of the evident trends has been a gradual shift towards the **constitutionalization of key workers' rights**, as a process that seeks to entrench certain legal norms and to attribute them with a higher status. As Bell explains, the area of equality is one where both the courts and the legislator have recognised that the legal norms engage fundamental principles of law, including the protection of human rights: "this impacts upon the Court's interpretation of equality legislation, with some recent decisions emphasizing that the constitutional rights and principles are superior and free-standing sources of law, which reach beyond the contents of EU secondary legislation" (Bell, 2013: 2).

The 'constitutionalisation of equality within the EU legal order' has different dimensions (O' Cinneide, 2015). Firstly, the elimination of discrimination and promotion of equality are recognized to be core social objectives of the EU. The preambles to the TEU and TFEU feature prominently the EU's social objectives. These range from the TEU preamble referring to 'fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers' and the promotion of 'social progress' to the TFEU and its reference to 'social progress of their States by common action to eliminate the barriers which divide Europe'. Crucially, the internal market remains in this context a means to various ends, listed in Article 2 of that Treaty, namely 'human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. As such, the adoption of active steps to promote social goals, including the respect of human rights, is now one of the Union's principal purposes, separately from those taken to establish the internal market (Deakin, 2012: 39).

However, respect for equality is not just an objective of the EU but also constitutes a **general principle of the EU legal order**, that is, an objective norm to which other elements of EU law must conform (O' Cinneide, 2015). As such, the principle of equality is only the starting point for an extensive framework of related principles and sub-principles that can be found in EU law today.⁴⁵ It has two distinct but interlinked aspects, which find particular expression in Articles 20, 21 and 23 of the CFREU respectively. On the one hand, Articles 20 aims to ensure that **'everyone is equal before the law'**. On the other hand, Articles 21⁴⁶ and 23

 $^{^{\}rm 43}$ On this, see further analysis in chapters 3 and 4 of the report.

⁴⁴ Exclusion from protective labour standards can also take place as a consequence of the exclusion of different forms of employer organisation from labour standards, e.g. in the case of supply chains and franchise agreements. This is explored in chapters 3 and 4.

⁴⁵ See, among others, Case C-144/04, *Mangold*, and Case C-555/07, *Kücükdeveci*.

⁴⁶ As AG Bobek noted recently, 'the principle of non-discrimination, as enshrined in Article 21(1) of Charter, is of continuous relevance even in the presence of secondary EU legislation on anti-discrimination. First, the provisions of the Charter remain fully applicable for the purposes of potential consistent interpretation of secondary EU law and national law which falls within the scope of EU law. Second, the provisions of the Charter constitute the ultimate yardstick of validity of EU secondary law. Furthermore, the 'independent life' of the equal treatment principle as a general principle of law or as a fundamental right of the Charter is of particular relevance where, as consistently held by the Court, the possibility to rely on the Directive is hindered by the fact that a dispute concerns private parties' (Case C-143/16, *Abercrombie*, paras 28 and 29).

of the Charter set out a **general right to equality and non-discrimination** and a more focused guarantee of **equality between men and women** respectively. It is true that **the principle of equal treatment of atypical workers** is somewhat distinct from that of equal treatment by reference to the grounds found in the TFEU (Article 19): the equal treatment principle in the case of atypical workers is based on contractual status and not on the individuals' innate attributes. However, Art 21(1) CFREU on the right to non-discrimination sets out a **non-exhaustive list of protected characteristics**, providing potentially scope to interpret this provision as extending to discrimination against atypical workers (Bell, 2012).⁴⁷ Similarly, the reference to **Article 31 CFREU in the Agency Work Directive** confirms the potential of the provision to act as a basis for the principle of equality between atypical and standard workers (Bogg, 2014).

But there is also increasing case-law evidence by the CJEU to suggest that the principle of equal treatment is borrowing from aspects of the case-law of the CJEU related to sex discrimination law in particular, leading Peers to suggest that 'the principle of equal treatment of (or non-discrimination against) atypical workers forms part of the general principle of equality recognised by EU law' (Peers, 2013: 30). This includes, among others, the statement by the CJEU that the non-discrimination rules in the Fixed-term Work Agreement are 'rules of Community social law of particular importance'48 which 'cannot be interpreted restrictively' in light of the 'principle of non-discrimination'.⁴⁹ Similarly, the CJEU has stated that the principle of non-discrimination in the Part-time Work Agreement is linked to the general principle of non-discrimination,⁵⁰ and is a principle of EU social law that should not be interpreted narrowly,⁵¹ linked to the EU's social charter and the principles set out in the prior Article 136 EC.⁵² The evocation of a rights-based approach to atypical work is not only consistent with the recognition of the need to protect atypical workers from the consequences of discrimination but should also lead to an expansive interpretation of EU secondary legislation and ensure its effectiveness in curbing the risk of employment precariousness.

2.2.2. EU primary law and inclusive labour standards

The notion of inclusive labour standards does not appear explicitly in the EU Treaties. However, the Treaty of Lisbon brought about changes that are of relevance to this issue. The first mechanism through which this happened is in respect to **the notion of 'social exclusion'**. As Albin and Prassl note, 'social exclusion is a European notion of social justice'. The **restatement of the values and objectives of the EU** in the TFEU and TEU, including the reference to 'social exclusion', is extremely relevant to the development of EU labour law (for an analysis, see Dorssemont, 2012). In this context, the combating of social exclusion is seen not only as **one of the Union's social objectives** on the basis of Article 151(1)TFEU⁵³ but also as one of the Union's **main and general objectives** established in Article 3 TEU. Indeed, the objectives set out in Article 3 include not just the reference to sustainable development based on (among other things) the 'social market economy', but also, among others, **the '[combating] of social exclusion and discrimination'**. In turn,

⁴⁷ Due to the interplay between certain protected characteristics (e.g. age, sex) and atypical work, Article 21 could also be interpreted as indirectly requiring equal treatment of atypical workers (Peers, 2013).

⁴⁸ Case C-307/05, *Del Cerro Alonso*, para 38; Case C-268/06 *Impact*, para 114; C-444/09 *Gavieiro Gavieiro*, paras 41 and 49; and Case C-273/10, *Montoya Medina*, para 31.

⁴⁹ Case C-307/05, *Del Cerro Alonso*, para 36; Case C-268/06 *Impact*, para 113; and C-444/09 *Gavieiro Gavieiro*, para 47.

⁵⁰ Case C-313/02, *Wippel*, para 56; Joined Cases C-395/08 and C-396/08 *Bruno and others*, para 58; and Case C-151/10, *Dai Cugini*, para 35.

⁵¹ C-396/08 *Bruno*, para 30 and the opinion in Case C-313/02, *Wippel*, para 76.

⁵² See generally C-396/08 *Bruno*. In Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, para 25, the Court states that the non-discrimination provisions of each Agreement are 'mutatis mutandis identical'. ⁵³ In conjunction with Article 151(3) and 153 TFEU.

these objectives shall be mainstreamed across all EU policies, in accordance with Article 9 TFEU, which provides that in 'defining and implementing its policies and its activities, the Union shall take into account requirements linked to the provision of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion'.

And it can be argued that employment precariousness is intrinsically related to social exclusion. As we saw in chapter 1, precariousness is a multi-faceted notion reflecting a range of factors, including instability, lack of protection, insecurity and social and economic vulnerability (Rodgers, 1989). In emphasising the shifts in the labour market structure as a result of changes in the quality of jobs, the concept of precarious work may be of significant value in explaining in a holistic manner processes of social exclusion than the traditional concept of unemployment (Bhalla and Lapeyre, 1997: 428). This is because poverty, lack of access to lifelong learning opportunities and discrimination, which arise out of precarious work, are then determinants of social exclusion. It is the case that the EU competences in the field of social exclusion are very limited, at least within the ambit of the social policy chapter.⁵⁴ However, this does not mean that the reference to social exclusion is without use. Following Dawson and De Witte (2015: 966), 'the language may come to play another, more indirect, role by prompting the EU institutions, including the Court of Justice, to give more consideration to social welfare implications when applying and interpreting other rules of EU law' (emphasis in original). It is primarily the CFREU, in its capacity as EU primary law, that can provide a connecting mechanism between social exclusion on the one hand and inclusive labour standards on the other hand. There are two main ways through which the CFREU may be seen as attempting to establish such a link. The first relates to inclusion in respect of industrial citizenship and namely the positive recognition of voice rights (on this, see chapters 1 and 3 for details). The second, which constitutes the focus of this section, concerns the inclusion of atypical workers in the scope of fundamental labour rights (Bell 2012).

A number of provisions in the **'Solidarity' chapter** (Articles 29, 33 and 35 CFREU) apply to 'everyone'. The CFREU can thus be seen as ensuring not some notion of equality of welfare, but one of **securing a minimum level of welfare for every citizen** (Collins, 2003: 22), as it acts as a gateway providing access to individuals to a range of fundamental social rights. The most relevant provisions for our analysis here are **Articles 30 and 31 CFREU**. Both apply to 'every worker' without qualification. The use of the **broader term 'worker'** instead that of 'employee' suggests that it includes not only employees on SER but also **atypical workers**, including, among others, casual workers and temporary agency workers (Freedland, 2006). Article 31 CFREU in particular is not only important in respect of its **personal scope**⁵⁵ but also in respect of its **width**. In touching upon the whole of 'working conditions' insofar as these engage workers' safety, health and dignity (Bogg, 2014: 845), ⁵⁶ the provision may act as a barrier to the process of precarisation and ultimately social exclusion. ⁵⁷

Despite the broadly inclusive approach that the CFREU seems to be taking, there are **important caveats** to a reading of the Charter that would provide protection across all cases

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⁵⁴ So far, the European policy to combat social exclusion remains within the remit of the non-legal Open Method of Coordination (OMC).

⁵⁵ There are two ways through which Article 31 CFREU is broader than the formulation in Article 30. The first is that Article 31 can be read as incorporating 'dependent self-employed', even if they are beyond the remit of the 'worker' concept (Barnard, 2012). The second is that 'every worker' suggests, according to Bogg (2014: 851), 'a strong purposive approach to contractual characterisation so that any doubts about the individual's employment status are resolved in favour of a determination that he or she is a worker.'

⁵⁶ This is illustrated in the reference to Article 31 in Directive 2008/104/EC on temporary agency work that not only refers to overtime, night work and pay (on the basis of Article 31(2) CFREU) but also to 'the duration, of working time, overtime, breaks, rest periods, night work, holidays and public holidays; pay'.

⁵⁷ On the potential of Article 31 in terms of its width, see chapter 1.

of precarious work. First of all, certain Articles⁵⁸ apply only 'in accordance with Union law and national law and practices'. Secondly, Article 51 on the scope of application applies, which limits its use to instances where Member States 'are implementing EU law'. The case of termination of the employment relationship constitutes a good example of employment protection gaps that arise in respect of the scope of application of the CFREU. In respect of on-call contracts, the employer may proceed to the termination of the employment relationship at any given time without complying with specific procedural and substantive standards. When read in conjunction with Article 1 CFREU, Article 30 CFREU recognizes that even if the decision to dismiss a worker is a legitimate exercise of the managerial prerogative, it is necessary for the employer to act rationally by respecting and protecting the worker's right to be treated with dignity in the conduct of the dismissal (Collins, 1992: 16-18). However, despite the fact that Article 153(1)(d) TFEU provides a specific legal basis for the adoption of Directives in the field of 'protection of workers where their employment contract is terminated', the provision has not be used for the adoption of a Directive in this area. As a result of this, Article 30 CFREU 'lacks the bite that would otherwise be provided by a comprehensive normative framework in EU law to protect 'every worker' against 'unjustified dismissal' (Kenner, 2014: 806).

This is because following Article 51(1) CFREU, the Charter applies to Member States only when they are 'implementing EU law'. Even though this has been interpreted broadly by the CJEU and is applied where Member States are 'covered by European Union law', ⁵⁹ the dominant interpretation is that **Article 30 on its own is unable to provide protection against unjustified dismissal** (see, for instance, Barnard, 2013). CJEU case law has held that this is the case even though there are a number of Directives that touch upon dismissal. ⁶⁰ However, there are certain cases where it is still possible to rely on Article 30 CFREU. Where, for instance, a dismissal is linked to the specific violation of the principle of equal treatment between men and women or is in relation to discrimination on the basis of protected characteristics, Articles 21 and 23 CFREU may be directly engaged, leading to stronger protection against unjustified dismissal since these right under Article 21 and 23 flow directly from EU Treaty provisions put in effect in the legal orders of the Member States by the transposition of Directives and underpinned by the general principle of equality, as developed by the CJEU (Kenner, 2014: 812). ⁶¹

2.2.3. Concluding remarks

In adopting an approach that highlights the role of inclusive labour standards and the principle of equality, the present analysis is consistent with a 'human-developmental' interpretation of social rights as means of enhancing the freedom of action of individuals (Deakin, 2012). In this respect, it is possible to benchmark EU secondary and national legislation related to these areas vis-à-vis their approach to labour standards inclusivity and the promotion of the principle of equality. The next section proceeds to an

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 $^{^{58}}$ Article 30 is such a case; however, Article 31 CFREU does not suffer from this.

⁵⁹ Case C-256/11 *Dereci*, para 72.

⁶⁰ C-361/07, *Polier*. For the purposes of atypical work, the Directives in this area may provide some protection to this extent, albeit this is limited (see analysis below).

⁶¹ On the protection afforded by the Atypical Work Directives, see analysis below. A broader issue concerns the extent to which the Charter can apply not only vertically (i.e. against public authorities) but also horizontally (i.e. between private parties). It has been put forward that the CJEU, as an institution of the Union, is bound by the Charter under Article 51(1) and so must apply the Charter in all situations (vertical or horizontal) where it is relevant (Craig, 2012). Recent case law by the CJEU, e.g. Case C-555/07 *Kücükdeveci,* seems to suggest an acceptance of the horizontal effect of fundamental rights, at least as general principles of law in the equality field (Barnard, 2013: 272). However, in Case C 176/12 *AMS*, the Court held that Article 27 CFREU could not be invoked in a dispute between individuals in order to dis-apply the national provision that related to information and consultation rights of employees. The Court went on to distinguish *AMS* from *Kücükdeveci,* ruling that 'the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they make invoke as such' (para. 47).

assessment in this area and elucidates the links between the regulation of atypical work and precariousness in the cases of ZCHs, FJCs and FTCs. As it will be seen, while EU secondary legislation and the CJEU case law have made certainly advances towards ensuring **labour standards inclusivity**, the **equal treatment of atypical workers** and the **principle of effectiveness**, protective gaps still exist as a result of **deficiencies in EU secondary law**, the **exercise of self-restraint by the CJEU** that is though in contradiction to the 'explicit competences' and to an evolved EU primary law (Jimena Quesada, 2017), and the **inadequate transposition and enforcement of labour standards** at EU Member State level.

2.3. EU secondary law

While there is not a single definition of ZHCs, a range of ZCHs can be considered to be a mix between *casual labour and part-time work* (Kenner, 2017: 153). Similarly, in the case of FJCs in Belgium, these can be considered again as a combination of *casual and fixed-term work*, as the contract of employment should be of fixed-term nature. Finally, the use of atypical work in the public sector predominantly relates to the phenomenon of reliance, often excessive, on FTCs. Taking into account these issues, the EU secondary legislation that is relevant examining here is first the Part-Time Work Directive and secondly the Fixed-Term Work Directive. The analysis is complemented, where relevant, by an examination of other EU labour law directives, including Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation and Directive 92/85 on maternity protection. The interplay between atypical work and the Written Statement Directive as well as the Working Time Directive is explored in chapter four of the report.

2.3.1. Atypical Work Directives

Personal scope of application

The first issue that arises here is whether work arrangements in the form of ZHCs and FJCs should be treated as falling within the **scope of part-time work and fixed-term work**. The Part-Time Directive does not limit its scope by reference to a threshold working time but defines a part-time worker 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."⁶² As such, it is submitted that ZHCs and FJCs may be considered forms of part-time work, provided they fulfil the conditions set out in the definition set out in the Part-Time Work Directive. In this respect, it is important to note that the Part-Time Work Directive does not lay down a right to a minimum number of working hours.⁶³ The FJCs arrangements in Belgium are in all cases established on the basis of fixed-term employment contracts and as such, they are in principle covered by the Fixed-Term Work Directive.

The second issue to be discussed here concerns the extent to which individuals engaged in such forms of work may be included in the **personal scope of both the Part-Tine Work**

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⁶² Clause 3(1).

⁶³ 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 Sinclaire (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.

Directive and the Fixed-Term Work Directive. 64 This is crucial since, as discussed earlier, certain individuals engaged in casual forms of employment, e.g. on ZHCs, may fall foul of the definition of 'employee' or even 'worker' under national legislation. Neither the Directive on Part-time Work nor the Directive on Fixed-Term Work defines the term 'worker'. Instead, the personal scope of application of the Directives is shaped by reference to the formula traditionally characterising EU social policy: 'This Agreement applies to [atypical] workers who have an employment contract or employment relationship as defined by ... each Member State'.65

In the context of free movement of workers (Article 45 TFEU), the definition of 'worker' is autonomous and defined at EU level (for an analysis, see Kountouris, 2017). The CJEU has adopted therein a fairly expansive definition of 'worker' that has allowed casual forms of work to be brought within the scope of various aspects of EU law, such as the right to work in another Member State or equal pay for women and men (Countouris, 2007: 172-181). This is to be contrasted to the area of EU social policy. Article 151(2) TFEU obliges the EU 'to take into account of the diverse forms of national practices, in particular in the field of contractual relations'. Drawing arguably on this, the standard formulation in EU secondary legislation in the field of social policy is that it is for the national law to determine who qualifies as a worker. This, for instance, applies in the case of part-time work and the CJEU has confirmed that it is for the Member States to define the concept of 'workers who have an employment contract or an employment relationship'.66 Effectively this means that if under national law a work relation does not satisfy the criteria for being a 'contract or employment relationship', none of the protections deriving from the EU Directive apply.⁶⁷ In this respect, the CJEU held in Wippel that concerned a zero-hours contract that it was for the national level to determine whether the Directive applied, following national legal definitions and practices.⁶⁸ Such an interpretation of the concept of 'worker' creates an **employment** protection gap for individuals engaged in non-standard forms of employment.

However, it is argued here that the Member States' discretion is constrained by the implementation and effectiveness principles. Even when a social policy Directive refers to national definitions, the discretion of Member States in respect of the definition of 'worker' is not 'wholly unfettered'.69 In the specific case of part-time work, the CJEU has held accordingly that while 'it is for the Member States to define the concept of "workers who have an employment contract or an employment relationship", in Clause 2.1 of the Framework Agreement on part-time work [...] and, in particular, to determine whether judges fall within that concept' this is 'subject to the condition that that does not lead to the arbitrary exclusion of that category of persons from the protection offered by [the] Directive'. 70 In a more recent decision, the CJEU, referring to the Temporary Agency Work Directive, declared: "the essential feature of an employment relationship is 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 legal characterisation under national law and the form of that

⁶⁴ Note that Directive 91/383/EEC on health and safety of atypical workers encourages improvements in health and safety of atypical workers who are defined as those on fixed-term contracts and those in temporary employment relationships. The Directive applies the equal treatment principle and requires that atypical workers be provided the same level of health and safety protection as other workers in the use undertaking. However, the Directive does not mention part-time workers.

⁶⁵ Directive 97/81, clause 2(1) and Directive 99/70, clause 2(1).

⁶⁶ See, among others, Case C-393/10, O'Brien.

⁶⁷ This is something that the ECJ itself accepted, following its jurisprudence developed since Case 105/84, Danmols Inventar, see Countouris (2010).

⁶⁸ Case C-313/02, *Wippel*, para. 40. ⁶⁹ Case C-311/13, *Tümer*.

⁷⁰ Case C-393/10, O'Brien.

relationship, as well as the nature of the legal relationship between those two persons, not being decisive in that regard'.⁷¹

What is more, a restrictive interpretation of the scope of application could be harmful to the social objectives of EU primary law and as such it is questionable to what extent Member States can limit the scope of application of EU labour law directives by such references to their own national legislation (Garben et al., 2017). Indeed, the European Commission in its reply to the UK petition examined at present stated that 'more globally, and based on caselaw, the Commission is of the opinion that the definition of a worker quoted above [they work under direction of a manager and receive remuneration for that work] must be retained for the purpose of the application of EU social provisions in general" (European Parliament, 2016c: 2). As such, it is suggested here that the personal scope of the Part-Time Work Directive and Fixed-Term Work Directive should cover ZHCs and FJCs, regardless of the material conditions of their employment.⁷²

The principle of equal treatment in the atypical work Directives

Under the Directives, part-time and fixed-term workers are entitled to equal treatment 'in respect of employment conditions' with, respectively, full-timers and those with indefinite contracts. 73 It is important to acknowledge that the principle of equal treatment is far from universal; it is confined by a number of factors within the Directives themselves but also by legislation and enforcement regimes in EU Member States. In the case of the Part-Time Directive, deviations are allowed, 'where appropriate', from the general principle of non-discrimination by making access to particular conditions of employment subject to a period of service, time worked or earnings qualification.⁷⁴ Forms of casual work may thus be indirectly affected by these exceptions, even if a specific exception for casual workers is not provided. This can be identified as an employment protection gap (on this, see chapter 1). However, as analysed in the previous section, Article 4 of the Directive has been interpreted by the CJEU as "articulating a principle of European Union social law, which cannot be interpreted restrictively" (emphasis added). 75 **This general principle of equality** should be the guiding framework for the analysis of Clause 4.

The three aspects of the principle of equal treatment that have raised questions of judicial interpretation and are relevant in the context of the petitions examined at present constitute:

- 1. the material scope of the equal treatment;
- 2. the comparator issue, and;
- 3. the definition and extent of objective reasons justifying unequal treatment.

Material scope of the Atypical Work Directives

Clause 4 of the Agreements on equal treatment contained in Directives 97/81 and 99/70 is directly effective, 76 and 'must be interpreted as articulating a principle of European Union social law which cannot be interpreted restrictively'.77 The CJEU has recently held that the

75 Joined Cases C-395/08 and C-396/08, Bruno and Pettiti; Case C-151/10, Dai Cugini.

⁷¹ Case C-216/15, Betriebsrat der Ruhrlandklinik, para. 27.

⁷² Case C-216/15, Betriebsrat der Ruhrlandklinik. In the case of Belgium, no use has been made of the possibility, provided under the Part-Time Work Directive to Member States, to exclude 'part-time workers who work on a casual basis' from the protection afforded therein, 'for objective reasons' and after appropriate consultation with social partners.

73 Directive 97/81 Annex, clause 4 and Directive 99/70 Annex, clause 4.

⁷⁴ Clause 4.4.

⁷⁶ Case C-486/08 *Land Tyrol*, para 25.

⁷⁷ Case C-395/08, *Bruno*, para 32. See also Case C-307/05 *Del Cerro Alonso*, para 38, Case C-268/06 *Impact*, para 114.

decisive criterion for determining whether a measure falls within the scope of 'employment conditions' within the meaning of Clause 4(1) of the Agreements is the criterion of employment, that is to say the employment relationship between a worker and his employer. As such, the notion of 'employment conditions' has been interpreted generously and 'by analogy' to the CJEU's jurisprudence in the area of equal pay and treatment, to include matters such as pay and occupational pension schemes, and treatments related to length of service, promotion, but also, and crucially, conditions relating to dismissal (including not only those that take place within the term of the contract but also those that constitute a failure to renew a contract) and remedies for breach of contract for an overview, see Kountouris, 2016). On this basis, it can be argued that the principle of equal treatment has the potential to encompass in principle the range of employment conditions outlined in the petitions in respect of FJCs and FTCs.

One of the main issues here concerns that of pay. In relation to this, the European Commission noted in its response to the UK petition relating to ZHCs that 'in accordance with Article 153(5) TFEU, the matter of pay is not within the scope of EU labour law directives and is left to the competence of the Member States. This question is therefore not regulated by EU law and the above-mentioned directives [Working Time Directive, Maternity Protection Directive and Framework Equality Directive (European Parliament, 2016c: 3). However, as outlined above, pay forms part of the notion of 'employment conditions' under both the Fixed-Term Work and Part-Time Work Directives.⁸⁵ Provided that non-standard workers, including ZHC and FJC workers fall within the personal scope of the Directives, they may be able to claim equal treatment including in relation to pay.86 In this respect, the exclusion in particular of the flexi-salary and respective paid leave entitlement, 87 as determined by the collective agreements in the sector, altogether from the notion of remuneration under the 16.11.2015 legislation in Belgium, is in contravention of the principle of equal treatment enshrined in the Fixed-Term Work Directive and Part-Time Work Directive, where the latter is applicable. This is because the difference in treatment is solely (as opposed to mainly or even one of the reasons) based on the grounds of the FJC worker's status.88

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⁷⁸ See, to that effect, Case C-361/12 Carratù, para. 35.

⁷⁹ Case C-38/13, *Malgorzata Nierodzik*, para 21-29; cf. also Case C-177/14, *Regojo Dans*, para 43-44.

⁸⁰ Case C-38/13, Małgorzata Nierodzik, para 28.

⁸¹ Case C-395/08, *Bruno*; C-385/11 Moreno.

⁸² Length of Service increment and Directive 99/70 in C-444/09 *Gavieiro*; Length of service in 'stabilization' procedures, Case C-305/11 *Valenza*.

⁸³ Regarding the shorter, two-week notice period for the termination of fixed-term contracts regardless of the length of service of the worker concerned, whereas the length of the notice period for contracts of indefinite duration is fixed in accordance with the length of service of the worker concerned and may vary from two weeks to three months, see C-38/13, *Malgorzata Nierodzik*.

⁸⁴Case C-361/12 Carratù.

⁸⁵ In a similar manner, the Framework Equality Directive (see analysis below) prohibits discrimination including in respect of pay on the basis of certain protected characteristics, which include age. See also the Equal Treatment Directive, which prohibits discrimination on the basis of sex.

⁸⁶ However, they also need to identify a comparator whilst it is possible for the employer to justify the difference in treatment (see analysis below).

⁸⁷ Article 31(2) and the case-law of the CJEU regarding annual leave recognise that the right incorporates the aspect of pay.

⁸⁸ In respect of part-time work, in a case regarding free movement under Article 45 TFEU, the CJEU emphasised that the freedom to take up employment is important not just for the creation of a single market but for the worker to raise her standard of living, even if the worker does not reach the minimum level of subsistence in a particular state (C-53/81, *Levin*). AG Slynn, in particular, emphasised that the exclusion of part-time work from the protection of Article 45 TFEU would exclude not only women, the elderly and the disabled, who would wish only to work part-time, but also women and men who would prefer to work full-time, but were obliged to accept part-time (in other words, involuntary part-time work, which has increased significantly in the recent years, see analysis above).

In respect specifically of the Part-Time Work Directive, the material scope of nondiscrimination includes hours of work and the organisation of working time,89 and the Court has held that it includes the loss of **paid annual leave**. 90 As discussed in the beginning of this chapter, a difference in treatment between FJC workers on part-time contracts and ordinary part-time workers on partly variable schedules is established in the 16.11.2015 legislation regarding FJCs in Belgium. In the case of the latter, namely ordinary part-time workers on partly variable schedules, Article 159 of Chapter 4 of Title II of the Program Law of 22 December 1989 provides that where part-time work schedules are variable within the meaning of Article 11(3) of the Employment Contracts Act of 3 July 1978, the daily hours of work shall be made known to the workers at least five days in advance by posting a notice on the premises of the company. Further, Article 38 of the Employment Act of 16 March 1971 provides that it is in principle prohibited to work or to work outside fixed working hours. However, under the 16.11.2015 legislation on FJCs in Belgium, these provisions are not applicable in the case of FJC workers on part-time contracts. Given again that the difference in treatment is solely (as opposed to mainly or even one of the reasons) based on the grounds of the FJC worker's status, the exclusion of FJC workers on part-time contracts from the notice requirements is in contravention of the equal treatment principle under EU law.

A third issue to consider here is in respect of the **requirements applicable to the contract** concluded between the employer and the non-standard workers. Under the FJC legislation in Belgium, while the framework contract shall be in writing, this is not the case with the FJC contract of employment, which can be in writing or oral. ⁹¹ This presents two issues. The first is that the worker may not receive all the information required under Directive 91/533/EEC (this is discussed in chapter 4 of the report). Secondly, the lack of requirement for a written employment contract diverges from the Belgian legislation on fixed-term work that requires the existence of a written contract. In turn, this is **incompatible with the Directive on Fixed-Term Work, which requires the application of equal treatment, including in respect of the requirements regarding the form, namely oral or written, of the fixed-term employment contract. This is again on the basis that the difference in treatment between FJC workers and those on standard contracts is solely (as opposed to mainly or even one of the reasons) is based on the grounds of the FJC worker's status.**

Finally, **protection against unjustified dismissal** (e.g. in the context of the unfair dismissal regime in the UK), is, broadly speaking, limited under EU law (see also the analysis above in respect of the application of Article 30 CFREU). This is because, despite Article 153 TFEU providing for the possibility for the EU to support Member States in ensuring the protection of workers where their employment contract is terminated, **there is no specific secondary EU law to implement this right.** Attempts to rely on Article 30 CFREU to challenge national legislation related to dismissal protection have so far been unsuccessful. In the recent case of *Poclava v Toledano*, ⁹² which concerned the one-year probationary period in Spain, the CJEU refused it had jurisdiction on the basis that the EU had not exercised its competence in relation to dismissal during probationary periods in employment. This was the case even though the claimant pointed out that the EU had legislated in the field of FTCs (Directive 1999/70/EC), putting forward that the one-year probationary period effectively rendered contracts such as the claimant's a form of FTCs.

However, in respect of the Atypical Work Directives, the CJEU has emphasised that `an interpretation of clause 4(1) of the Framework Agreement which excludes from the definition

⁸⁹ Case C-313/02, *Wippel*, para 32.

⁹⁰ Case C-486/08, Tirols.

⁹¹ Article 23.

⁹² C-117/14, *Poclava*.

of 'employment conditions', within the meaning of that provision, conditions of that nature relating to termination would limit the scope of the protection granted to fixed-term workers against discrimination, in disregard of the objective assigned to that provision.' In this respect, the Court has held that three-yearly length of service increments fall within the definition of 'employment conditions' within the meaning of Clause 4(1) as well as the compensation that the employer must pay to an employee on account of the unlawful insertion of a fixed-term clause into his employment contract. This **partial protection provided by the Atypical Work Directives** is on top of other EU Directives dealing with the issue of termination in the context of structural changes in companies (e.g. the Insolvency Directive⁹³ and the Collective Redundancies Directive); ⁹⁴ the latter embody the right to protection against unjustified dismissal but only in 'collective circumstances'. In addition, the Directive establishing a framework for equal treatment in employment⁹⁵ protects workers against dismissal where there is discrimination on a prohibited ground, including victimisation. ⁹⁶

The issue of the comparator

Clause 4(1) of Directives 97/81 and 99/70 provide that the principle of equal treatment operates by reference to 'comparable' standard workers. The issue of the comparator may lead, according to Davies (2013: 243), to the removal from protection those 'problems faced by non-standard workers that have no obvious equivalent for standard workers'. This is because it seems to require the identification of a standard worker that meets at least two requirements: the performance of 'same' (or 'similar') 'work or occupation', and, at least under the Part-time Work Directive, establishing that the two workers work under the 'same type of employment contract (Kountouris, 2016: 257). Yippel, Wippel, Wipp

⁹³ Directive 2008/94/EC.

⁹⁴ Directive 98/59/EC..

⁹⁵ Directive 2000/78/EC.

⁹⁶ See analysis below regarding the interplay between atypical work and discrimination legislation.

⁹⁷In addition, the CJEU has not yet dealt with the question of whether a fixed-term worker can be compared to a prior permanent employee, or to a hypothetical comparator.

98 Case C-313/02 *Wippel*.

Box 2. The Wippel case

Ms Wippel was employed part-time under a 'framework contract of employment' based upon a 'work-on-demand' principle. The contract did not lay down a specified minimum level of work. The CJEU took the view that a contract of the type at issue in Wippel was within the personal scope of the relevant Directives. Nevertheless, the CJEU took the view that Ms Wippel had no basis for challenging her contractual arrangements under European law. In relation to the Working Time Directive, the Court observed that the Directive was concerned with guaranteeing minimum rest periods and maximum weekly working time in the interests of workers' health and safety. Since Austrian law provided a basic maximum working time of 40 hours per week and eight hours per day, this was to be regarded as being equally applicable to part-time and full-time workers. Accordingly, Ms Wippel enjoyed the rights available under the WTD in that she was entitled to the same rest periods and maximum working time limits as a full-time worker. She also argued that her contractual arrangement constituted indirect sex discrimination and subject to less favourable treatment on the ground that she was a part-time worker. To be treated on an equivalent basis to a full-time worker under Austrian law, Ms Wippel argued, she ought to have enjoyed a right to a fixed weekly working time with a predetermined salary. The CJEU concluded that there was no discrimination in this situation because there was no full-time comparator working under a contractual arrangement on an 'as needed' basis: 'It follows that no full-time worker in the same establishment has the same type of contract or employment relationship as Ms Wippel'.

However, it is submitted here that the decision in Wippel, which was referred to by the European Commission in its response to the petition regarding FJCs in Belgium, creates perverse effects regarding the application of the principle of equal treatment for 'very atypical part-time workers' (for a critical review of the decision, see Bogg, 2016; Kenner, 2009; Kountouris, 2016). 99 In requiring individuals in such contractual arrangements to identify a full-time worker that offers his or her services on the basis of an equally atypical contract of employment, the decision essentially frustrates the application of the principle of effectiveness and reinforces ultimately labour market segmentation. An alternative reading would be that the problem, as illustrated in Wippel, is not in respect of the interpretation of the Directive by the CJEU but of the Directive itself. This is because the principle of equality, as enshrined in the Directive, is not well designed to provide full equality, as it requires the existence of certain characteristics when identifying a comparator that may not be available in the case of employers that rely exclusively on very atypical forms of employment. It is important to add here that whilst referring to the Wippel decision, the Commission stated the following in its reply to the petition regarding FJCs: 'part-time workers on flexi-job contracts performing the same or similar work as full-time workers may, for example as regards the right to minimum pay, be considered to be in a comparable situation to workers on ordinary full-time contracts. Such a difference in treatment would then only be permissible if justified by objective grounds' (European Parliament, 2017, emphasis added). 100

Definition and extent of objective reasons justifying unequal treatment

The third issue that is relevant to examine here concerns the scope under the Directives for the justification on the basis of objective grounds of the unequal treatment. According to the CJEU, the concept of 'objective grounds' for the purposes of clause 4(1) of the framework agreements 'must be understood as not permitting a difference in treatment between [non-standard] workers and [standard] workers to be justified on the basis that the

⁹⁹The CJEU has found that comparability was established between different groups of part-time and full-time workers on cyclical contracts (Case C-395/08 *Bruno*).

¹⁰⁰ See analysis below on the extent of justification.

difference is provided for by a general, abstract national norm, such as a law or collective agreement'. 101 As a result, the introduction, for instance, of FJCs by national legislation in Belgium is not sufficient to provide a justification of unequal treatment between standards workers and those on FJCs. Justification is instead required by reference to 'the existence of precise and specific factors, characterising the employment condition to which it relates, in the particular context in which it occurs and on the basis of objective and transparent criteria in order to ensure that that unequal treatment in fact meets a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose'. 102 According to the CJEU, 'those factors may result, in particular, from the specific nature of the tasks for the performance of which [non-standard] contracts have been concluded 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'. 103 As such, it seems that these grounds are examined according to a model that is similar to the one associated with indirect discrimination.

Ouite a strict view on the permissibility of differences between, in particular, fixed-term workers and permanent workers has developed in the CJEU case law (for an analysis, see Pettersson, 2015: 65). In this respect, the non-discrimination clause in the Fixed-Term Work Directive must be interpreted in a way that is consistent with the objectives of the framework agreement, such as improving the quality of life of workers and preventing an employer from using fixed-term employment contracts to deny fixed-term workers rights that are granted to permanent workers. 104 In the case of FJCs in Belgium, the primary rationale for the adoption of the legislation was related to the need to limit the extent of under-declared work in the HORECA sector. However, as submitted before the Constitutional Court, the legislation was also intended to serve a range of other objectives including, limiting wage costs, increasing labour market flexibility and creating new jobs. 105 On the basis of the emphasis of the CJEU on the improvement of the quality of the life of workers, the lowering of labour costs justification of the FJC legislation in Belgium, which provides, among others, for different rates of pay for FJC workers, is hence questionable. What is more, it can be argued that the FJCs arrangements run counter to some of the stated aim of the 16.11.2015 legislation. This includes the stated objective of increasing employment rates, insofar as it might actually lead to the reduction of new entrants in the labour market, as FJCs are reserved to individuals that are already employed. Finally, in Dai Cugini, 106 which dealt though with part-time work, the CJEU indicated that the objectives of aiming to prevent illegal work and encouraging 'flexicurity' could in principle be legitimate reasons justifying unequal treatment of part-time workers, subject to the principles of necessity and proportionality. 107 However, the reasoning of the decision appears to be problematic: this is because, as Peers (2013: 43) explains, the reasoning of the CJEU diverges from existing case-law that broadly rejects arguments based on economic efficiency to justify discrimination and it would also be interpreted to mean that a 'flexicurity' defense could justify treating part-timers worse than full-timers. 108

 $^{^{\}rm 101}$ Joined Cases C-302/11 to C- 305/11 Valenza, paras $\,$ 50–51.

 $^{^{102}}$ Joined Cases C-302/11 to C-305/11 Valenza, paras 50–51 103 Joined Cases C-302/11 to C-305/11 Valenza, paras 50–51.

¹⁰⁴ Case C-307/05 *Del Cerro Alonso*, para. 37; Case C-486/08 *Tirols*, para. 49 (and case law cited there); Case C-361/12 *Carratù*, para. 33.

¹⁰⁵ Constitutional Court, Decision 107/2017 of 28 September 2017.

¹⁰⁶ C-151/10, *Dai Cugini*.

¹⁰⁷ C-151/10, *Dai Cugini* paras 46-51.

¹⁰⁸ A similar case could be made in respect of ZHC arrangements that fall within the definition of 'part-time work'.

Abuse of fixed-term contracts (FTCs)

In contrast to Directive 97/81, whose primary objective is to 'promote' part-time work, the Fixed-term Work Directive has as 'its purpose ... to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships' (Clause 1). Drawing on the Directive's preamble and general considerations (paragraphs 6 and 8), the CJEU has drawn attention to the Directive's emphasis on openended contracts as the *general* type of employment.¹⁰⁹

Two types of national measures are relevant for the implementation of Clause 5(1) of the Directive: (i) measures aimed at **preventing** misuse of successive FTCs and (ii) those aimed at **penalizing** such misuses.

For preventative measures, the Directive provides that Member states, in the absence of an equivalent national legal measure to prevent abuse, should choose at least one of the following options:

- subjecting the renewal of successive fixed-term contracts to 'objective reasons',
- limiting their maximum total duration,
- or limiting the number of renewals (Clause 5(1).

Whereas the Directive leaves Member States the choice as to how to achieve the objective of preventing abuse, the **discretion is not unfettered**. It is limited by the 'effectiveness' requirement that any measure should not 'compromise the objective or the practical effect of the Framework Agreement'. 110 In relation to the 'objective reasons' option, the Court has famously noted in Adeneler that they should be 'justified by the presence of specific factors relating in particular to the activity in question and the conditions under which it is carried out'111 and cannot be found to exist only by reference in a a general and abstract manner to a rule of statute or secondary legislation. In Mascolo, a case concerning the practice of renewals of fixed-term employment contracts in the Italian public education sector where the law barred conversion to open-ended contracts (see Guastaferro, 2017), the Court held that even if there are objective reasons (in this case the organization of the education system and replacing permanent workers on various leaves) they should not lead 'in practice, to misuse of successive fixed-term employment contracts'. 112 On the facts of the case, the Court observed that the delay in the pending competitive process for tenure for the staff (2000 to 2011), the widespread use of FTCs in the sector 113 and the uncertain possibility for the staff to get tenure through progressing up the lists were contrary to the Directive. 114

As for **sanctioning measures**, the Directive is silent on the issue of penalties. The Court has **refused to find the prohibition of conversion to open-ended contracts as incompatible with the Directive**, as long there is 'another effective measure to prevent and, where relevant, punish the abuse of successive fixed-term contracts by a public-sector employer'. Hence **Member's States procedural autonomy in devising the sanctions for abuse are limited by effectiveness**, a general principle of EU law requiring Member States to 'adopt all the measures necessary to ensure that the Directive conferred is fully

¹¹⁴ Ibid para.103-113.

¹⁰⁹ C-22/13. *Mascolo* para.73; C-212/04 *Adeneler* para. 63

¹¹⁰ C-362-13, C-363/13 and C-407/13, Fiamingo and Others para.60.

¹¹¹ C-212/04 *Adeneler* para. 72.

¹¹² C-22/13 *Mascolo* para 104.

¹¹³ Ibid 109.

¹¹⁵ C-53/04 *Marrosu* para.49; C-212/04 *Adeneler* para.105

effective in accordance with the objective which it pursues'. ¹¹⁶ In the context of the Directive, the Court has held that national measures need to be 'not **only proportionate**, **but also sufficiently effective and a sufficient deterrent** to ensure that the provisions adopted pursuant to the Framework Agreement are fully effective', ¹¹⁷ meaning that they are capable to 'punish that abuse and nullify the consequence of the breach of Community law'. ¹¹⁸ In practice, as founded by a European Commission's survey, the following sanctions are used in the Member-States: conversion to an open-ended contracts, damages, criminal and civil sanctions (European Commission, 2006). Following the Court's jurisprudence, **Member States enjoy freedom in choosing the sanctions**. Having said that, in Mascolo, the Court found problematic the lack of any sanction for public education employees, though it left to the referring court to make the final determination. ¹¹⁹

In general, despite the clear teleology of the Directive in combatting abuse, there are multiple gaps weakening its application. Firstly, clause 5 is not applicable to a 'first or single use of a fixed-term employment contract', 120 thus potentially discouraging Member-States from enacting such restrictions or encouraging Member States with these restrictions to replace them (Davies, 2016: 232) Secondly, it seems to be the case that the provision is not capable of direct effect, for being insufficiently precise. 121 Third, as de la Porte and Emmeneggers observed, there is a marked difference between the Court's 'expansive' approach to equal treatment which aligns with its strong jurisdiction of equality and anti-discrimination (Clause 4) and the more 'restrictive' attitude towards abuse of fixed-term contracts (Clause 5) (de la Porte and Emmenegger, 2017; see also Aimo, 2016). In the latter, there is a mixed pattern of Court's discretion to the Member States' determination of the conditions for abuse to Member States with the exception of instances of 'gross abuse', and assessment by national courts(de la Porte and Emmenegger, 2017). For example, in *Impact* the Court found that successive FTCs in the public sector for 8 years authorised for the period between the deadline of transposition of the Directive and the entry of force of transposing legislation were an 'unusually long period' going against the objective pursued by the Directive. 122 On the contrary, in Kücük the Court granted wide discretion to the Member State. In a dispute between an employee and the German state related to the permanent recurrence of 13 FTCs for 11 years all concluded as replacement for staff with open-ended contracts on temporary leave (including parental and special leave), the Court failed to establish an automatic link between the employer's hiring of replacements on a recurring or permanent basis with the lack of objective reason or with abuse, not least because those FTCs may be concluded in pursuit of legitimate social policy connected with the provision of various types of leave. 123 Eventually, the decision left to national Courts the assessment 'of all the circumstances of the case, including the number and cumulative duration of the fixed-term employment contracts or relationships concluded in the past with the same employer'. 124 Finally, the Court's failure to prescribe the availability of the sanction of conversion to an open-ended contracts as necessary for the effectiveness of Clause 5 establishes a major gap as in many cases it is the most effective and meaningful sanction for the employee, acting also as a serious deterrent against the abuse of FTCs.

¹¹⁶ Case C-140/83 Von Colson para. 15; Case C-212/04 Adeneler para. 93

 $^{^{117}\,}$ C-362-13, C-363/13 and C-407/13 Fiamingo and Others para. 62; C-22/13 Mascolo para. 77

¹¹⁸ C-22/13 Mascolo para.79; Fiamingo and Others para. 64.

¹¹⁹ C-22/13 *Mascolo* para. 114-120

¹²⁰Case C-378/07 Angelidaki para 90.

¹²¹ Case C-268/06 Impact para. 69-80.

¹²² Ibid.

¹²³ C-586/10 *Kücük* para. 56.

¹²⁴ Ibid.

2.3.2. Interaction with EU anti-discrimination legislation

The EU rules on equal treatment of atypical workers have two forms of interaction with other EU-anti-discrimination rules: first, established discrimination law concepts may be 'borrowed' in order to apply to the rules on atypical workers; secondly, there is interplay between the substantive application of the various sets of rules (Peers, 2013: 50). It is the latter, namely the interplay between various sets of rules, that is relevant for our analysis. The UK petition on the use of ZHCs raised the issue of the application of Directive 2000/78/EC (Framework Equality Directive) (European Parliament, 2016c). This relates directly to the cross-over between different sets of rules. The European Commission, in its reply to the UK petition, noted that it 'has no indication that it is not properly transposed in the UK and that zero-hours workers cannot rely on these provisions before UK competent authorities, including the courts (ibid 2-3).' The statement by the European Commission seems to accept that ZHC workers fall within the personal scope of the Framework Equality Directive.

It is the case that the Framework Equality Directive does not explicitly refer to atypical forms of employment. However, in the absence of an express exclusion of atypical workers or the introduction of lex specialis rules regarding this category of individuals, atypical workers must be presumed to be included within the scope of the Directive, as they are included on the same basis within the scope of other EU employment law rules (Peers, 2013: 52). 126 A similar case can be made in respect of EU sex discrimination legislation. Whilst Directive 2006/54 regarding equal treatment for men and women in employment and occupation does not make any explicit reference to its application to atypical workers, it is long accepted that part-time and fixed-term workers are covered by legislation in this area. 127 In a recent case, the CJEU dealt explicitly with the issue of whether on-call workers should be covered by the Framework Equality Directive and held that such work cannot be considered as being purely marginal and ancillary, allowing thus such individuals to assume the status of 'workers'. 128 The same outcome is reached in respect of the scope of application of Directive 92/85 on maternity protection, providing for maintenance of a payment to, and/or entitlement to an adequate allowance that shall be at least equivalent to sick pay.

The Framework Equality Directive lays down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. There may be an overlap between the specific rules on equality of atypical workers on the one hand and other EU non-discrimination rules on the other, in this case the equal principle laid down in the Framework Equality Directive. Neither set of rules constitutes a *lex specialis* preventing the application of the other to a particular case: as a result, **each set of rules applies simultaneously** (Peers, 2013). The evolving case-law by the CJEU indicates that invoking EU anti-discrimination legislation may limit some of shortcomings identified in respect of the Atypical Work Directives, including most notably

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¹²⁵As such, the second aspect of the relationship is not examined at present.

 $^{^{126}}$ The case-law on the Directive has indeed assumed that fixed-term workers are within the scope of the Directive (see Case C-144/04 *Mangold*).

¹²⁷ Following the decision of the UK Supreme Court in *Jivraj*, Directive 2000/78 would not apply only if individuals on ZHCs were considered self-employed.

¹²⁸ Case C 143/16 *Abercrombie*, paras 20-23, discussed below.

¹²⁹Article 1.

¹³⁰ See the AG opinion in Case C-313/02 *Wippel* and the CJEU decision in the case that seems to apply this approach in practice. As Peers also suggests, 'different results from applying different non-discrimination rules are in principle are acceptable, as long as a 'most favourable result' rule applies (2013: 54).

the problems in respect of the comparator test, as discussed in the previous section, and the emphasis on the role played by part-time work in furthering labour market flexibility. 131

The principle of equal treatment under Article 2(1) of the Framework Equality Directive **prohibits direct or indirect discrimination** on any of the grounds referred to in Article 1 of that directive. The case of indirect discrimination is most relevant for our purposes here. While the evidence submitted regarding the UK petition is not sufficient to infer in a definite manner a case of indirect discrimination in the case of ZHCs, there is empirical evidence suggesting that **the use of ZHCs is particularly prevalent in respect of particularly young workers** (see analysis above). In respect of young workers, in particular, the use of ZHCs may intersect with the lower national minimum wage entitlements provided in the UK, exposing this group to significant income precariousness. In a similar vein, other forms of atypical work, including for instance FTCs in Italy, are particularly prevalent among younger age groups.

The flexibility provided by Article 6 of the Framework Equality Directive¹³² indicates that some **deviations from the standard level of employment protection** on the basis of age considerations can be accepted. However, the justification test requires that such deviations are **subject to scrutiny in respect of their appropriateness and proportionality**. While there is a slowly developing CJEU case law in respect of discrimination against older workers with reference to FTCs,¹³³ there is a smaller number of case-law regarding the application of equality legislation to deal with precarious work in respect of younger workers.¹³⁴ As Bell (2016: 18) notes, the limited number of cases involving young workers may **'reflect the inherent obstacles to litigation that those in the most precarious jobs encounter and the difficulty of trade union organization within casualised work'**. The recent decision by the CJEU in *Abercrombie and Fitch Italia Srl v Bordonaro* invited the Court to assess, for the first time, a national measure introducing specific conditions for younger workers with regard to access to a particular type of flexible employment contract from the perspective of age discrimination (see box 3 for the facts of the case).

¹³¹ For a review of the case law in this area, see Bell (2016).

¹³² Article 6(1)(a) allows for the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection.

¹³³ See, for instance, Case C-144/04, *Mangold*, Joined Cases C-250/09 and C-268/09, *Georgiev* and Case C-109/09, *Deutsche Lufthansa*. As discussed by Bell (2016): 16, the decisions in these cases seem to suggest that the CJEU will apply 'strict level of scrutiny to legislative measures that exclude older workers from laws regulating fixed-term work, especially if these apply in an abstract fashion to all workers over a given age'.

Box 3. Abercrombie and Fitch Italia Srl v Bordonaro 135

The case was concerned with the conformity of Italian law on on-call contracts with the EU principle of non-discrimination on grounds of age. Antonino Bordonaro was employed under an on-call contract (similar to a ZHC) by Abercrombie & Fitch Italia Srl on a permanent basis; he was dismissed upon his 25th birthday Mr Bordonaro due to the fact that he no longer complied with the conditions for the intermittent contract, as laid down by Article 34(2) Legislative Decree No 276/2003. The latter specified that an on-call contract can 'in any event' be concluded 'with a person under 24 years of age, on the understanding [...] that the contractual service must be performed before the age of 25 is reached'. The provision thus allowed automatic termination of permanent on-call contracts with younger workers once they reached the age of 25, in addition to allowing more flexibility regarding younger and older workers' exposure to on-call contracts. The Supreme Court of Cassation (Corte Suprema di Cassazione) identified the direct and clear reference to age in Article 34 as potentially problematic and asked the Court of Justice of the European Union (CJEU) to rule on its compatibility with the principle of non-discrimination on grounds of age in Directive 2000/78 (Article 2(1) and (2)(a) and Article 6(1)) and Article 21 of the EU Charter.

The CJEU was clear that Article 34 of the Italian legislation did indeed treat the under-25s less favourably. There was a clear difference in treatment: the under 25s could be engaged on on-call contracts in any circumstances, without conditions, and faced automatic dismissal on reaching 25. However, accepting the arguments of the Italian government that the legislation was intended to facilitate the entry of young people to the labour market, the CJEU held the Italian legislation was compatible with both Article 21 CFREU and Article 2(1), Article 2(2)(a) and Article 6(1) of the Framework Equality Directive. In doing this, the CJEU departed to some extent from the opinion of AG Bobek, who suggested that Article 6(1) implied a **strict test of justification** even if 'Member States enjoy broad discretion in their choices to pursue a particular aim in the field of social and employment policy, as well as in the configuration of the measures capable of achieving it'.136

But atypical work in the form of FJCs and ZHCs may not intersect only with **age** but also with **sex**. When it comes to the application of the EU sex discrimination legislation, the established CJEU case-law in the areas has recognized that the **unequal treatment of part-timers as compared to full-time workers may amount to indirect discrimination against women, if they make up a greater proportion of part-timers** (see, among others Costello and Davies, 2006). There is no evidence regarding the extent to which FJCs are more prevalent in the case of women in Belgium. If evidence confirms that women make up a greater proportion of fixed-timers under the FJC arrangements, there will be scope for the application of sex discrimination legislation. In this respect, the CJEU has held that **fixed-term workers are covered by the sex discrimination legislation**, ¹³⁷ even to the extent that sex discrimination law might require a renewal of a FTC, if the refusal to renew that contract was for reasons of direct discrimination. ¹³⁸

Whilst there is no statistical evidence demonstrating the existence of impact of FJCs on women in Belgium, this is not the case with ZHCs in the UK. As discussed earlier in the chapter, empirical evidence has confirmed that **women make up a bigger share of those reporting working on ZHCs (57,7%)**, compared with their share in employment not on

¹³⁵ Case C-143/16, Abercrombie.

¹³⁶ Case C-143/16, Abercrombie, para. 86.

¹³⁷ C-438/99 Jimenez.

¹³⁸ C-438/99 Jimenez, paras 39 to 47. In this case, it was implicit that no justifications for the discrimination were possible, since it constituted direct discrimination on grounds of sex (as it was due to pregnancy) (Peers, 2013: 50).

ZHCs (46,7%); importantly, this characteristic has shown little change over recent years. Given that ZHCs may sometimes fall within the definition of part-time work, the **indirect discrimination route on the basis of sex discrimination legislation** may be here relevant. This is important given the limitations of relying only on the Part-Time Work Directive, discussed above, which include, among others, identifying a comparator and considerable emphasis on promoting labour market flexibility. ¹³⁹ In emphasizing more the **issue of justification**, reliance on sex discrimination legislation 'would ensure a more balanced weighting of the interests of the employer and the worker, as well as rendering visible the gendered consequences of prioritizing labour market flexibility in this fashion' (Bell, 2016: 8-9). ¹⁴⁰ Similar to the case of the Framework Equality Directive, neither set of rules constitutes a *lex specialis* preventing the application of the other; hence, **each set of rules applies simultaneously**. What is more, to the extent to which discrimination against part-timers constitutes sex discrimination, the relevant **remedies' rules on the basis of EU sex discrimination law** will apply.

Finally, the intersection between ZHCs and FJCs on the one hand and EU rights relating to pregnancy and maternity on the other hand is worth noting. In this respect, the European Commission has confirmed that **ZHCs should be protected by the Maternity Protection Directive** (European Parliament, 2017). Further, the CJEU case-law is supportive of an **inclusive approach to maternity rights in respect of fixed-term workers**. In terms of the personal scope of the Maternity Protection Directive, the CJEU found in *Danosa* that a member of the board of directors of a capital company who regularly and in return for remuneration performed the duties assigned to het under the company's statutes and rules of procedures of the board of directors, could have the status of worker for the purposes of the Maternity Protection Directive. ¹⁴¹ Moreover, it has been held that it is unlawful to dismiss a fixed-term worker who cannot complete the full duration of the contract due to pregnancy. ¹⁴²

2.3.3 Concluding remarks

The discussion above focused on the compatibility of certain types of atypical work, including ZHCs, FJCs and FTCs, with EU secondary law. In doing this, it examined the interplay between EU primary law, in the form primarily of the CFREU, as well as secondary law, including here not only the Atypical Work Directives but the Framework Equality Directive as well as other relevant legislation on anti-discrimination. The analysis points to several areas, where the compatibility of national legislation with EU law is questioned. This includes the unequal treatment in respect of workers on FJCs in Belgium, the lack of effectiveness in respect of limiting the abuse of FTCs in the public sector (e.g. in Italy) as well as the lack of protection of individuals under ZHCs on the basis that they are not workers. At the same time, we acknowledge that there are still significant protective gaps at EU primary and secondary law, which limit in turn the extent to which inclusiveness, equality and effectiveness of labour standards may be pursued. These include, among others, the limited scope for the application of the CFREU, the lack of EU legislation regarding dismissal protection and the partial protection afforded by the Atypical Work Directives as a result primarily of the requirements related to the identification of a comparator and the scope for justification of the unequal treatment between standard and non-standard workers.

¹³⁹ However, it is important to note here that *Wippel*, which represents the clearest example of the comparator hurdle, also involved an indirect sex discrimination claim that was rejected by the CJEU. Further, the drawback with the indirect sex discrimination approach in cases involving atypical workers is that it is dependent on the atypical workers, typically part-timers, showing that the rule actually disadvantaged a considerably higher percentage of women than men, in other words, hat they experienced disparate effect (Barnard, 2012: 431).

¹⁴⁰ For a critique, see Bell (2016).

¹⁴¹ Case C-232/09, *Danosa*.

¹⁴² Case C-438/99, *Jiménez*.

3. THE COLLECTIVE DIMENSION OF PRECARIOUSNESS: THE CASE OF FRANCHISING

KEY FINDINGS

This Chapter deals with a major issue concerning the collective dimension of precariousness. It considers the **implications of franchising**, a form of business fragmentation used especially by multi-national and national businesses in the fast-food sector (Royle, 2010), **for workers' collective representation rights secured by primary and secondary EU law**. It advances two main theses. First, it argues that **franchising should be considered as a high-risk driver of representational precariousness only to the extent that law fails to adequately prevent business fragmentation from turning into voice fragmentation.**

Secondly, it identifies the major 'protective gaps' as mainly located in secondary EU law but also arising from the asymmetry generated by the exclusion of competences in areas of freedom of association and industrial action and the application of fundamental rights. These gaps offer 'loopholes' that may undermine the 'effective and 'inclusive' workers' representation standards.

The analysis is divided in four parts. The first part looks at the business architecture of franchising which rests upon the paradoxical combination of legal independence and business fragmentation with strong economic integration and control. Subsequently, the second part examines the labour architecture of franchised networks and maps its potential negative implications for workers' voice. The third part reviews the primary and secondary EU law for its application to franchised networks by identifying the relevant protective gaps. The final part illustrates the problematic asymmetry between the fundamental rights framework and the lack of competence exposed in the major problems of the lack of transnational industrial action and stronger forms of collective bargaining or co-determination than information and consultation.

3.1. Franchising: The paradoxical business architecture

Before examining the labour aspects of franchising, it is essential to analyse its complex architecture. The latter rests upon the **paradoxical combination of legal independence and business fragmentation with strong economic integration and control by the franchisor.** Franchising could be defined as a 'vertical' corporate structuring of an economic activity (of production and/or distribution of goods and/or services) in the form of a **network** (for franchise as a hybrid network see Teubner 2009 and 2011 and Ménard, 2012) comprising a **major 'lead firm', the franchisor** (typically a major brand, e.g McDonald's or Starbucks) **and various smaller business units enjoying legal and financial independence, the franchisees** (typically SMEs).

In terms of its substance, franchising is a 'business relationship whereby a franchisor **permits** a franchisee to use their **brand name**, **product**, **or system of business** in a **specified** and **ongoing** manner in return for a **fee**' (Connell, 1997: 215 emphasis added). Abel usefully summarises six key fundamental features of a franchise relationship: (i) **independence** of

the firms ii) **common economic interest**; (iii) **business format**¹⁴³ (e.g method of sales, marketing and distribution, design of premises e.t.c) (iv) **brand** (v) **control** of the franchisee by the franchisor (vi) **provision of assistance** to the franchisee by the franchisor (including training and technical assistance) (Abell, 2013: 55).

The franchise relation offers several unique commercial advantages to the parties. The **franchisee** can get access to a national (or international) brand, ready customer base loyal to the brand, easier market entry through a proven business format and support by a large and experienced business. For the **franchisor**, it gives an opportunity for an expansion with low capital and low risk exposure as the franchisee contributes the investment and bears most of the financial risks (including insolvency), a regular and secure stream of revenues, and the involvement of profit-motivated franchisees that in theory are more committed to the success than managerial staff with fixed salaries and possibilities of occupational mobility, i.e dismissal or move to a competitor (see Abell, 2013: 27-31).

As an **organizational form**, franchise is paradoxical to the extent that it combines elements of 'business **fragmentation**' and **legal independence** of the entities, with 'strong network **integration**' attained under the franchisor's control. This integration is externally so strong as for the franchise system to appear for consumers and third parties as a 'unified subject creating virtual identity between franchisor and franchisees' (Kerkovic, 2011: 104). For example, a customer entering a franchised McDonald's or Starbucks store would most likely not recognize its ownership by the franchisee. This perception corresponds to the strong integration of the network. The OECD characteristically observes that the control can often render franchising an even more effective way to integrate decision-making than an internal integration under common ownership (OECD, 1994: 11). It is also important to note that franchisors usually operate a minority of their outlets, as well as appointing 'master franchisees' with the power to franchise in a specific territory. This creates a multi-layered and segmented business structure.

Unlike other 'equity-based' forms of integration based on common ownership and shareholder ties, however, franchising is governed by a **commercial contract** concluded by the franchisor and franchisee. The contract typically specifies in considerable detail the rights granted to the franchisee, the initial and ongoing obligations undertaken by the franchisor, obligations imposed on the operation of the franchise itself, conditions for and consequences of termination and provisions for the assignment/death of franchisee (Felstead, 1993: 93). In terms of financial arrangements, the franchisor receives a percentage of the annual turnover (royalties) of each franchisee plus initial franchise fees. So, the franchisor and franchisee operate under different financial incentives: **sales maximization** for the franchisor and **profit maximization** for the franchisee, meaning that the latter is incentivised to increase profit margins (often by reducing labour costs).

In spite of the formal independence of the parties, the franchise contract is treated as an **'asymmetrical'** contract dominated by the franchisor (Felstead, 1993; Royle, 2000, 2002 and 2010; Riley, 2012). In a recent resolution, the European Parliament took notice of the power and informational deficits in its observation that:

[f] ranchisees are often the weaker contracting party, especially when they are SMEs, as the franchise formula has normally been developed by the franchisor and franchisees tend to be financially weaker and may consequently be less well-informed than the

¹⁴³ This section considers the so-called 'business format franchising' and not the less used product franchising.

franchisor and therefore dependent on the expertise of the franchisor (European Parliament, 2017: para.6).

Indeed, the franchisor possesses various **coercive** and **non-coercive powers** (Hunt and Nevin, 1974; Quinn and Doherty, 2000). Regarding the former, the franchisor can invoke sanctions for non-compliance, notably the termination (or non-renewal) of the franchise contracts with detrimental consequences for the franchise whose economic survival is contingent on its membership of the network. **Non-coercive powers** include **rewards** to compliant franchisees in the form of granting rights to additional outlets and use of **franchisor's expert power** as the result of the know-how and superior resources of the franchisor. Other practices such as **socialization** and **selection** of the franchisees by the franchisor (Royle, 2000) could be also essential in securing tight control.

Roper distinguishes three levels of control: (i) 'control through legal contractual stipulations' (usually fee structures, termination clauses and restrictions, territory rights and adherence to operating manuals) (ii) administrative control which is usually exercised via operational processes used to achieve goal congruence between the two parties and the processes used to monitor adherence to them, (iii) economic control, meaning that the franchisor enjoys control as a result of the promise of economic rewards of joining the franchise system and because of the franchisee's fear of losing upfront investment made to join the system (Roper, 2013: 14).

Operational controls are stronger when the brand success depends upon the uniformity and specificity of product as in fast-food and coffee industries. An example of tight control is offered by McDonald's sophisticated software, monitoring in real time each store's volume of sales for calculating the desirable number of staff levels (Royle, 2000). The control question is crucial for workers' representation, as it creates confusion over the *strategic centre of decisions where workers' voice should be located and exercised.*

Box 4: Franchising as an Economic Activity within the EU

- In terms of GDP, in 2009 franchising contributed £11.8 billion in the UK, €48 billion in Germany and €47.6 billion in France (Abell 2013: 1).
- The European Franchise Association estimates that in 2011, there at least 3 million people are employed or self-employed in the franchised sector (figures representing only 16 EU countries excluding Bulgaria, Cyprus, Estonia, Greece, Ireland, Latvia, Lithuania, Luxembourg, Malta, Romania, Slovakia, Slovenia) including 594,000 in the UK, 330,991 in France, 496.000 in Germany and 188,822 in Italy (European Franchise Federation 2012: 58).
- In 2011, McDonald's employed 294,000 workers within the EU in 6.200 restaurants, 70% of which are franchise-operated (London Economics 2011: vii and 58)
- The estimated turnover of franchising in the EU is over €215 billion generated by over 9971 franchisees (Abell 2013:1 referring to statistics by the European Franchise Federation)

3.2. Franchising and (representational) precariousness: The labour architecture

Academic literature recognises that precariousness and atypical work do not arise only in relation to *forms* of employment (part-time, fixed time, casual, agency work) but may be

intimately linked with *business organizational forms*. Viewed from the perspective of workers, franchising is considered as a source and manifestation of the fragmented landscape characterised by the diversification and multiplication of management entities that control and profit from workers' labour. Franchising has been described as an instance of the 'fissured' (Weil, 2014), 'fragmented' (see Fudge, 2006: 216; ILO, 2011: 5; in general see Albin and Prassl, 2016) flexible labour (Felstead and Jewson, 1999) and even a potential case of a 'triangular relationship' (Quinlan, 2015: 6).

Franchising fits a broader trend towards the 'vertical disintegration' of the firm (see Collins, 1990(a); for the US see Stone, 2006: 253-255) characterised by 'dislocating strategies' such as outsourcing, networking, subcontracting (Weiss, 2011:45) involving the transfer of functions regarded as peripheral to other entities so that the core firm focuses on its core competencies (the **brand** in case of franchising). Consequently, this rise of the 'permeable' organization leads to blurred organizational boundaries (Kellner et al., 2011: 75). Indeed, a key strategic feature of franchising is the effort to externalize management and risks (including employment risks) away from the lead to other independent firms with franchisor duties confined to mere 'contractual policing' (Thompson, 1994: 211). For workers' representation, the problem is that these trends may move power 'away from centralized locations where there are opportunities to establish effective institutions of countervailing power' (Grimshaw et al., 2004b: 273). In this sense, franchising may generate a profound lack of correspondence between decision-making at the network level controlled by the franchisor and workers' location of voice dispersed at the franchisee level. This has the effect that the franchise network may operate in a representational void, as franchisor decisions are unrestrained by the voice of franchisees' workers while at the franchisee level voice may be ineffective because of the lack of real decision-making power by the franchisee.

In this context, the franchise structure may operate as a restraining, or even disabling, factor of workers' effective representation and therefore being a chief driver of precariousness. This effect is attained by firms capitalizing on the associated fragmentation of workforce for either 'excluding' workers from representation structures altogether or restraining voice to 'ineffective' smaller sites, while simultaneously reducing the strength of any potential unionised employees among the core workforce. But this threat is the joint outcome of two factors: (i) the business fragmentation-(network) integration dialectic contrasting the legal independence with the control of the lead's firm, raising important questions over the 'real' decision-making and the appropriate site of voice and (ii) law's failure to adequately prevent business fragmentation from turning into voice (representational) fragmentation. It is this synergistic interaction between the legitimate business structure and the legal failure which creates the potential for gaps.

Let us examine the first factor, that of **fragmentation-integration**. In the previous section, we already touched upon this paradoxical dynamic. From an employment perspective, franchise relationships are characterised by the control of classical aspects of employment relations, such as wages and benefits, disciplinary procedures or dismissals by the franchisees. As Brand and Croonen put it, human resources management 'could very well be the last strategic area that is left to the franchisees' discretion' (Brand and Croonen, 2010: 607). Hence one may invoke the legally and economically independent nature of the franchisee and the absence of the franchisor's control over employment matters for denying the relevance of a network-level voice directed towards the franchisor. However, reality tend to be more complex. While it is important to highlight the diversity of franchise arrangements,

the franchisor could typically directly or indirectly influence employment conditions through a variety of channels, including the following:

- The franchise contract, or the operations manual to which the franchisee should adhere, can **directly or indirectly regulate** matters affecting working conditions, such as working hours, uniforms, training and recruitment policies justified on the basis of protecting the brand integrity and brand reputation.
- The powerful sanctioning mechanism for ensuring compliance with the instructions of the lead company (through terminating the franchise agreements or not granting additional outlets) could have a disciplining effect curtailing the actual management discretion of the franchisee. A clear example is that when the lead company has a policy against unionisation, it is harder for individual franchisees to act otherwise owing to fear of losing the contract (for McDonald's see Royle, 2000).
- The financial arrangements can **indirectly influence working conditions**, by controlling all the other factors besides labour conditions. For instance, a US report stated that:

'The franchisors can dictate how many workers are employed at an establishment, the hours they work, how they are trained, and how they answer the telephone. While the brands claim that they have no influence over wages paid to workers, they control wages by controlling every other variable in the businesses except wages'. (Ruckelshaus et al., 2014: 11).

Particularly in sectors where the labour costs amount to a significant percentage of the overall costs (as in fast-food industry), the inability of the franchisee to control all others factor (such as pricing policy, products purchased from the franchisor or from approved by the latter producers at specific prices, rents) may make **labour costs one of the few, if not the only, variable to be adjusted for increasing the profit margins and profitability by the franchisee.** This fact, combined with a perception of workers' representation as a cost or liability in as much as having a upwards effect on wages, may prompt the franchisee's hostility to workers' representation.

Determining who is 'controls' and influences working conditions in reality as well as taking business strategic decisions which could have an effect on employment conditions is key for locating the 'effective' and 'appropriate' level of workplace representation. Besides the 'control' rationale, two other rationales may be of relevance. A 'democratic' rationale, focusing on the democratic character of workplace representation (Mantouvalou, 2014), would furnish a democratic basis for the involvement of workers of the entire network in decisions of the franchisor that could affect, directly or indirectly, their employment. A 'risk rationale' would require the franchisor to take responsibility of the effect of its decisions justified by the need to internalize the risks of its entire network activity from which it profits, which will include worker representation obligations. (see Deakin, 2001; Collins, 1990b).

These dynamics interact with the **law's failure to prevent business fragmentation from turning into voice fragmentation by restoring representation institutions at a network level.** The gaps assume two main forms. The first relates to the *location* of the voice. To the extent that the law privileges a single contractual employer at the expense of organizational reality as a basis for determining the relevant institutions, which in labour law literature is termed as the unitary concept of employer (see Prassl, 2015 and Deakin, 2001), **voice fragmentation tends to naturally follow business fragmentation**. And even if

the workers of the franchisee are able to exercise collective rights in their dispersed units, they are at high-risk of 'barking up the wrong tree' for two reasons: (i) franchisees may lack the appropriate resources to implement alone certain financial decisions such as wage increases without a reconsideration of the whole cost structure imposed by the network and (ii) they may not have actually the power to take a decision, as for example when the franchisor operates a strong non-unionisation policy. Shamir offers a more sophisticated account of these collective problems in the context of the difficulties in unionising subcontracted labour, which for her covers franchising. She traces three assumptions of collective bargaining that are challenged by subcontracting. The first assumption is that the union has leverage and significant bargaining power vis-à-vis the employer. Indeed, this leverage is curtailed in franchising because of the dislocation between the confinement of voice to de-centralised units and the centralised decision-making. The second assumption is that the union and the employer are repeat players in the negotiations, termed as the 'stability of contracting entities. Subcontracting destabilises the relationship in the presence of 'the great unilateral power of a third, supposedly neutral and unrelated partythe lead company' (Shamir, 2016: 240). The easy discernible and quite stable nature of the bargaining unit is the third assumption (Shamir 2016) to be challenged, which for franchising concerns the exclusion of the franchisees' workforce for the bargaining unit of the franchisor.

Secondly, and very importantly, the personal scope of various collective labour rights (see below for EU law) is often attached to **'exclusionary minimum thresholds'** related to minimum numbers of employees. This could produce a **'disenfranchising effect'** for franchisees' workers by giving rise to **'eligibility gaps'** (for the term see above chapter 1). And if a large network workforce is spread into multiple separate small units with each franchisee, this may lead to the complete lack of access to any workplace representation, thus depriving them of the possibility of exercising their collective labour rights.

3.3. Franchising and EU law: Identifying the gaps

Primary and secondary EU law does not acknowledge, let alone regulate, franchising as an organizational form posing a threat to workers' effective representation. On its own this silence would be hardly problematic if the general framework for applying the fundamental collective labour rights was 'robust' and devoid of 'protective gaps'. However, this section identifies several gaps, mainly sourced in secondary legislation which could undermine the 'inclusiveness' and 'effectiveness' of labour rights afforded by EU law in franchise networks by weakening or excluding workers' representation.

Before turning to the review, it is important to make two preliminary clarifications. First, we should note that, in comparative terms, the EU's regulatory silence on the labour aspects of franchising corresponds with a **general under-regulation of franchising as a specific, distinct commercial activity at EU level** (Abell, 2013). With the exceptions of the regulation generally exempting franchise agreements from the prohibition of anti-competitive practices under Article 101 while disallowing the imposition of minimum prices as a 'hard core' practice¹⁴⁴ and the potential application of the *Directive on Unfair Contract Acts* prohibiting terms that 'cause a significant imbalance in the parties and obligations' between

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¹⁴⁴ COMMISSION REGULATION (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices; see C-161/84 *Pronuptia*.

the parties which may operate to exclude the more onerous provisions against the franchisee, franchising remains largely regulated at national level.

Secondly, we should note that employee representation may take two 'hard' and two 'soft' forms as seen from the perspective of the strength of workers' influence:

- (i) co-determination and collective bargaining referring to the workers' involvement in the business management and regulation of terms and conditions of employment through collective agreements respectively ('hard forms') and/or;
- (ii) **consultation,** focusing on the establishment of active dialogue on several issues and **information** which concerns the more passive acquisition of information by the workers ('soft forms').

3.3.1. Primary EU Law

Chapter 1 developed the argument that primary EU law offers a broadly supportive framework against precariousness, a key dimension thereof being effective workers' representation. In the assessment of the collective aspects of franchising, the following collective labour rights are of direct relevance (see table 12).

Table 12: The CFREU and the collective aspects of franchising

Art. 27: Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

Art. 28: Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Art. 31(1) Fair and Just working conditions. Every worker has the right to working conditions which respect his or her health, safety and dignity.

Article 12 Freedom of Assembly and of association. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

In spite of the reservation clauses referring to national provisions (Art. 27 'under the conditions for provided by Community law and national laws and practices'; Art. 28 'in accordance with Community law and national laws and practices'), as part of a rights-based dignity-focused approach two core principles emerge as central: (i)'inclusiveness', associated with the comprehensive coverage of voice to include all workers which immediately derives from the equal treatment principle; (ii) 'effectiveness' of voice implying appropriateness, expressed in Article 27 as a right to information and consultation 'at appropriate levels, which should be interpreted as asking for voice to be 'meaningful' and 'effective'.

To be sure, alongside these collective labour rights secured under Articles 27 and 28 which encompass both collective bargaining/industrial action and information/consultation, **Article 16 on freedom to conduct business** should be considered. It certainly guarantees franchising as a legitimate organizational form. But this should not be taken as entailing that workers' representation should necessary follow the business fragmentation model according to a strict principle of legal independence of firms and thereby denying workers a voice at the network level. Such view would be unacceptable for several reasons. First, accepting a

network-wide scheme of representation does not annul or substantially hinder the economic freedoms of these agreements. Second, even if this was the case, Article 16 should be interpreted in 'accordance with dignity' and 'must be viewed in relation to its social function'. This interpretation is already existent in secondary EU law. For example, notwistanding the fact that transfer of undertakings is a core manifestation of the freedom to conduct business, the EU's regulatory framework provides for mandatory collective representation structures of information and consultation and preservation of employees' contractual rights during transfers.

Finally, the exclusion of competences on pay, the right to association, the right to strike or the right to impose lock-outs provides for a complicated geometry where **primary law competence gaps** can interact with domestic legislation to weaken the application of fundamental social rights.

3.3.2. Secondary EU Law

The EU has actively promoted 'soft' mechanisms of worker representation in the form of Directives concerning information and consultation based on the respective social policy competences ((Article 153(1)).

For franchising, the following four directives are of potential relevance: 147

- The *European Works Council Directive (2009/38/EC)* [EWCD] on the establishment of a European Works Council or a procedure in Community-scale undertakings and community-scale groups of undertakings for the purposes of informing and consulting employees;
- **Information & Consultation Directive (2002/14/EC)** [ICD] establishing a general framework for informing and consulting employees in the European Community;
- **Collective Redundancies Directive (98/59/EC)** [CRD] on the approximation of the laws of the Member States relating to collective redundancies;
- **Transfer of Undertakings Directive (2001/23/EC)** [TUD] on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses;

These regulatory interventions share the common aim of securing the involvement of employees in decision-making in general, transnational and specific instances concerning collective redundancies and transfer of undertakings. In a recent 'fitness check' of the three directives (excluding the EWCD), the European Commission described their benefits as ensuring respect of fundamental social rights, increasing trust between management and labour, protecting workers, providing solutions to work problems, contributing to increased adaptability and employability, improving staff and company performance, and ensuring a more level playing field among companies (European Commission, 2013: 2). Deakin and Morris (2012:980) find three broader arguments for worker involvement:

 The 'democratic argument', meaning that workers have a right to participate in the decisions which affect their interests and working lives to the extent involving those affected;

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¹⁴⁶ See cases cited in footnote 9 above.

¹⁴⁷ The Societas Europeae (2001/86/EC) supplementing the Statute for a European company is not examined. Whereas going even further by prescribing potential rules for workers' involvement in the management or supervisory board, the fact that it requires a single company is obviously inconsistent with the franchise network model.

- ii. The 'economic argument', meaning that even if there is a delay in business decisions, the reconciliation of interests is more beneficial to the well-being of the enterprise;
- iii. and the 'community-based' argument pointing to the benefit for local community of information and consultation as, for example, in collective redundancies.

European Works Council Directive (EWCD)

The EWCD (recast in 2009) is a regulatory response to the increasing gap between the 'transnationalisation' of corporate activity and the confinement of information and consultation procedures to national level. As characteristically observed in the Directive's preamble:

Procedures for informing and consulting employees as embodied in legislation or practice in the Member States are often not geared to the transnational structure of the entity which takes the decisions affecting those employees. This may lead to the unequal treatment of employees affected by decisions within one and the same undertaking or group of undertakings' (Recital 11 of the Directive).

The Directive aims at creating a transnational body of information and consultation in community-wide undertakings or group of undertakings for information and consultation purposes. Described as 'one of the most important achievement of social Europe' (Laulom, 2010: 202) and an 'important challenge to the unadulterated rights of ownership and management (Ramsay, 1997:320) the Directive provides for the establishment of a European Works Council (EWC) or an information and consultation procedure in community-scale undertakings or group of undertakings. Its objective is to 'improve the right to information and consultation' in transnational undertakings' with 1000 employees in at least two Member States (Article 1)' while 'ensuring their effectiveness and to enable the undertaking or group of undertaking to take decisions effectively' (Article 1(2)). It is grounded in the recognition of effective workers' participation, albeit of the 'soft' information and consultation variant, as a prerequisite for business success and balanced economic and social process.

Infused by the spirit of 'contractual voluntarism' (Streeck, 2001: 138), the Directive assigns priority to voluntary arrangements for the creation of EWC, and only if there is no agreement a mandatory subsidiarity process of setting EWCs is prescribed (Article 7 and Annex I). Following a review by the Commission and social partners (see Jagodzinski, 2008), the last revision of the Directive contained several improvements concerning the improved definitions of information and consultation (Article 2(1)f and 2(1)g), ¹⁴⁸ 'adaptation clauses' to resolve issues during restructuring of companies (Article 13), provisions for training of workers' representatives without loss of wages (Article 10(4)), separate meetings of the representatives of the special negotiating body after negotiations (Article 5(4)), an important duty to transmit information to the parties concerned by the application of the Directive, especially with regards to the 'structure of the undertaking or the group and its workforce' (Article 4(4) ,the possibility of requesting assistance from outside experts that can include

¹⁴⁸ (f) `information' means transmission of data by the employer to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it; information shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to undertake an indepth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings;

⁽g) 'consultation' means the establishment of dialogue and exchange of views between employees' representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content as enables employees' representatives to express an opinion on the basis of the information provided about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings;

community-level trade union organisations (Article 5(4)) and the duty to inform appropriate European trade union organisation of the commencement of negotiations (Article 5.(2)(c)).

As designed for transnational undertakings, EWCs **seem a suitable representational vehicle for franchise networks**, which may operate in multiple Member-States and led by a multinational company. However, there are several gaps hindering this effect.

The major gap concerns the uncertainty over whether the franchisor is a 'controlling undertaking' of its franchisees. This question is of major significance since its determination affects whether the franchise network is to be construed as a 'group of undertakings'.

Article 3 of the Directive offers the following definition of 'controlling undertaking' (box 5):

Box 5: Defining the notion of the 'controlling undertaking'

- 1. For the purposes of this Directive, 'controlling undertaking' means an undertaking which can exercise a dominant influence over another undertaking ('the controlled undertaking') by virtue, for example, of ownership, financial participation or the rules which govern it.
- 2. The ability to exercise a dominant influence shall be presumed, without prejudice to proof to the contrary, when, in relation to another undertaking directly or indirectly:
- (a) holds a majority of that undertaking's subscribed capital; or
- (b) controls a majority of the votes attached to that undertaking's issued share capital; or
- (c) can appoint more than half of the members of that undertaking's administrative, management or supervisory body. (emphasis added).

The sole determining criterion is the existence of 'dominant influence' by one undertaking over another. This criterion points to the rejection of a formal 'legalistic' assessment deferring to the business choice of legal independence in favour of an 'economic/business reality' one looking at the undertaking controlling the other's decisions and thus being a major decision-making center. This interpretation is consistent with the *effet utile* of the right of information and consultation, which would be rendered ineffective if these rights are exercised in relation to an entity not in actual control of the decisions.

Article 3(1) gives a non-exhaustive list of types of 'dominant influence: ownership, financial participation or rules governing the controlling undertaking covering both 'equity-based' (ownership, financial participation) and 'non-equity based' linkages (rules which govern it). Article 3(2) establish a rebuttable presumption of this influence in case pertaining to 'equity-based' links of majority shareholding, majority of votes or power to appoint half of the members in the company's administrative, management or supervisory bodies.

Does franchising fall under Article 3(1)? The franchise contract, in as much as establishing various forms of control over the franchisees, is an example of 'rules that govern the undertaking' (see Dorssemmont, 2013; Buschak, 2003). Indeed, academic literature has posited 'contracts' as a form of bonding of productive organizations (Collins, 1990b), which often is not dissimilar to those found in equity-based corporate groups (Muchlinski, 2007:316).

This interpretation is supported by the Working Party for the Directive stating explicitly that some forms of franchising may establish the dominance (Working Party, 1995: 95) required for 'controlling undertaking' as well as the preamble which states that 'the functioning of the internal market involves a process of concentration of undertakings, cross-border mergers, take-overs, joint ventures and consequently a transnationalization of undertakings'. Since franchising is an important form of transnationalisation of economic activities, it would run counter to the spirit of the Directive to be excluded. Having said that, Dorsemmont rightly points to the fact that the Directive is mute towards the purpose of 'control' (Dorsemmont, 2013). Does control need to be exercised on employment matters narrowly conceived as wages, working time, etc. or is it sufficient to be generally about business and management decisions? This lack of clarity generates an important gap, even though it is possible to argue that what matters is the overall decision-making even if indirectly affecting employment conditions over the entire franchise network.

This uncertainty over the capture of franchising by the 'controlling undertaking' provisions, reported as an issue by the EWC co-ordinators (Voss, 2016:20) and combined with the thresholds of 1000 workers over two countries, could have a negative impact on the collective voice of franchisees' in the following ways.

First, as franchisees typically operate in a single country and employ far less than 1000 workers, they are **excluded** from representation at the EWC structures (unless voluntary agreements provide otherwise). In certain cases of companies relying heavily on franchised outlets, this would make it even harder for the workforce of company-owned outlets run by the franchisor to satisfy the threshold and would hence deny forms of collective representation even for the core workforce employed by the franchisor. However, even if the company's core (e.g McDonald's Europe) has a EWC, the 'exclusionary effect' means that it is not effective as would have been if including all workers across the network. In addition, this segmentation gives the chance to a franchisor determined to resist workers' representation to engage in a 'shifting game' by trying to move workforce between company-owned and franchised outlets, or converting company-owned outlets to franchised outlets, for defeating the application of the thresholds.

Secondly, another gap concerns the **inclusiveness of the type of workers counted for satisfying the thresholds.** As franchise workers, especially in fast-food industries, are employed on casual atypical contracts, they may not have employment status under domestic law (see Chapter 2). While the Directive expressly provides for the inclusion of part-time workers, it is silent on the definition of the 'employee'. This could manifest in a gap depending on each country's definition of workers, which can operate at the exclusion not only of atypical workers but also of typical workers to the extent that they may not be able to satisfy the thresholds alone.

In his work on labour relations in McDonald's, Royle (2000;2002) has identified the following issues associated with the 'effectiveness' of the EWCD provisions:

- Problems with the development of an autonomous effective employee policies linked with the lack of separate meetings for EWC or special negotiating committee representatives, lack of advice from outside experts, lack of training in negotiation skills along with the problem of individual commitment of workers often employed on casual and part-time contract;
- Management's anti-union flying squads dispatched by the franchisor to stores for preventing unionisation and anti-labour practices such as buy-out of work councillors;
- An overall passive acquiescence of workforce in employer decisions;
- Election of salaried managers as EWC representatives which do not have genuine independence from the employer's interest;

Lack of involvement of hourly or part-time workers who are in most need of representation and usually constitute the majority of the workforce.

The recast directive, hailed as a substantial progress (Jagodzinski 2009; De Spiegalaere and Waddington, 2017) sought to address some of the issues. As we saw above, it stipulated a meeting for the employees' representatives alone, training without loss of wages, and expert assistance at the request of employees' representatives. It also provides that the content of the agreement should provide for the composition by 'taking into account where possible the need for **balanced representation** of employees with regards to their activities, category and gender, and the term of office' (Article 6(2)b (emphasis added). While the inclusion of these categories is welcome, it is still very vague and weak thus giving potential right of abuse by excluding atypical workers from representation.

Third, the union involvement in the EWCs is of great significance. The lack of a provision for a formal trade union role in nominating EWCs representatives is a disabling factor of their effectiveness rendering them vulnerable to employer control and thereby potentially linked with power deficit gaps experienced by the workers. In his finding of McDonald's EWC as generally involving a process captured by management with little or no employees' influence over management decisions (Royle 2000; Royle 2002), Royle invokes as one of the reasons the low or non-inclusion of trade union-backed members as employee representatives (Royle 2002:274)

Fourth, another issue concerns the sanctions for the non-compliance with the Directive. In the preamble the Directive calls for 'effective, dissuasive and proportionate sanctions for violations'. Although this change moves in the right direction, the provision of soft sanction mechanisms by the Member State may restrict the effectiveness of the directive. As a result, a strong sanction regime is required.

Fifth, the restriction of the issues subject to discussion, information and consultation by the EWC to 'transnational matters' may present a technical barrier for franchising. According to the Directive 'matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States' (Article 1 par.4 of the EWC Directive). Depending on the broad or narrow interpretation, this definition may exclude matters which whereas concerning undertakings in one country arise from decisions by the central management, as for instance the franchisor's decision to withdraw entirely from the territory of a Member State.

Finally, a serious gap of the Directive concerns the so-called **'transparency deficit'** (Whittall et al., 2008). Before 2009, there was no express legal duty for undertakings to provide their numbers and structure so as for workers to ascertain the possibility of setting an EWC. Following a series of judgments involving undertakings within group of undertaking requiring the supply of necessary information essential for the opening of negotiations for the establishment of EWC, ¹⁴⁹ Article 4(4) specifies a duty of the undertakings to provide information at the workers' and unions' request in order to verify the legal possibility of establishing EWCs. However, no mechanism is stipulated for workers to 'verify' these data through a public authority that could be helpful especially for franchise networks where it is unclear whether they fall within the 'controlling undertaking' provisions.

¹⁴⁹ See Case C-349/01 ADS Anker, Case C-62/99 Bofrost and Case C-440/00 Kühne & Nagel.

Information and Consultation Directive 2002/14/EC

The Information and Consultation Directive establishes a general minimum framework for 'timely' and 'a priori' information and consultation in undertakings or establishments within the EU. Sensitive to the diverse range of such schemes at national level, the Directive affords Member-States wide flexibility in defining key concepts ('establishment', 'employer', 'employee', 'employee representatives') and in the implementation of its arrangements. Notably, it defines information as 'transmission by the employer to the employees' representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it'(2f) and consultation as 'the exchange of views and establishment of dialogue between the employees' representatives and the employer' (Art 2g). Information and consultation cover a range of issues concerning the economic development of the undertaking or establishment in general, and employment-related affairs namely the situation, structure and development of employment and any measures presenting a threat to employment as well as decisions likely to lead to substantial changes in work organisation or in contractual relations (Article 2 of the Directive).

For franchising networks, the scope of application of the Directive determined by thresholds is crucial. More specifically, Article 3(1) gives Member States the choice of two thresholds, either of an 'undertaking' employing at least 50 employees in any one Member State, defined as a public or private undertaking carrying out an economic activity' within the EU or an 'establishment' employing at least 20 employees in any one Member State, defined as a 'unit of business defined in accordance with national law and practice, and located within the territory of a Member State, where an economic activity is carried out on an ongoing basis with human and material resources'. These thresholds, along with the unclear definitions of 'undertaking' and 'establishment and the absence of 'controlling undertaking' provisions akin to the EWC Directive give rise to gaps in its application to franchise networks.

First, the **thresholds may produce an exclusionary effect** to the extent that the spreading of the franchising among various sites by the franchisor makes it harder for employees to meet the threshold of 50 employees, or even the 20 employees in any establishment thus depriving those workers of their right to information to consultation. Whereas these thresholds are justified on the need to 'avoid any administrative, financial or legal constraints which would hinder the creation and development of small and medium-sized undertakings' (recital 19), in fact the **element of control differentiates franchised units from** *independent* **small business**. And even if these thresholds are satisfied for some franchisees, the multiple sites of information and consultation may significantly divergence from the *site* where the real decision-making is taken thereby reducing the effectiveness of the existing information and consultation processes.

At this point, the main legal question is whether the legal concepts of 'undertaking' or 'establishment' could be interpreted in an 'inclusive' manner encompassing the franchise network or at least multiple franchisees, rather than each franchisee. In such case, the thresholds would be usually met. The Directive fails to provide guidance on this question and does not contain any reference to 'controlling' undertakings or group of undertakings which could be used as a basis for including franchisees. For 'undertaking', the reference to an 'undertaking carrying out an economic activity' is not very helpful in determining the upper boundaries of what might constitute an undertaking. To be sure, the 'economic activity' criterion expresses an intention to adopt a functional criterion which coincides with the CJEU's definition of undertaking under competition law (see Jones, 2012) by rejecting a simple formal correspondence with formal corporate legal personality. In the field of competition law, the Court has treated the legal status of the entity immaterial for the concept of

undertaking. 150 In the context of anti-competitive practices and a parent-subsidiary relationship, the CJEU has held that the parent and subsidiary relationship can be treated as an economic unit if the subsidiary 'enjoys no economic independence', 151 has 'no real freedom to determine its course of action on the market' 152

With the serious caveat of the different areas where these interpretations are made and bearing in mind that they concerned parent-subsidiary relationship, if applied *mutatis mutandis* as criteria for the scope of undertaking, the franchisee cannot be held to 'enjoy no economic dependence' while the 'real freedom' test may be more nuanced depending on the level of actual control. So, even though the definition of 'undertaking' exhibits a *functional* orientation in looking at the reality over the form, it still lacks clarity for its application to franchise network and there is no relevant case-law for that matter. As for the definition of 'establishment', the Directive defers to national practices. Whereas in principle this does not preclude the possibility of Member-States interpreting integrated franchise networks as 'establishment', the reference to a "unit of business' provision seems to support a decentralised approach that cannot be easily accommodated with a network-wide 'franchise establishment'.

An additional gap concerns the 'inclusive' scope of all types of employees for the threshold. The Directive defers also for the notion of 'employee' to the national laws while granting the Member States the determination of the methods for calculating the thresholds. Similar to the EWC Directive, this could exclude from the calculation atypical or casual workers. This is part of the general problem of the lack of a uniform inclusive notion of worker unlike what is the case for free movement of workers (Kountouris, 2017). Having said that, in this area the CJEU has strongly criticised certain forms of exclusion of atypical workers by the French Government on the basis that they are 'liable to render those rights meaningless and thus make that directive ineffective'. ¹⁵³

Collective Redundancies Directive 98/59/EC

In recognition of the social consequences of collective redundancies, the *CRD* mandates the involvement of workers affected in planned collective representatives through workers' representatives with a view to prevent or minimize their effect. Like the *ICD* and *EWCD*, the fragmented structure of franchises could interact with the thresholds as to 'exclude' workers threatened with redundancies. The Member-States are allowed a choice to define them as (box 6):

Box 6: Definition of collective redundancies

- i) either, over a period of 30 days:
- at least 10 in establishments normally employing more than 20 and less than 100 workers, $\,$
- at least 10 % of the number of workers in establishments normally employing at least 100 but less than 300 workers,
- at least 30 in establishments normally employing 300 workers or more,
- (ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question;

¹⁵⁰ Case C-41/90 *Höfner*, para. 21

¹⁵¹Case 22/71 *Import* para.8.

¹⁵² Case 15-74 *Centrafarm*, para 5.

¹⁵³ C-176/12, *AMS*, para 25.

The absolute numerical thresholds (10 and 30 workers for option (i) and 20 workers for option (ii)) could lead to the exclusion of those workers in those franchise networks where the individual units dismiss a lesser number of workers. For instance, if a franchisor decides to withdraw from a particular country where each individual franchisee employs fewer than the chosen thresholds or use its control mechanisms to downgrade the staff operations but in an even-spread manner across the franchised outlets, then these workers may not meet the threshold and thereby lose their representation rights.

This gap, of course, could be potentially rectified if the definition of 'establishment' was to include the franchise networks. The CJEU had the opportunity to rule on the definition on various occasions. In *Rockfon* it clarified that the definition of establishment is 'a term of community law and cannot be defined by reference to the laws of the Member States'. ¹⁵⁴ The Court adopted an 'expansive' view of the minimum boundaries of establishment by stating that:

The term "establishment" appearing in Article 1(1)(a) of the Directive must therefore be interpreted as designating, depending on the circumstances, **the unit to which the workers made redundant are assigned to carry out their duties.** It is not essential, in order for there to be an "establishment", for the unit in question to be endowed with a **management which can independently effect collective redundancies**. 155

In *Fijutsu-Siemens*, a case involving an entity taking *de facto* decisions for collective redundancies to be effected by a subsidiary, the Court held that it is the **contractual employer** who has the obligation to carry out the information and consultation¹⁵⁶ while noting that the purpose of the Directive is not 'to restrict the freedom of such a group to organise their activities in the way which they think best suits their needs'.¹⁵⁷

In light of these effects, and to the extent the franchisee is the contractual employer which can, at least formally, independently effect collective redundancies, it is hard to see how the network can be considered as an entire unit for the purposes of being held as 'establishment'. Even though the Court has held that the Directive should now allow companies 'to escape the obligation to follow certain procedures for the protection of workers and large groups of workers could [thus] be denied the right to be informed and consulted", it is difficult to establish an 'establishment' at the franchise network in light of Court's jurisprudence. This creates gap in cases of numerical thresholds. But the opposite is true for thresholds in the form percentages of the employees since the broader the definition of 'establishment' the more likely is that the percentage of redundancies in a single establishment will be diluted by including other places without planned collective redundancies (see Countouris et al., 2016: 39-40). Finally, the Directive does not contain any definition of 'worker thus deferring to Member States which can exclude certain atypical workers from its provisions, though this discretion is subject to judicial control for not undermining the purpose of the Directive.

Transfer of Undertakings Directive 2001/23/EC

The Transfer of Undertakings Directive aims at safeguarding workers' rights in case of a transfer of undertakings in three ways: (i) preserving their contractual terms and conditions after the transfer, (ii) protection from dismissal because of the transfer and (iii) information and consultation for the employees of both the transferor and transferee.

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¹⁵⁴ C-449/93, Rockfon para. 25.

¹⁵⁵ Ibid para. 32 (emphasis added)

¹⁵⁶ C-44/08 Fujitsu Siemens para.43.

¹⁵⁷ ibid para.59.

Should franchisees workers be consulted in case of the transfer of the franchisor to another company that may have implications for the economic operation and affect the employment status? Here despite the absence of thresholds, the requirement of the existence of a direct relationship with the transferor or transferee seems to preclude any possibility of information and consultation with the network's employees. As the definition of 'transferor' and 'transferee' is one related to the natural or legal persons who 'ceases to be the employer' and the one that 'becomes the employer in respect of the undertaking, business or part of the undertaking or business', an interpretation expanding the scope of information and consultation to the entire franchise network is hard to adopt (unless one adopts the joint employer doctrine). It is true that in Albron, 158 the Court rejected a strict adherence to a contractual employer, saying that it does not prevent the noncontractual employer, to which employees are assigned on a permanent basis, from being likewise capable of being regarded as a 'transferor', within the meaning of Directive 2001/23'. However, the franchise employees would not typically be regarded as 'assigned on a permanent basis' to the franchisor except for cases of explicit and direct control thus meaning that they would not be able to exert influence over the transfer decisions despite the potential radical implications of the transfer for their status (e.g restructuring plans of the new transferee involving the closure of franchised outlets).

3.3.3. Collective Bargaining and Industrial Action

This section notes the asymmetry generated by the exclusion of competences in areas of freedom of association and industrial action and the application of fundamental rights. Primary EU law guarantees not just the 'soft' right of information and consultation but 'hard' rights related to collective bargaining and industrial action. However, the absence of EU regulation in these areas, not least because of the Treaty-based competence exclusion (Article 153 TEU), constitutes a primary enabler of representational gaps in the application of these fundamental rights by allowing Member States to fail to effectively prevent business fragmentation from turning into voice fragmentation. The problem, as Marginson puts it, derives from the challenge of multinationals to the principle of correspondence of effective trade unions, in their organisation and capacity for action, with the spatial scope of employers (Marginson, 2016: 1).

Regarding collective bargaining, national provisions may undermine the 'effectiveness' of this voice by tying the respective bargaining units only to the franchisees according to the *principle of legal independence*, which can lead to fragmented collective bargaining or if combined with numerical thresholds can prevent the possibility of collective bargaining altogether

For industrial action, which is a prerequisite for meaningful collective bargaining (Hyman, 1975: 189-190; Ewing and Hendy, 2012: 3), the prohibition by some countries of 'solidarity industrial action', such as in the UK (supporting other workers in their primary action) could severely undermine the possibility of coordinated action against the franchised and franchisor-owned outlets. For example, McDonald's workers striking in one store could not be assisted by workers in other franchised outlets thus diminishing the effect of the industrial action. In addition, the lack of any provisions for guaranteeing **transnational industrial action** could severely hinder the possibility of coordinating actions across the sites of a multinational that can act as a leverage instrument for the employees of the franchised network in their effort to gain and improve their representational rights.

¹⁵⁸ C-242/09 Albron.

Especially in countries with no binding sectoral agreements with *erga omnes* effect, the combined lack of information and consultation, collective bargaining or industrial action could make franchisees unable to access any representational structure thus creating a collective form of precariousness. And while unionisation in the fragmented small sites is theoretically possible, as Abbott has demonstrated in small enterprises, this is more difficult due to 'variety of factors including employer hostility, employee resistance/ lack of interest and the reluctance of trade unions to organize small firms because of the higher costs and lower returns, for example in relation to subscriptions and bargaining power of unions'. Conversely, 'the larger the organization, the greater the likelihood that employees are treated as a group, building up a sense of common interests between individuals that can be best represented collectively' (Abbott, 1993: 316).

3.4 Concluding remarks

The Chapter considered the implications of franchising for workers' collective representation rights protected under primary and secondary EU law. It argued that franchising should be considered as a high-risk driver of representational precariousness when combined with law's failure to adequately prevent business fragmentation from turning into voice fragmentation. Primary and secondary EU law does not acknowledge, let alone regulate, franchising as an organizational form presenting a risk to workers' effective representation. On its own, this silence would be unproblematic if the general framework for applying the fundamental collective labour rights was 'robust' and devoid of 'protective gaps'. However, the analysis identified several gaps, mainly sourced in secondary legislation which could undermine the 'inclusiveness' and 'effectiveness' of labour rights afforded by EU law in franchise networks by weakening or excluding workers' representation.

4. THE INTERPLAY BETWEEN DIFFERENT POLICY MEASURES

KEY FINDINGS

The reduction of precarious work in Europe is more likely to be achieved in societies where more inclusive, equal and effective labour standards are upheld. In turn, this means that there are strong interactions across different policy instruments; initiatives designed to fill in gaps in one area may not be successful if they are not supported by complementary policies and reinforcing mechanisms in other areas. Against this context, interactions based on complementary policy approaches may reinforce outcomes for precarious work in either negative or positive directions (Rubery and Koukiadaki, 2016).

The present chapter examines the interactions between different policy mechanisms that affect specific forms of precarious work, as identified in the petitions to the Committee on Petitions of the European Parliament. The analysis identifies three main domains of interaction. The first is in respect of the **links between working time and precariousness**. The growth of variable working hours' arrangements, encompassing issues of predictability and control over the allocation and scheduling of working time, is directly constructed by regimes of working time regulation (Bogg, 2016: 278). In this respect, the Working Time Directive deems that **individuals will be workers** regardless of whether the contractual arrangement is fixed-term or part-time, and irrespective of whether there is 'mutuality of obligation', which is required in British labour law but may be absent in certain forms of casual work. However, the **absence of minimum working hours** is directly linked to the irregularity of future work and ultimately to the employer's unilateral control over working time schedules.

Secondly, on the basis that the provision of information to employees about the main terms of their employment is a fundamental aspect of social policy (Clark and Hall, 1992: 106), the analysis concentrates on the **relationship between atypical forms of work and the regulation of the employee's right to know of the conditions applicable to their contract or employment relationship.** It identifies three rationales: (i) a moral rationale, namely that awareness of the main terms of their employment is intrinsically linked with the notion of personal autonomy and dignity; (ii) an economic rationale, namely that the provision of information can be associated with market efficiency, and (iii) an effectiveness rationale, namely enhancing the ability of individuals but also that of public institutions and other parties to monitor and enforce compliance with labour standards.

Drawing on the fast-food sector, the third domain of interaction concerns the **mutually reinforcing interaction between business fragmentation in the form of franchise agreements, atypical employment and representational precariousness**. By its logic, franchising could operate as a significant enabler of atypical forms of employment and lack of compliance with labour standards, an effect achieved in combination with sector-specific characteristics. This is because the economic logic of franchising may enable the adoption of atypical work through cost minimization strategies, though by no means franchising is the sole factor. The prevalence of atypical forms of employment, in turn, may enable representational precariousness to the extent that it leads to deprivation of effective workers' voice. Finally, representational precariousness itself may be an enabler of atypical forms of employment and hence of franchising as a cost reduction structure.

4.1. Introduction

The reduction of precarious work in Europe is more likely to be achieved in societies where more inclusive, equal and effective labour standards are upheld. In turn, this means that there are strong interactions across different policy instruments; initiatives designed to fill in gaps in one area may not be successful if they are not supported by complementary policies and reinforcing mechanisms in other areas (for a similar argument in the case of the gender pay gap, see Rubery and Koukiadaki, 2016). This can be attributed to two issues. The first is that precarious work is shaped and driven by multiple pressures and influences: technological transformation, structural changes in the economy, demographical and societal changes are constantly shaping employment conditions in a variety of ways. The second is that in respect of the issues examined in the petitions, namely franchise agreements and atypical employment (European Parliament, 2016b and 2016c), there is a direct relationship between fragmentation, as a process leading to extensive changes in the conventional organisational models, and the nature of employment. As a result, curtailing precarious work is not a fixed but a constantly moving target and even the current level of decent labour standards is at risk. 159 The impact of the 'structural labour market reforms' introduced during the recent economic crisis serves as evidence of the nature of the objective regarding reducing precarious work.

Against this context, interactions based on complementary policy approaches may reinforce outcomes for precarious work in either negative or positive directions. When policies pull in competing directions advantages for the reduction of precarious work in one direction may be offset by disadvantages in another direction (Rubery and Koukiadaki, 2016). The present chapter examines the interactions between different policy mechanisms that affect specific forms of precarious work, as identified in the petitions to the Committee on Petitions of the European Parliament. It identifies three main domains of interaction. The first is in respect of the links between working time and precariousness. The growth of variable working hours' schemes, encompassing issues of predictability and control over the allocation and scheduling of working time, is directly constructed by regimes of working time regulation (Bogg, 2016: 278). An assessment of the relationship between organisational practices, located at national level, and Directive 2003/88/EC concerning certain aspects of the organization of working time (Working Time Directive) is thus essential for the purposes of the present analysis. 160 Further, on the basis that the provision of information to employees about the main terms of their employment is a fundamental aspect of social policy (Clark and Hall, 1992: 106), the analysis concentrates on the relationship between atypical forms of work, namely ZHCs and FJCs and the regulation of the employee's right to know of the conditions applicable to their contract or employment relationship; in the EU context, this has taken place via Directive 91/533/EEC (Written Statement Directive). Drawing on the fast-food sector, the third domain of interaction concerns the mutually reinforcing interaction between business fragmentation in the form of franchise agreements, atypical employment and representational precariousness. The analysis illustrates how, as discussed in chapter one, business and employment fragmentation are inter-related.

In light of the remit of the petitions, the present report does not address the issue of **social protection**. However, it is important to note here the close relationship between the domain of social protection and precarious work. A key issue, when assessing the evolution of precarious work, concerns, among others, the scope provided to atypical workers for equal

¹⁵⁹ On a similar argument regarding the gender pay gap, see Rubery and Grimshaw (2015).

¹⁶⁰ Directive 91/533 will be analysed in a separate section as it inter-relates to other aspects of precariousness, discussed in the report.

access to social security systems.¹⁶¹ This has been even more important given the emphasis some years ago on flexicurity on the part of the European Commission, which in turn resulted in a strong emphasis between employment security and supporting transitions between jobs (Bell, 2012). However, with the exception of social security rights when moving within Europe,¹⁶² very limited attempts have been made so far to improve social protection, including for atypical workers.¹⁶³ The proposed European Pillar of Social Rights identifies in chapter 3 a range of rights regarding social protection. Whether the Pillar would make it possible to address such a broad and cross-cutting issue remains a challenge due to the division of competences between Member States and the Commission in the field of social protection as well as the underlying rationale behind the initiatives in this area.¹⁶⁴

4.2. The working time dimension of precariousness: Atypical workers and the Working Time Directive

Central to arrangements such as ZHCs and FJCs is the creation of a permanent bargaining position between employers and employees, whereby the amount and allocation of working time is left 'entirely' to the discretion of the employer. The increase in the use of such variable working hours' arrangements has exposed the critical role that working time regulation has in reducing or expanding the risk of employment precariousness. At EU level, the health and safety premise of the Working Time Directive has directed attention to the issue of excessive long hours to the detriment though of the **role that working time may have in the construction of precarious work relations**' (Bogg, 2016: 267). Informed by this approach, this section explores the relevance of the Working Time Directive for precarious work with specific reference to ZHCs in the UK and FJCs in Belgium.

4.2.1. Personal scope of application

freedom of movement.

Although Article 2 of Directive 2003/88 defines 'working time' by reference, inter alia, to periods during which a 'worker' is 'working', the Directive refrains from defining the notion of 'worker' itself. However, in contrast to the personal scope of the Directives on atypical work (see chapter 2), the position is clearer in respect of the personal scope of the Working Time Directive. The CJEU has held that **the notion of 'worker'** under the Working Time Directive is an **autonomous concept of EU law**. ¹⁶⁶ Applying its case law concerning Article 45 TFEU, the Court has held that the definition of 'worker' should be interpreted as meaning 'any person who pursues real, genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary'. ¹⁶⁷ In this context, the essential

163 Social security is not an independent field of competence that the EU Member States have transferred to the EU;

at providing access to employment or maintaining employment'.

¹⁶¹ For instance, in the case of ZHCs in the UK, a worker who refuses to accept a ZHC offer because he or she is seeking more regular hours could be subjected to a sanction and loss of benefits (on this, see Kenner, 2017). ¹⁶² Article 48 TFEU enables the adoption of measures in the field of social security that are necessary to provide for

instead, the EU has competence partly through the EU social policy and partly through the free movement of workers. In this context, Directive 79/7 on the principle of equal treatment for men and women in matters of social security (OJ [1979] L6/1) has dealt with the issue of equal treatment in state social security schemes. In line with the limited scope for Union action in the field, the material scope of EU secondary law related to atypical work examined in the report (namely the Part-time Work and Fixed-term Work Directives) does not extend to cover the issue of social security. What is more, the Fixed-term Work Directive permits in clause 2(2) Member States to exclude from its scope 'employment contracts and relationships which have been concluded with the framework of a specific public or publicly supported training, integration and vocational retraining programme', excluding thus workers engaged in labour market transition from the principle of equal treatment. Similarly, the Framework Equality Directive does not cover social security and social protection schemes nor any kind of payment by the Member States that is 'aimed

¹⁶⁴ It is important to stress here that the financial assistance programmes provided to the EU Member States most affected by the crisis included an extensive range of 'structural reforms' in social protection systems. For an analysis of the proposals under the European Pillar of Social Rights, see Lörcher and Schömann (2016).

¹⁶⁵ On this, see Opinion of Advocate General Kokott, Case C-313/02 Wippel, para. 102.

¹⁶⁶ See C- 428/09, *Union syndicale Solidaires Isère*, para. 28.

¹⁶⁷ See C-316/13, Fenoll, para. 27 and the case-law cited.

feature of an employment relationship is 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. What is more, the Court has held that the Directive's requirements on maximum working time, paid annual leave and minimum rest periods 'constitute rules of Community social law of particular importance, from which every worker must benefit'. This means that individuals will be workers regardless of whether the contractual arrangement is fixed-term or part-time, and irrespective of whether there is 'mutuality of obligation', which is required in British labour law but may be absent in certain forms of casual work. 169

On this basis, **individuals on ZHCs should be considered workers under EU law**. This interpretation is espoused by the European Commission as well. In its answer to the UK petition examined at present, it stated: 'Zero-hour workers have to be considered as workers under EU law as they work under the direction of a manager and receive remuneration for that work...In view of this definition, it has to be concluded, for instance, that the Working Time Directive applies to zero-hours workers and imposes on the one hand that workers are subject to the minimum rest periods and the maximum working times provided therein and on the other hand that they are entitled to paid annual leave in proportion to the time worked (European Parliament, 2016c: 2).' Similarly, the legal position is clear in respect of the FJCs in Belgium: in line with the notion of 'worker', as an autonomous concept in EU law, **individuals with FJCs should be considered workers and as such be covered by the Working Time Directive**.

4.2.2. The substantive content of the Working Time Directive

While the Directive's primary focus is on limiting the culture of excessive long-hours in the name of health and safety, it is still pertinent to part-time workers as regards entitlements to annual holidays and certain provisions relating to limits in respect, for instance, of night work (see box 7 for the main entitlements and limits stipulated under the Directive).

Box 7: Main entitlements and limits under the Working Time Directive

The aim of the Directive is to set down 'minimum safety and health requirements for the organisation of working time'. To this end, the Directive specifies:

- Minimum rest periods in the form of daily rest (11 consecutive hours in a 24-hour period),
- Rest breaks during working days longer than six hours (duration to be determined by collective agreements or, failing, that, by national legislation),
- Weekly rest period (an uninterrupted period of 24 hours in a seven-day period),
- Maximum weekly working time of 48 hours, including overtime,
- Right to paid annual leave of four weeks that may not be replaced by an allowance in lieu except on termination,
- Extra protection for night workers.

In respect of the petitions examined at present, three main issues can be identified. The first concerns the existence of a **right to specify a number of hours or time schedule** for individuals on ZHCs and FJCs arrangements. As discussed in chapter 2, one of the main characteristics of ZHCs in the UK is that they are not subject to specific minimum standards' requirements to protect workers, including a guaranteed number of hours. However, the Working Time Directive (and similarly the Part-Time Work Directive) does not impose any

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¹⁶⁸ Case C-14/04, *Abdelkader Dellas*, paras 40-41 and 49; Case C-124/05 *Federatie Nederlandse Vakbeweging*, para 28

¹⁶⁹ Case 66/85 Lawrie-Blum and Case C-256/01 Allonby.

minima in terms of number of hours or time schedules. The absence of such minima is arguably related to "the legal structure of the Working Time Directive itself which, being based on health and safety considerations, has framed working time issues in a rather particular way, isolating the problem of (predominantly male) long hours working and working time limits as the dominant regulatory issue' (Bogg, 2016: 285). This should be identified as a major protective gap in EU labour standards, as the absence of minima is directly linked to the irregularity of future work and ultimately to the employer's unilateral control over working time schedules. The case of Wippel illustrates this point aptly: while the CJEU found that Ms Wippel was entitled to the working time rights enjoyed by a full-time worker under the Directive, these were not the type of working time rights that would have been helpful to her due to the casual nature of her work. In this respect, new working time regimes should be as concerned with setting mandatory minimum weekly working hours as much as with setting maxima (Collins et al. 2012: 310). 170

The second issue relates to access to breaks and rest periods as well as maximum weekly working hours.¹⁷¹ In respect of rest periods, the CJEU has emphasised that these minimum rest requirements 'constitute rules of Community social law of particular importance from which every worker must benefit as a minimum requirement necessary to ensure protection of his safety and health.'172 In the case of FJCs, the flexi-job contract worker may work beyond the hours fixed in the Belgian legislation that transposes the Working Time Directive. As a result of the fact that FJCs and ZHCs are covered by the Working Time Directive, workers under such arrangements are subject to the minimum rest periods and the maximum working time provided therein. The Further, while the Working Time Directive establishes minimum requirements for 'workers', it does not explicitly state whether its provisions set absolute limits in case of concurrent contracts with one or more employer(s) or if they apply to each employment relationship separately.

Despite the fact that the CJEU has not yet had to rule on this point, it is submitted that due to the Directive's objective to improve the health and safety of workers, the limits on average weekly working time and daily and weekly rest should as far as possible, apply per worker.¹⁷⁴ The UK applies the Directive on a 'per-worker' basis, mostly under express legal provisions to that effect. 175 However, in Belgium, the Directive applies per worker where there is more than one contract with the same employer but per contract in situations where the worker has more than one contract with different employers. Given the fact that the FJCs are by necessity with different employers and taking into account the health and safety objective of the Working Time Directive, the FJC legislation is problematic; this is because it exposes individuals on such contracts to potentially long working hours whilst limiting potentially access to breaks and daily rest periods contrary to the provisions of the Working Time Directive. In this respect, it is also important to recall Recital 4 to the Working Time Directive that 'improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations'.

In respect of the right to paid annual leave, the CJEU, relying on the Working Time Directive but also Article 31(2) CFREU, has developed a prominent role in safeguarding the

 $^{^{170}}$ See also the concluding chapter, which discusses possible directions for reforms in this area.

¹⁷¹ In this context, it is also necessary to note that all on-call time must be fully counted as working time for the purposes of the Directive. This principle applies both to periods where the worker is working in response to a call, ('active' on-call time), and to periods where s/he is allowed to rest while waiting for a call, ('inactive' on-call time), provided that s/he remains at the workplace.

172 Case C-484/04 Commission (United Kingdom); Case C-428/09 Union syndicale Solidaires Isère para 36.

¹⁷³ See also the response by the European Commission's to the UK petition on ZHCs (European Parliament, 2016c).

¹⁷⁴ The European Commission is supportive of this interpretation, see European Commission (2017a).

¹⁷⁵ The employer in the UK has the obligation to 'take all reasonable steps' to verify that a worker does not exceed the working time limit and, if this is the case or is suspected to be the case, to make arrangements to protect the worker's health and safety (via an individual opt-out, reducing hours).

right of individuals to paid leave arrangements. Such arrangements are significant in that they not only help to preserve health and well-being but also, more positively, allow employees to pursue personal needs (which may of course also be social needs associated with families and communities) without incurring substantial penalties as a result of absence from paid work or failure to be available to the employer (Campbell, 2017: 110). Importantly, the CJEU has expressly addressed the issue of paid leave entitlements in respect of atypical workers. Although the Working Time Directive does not make any express reference to this issue, the CJEU has ruled that the right to four weeks' paid holiday cannot be limited to those workers who have completed a qualifying period of thirteen weeks' work with their employer, despite the provision in the Directive referring to the possible adoption of 'national conditions' regarding the right to an annual holiday. What is more, the Court has explicitly stated that part-time workers fall within the scope of the Directive. The European Commission has explicitly acknowledged that individuals on ZHCs should be covered by EU labour law, including when it comes to paid annual leave in proportion to the time worked (European Parliament, 2017: 2/3). 178

In the case of FJCs in Belgium, in accordance with Article 5 (3) of the Law of 16 November 2015, the holiday pay is equal to 7.67% of the FJC salary and must be paid to the worker at the same time as the FJC salary. As a result, FJC workers can only receive the simple holiday pay and are excluded from the double holiday entitlement, which is available in the case of other workers in the sector. ¹⁷⁹ According to the Belgian Council of Ministers, the difference regarding holiday pay is necessary and proportionate, as FJC workers already have the right to a double holiday pay on the basis of their primary activity. The Belgian Constitutional Court accepted that the condition of full-time or almost full-time employment in the case of FJC ensures that flexi-job contract workers are entitled to double holiday pay on the basis of their main activity on the basis of the justification provided by the government. 180 It further found that the 7.67% FJC salary corresponds to the four-week salary, set out by the Working Time Directive. 181 Similarly, the Constitutional Court ruled that the requirement that the holiday pay be paid to at the same time as the FJC salary was constitutional. In doing this, it relied on the interpretation of Article 31(2) CFREU and Article 7 of the Working Time Directive 182 and held that the advance payment of the simple holiday pay at the same time as that of the FJC salary put the worker a situation which is, as regards the salary, comparable to the periods of work. In addition, it was considered that a FJC worker had a choice to exercise during the period of annual leave an ancillary activity under a FJC, which is unrelated to the main activity. However, the payment of annual leave, as prescribed in Article 7(1) of the Directive, is intended to ensure that workers will, in fact, take the leave to which they are entitled since the actual taking of leave is essential for their rest and recuperation from work.

¹⁷⁶Case C-173/99 *BECTU*, para 46. The Court reasoned that due to the absence of any express exclusion of fixed-term workers from the scope of the Directive, along with the general inclusive wording of the Directive, fixed-term workers could not be excluded from its scope.

¹⁷⁷ Case C-313/02, Wippel.

¹⁷⁸ In Cases C-229/11 and C-230/11, *Heimann and Toltschin*, the CJEU had to address the inter-relationship between a German short-time work arrangement and the right to paid annual leave. Since the social plan had been negotiated through a representative body (the works council), and in order not to deter the negotiation of socially beneficial arrangements for other workers, the CJEU upheld the principle of *pro rata temporis* for the duration of the short-time work arrangement. While the decision appears to negate the entitlement to a payment in lieu on termination of employment, it displays, according to Bogg (2016: 289) 'a welcome sensitivity to the regulatory role of collective agreements with representative bodies.' It is important to add here that the European Commission considers that the decision confirms that minimum paid annual-leave entitlements are accrued proportionally on the basis of the hours worked, thereby protecting the rights of zero-hour workers (http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-009517&language=EN)

¹⁷⁹ Article 5(3). In addition, the legislation provides that the FJC paid leave is excluded from the notion of

¹⁷⁹ Article 5(3). In addition, the legislation provides that the FJC paid leave is excluded from the notion of remuneration.

¹⁸⁰ Para B.7.1-7.2.

¹⁸¹ However, the Court failed to consider entirely the extent to which the provision was compatible with the equal treatment principle set out in the Fixed-Term Work Directive (see analysis in chapter 2). ¹⁸² C-214/10, *KHS*, para. 31.

In line with this, the CJEU has held that payment for leave should take place contemporaneously with the taking of leave in order to ensure that economic pressures on workers to forgo their leave entitlement are reduced or eliminated. 183

4.3. The informational dimension of precariousness: Atypical work and the Written Statement Directive

The provision of information about the employment relationship is linked to three main considerations. The first relates to the individual employee's right to know of the conditions applicable to their contract or employment relationship. This is grounded on a moral rationale, namely that awareness of the main terms of their employment is intrinsically linked with the notion of personal autonomy and dignity. The second is concerned with the interplay between information provision and transparency in the labour market. Seen from this perspective, the provision of information can be associated with an economic rationale in the context of market efficiency and greater market integration. Finally, the promotion of information is associated with an effectiveness rationale, enhancing the ability of individuals but also that of public institutions and other parties (e.g. trade unions) to monitor and enforce compliance with labour standards.

Lack of transparency regarding the essential terms of the employment relationship has been highlighted in both the cases of ZHCs and FJCs. In the case of ZHCs in the UK, this may arise either out of lack of certainty about the number of hours of work arising from a dearth of information or conflicting information about the contract terms, leading in turn to uncertainty about present and future earnings and entitlement to welfare benefits (on this, see Kenner 2017: 176). In the case of FJCs in Belgium, the legislation provides for the possibility of working with a fixed-term contract either in writing or orally. Aside from the fact that this is contrary to the provisions of the Employment Contracts Act, which provides that such contracts must be concluded in writing, ¹⁸⁴ it also implies that the employee might not receive in writing all the information he/she should receive regarding the essential conditions of their employment.

In the EU, the most relevant measure dealing with the employee's right to know is Directive 91/533/EEC of October 1991 (**Written Statement Directive**). Its objective is to ensure that employees within the EU are provided with a written statement of the essential conditions of their employment relationship within a short period of commencing employment or whenever those conditions are modified. The potential of the Directive to provide a catalyst for employee rights at work led Clark and Hall (1992) to describe it as the **'Cinderella Directive'**. Importantly, the adoption of the Directive was directly linked to Article 9 of the Community Charter of the Fundamental Social Rights of Workers. The latter provides that 'the conditions of employment of every worker of the European Community shall be stipulated in laws, in a collective agreement or in a contract of employment, according to arrangements applying in each country'.

In line with a moral and economic rationale, described above, the Directive has two **objectives**:

 a. to improve the living and working conditions of the labour force as required by the Treaty, by providing employees with a degree (albeit minimal) of certainty and security as to their terms of employment relationship, and;

¹⁸³ C-131/04 Caulfield and Robinson-Steele.

 $^{^{184}}$ See Opinion No. 1.944 by the Conseil National du Travail (2015). See also analysis in chapter 2.

b. to achieve a **degree of convergence in the employment legislation of the Member States**, whose employment regimes, at the time of the adoption of the Directive, were widely divergent on the issue of the required level of awareness of the employee on the precise details of his employment relationship. This divergence was believed to be potentially prejudicial to the achievement of the internal market. 185

The link with the effectiveness principle was also recognised recently by the European Commission in its assessment of the Directive: "**Improved transparency** is useful not only for employees but also for public authorities (in their efforts to reduce undeclared work), for employers, and for potential investors who may need legal certainty concerning working conditions" (European Commission, 2017b: 47).

4.3.1. Scope of application

The essential criterion for the application of the Written Statement Directive is the **existence** of a contract of employment or an employment relationship. This embraces all types of employment and must include part-time and temporary employment, employment of both indefinite duration as well as fixed-term and any other form of relationship that can be viewed as employment for remuneration. However, the Written Statement Directive suffers from an employment protection gap, limiting in turn its **inclusiveness dimension**. This arises of the possibility for Member States to exclude casual workers from national implementing measures. Under Art 1(2), Member States are allowed to exclude workers in 'employment with a total duration not exceeding one month, and/or with a working week not exceeding eight hours' or 'of a casual and/or specific nature provided, in these cases, that its non-application is justified by objective considerations'.

On implementing the Directive into national law, a number of Member States have chosen, in the name of flexibility, to remove the obligation for employers to provide information to employees whose contracts or employment relationships last less than one month. This does not include Belgium: as such, the scope of the national legislation encompasses individuals engaged in casual work in Belgium. In contrast, this is not the case in the UK, where employees whose employment lasts for less than one month are excluded. However, as the stated objective of the Directive is to increase certainty for employees and transparency in the labour market, there are grounds for suggesting that **it is this category of casual workers, who are excluded from the scope of the Directive, are those who would benefit most from being provided with a legal right to information about their employment relationship (Clark and Hall, 1992: 111). Given the evidence in the case of the UK that it is mostly women and young workers that are employed on a ZHC basis (see chapter 2), excluding such an overwhelmingly group of employees from their right to know may amount to indirect discrimination under Art 141 TFEU.**

4.3.2. Substantive content of the Written Statement Directive

Article 2 of the Written Statement Directive sets out the **extent of the employer's obligations towards its employees**. Paragraph 1 is phrased in broad terms. It obliges an employer to provide an employee with information on 'the essential aspects of the contract or employment relationship'. This has been interpreted by the CJEU as meaning **'all aspects of the contract or employment relationship which are, by virtue of their nature, essential elements'.** ¹⁸⁶ What's more, paragraph 2 sets outs a non-exhaustive list of matters particular types which are covered by paragraph 1 of which an employee must be informed by his/her employer, including in the case of a temporary contract or employment

 $^{^{185}}$ Recitals 3 and 4. The Directive was adopted on the basis of then Article 100 of the Treaty of Rome which deals with 'matters directly affecting the ... functioning of the common market'. 186 Case C-350/99 *Lange*.

relationship its expected duration;¹⁸⁷ entitlement to paid leave or the procedures for determining such leave; the basic level of remuneration and other elements of remuneration and the frequency of payment of such remuneration; the length of the employee's normal working day or week.¹⁸⁸ In line with moral and economic rationales, the CJEU has provided a broad interpretation of the requirements, emphasising the **obligation of the employer to supply information that is as complete and precise as possible**. In *Kampelmann*, the Court held that 'the mere designation of an activity cannot in every case amount to even a brief specification or description of the work done by an employee'.

Importantly, all the information required in Article 2(2) must be provided to the employee in writing. This may take the form of a written contract of employment, and/or letter of engagement or any other written document. 189 In Lange, the Court held that even a requirement on an employee obliging him to work overtime whenever requested by the employer constituted an essential aspect of the employment relationship, although not mentioned in Article 2(2), and thus had to be communicated to the employee in writing. Against this context, doubts could be raised in respect of whether Article 2 allows employers in Member States that allow recourse to variable work arangements to not define the information required by the Written Statement Directive. This is because the very essence of variable work arrangements is that they allow employers not to commit to a specific volume of work, whereas the Directive requires specification of the 'length of the employee's normal working day or week' (on this, see also Toumieux, 2016). Even if it is accepted that the legal obligation on the employer to notify the worker cannot be implemented where working time is flexible, 190 national legislation in the case of FJCs requires this information to be included only in the framework agreement and not in the contract of employment.

What is more, the CJEU held in *Kampelmann* that the Directive has **direct effect.** The fact that it allowed the Member States to choose between the categories of information to be notified and the means by which they were notified to the employee did not render it impossible to determine with sufficient precision on the basis of the Directive alone, the content of the right conferred upon an individual, the scope of which is not in the discretion of the Member State: "The provisions in question here are unconditional and sufficiently precise to enable individuals to rely on them directly before the national courts either where the Member State has failed to transpose the Directive into national law within the prescribed period or where it has not done so correctly." 191

This is finally related to the **effectiveness rationale** of an employee's right to know of the terms of their employment relationship. The Written Statement Directive provides not only a

¹⁸⁷ In Case C-306/07 *Ruben Andersen*, the CJEU clarified that the Union legislation, when it referred to workers with a 'temporary contract or employment relationship' in Article 8(1) regarding enforcement, intended to refer to workers whose contract is of such short duration that the obligation to notify the employer before taking legal proceedings could compromise effective access to judicial means of redress. The question of what constitutes a short-term employment contract is one which, in the absence of any national rules fixing the duration of short-term contracts, must be dealt with on a case-by-case basis, taking into account the characteristics of the contract in question and the normal duration of employment in the sector in question.

¹⁸⁸ This does not include overtime, but where an employer does require the employee to work overtime whenever requested to do so, the employee must be informed of this: Case C-350/99 *Lange*.

¹⁸⁹ Article 3(1).

¹⁹⁰ Note, however, the response of the European Commission to the petition regarding FJCs, where it was stated: On the issue of working time, the Directive 91/533/EEC mentions that employees must be notified of 'the length of the employee's normal working day or week'. This legal obligation cannot be implemented as such where working time is flexible as there is, in this hypothesis, no normal working day or week. Nevertheless, the Commission is of the opinion that, where flexible working is concerned, the written information given to the employees should at least confirm that the working time is flexible and also specify the modalities according to which the working time schedule will be transmitted to them.' However, the Belgian law of 16.11.2015 requires this information to be included only in the framework agreement and not in the contract of employment.

¹⁹¹ Cases C-253 to 256/96 *Kampelmann*, para 40.

basis for ensuring that employees are aware of their rights but also requires that Member States introduce into their national legal systems measures that are necessary to enable employees to defend their rights regarding the failure of an employer to comply with his or her obligations under the Directive. The most vulnerable workers are often not aware of their rights or expect to be denied their rights or do not bother to claim and there are many reasonable fears of victimisation, especially for individuals in disadvantaged groups, such as women, migrants or young workers. The REFIT exercise on the Written Statement Directive identified varying effectiveness of enforcement mechanisms. There was strong evidence to suggest that remedy systems based only on claims for damages were less effective at ensuring protection of employee's rights and ensuring compliance with the Directive. On the contrary, the use of written statements as a protection mechanism appeared to be most effective in conjunction with other protection mechanisms, e.g. in countries where there are strong labour unions and/or labour inspectorates in place with a mandate to monitor employers' compliance with the obligation to inform (Ramboll Management Consulting, 2016).

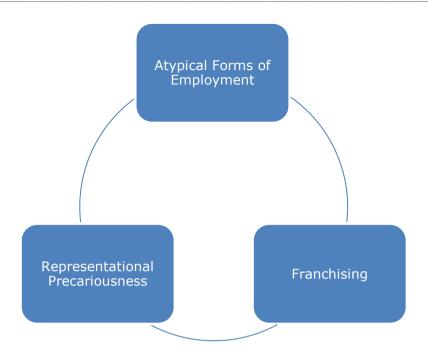
4.4. Franchising, atypical work and representational precariousness: The case of the fast-good sector

Drawing on the case of fast-food sector, ¹⁹² this section notes the **mutually reinforcing interplays between franchising, atypical employment and lack of effective voice (representational dimension of precariousness)** (**see figure 19**). The fast-food sector relies on the use of limited menus and high standardization of product offerings while adopting franchising as a privileged organizational form, especially preferred by large (multinational) brands seeking quick domestic and international expansion (Royle and Towers, 2002a). Academic literature has documented the widespread levels of precariousness in fast-food sector employment exhibiting the following features: low pay, inadequate hours, insecure work which is predominantly hourly paid, unpaid hours and hazardous and intimidating conditions, 'high turnover' of staff, de-skilled and routinized tasks corresponding to high levels of control and supervision, low unionisation rates and a general employer resistance to unionisation as notably by McDonald's (Royle, 2010: Reeders, 1998; Tannock, 2011; Royle and Towers, 2002a; Krueger, 1991; Schlosser, 2002; Leidner, 2002).

Figure 18: Interplay between franchising, atypical employment and voice

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¹⁹² The use of zero-hour contracts by McDonald's has been subject to a petition (European Parliament, 2016c).



By its logic, franchising could operate as a significant enabler of atypical forms of employment but also of non-compliance with labour standards, an effect achieved in combination with sector-specific characteristics. In the fast-food sector, the specific set of risks, distribution of responsibilities and financial incentives and linkages borne by the business architecture of franchising (see Chapter 3) can prompt businesses to adopt a 'low-road to competition' focused on 'cost minimizing behaviour', the latter described as the 'paramount objective of management' in fast-food sector (Royle and Towers, 2002b: 192) and a key feature of the sector (Allan et al., 2006: 416). Since the franchisor uses the franchise agreement to control an entire range of cost-related factors of production (e.g rent, royalties, product purchases, production methods), labour cost typically constitutes the main variable to be adjusted by the franchisee for its profitability (Leidner 2002). As Felstead explains:

[T]he franchise relationship has a knock-on effect in terms of franchisees' treatment of those (if any) they employ. The clearest consequence of franchising in this regard is cost minimization, and that of wages in particular. Other cost savings are more likely to be at the expense of business standards and hence are effectively outlawed by the franchisor's policing role. Forcing wages down is far quicker way for franchisees to raise profits without having to share the benefits with their franchisors as they would if turnover were to rise (1991: 53)

Indeed, Krueger has found that remuneration is higher in franchisor-owned outlets than those owned by the franchisees in the same network (Krueger, 1991). McDonald's software reporting the number of customers served and employing workers for assessing the cost-efficiency of each outlet so that managers/franchisees should start sending employees home to reach the optimal levels (Pinarbasi, 2017: 155 quoting Richard Griffith; see also Leidner, 2002: 19) is an example of the close interplay between **cost-minimization strategies and zero-hour contracts**. Recourse to casual contracts is one way to allow franchised outlets to achieve a perfect correspondence of customer demand and cost-efficiency, while this has been reported to involve (illegal) 'off-the-clock' work where managers prevent workers from working when the demand is low by dividing time into tiny segments (ibid 19-20).

Another logic-driven interplay between franchising and atypical work stems from the fact that the franchisor receives a fixed percentage of sales as revenue. As a result, the franchisee is incentivised to minimize labour costs to the extent that he takes the full share of this In addition, literature has demonstrated a positive correlation between franchising and non- compliance. Kellner et al, in the context of finding higher level of noncompliance with industrial relations law in Australia, found also that 'franchisors take advantage of the ultimate ability to dissociate themselves both legally and morally from misbehaving franchisees, consistent with the diverse accountabilities model' (Kellner et al., 2016:41). In the US, Ji and Weil's (2015; see also Weil, 2010 and generally for franchising Elmore 2018) survey of 20 branded fast-food restaurants found a 'large, significant and robust' (Ji and Weil, 2015: 1004) effect of lower compliance rate with labor standards (e.g. minimum wage and overtime pay) among the franchised units compared to franchisor-owned outlets. This disparity was attributed to 'internal factors relating to the profit models faced by franchisees versus franchisors, and the trade-offs the respective parties are willing to make between cost control (including decisions not to comply with labor standards) and protecting brand reputation' (ibid). So, the economic logic of franchising may enable the adoption of atypical work through cost minimization strategies, though by no means franchising should be considered as the sole factor.

The prevalence of atypical forms of employment may in turn enable representational precariousness to the extent that it leads to deprivation of effective workers' voice. Besides the operation of legal determinants consisting of legal impediments which may render inaccessible representational rights for non-standard workers (e.g narrow conception of employment status, thresholds), the atypical nature of the employment relationship is a disabling factor of their actual effective exercise even when they exist. For example, in ZHCs and FTCs, the fear of not getting enough hours, of losing the job or of non-renewal of the contract establishes what Leonardi calls 'conditions of legal instability and psychological subjection/fear that are totally unfavourable for the individual choice of becoming union members' (Leonardi, 2008: 207; see also Evans and Gibb, 2009: 11). In addition, trade unions face extremely higher-organizational constraints in the fast-food sector owing to the need for mobilising in multiple sites, high turnover of employees and determined employer opposition to unionisation (Leidner, 2002: 9). Ebisui summarises the unionisation constraints of non-standard workers as the following: 'limited attachment to a single workplace/employer', reluctance to unionise in fear of job losses and the difficulty in the identification of the employer that can be 'practically' responsible as a negotiating party which has the ultimate decision-making (Ebisui, 2012: 216-218).

Finally, representational precariousness itself may be an enabler of atypical forms of employment and hence of franchising as a cost reduction structure. The lack of adequate structure of collective representation, in particular of collective bargaining, gives rise to four types of deficits for workers: (i) representational deficits, as their interests are not represented, an issue also associated with the inclusive nature of unions towards atypical workers, where there has been significant progress in the last decade (see Gumbrell-McCormick 2011; Bispinck and Schulten 2011; Leonardi 2008); (ii) power or democratic deficits (Davidov 2004), as workers have no access to collective structures for restraining the unilateral power of their employers (for the power-equalizing function of collective bargaining see Kahn-Freund 1977) (iii) transparency deficits, as the presence of unions or other representation bodies is of assistance to workers' knowing their rights as well as gathering statistical information and data about atypical work; (iv) enforcement deficits, to the extent that social dialogue can be key in formulating and enforcing policies against atypical work (Theron 2011; see cases included in McKay et al 2012 including social dialogue ways of reducing precariousness) that may be flexible and sensitive to local circumstances.

Indeed, Royle has observed the problem of enforcement of collective agreements even when they are applicable in the fast-food sector (Royle 2010), an issue that could be rectified by strong collective representation structures operating at both network and franchisee level. These four deficits (representational, power, transparency, enforcement) are critical for the retention of precarious forms of employment, which in turn, could enhance the attractiveness of franchising for firms seeking a 'low labour cost strategy'.

5. CONCLUSION AND POLICY RECOMMENDATIONS

KEY FINDINGS

Labour law and industrial relations systems in the EU are increasingly characterised by the transfer of risk from employers to the workforce. If the problem of a transfer of risk from employers to the workforce is unescapable and applies at all levels of the labour market (including also in respect of the erosion of the SER), this raises serious **questions for EU social policy.** What is more, regulation to tackle the transfer of risk to the workforce would require **the EU to work holistically across boundaries within EU law** (on this, see Davies, 2013).

This chapter identifies different domains where policy reforms could be developed to counter the rise of precarious work in the forms identified in the report. In doing this, the report puts forward as a central argument that the socially-progressive goal of reducing precarious work in the EU should be pursued on the basis of three main principles: those of **inclusive**, **equal and effective labour standards**. The analysis suggests the need to identify new mechanisms simultaneously to promote equality between standard and non-standard workers alongside effective and inclusive labour standards. Four main policy areas are identified:

- 1. Extending **coverage of employment protection** through the adoption of a broader, EU-wide definition of the notion of 'worker' that applies across all EU labour law Directives and the promotion of the role of multi-level collective bargaining;
- 2. Addressing the **temporal and organisational control dimensions of precariousness**, through the revision of the focus and the substantive content of both the Atypical Work Directives and the Working Time Directive;
- 3. Developing more holistic **mechanisms for ensuring the effectiveness of labour standards**, including improved access to information regarding employment conditions, including in the case of franchise networks, and access to justice;
- 4. Protecting the **inclusive and effective workers' voice** in franchise networks by measures addressing the law's failure to adequately prevent business fragmentation from turning into voice fragmentation and recognise franchising as a high-risk enabler of representational precariousness.

In putting forward these proposals, we are aware of two main objections that could be raised. The first concerns the fact that the call for coordinated action across many interconnected domains presents particular **political challenges for the EU Member States but also the social partners**. However, given than curtailing precarious work is not a fixed but a constantly moving target and even the current level of decent labour standards is at risk, there is a strong argument for being attentive to the interactions between different policy mechanisms that affect specific forms of precarious work. The second challenge concerns the fact that effective regulation to tackle the transfer of risk to the workforce would have to cut across the **boundary between EU and national competence** (Davies, 2013). Considering the increasing evidence suggesting a strong relationship between precarious work and health and safety and the direct relevance of working conditions with precariousness, the legislative competence under Articles 153(1)(a) and (b) TFEU in respect of improvements in particular of the working environment to protect workers' health and safety and working conditions, which covers in principle the whole labour field of labour law, would be appropriate legal bases.

5.1. Introduction

Labour law and industrial relations systems in the EU are increasingly characterised by the **transfer of risk from employers to the workforce** (Countouris and Freedland, 2013). In respect of the petitions examined in the report, a first illustration of this constitutes the shifting of the risk of a drop in demand onto the workforce through the use of variable working hours' schemes such as the ZHCs in the UK. Similar issues in terms of casualization of labour can be found in respect of FJCs in Belgium but also the (ab)use of FTCs in a number of EU Member States, as explored in chapter two. Yet another prime example of the shifting of risk, discussed in chapter three, concerns the fragmentation of organisations through franchise agreements that allow for the shifting of risks at organizational level, with significant implications for workers themselves. If, as Davies has identified (2013), the problem of a transfer of risk from employers to the workforce is a pervasive one and applies at all levels of the labour market (including also in respect of the erosion of the SER), any initiatives to deal with the demutualisation of risk would require the EU to **work holistically across boundaries within EU law.**

Against this context, this chapter identifies different domains where policy reforms could be developed to counter the rise of precarious work. In doing this, the report puts forward as a central argument that the socially-progressive goal of reducing precarious work in the EU should be pursued on the basis of three main principles: those of **inclusive**, **equal and effective labour standards** (for a similar argument, see Rubery and Koukiadaki, 2016). As argued in chapter four, the reduction of precarious work in Europe is more likely to be achieved in societies where more inclusive, equal and effective labour standards are upheld. This then implies that there are **strong interactions across policy mechanisms**; as such, action in one domain needs to be supported by complementary policies and reinforcing mechanisms in other domains.

The analysis here suggests the need to identify new mechanisms to promote simultaneously equality between standard and non-standard workers alongside effective and inclusive labour standards. Four main policy areas are identified:

- Extending coverage of employment protection through the adoption of a broader, EUwide definition of the notion of 'worker' that applies across all EU labour law Directives and the promotion of the role of multi-level collective bargaining;
- Addressing the temporal and organisational control dimensions of precariousness, through the revision of the focus and substantive content of both the Atypical Work Directives and the Working Time Directive;
- Developing more holistic mechanisms for ensuring the effectiveness of labour standards, including improved access to information regarding employment conditions, including in the case of franchise networks, and access to justice;
- Protecting the inclusiveness and effectiveness of workers' voice in franchise networks by addressing the law's failure to adequately prevent business fragmentation from turning into voice fragmentation recognise franchising as a high-risk enabler of representational precariousness.

In putting forward these proposals, we are aware of two main objections that could be raised. The first concerns the fact that the call for coordinated action across many interconnected domains presents particular **political challenges for the EU Member States but also the social partners**. The difficulty to come to an agreement regarding a single topic (e.g. the Working Time Directive) would be increased significantly if negotiations would have to deal with a wide range of issues affecting different domains (see Davies, 2013). However, given than curtailing precarious work is not a fixed but a constantly moving target and even the

current level of decent labour standards is at risk, there is a strong argument for being attentive to the interactions between different policy mechanisms that affect specific forms of precarious work (on a similar argument in the case of the gender pay gap, see Rubery and Grimshaw, 2015).

The first challenge is then linked to the second one, which concerns the fact that effective regulation to tackle the transfer of risk to the workforce would have to cut across the boundary between EU and national competence (Davies 2013). An example of this is in respect of the personal scope of rights in EU labour law, which has been traditionally reserved for EU Member States (see chapter 2). In broad terms, the EU can act only if: a) there is specific competence to act; b) the chosen measure can be better achieved at EU level, in other words the principle of subsidiarity, and; c) there is sufficient political will for the EU to act (Barnard, 2016). Given the increasing evidence suggesting a strong relationship between precarious work and health and safety (see chapters one and two), the legislative competence under the Social Treaty of the Treaty, namely Article 153(1)(a) in respect of improvement in particular of the working environment to protect workers' health and safety, may act as an appropriate legal basis for a number of proposals that are discussed below. In this context, health and safety must be understood as in the definition provided by the World Health Organisation (WHO). In the latter's constitution, health is defined as 'a state of complete physical, mental and social wellbeing and does not consist only in the absence of disease or infirmity'. Consistent with this, the CJEU has adopted a broad interpretation of the notion of "working environment", based on the Nordic's countries concept of physical, psychological and social aspects of working time such as monotony, lack of social contacts at work and has accepted the definition of health as construed by the WHO.¹⁹³

Still in the context of Article 153 TFEU, subparagraph (b) on working conditions, which covers in principle the whole labour field of labour law, would be an additional basis. Both would provide for the ordinary legislative procedure, as defined in Art 289 TFEU. Alternatively, the internal market provision (Article 114(2) TFEU or Article 115 TFEU), conferring confers upon the EU the competence to enact 'measures for the approximation' of national rules regarding the establishment and functioning of the internal market, 194 or the 'flexibility clause of Article 352 TFEU may be used as a legal basis to enact EU legislation. Provided the issues are covered by Article 153 TFEU, Article 155(1) TFEU, which promotes the role of social partners in contractual relations, including agreements, would constitute the most effective way for introducing legislation in this area, albeit this would be dependent on the initiative of the social partners as well as the willingness of the European Commission to take a proposal to the Council. Despite the recent EU policy initiatives, such as the European Pillar of Social Rights, it may be the case that a number of the policy proposals discussed below would not gain the support from certain EU Member States or EU institutions. An alternative proposal that could be developed would be to consider the use of enhanced cooperation that enables and encourages a group of EU Member States to cooperate, insider, rather that outside, the framework of Union law (Barnard, 2016). However, this should be seen only as a second best approach to regulate against the types of protective gaps identified in the report.

Bearing these issues in mind, we proceed in the next sections to identify different sets of policy measures and possible alternatives that are aimed to deal with the particular problems

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¹⁹³ C-84/94 UK v. Council of the European Union.

¹⁹⁴ But note that Article 114 TFEU may not be used in three areas: fiscal provisions, provisions relating to the free movement of persons and provisions relating to the rights and interests of employed persons. The latter must be adopted under Article 153 TFEU, which differs greatly as to the extent of EU competence and the legislative procedures to be followed.

that the petitions have identified and how these may be tackled trough EU action (for an overview, see Table 13).¹⁹⁵ In doing so, we are cognisant of two risks. The first is that **any policy reform in the area should not become merely an exercise in normalising these forms of work that legitimise precariousness** (Kenner, 2017). The second is **the policy options regarding the direction of regulation should not be framed around prohibition and permission only**. This is because the prohibition of casual work arrangements might lead to creative attempts at sidestepping the legislation and the creation of new forms of highly precarious work arrangement (Bogg, 2017).

Table 13: Matrix of policy recommendations

Principles	Recommendations
Inclusiveness	Extending employment protection
	Adopting a broadly defined and EU-wide definition of the notion of 'worker'
	Promoting complementary means to promote inclusiveness (e.g. multi-level collective agreements)
	Mainstreaming franchising in the information and consultation directives through a special <i>ad hoc</i> extension of the Directives to cover franchising
	Introducing a notion of the 'employer' in EU directives in labour law
Equality	Promoting equality and limiting temporal and organisational control precariousness
	Guaranteeing a minimum amount of work over the course of a given period (e.g. week or month) through the Working Time Directive or the Part-Time Work Directive
	Stipulating an obligation to pay the minimum wage or, where higher, the agreed contractual wage, or possibly a proportion of it, for all the time spent on-call
	Adopting a new 'atypical' work directive dealing with 'casual workers'
	Adopting a 'Mother' Framework Directive on Decent Work providing a floor of rights for all workers engaged in atypical work
Effectiveness	Developing more holistic mechanisms for ensuring the effectiveness of labour standards
	Setting aside conflicting national law in order to enforce the EU rules on equal treatment of atypical workers
	Applying general remedies rules as regards discrimination against atypical workers
	Improving access to information regarding employment conditions, including in the case of franchise networks
	Introducing legislation on enforcement of labour standards (e.g. 'Enforcement of Workers Rights Directive')

¹⁹⁵ The report does not consider issues of pensions and social security and focuses instead on the labour law issues that were identified in the petitions. However, we recognise fully that social protection and social security are important determinants of precarious work.

Supporting the mandatory involvement of trade unions in nominating a substantial number of the EWC

Providing a clearer definition of employees' representatives for EWC to exclude those employees whose interest are not genuinely independent from management such as salaried managers

Providing a right to workers to verify data given by multinational undertakings on the number and categories of employees for determining the possibility of setting a EWC

5.2. Inclusive labour standards

Different EU Member States have increasingly experienced an evolution of employment statuses whose primary objective is flexibility, not the avoidance of employment protection and social security contributions (although this may also play a role) (Barnard, 2016). The analysis in chapter two illustrated that while ZHCs and FTCs share some similarities with more common types of atypical work, they are not well captured by the model contained in the existing EU Directives on atypical work and working time regulation. The irregular character of such forms of employment in conjunction with inherent limitations on the part of EU secondary law, including the flexicurity philosophy underpinning the Atypical Work Directives and the regulatory choices made in respect of the scope of application and the substantive rights provided therein, have resulted in a range of protective gaps, exposing in turn individuals to different forms of precariousness, including income, temporal and organisational control (Kountouris, 2012).

As noted in a recent decision regarding ZHCs in the UK, 'there can be no doubt that this is an area which is crying out for some legislative intervention'. 196 One of the central issues here concerns the definition of 'worker' under EU law. Many of the difficulties of riskshifting by employers to the workforce arise because they change an individual's status from the protected 'employee' category to some other employment status with fewer rights and entitlements (Davies, 2013). Emerging case-law in the area of social policy suggests a move towards a uniform definition of the scope of application of EU labour law directives. For reasons of legal certainty (Garben et al. 2017: 3) but also in line with the principles of inclusiveness, our policy recommendation consists of introducing a broader and EU-level definition of the notion of 'worker', borrowing from the area of free movement of workers and applying across all EU law regarding social policy. One way to address this would be through the 'harmonisation' of "worker" status across EU Labour law directives' by reference to an instrument in the form of a 'horizontal directive to implement a commonly agreed definition of a "worker", the "Worker Status (Interpretation) Directive" (Kenner, 2009).¹⁹⁷ Provided this is impossible to achieve, an alternative solution would be the adoption of a Directive with a presumption of employee status under Article 153(1)(b) TFEU and Article 352 TFEU. However, this would not be of much help to individuals on non-standard contracts where it is hard to construct a case that the individual is an employee (Barnard, 2016).198

¹⁹⁶ Saha v Viewpoint Field Services Ltd [2014].

¹⁹⁷ The EU free movement definition of 'worker' could constitute a potential basis for the personal scope of this hypothetical directive, but would enrich it by reference the UK definitions of 'worker' as contained in s. 230(3) of the Employment Rights Act 1996, and by reference to the South African concept of 'economically dependent worker' (Kenner, 2009).

¹⁹⁸ The adoption of such a Directive could be based on two alternative bases: the first, which would though require unanimous voting, would be on the basis of Article 115 TFEU; alternatively Article 153(1) TFEU, requiring only the

In this respect, policy initiatives in other areas could act in complementary ways to increase inclusiveness of labour standards. Of primary importance here would be the **role of collective bargaining**. While support for collective bargaining has traditionally differed per EU Member State and even sector, it cannot be disputed that it is an essential mechanism for inclusive labour markets. A recent OECD report (2014) argued that 'reducing the legal extension of collective wage agreements might lower labour costs and promote employment, especially for the low-skilled, which is good for growth but it might also contribute to widening wage distribution' (OECD 2014: 115). In a similar vein, IMF researchers have also recently stated that 'more lax hiring and firing regulations, lower minimum wages relative to the median wage, and less prevalent collective bargaining and trade unions are associated with higher market inequality' (Dabla-Norris et al. 2015: 25); increasing the income share of the poor and middle class actually increases growth.

And it is multi-employer bargaining structures that are the most inclusive in terms of the level of coverage (Visser et al., 2015). Given that such forms of bargaining arrangements play a vital role in reducing casualisation, protecting vulnerable workers from abuse and in driving up living standards, policy efforts, including at EU level, should be directed towards the promotion of measures to ensure that all workers have access to the benefits of multi-level collective bargaining. Whilst acknowledging the challenges related to political preferences and division of competences, existing EU mechanisms, such as the Council-Specific Recommendations (CSRs) in the European Semester process, could constitute a mechanism to steer EU Member States towards adjusting their labour law and industrial relations systems. Rather than being used predominantly to tie social policy closely to a competitiveness agenda, as seen during the crisis (Koukiadaki et al. 2016), CSRs should be geared instead towards countering the rise of precarious forms of work. The promotion of such policies would possibly induce wider systemic effects, modifying the broader social and economic context to casualization practices rather than targeting specific contractual arrangements and as such being less reliant on the coercive techniques of legislative prohibition but probably more effective (Bogg, 2016).¹⁹⁹ Support for multi-level collective bargaining would not imply the absence of support for improving statutory employment rights (see proposals below). Such rights would continue to operate as minimum standards on which collective bargaining would build, across a wide range of areas (on this, see also IER, 2016).

In relation to franchising, there should be an overall strategy to 'mainstream' franchising in information and consultation directives with the view to ensure their 'inclusive' application to all workers in a non-fragmented, universal manner. This strategy should include a range of measures. To start with, a clarification of the scope of Article 3(1) of the European Works Council Directive by **explicitly including franchising as an example** of a controlling undertaking would be a useful step in removing the uncertainty. This may take the form of a 'presumption', to be rebutted only in cases where the franchisor exercises minimal influence over the franchisee. Secondly, it is desirable to clarify the **object of 'control'** required for the existence of 'determining influence' by one undertaking over the other. For ensuring an effective workers' voice, the control should be deemed to encompass all forms of influence in the form of rules, practices and powers that could directly or indirectly affect the terms and conditions of employment and organization of the firms, including strategic business decisions. Third, we suggest a review of the Information and Consultation, Collective

ordinary legislative procedure, could be used on the basis that such a measure actually concerns access to working conditions (Barnard, 2016).

¹⁹⁹ For example, Fudge and McCann (2017) discuss the possibilities for the development of sectoral codes of practice on the fair use of zero hours contracts, negotiated by the social partners and supported by the state.

Redundancies and Transfer of Undertakings Directives aimed at ensuring that vital collective representation are not lost because of the application of thresholds. A *special ad hoc* extension of the coverage of these Directives to franchise networks is preferable for guaranteeing general information and consultation structures, information and consultation in case of transfer of the franchisor and for collective redundancies as appropriate to the franchise network. In addition to the adoption of a 'horizontal', 'inclusive' definition of worker modelled upon that existing for free movement of workers, the establishment of an 'inclusive' EU concept of employer, which could make the franchisor a joint employer within the field of the application of the directives, as soon as it directly or indirectly has the power to determine essential terms and conditions of employment without the need to show actual control (similar to what has been adopted by the NLRB in the US context),²⁰⁰ could provide another direct legal legal mechanism to ensure inclusive coverage of the Directives.

As the above proposals may be controversial, as a minimum, the establishment of social dialogue forums at network level with the involvement of sectoral trade unions is recommended. The recent legislation by France in this respect (see Box 8) provides a model for the creation of social dialogue structures. All above measures may be enacted either as amendments in existing law or as clauses in a Framework Directive on Decent Work. In addition, a robust strategy for combatting precariousness arising from franchising, should be associated with a EU permissive regime for transnational solidarity action enabling workers to exert pressures at the network level and transnational sectoral collective bargaining. The exclusion of competences in respect of pay, right of association and the right to strike (Article 153(5) TGEU) presents a major obstacle. Even though this is certainly politically difficult to achieve, we think that a creative strategy to address representational precariousness should involve a comprehensive review of competence to allow the vital mechanisms of collective bargaining and industrial action to operate as levels of influence for workers in multinational undertakings. The absence of such mechanisms may have a detrimental effect on the quality of information and consultation due to the lack of workers' bargaining power.

Box 8: Franchising and Social Dialogue in France

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²⁰⁰ In the US Context, the NLRB in its decision *Browning Ferris* have adopted a broader definition of joint employer to include those employers that ' they share or codetermine those matters governing the essential terms and conditions of employment', but crucially it "will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a 'limited and routine' manner ' at 15-16 (see further Pinarbasi 2017)

Pursuant to Article 64 of the Employment Act of 8th August 2016 ('El Khomri Law') and the implementing Degree of 4th May 2017, French Law has introduced a 'social dialogue committee' in franchise networks with at **least 300 full-time workers** on the condition that franchise agreements include 'clauses that have impact on work organisation and conditions in franchisee business' (Article 64 of the Labour Code) (See Fin-Langer and Bazin-Beust 2017).

This Committee has a right to be informed of any decisions likely to affect the size or structure of the labour or to affect working time or conditions of employment of the employees of the franchisee as well as of franchisees joining and leaving the network. It can also formulate proposals or review of any proposal likely to improve working and employment conditions of the employees of the franchise network.

The employer should take active part in the negotiations and create a 'negotiated forum' consisting of representatives of employees and employers (both franchisors and franchisees) with a view to negotiate an agreement and organize the Social Dialogue Committee (model after the EWC). The Agreement will specify matters such as the representation of members, the frequency of meeting and resources for the committee to perform its functions. This Social Committee does not possess any powers besides that of information of franchisees joining or leaving the network of the franchisor's decisions liable to impact the volume and structure of staff, working time, or the employment, work, and vocational training conditions of the franchisees' employees.

The scheme (echoing the EWC model) prioritises a negotiated agreement by a 'negotiation group' consisting of representatives organizations of employees within the **sector**, or if the franchisee operates across various sectors of representatives organizations in different sectors and of franchisor's representatives and representatives of the franchisees. The agreement should be signed by the franchisor, the representative sectoral organization(s) with at least 30% of the votes in the last elections and 30% of companies operating in the franchise network employing at least 30% of the employees of the companies of the network. If no agreement is reached, the law provides for the Committee to meet twice a year (Taylor Wessing 2017).

5.3. Equal treatment and the relevance of working time regulation

Any policy debate about reducing precarious work should consider the existing EU acquis in the area of atypical work alongside that regarding the regulation of working time. On the one hand, the emphasis of the existing Atypical Work Directives on equality means that in focusing solely on whether comparable workers enjoy, for instance, the same rates of pay, EU secondary law neglects the fact that the same individuals are still exposed to different levels of precariousness as a result of the inherently insecure nature of atypical work (Davies, 2013). Besides, it is true that the emphasis on equal treatment leads to the acceptance of the legitimacy of atypical forms of work and their distinct legal status as separate from the SER (Adams and Deakin, 2014a). However, this does not mean that the principle of equality can no longer be an appropriate normative goal informing policy interventions regarding the relationship between atypical and precarious work. For pragmatic reasons, focusing on equality of treatment may promote support for policy interventions. From a substantive point of view, the inclusion of the right to equal treatment in the Directives has played a significant

 $^{^{201}}$ One way to solve this would be to give non-standard workers a slightly higher rate of pay to compensate them for the uncertainty of their situation and to enable them to save up for times when they are out of work.

role in the shifting of the legal and social norms regarding atypical work, reducing the risk of the emergence of a segmented labour market (Davies, 2013).²⁰²

In this context, the European Commission has already announced its intention to carry out a REFIT Evaluation of the Part-Time Work and Fixed-Term Work Directives, 'aiming to ensure this legislation remains fit for purpose in today's labour market'. 203 Provided there is political will to proceed to the amendment of the existing Atypical Work Directives, policy reforms would need to be informed by an understanding of the protective gaps that characterise the EU acquis in this area. A major issue here concerns the fact that the Directive on Part-Time Work does not address the issue of control over working hours directly; the only exception here is clause 5(2), which makes clear that a worker's refusal to transfer from full-time to part-time or vice versa should not constitute a valid reason for dismissal. Our analysis in chapters two and four illustrated how in cases, such as Wippel, differences in contractual terms can render a particular group of workers incomparable to all others, eliminating thus the scope for recourse to the protections available under either the Directives on atypical work or those on equality. But our analysis in chapter four also illustrated the central importance of working time regulation when considering the issue of employment precariousness. Similar to the Part-Time Work Directive, the Working Time Directive does not lay down a right to a minimum number of working hours. In respect of the Working Time Directive specifically, this has been attributed to the approach adopted therein, which emphasised the need to limit the risk of excessively long working hours facing individuals on SER. While this still affects a considerable number of individuals, it does not provide a basis for dealing effectively with the shifting of risk from the employer to the workforce in the case of casual work that involves no guaranteed amount of working hours and lack of control (Davies, 2003).

In light of these issues, future reforms at the European level have to engage with the relationship between working time norms, equality and temporal and organisational control precariousness. In this respect, it is vital to only consider here proposals that avoid the problem of requiring the individuals to cross the threshold of a continuity period, as this would entail similar problems with those that individuals on casual employment face today (Kenner, 2017). The most promising reform, which would limit reliance on the most extreme forms of ZHCs, would be to require the employer to guarantee a minimum amount of work over the course of a given period such as a week or month. This could then be coupled with an obligation to pay the minimum wage or, where higher, the agreed contractual wage, or possibly a proportion of it, for all the time spent on-call for the employer and expected to be available for work at short notice (Adams and Deakin, 2014b; see also Davies, 2013).²⁰⁴ Workers could also be provided with the right to reimbursed by employers for travel costs where a shift is cancelled at short notice. A variant of this would be to require that part-time contracts contain minimum and maximum working hours, or guarantees about when during the week the worker can be called upon to work. As Davies (2013) suggests, a contract might specify that a worker is guaranteed six hours of work per week but cannot be required to work more than 16 hours and that the worker can only be called upon to work between the hours of 9 am and 1pm. Such a contract would still

²⁰² According to Davies (2013), the application of the principle of equality is first fairer to the non-standard workers, who are paid equally for the work they do. Secondly, while this may deter employers from hiring altogether, it might encourage others to hire directly without using agency or on the basis of open-ended contracts, thereby increasing the supply of 'standard' jobs.

²⁰³ http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2017-002632&language=EN

Laws along these lines currently operate in several other European countries (for a review, see Adams and Deakin, 2014). For examples outside the EU, see the case of New Zealand, where recent legislation has sought to regulate the extent to which an employer can require an employee to be available for work while not being guaranteed it.

leave some room for flexibility on a week-to-week basis, but would create a framework within which the parties could negotiate and would place some boundaries on what the employer could require.²⁰⁵

Different legal means can be used to achieve this. The first would be through a revision of the Working Time Directive. As Bogg has suggested, it would be better to address the aspect of temporal and organisational control precariousness through a right to minimum working hours or to a weekly guaranteed income, rather than through part-time work regulation, particularly since ZHCs may be widely distributed amongst full-time workers too (Bogg, 2016: 287). Provided no agreement is possible in respect of a possible amendment of the Working Time Directive, the specific problems associated with such forms of work might require the adoption of a new 'atypical' work directive dealing specifically with 'casuals', alongside fixed-term, part-time and agency work (Bogg, 2016: 287). This would provide scope for countering some of the limitations of the existing approaches to atypical work, namely the problematic application of the equality principle due to the comparator issue. A proposal that would go further than this would be to adopt a 'Mother' Framework **Directive on Decent Work**, which would complement the existing legislation on atypical work. Such a Directive could encompass a range of rights that would provide a floor for all workers engaged in atypical work. This would mean that the Directive could set out a EUwide definition of the concept of worker (as discussed in section 5.2); minimum limits in respect, for instance, of hours of work; a general principle of equal pay and treatment; protection against abuse and casualisation and access to worker representation and enforcement. Such an initiative would be consistent with the report recently published by the European Parliament that puts forward a proposal for the adoption of a directive on fair working conditions for precarious forms of employment, incorporating limits regarding oncall work and ensuring that all workers are quaranteed core working hours.²⁰⁶ We recognise though that, for the reasons explained in section 5.1, the scope for the adoption of a Directive along these lines would be perhaps limited.

5.4. Effective labour standards

In our analysis, we saw that EU labour law directives suffer from certain protective gaps and a major one concerns that of **effectiveness**. In this respect, policy proposals should promote structural coupling mechanisms that reinforce first of all the complementarity between equality and effectiveness. A first issue to consider here would be to provide scope for **setting aside conflicting national law in order to enforce the EU rules on equal treatment of atypical workers** (Peers, 2013: 55).²⁰⁷ This would be consistent with the recognition by the CJEU that **equality, including in the case of atypical work, is a general principle of EU law**. The second issue would concern the **application of those general remedies rules as regards discrimination against atypical workers** (see Peers, 2013). For instance, the Fixed-Term Work Directive does not contain rules on the burden of proof, non-victimisation, the role of equality bodies, and support from non-governmental organisations. The application of rules concerning particularly the burden of proof and victimization would

Attention should be paid here to the scope for abuse. For example, if the minimum and maximum thresholds could be set by the employer at zero and eighty respectively, the contract would be worthless.

²⁰⁶ Calls to this direction have also been made recently by other academics. Garben et al. (2017) have called for the adoption of a Precarious Work Directive. The Directive could stipulate a range of different measures, including, among others, a requirement of objective reasons for the use of atypical contracts as well as an effective overall time limit for the use of such contracts; a right to request a regular contract; a limited range of hours between which the assigned working hours will be worked to enable workers to plan ahead and; the establishment of the principle of equal treatment as regards all employment conditions for such workers (Garben et al. 2017 : 5).

²⁰⁷ This would be on the basis of Case C-555/07, *Kücükdeveci*.

go some way towards addressing the limited scope of effectiveness of the rights stipulated under the Atypical Work Directives.²⁰⁸

The issue of effectiveness in respect of the Atypical Work Directives is also directly related to the broader question of access to iustice for individuals engaged in precarious work. The limited number of court cases involving certain categories of individuals, e.g. young workers, may 'reflect the inherent obstacles to litigation that those in the most precarious jobs encounter and the difficulty of trade union organization within casualised work' (Bell, 2016: 18). It is crucial that workers and their unions are able to truly benefit from EU employment rights. To that end, recognising the right to effective enforcement across different areas of EU labour law necessitates bringing forward a legislative proposal for an 'Enforcement of Workers Rights Directive'. Garben et al. (2017: 5-6), who recently called for such a Directive, suggested it should cover a broad set of factors that enhance compliance with EU rules. Drawing on other fields of EU law, including discrimination legislation, the new directive could include, for instance, rules on access to and support in judicial or administrative procedures, provisions related to the burden of proof that would take into account the vulnerability of workers, measures to ensure that workers can be represented by their trade union, rules on sanctions and out-of-court mechanisms for the resolution of disputes.

Still in the context of effectiveness, policy efforts should also be directed at ensuring that the Written Statement Directive is adequately dealing with the recent changes in the labour market. The recently completed REFIT study (Ramboll Management Consulting, 2016) revealed several gaps or instances of incorrect transposition of the directive in a number of EU Member States involving, among others, gaps regarding essential elements of the information and notification of changes. In light of the consultation exercise of the social partners that is taking place at present, a number of recommendations on the possible direction of EU action could be made. One of the biggest challenges concerns the fact that a significant number of individuals on 'very atypical' forms of employment are excluded from the scope of the Directive, either because they are not considered 'employees' or even 'workers' or because they do not have continuity of employment. On the basis of this, a potential reform of the Directive would include requiring the employer to issue the written statement of terms and conditions of employment from day one and to extend the right from employees to cover all forms of dependent and quasi-dependent labour (Adams and Deakin, 2014b: 34). This would avoid the problem of individuals, such as those on ZHCs who have unclear status or insufficient continuity of employment, being denied the basic right to information concerning their terms and conditions of employment.

A second issue concerns the inability of the Written Statement Directive to capture effectively new forms of employment, amplifying in turn the informational dimension of precariousness. In light of this, any amendment of the Written Statement Directive should include an **explicit requirement on the employer to specify the nature of working arrangements on matters of hours and pay**. This would involve, for instance, extending the list of information provided in Article 2 of the Directive to require employers: to define, in the case of variable work arrangements, the active periods of employment and in situations in which the worker does not benefit from the usual protection reserved for employees to indicate this fact. In this context, employers could be required to provide workers with notice of when work will be made available work or will be cancelled. The introduction of such requirements would not in themselves guarantee income where no work is provided and as such would not fundamentally alter the balance of power between the parties (for proposals in this area, see

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 $^{^{208}}$ These rules were developed in some respects by the CJEU before legislative intervention (see, e.g. Case 109/88 *Danfoss* and Case C-185/97 *Coote*) (Peers, 2013: 55).

discussion above). However, they would help demystifying the terms of the relationship involved in casual work (Kenner, 2017: 177).

In relation to franchising, the following measures could be recommended with a view to achieving effective labour standards:

- a clearer definition of employee representatives excluding employees, such as salaried managers, whose interest are not genuinely independent from management;
- the establishment of mandatory involvement of trade unions in nominating a substantial number of the EWC could enhance the effectiveness and strength of workers' representation;
- **a workers' right to verify the data** given by multi-national undertakings on the number and categories of employees for determining the possibility of setting a European Works Council **by a public authority.**

5.5. Conclusion

The starting premise of the report has been that the recent changes in the world of work have strained the ability of regulation, at both supranational and national levels, to provide protection to workers, leading to **decent work deficits** (see also ILO, 2016). Drawing on a rights-based approach against precarious work in the EU, the report identified a range of protective gaps located at different levels of regulation, including EU primary law, EU secondary law and EU Member States. Against this context, there is a need to adapt the existing policy responses to reflect the fact that precarious work is a constantly moving target. The key argument of the report is that the fight against precarious work needs to be pursued through a policy package that promotes inclusive and effective labour standards alongside specific measures to promote the principle of equality. Initiatives that fail to adopt an integrated policy approach and lack support by complementary policies and reinforcing mechanisms in other areas will only have limited effects. To bring these three principles together, EU institutions, EU Member States, employers and workers have to come together to limit the exposure of individuals to vulnerability in the world of work and to secure and promote instead the goals of human dignity, autonomy and equality.

REFERENCES

- Abbott, B. (1993) Small firms and trade unions in services in the 1990s, *Industrial Relations Journal*, 24(4), 308-317.
- Abell, M. (2013) *The Law and Regulation of Franchising in the EU,* Cheltenham and Northampton: Edward Elgar.
- Adams, Z. and Deakin, S. (2014a) Institutional Solutions to Precariousness and Inequality in Labour Markets, *British Journal of Industrial Relations*, 52, 779–809.
- Adams, Z. and Deakin, S. (2014b) *Re-regulating Zero-Hours Contracts*, London: Institute of Employment Rights.
- Aimo M. (2016) In Search of a 'European Model' for Fixed-Term Work in the Name of the Principle of Effectiveness, *European Labour Law Journal*, 7(2), 232-260.
- Albin, E. and Prassl, J. (2016) Fragmenting Work, Fragmented Regulation in Freedland, M., Bogg, A., Cabrelli, D., Collins, H., Countouris, N., Davies, A.C.L., Deakin, S. and Prassl, J. (2016) The Contract of Employment, Oxford: Oxford University Press.
- Allan, C., Bamber G. and Timo, N. (2006) Fast-food work: are McJobs satisfying?, Employee Relations, 28(5), 402-420.
- Ashiagbor, D. (2005) Promoting Precariousness? The Response of EU Employment Policies to Precarious Work in Fudge, J. and Owens, R. (eds.), *Precarious Work, Women, and the* New Economy: The Challenge to Legal Norms, Oxford: Hart Publishing.
- Auer, P. and Cazes, S. (2000) The Resilience of the Long-term Employment Relationship: Evidence from the Industrialized Countries, *International Labour Review*, 139(4), 389-408.
- Barak, A. (2015) *Human Dignity: The constitutional Value and the constitutional right,* Cambridge: Cambridge University Press.
- Barbier, J.C. (2011) "Employment precariousness" in a European cross-national Perspective. A Sociological Review of Thirty Years of Research. Documents de travail du Centre d'Economie de la Sorbonne 2011.78
- Barbier, J.C. and Colomb, F. (2015) The Janus Face of EU Law: A Sociological Perspective on European Law Making and its Influence on Social Policy in the EU in Barbier, J.C., Rogowski, R. and Colomb, F. (eds.) The Sustainability of the European Social Model: EU Governance, Social Protection and Employment Policies in Europe, Cheltenham: Edward Elgar.
- Barnard, C. (2012) EU Employment Law, Oxford: Oxford University Press.
- Barnard, C. (2016) Non-standard Employment: What Can the EU Do? in Blanpain, R. Hendrickx, F. and Waas, B. (eds) New Forms of Employment in Europe, Zuidpoolsingel: Kluwer Law International.
- Bell, M. (2011) The Principle of Equal Treatment: Widening and Deepening, in Craig, P. and de Búrca, G. (eds) The Evolution of EU Law, Oxford: Oxford University Press, 611 639.
- Bell, M. (2012) Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work, *European Law Review*, 37(1): 31-48.

 Bell, M. (2016) EU Equality Law and Precarious Work, forthcoming in Belavusau, U. and Henrard, K. (eds.), EU Anti-Discrimination Law beyond Gender, Hart: Oxford, 2017. Available at SSRN: https://ssrn.com/abstract=2797220

- Benach, J., Vives, A., Amable, M., Vanroelen, C., Tarafa, G. and Muntaner, C. (2014) Precarious Employment: Understanding an Emerging Social Determinant of Health, *Annual Review of Public Health*, 35: 229-253.
- Ben-Israel, R. (2001) The Rise, Fall and Resurrection of Social Dignity in Blanpaid R. (ed), Labour Law, Human Rights and Social Justice: Liber Amicorum in Honour of Prof.Dr.Ruth Ben Israel, Alphen aan den Rijn: Kluwer Law International.
- Bercusson, B. (2009) *European Labour Law*, 2nd edn, Cambridge: Cambridge University Press.
- Bhalla, A. and Lapeyre, F. (1997) Social Exclusion: Towards an Analytical and Operational Framework, *Development and Change*, 28(3): 413-433.
- Bispinck, R. and Schulten, T., (2011) Trade Union Responses to Precarious Employment in Germany, German Report to the Project "Bargaining for Social Rights" (BARSORI) financed by the European Commission (Agreement Ref. VS/2010/0811), WSI-Diskussionspapier Nr. 178, Düsseldorf Wirtschafts und Sozialwissenschaftliches Institut in der Hans-Böckler-Stiftung,
- Bogg, A. (2014) 'Article 31- Fair and Just Working Conditions' in Peers, S., Harvey, T., Kenner, J. and Ward, A. (eds.) The EU Charter of Fundamental Rights: A Commentary, Oxford: Hart.
- Bogg, A. (2016) EU law and the Regulation of Working Time, in Bogg, A., Costello, C. and Davies, A.C.L. (eds), Research Handbook on EU Labour Law, Cheltenham and Northampton: Edward Elgar.
- Bogg, A. (2017) Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?, International Journal of Comparative Labour Law and Industrial Relations, 33(3): 391–417.
- Bosch, G. (1986). 'Hat das Normalarbeitsverhältnis eine Zukunft?' *WSI-Mitteilungen*, 3 (90): 163–176 (in German).
- Bosch, G. (2004) Towards a New Standard Employment Relationship in Western Europe. British Journal of Industrial Relations, 42, 617–636.
- Brand, M. and Croonen, E. (2010) Franchised and Small, the Most Beautiful of All; HRM and Performance in Plural Systems, *Journal of Small Business Management*, 48(4), 605-626.
- Buschak, W. (2003) The practical and legal problems of European Works Councils: reviewing the Directive in Fitzgerald, I. and Stirling J. (eds.), *European Works Councils: Pessimism of the Intellect Optimism of the Will?*, New York and London: Routledge.
- Campbell, I. (2017) Working Time Flexibility: Diversification and the Rise of Fragmented Time Systems, in Grimshaw, D., Fagan, C., Hebson, G. and Tavora, I. (eds) Making Work More Equal: A New Labour Market Segmentation Approach, Manchester: Manchester University Press.
- Carrera, S., Guild, E. and Hernanz N. (2013) The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU, study for the European Parliament available at:

http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE ET(2013)493031 EN.pdf

- CIPD (2015) Zero-hours and Short-hours Contracts in the UK: Employer and Employee Perspectives, Policy Report, London: CIPD.
- Clark, J. and Hall, M. (1992) The Cinderella Directive? Employee Rights to Information about Conditions Applicable to their Contract or Employment Relationship, *Industrial Law Journal*, 21(2): 106–118.
- Collins, H. (1990a) Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Law, *Oxford Journal of Legal Studies*, 10(3), 353-380.
- Collins, H. (1990b) Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration, *The Modern Law Review*, 53(6), 731-744.
- Collins, H. (2003) Discrimination, Equality and Social Inclusion, *Modern Law Review*, 66(1): 16-39.
- Collins, H., Ewing, K.D., and McColgan, A. (2012) Labour Law, Cambridge: Cambridge University Press.
- Connell, J., (1997) International hotel franchise relationships UK franchisee perspectives, International Journal of Contemporary Hospitality Management, 9(5/6), 215-220
- Conseil National du Travail (2015), Avis No 1.944: Avant-projet de loi portant des dispositions diverses sociales, Séance du mercredi 24 juin 2015.
- Costello, C. and Davies, G. (2006) The Case Law of the Court of Justice in the Field of Sex Equality since 2000, *Common Market Law Review*, 43(6): 1567-1616.
- Council of the European Union (2011) Joint Employment Report 2015, 9 March 2015: Addressing the Challenge of Segmented Labour Markets, Ensuring a Proper Balance between Flexibility and Security.
- Countouris, N. (2007) The Changing Law of the Employment Relationship: Comparative Analyses in the European Context, Aldershot: Ashgate.
- Countouris, N. (2010) Strengthening the Protection of Precarious Workers: The Concept of Precarious Work, Turin: ITCILO.
- Countouris, N. (2012) The Legal Determinants of Precariousness in Personal Work Relations: A European Perspective, Comparative Labor Law and Policy Journal, 34(1), 21-46.
- Countouris, N., Deakin, S., Freedland, M., Koukiadaki, A. and Prassl, J. (2016) Report on Collective Dismissals, ILO: Geneva available at http://www.ilo.org/wcmsp5/groups/public/---ed dialogue/---ed dialogue msu/documents/publication/wcms 541637.
- Countouris, N. and Freedland, M. (2013) Introduction The Myth and Realities of 'Social Europe' in Countouris, N. and Freedland, M. (eds) *Resocialising Europe in a Time of Crisis,* Cambridge: Cambridge University Press.
- Crouch, C. (2015) Labour Market Governance and the Creation of Outsiders, *British Journal of Industrial Relations*, 53(1): 27–48.
- Dabla-Norris, M. E., Kochhar, M. K., Suphaphiphat, M. N., Ricka, F. and Tsounta, E. (2015) Causes and Consequences of Income Inequality: A Global Perspective, IMF Discussion Note, Washington: International Monetary Fund.

• Davidov, G. (2004) Collective Bargaining Laws: Purpose and Scope, *International Journal of Comparative Labour Law and Industrial Relations*, 20(1), 81-106.

- Davies, A. (2010) Perspectives on Labour Law, 2nd edn, Cambridge: Cambridge University Press.
- Davies, A. (2013) Regulating Atypical Work: Beyond Equality in Countouris, N. and Freedland, M. (eds.), Resocialising Europe in a Time of Crisis, Cambridge: Cambridge University Press.
- Davies, A.C.L (2016) Job Security and Flexibility in Bogg, A., Costello, C. and Davies A. (eds), *Research Handbook on EU Labour Law,* Cheltenham: Edward Elgar.
- Dawson, M. and De Witte, B. (2015) Welfare Policy and Social Inclusion, in Arnull, A. and Chalmers, D. (eds.) *The Oxford Handbook of European Union Law*, Oxford: Oxford University Press.
- De Spiegelaere, S. and Waddington, J. (2017) Has the recast made a difference? An examination of the content of European Works Council agreements, *European Journal of Industrial Relations*, 23(3), 293-308.
- De la Porte, C. and Emmenegger, P. (2017) The Court of Justice of the European Union and fixed-term work: Putting a brake on labour market dualization, *Journal of European Social Policy*, 27(3), 295-310.
- Deakin, S. (2001) The Changing Concept of the 'Employer' in Labour Law, *Industrial Law Journal*, 30(1), 72-84.
- Deakin, S. (2012) The Lisbon Treaty, the Viking and Laval Judgments and the Financial Crisis: In Search of New Foundations for Europe's 'Social Market Economy', in Bruun, N., Lörcher, K. and Schömann, I. (eds) The Lisbon Treaty and Social Europe, Oxford: Hart Publishing.
- Deakin, S. and Morris, G. (2012) *Labour Law*, 6th edn, Oxford: Hart Publishing.
- Deakin, S. and Mückenberger, U. (1992) 'Deregulation and European labour markets' in Castro, A., Méhaut, P. and J. Rubery (eds.), *International Integration and the Organisation of Labour Markets*, London: Academic Press.
- Department for Business, Innovation and Skills (BIS) (2013), Consultation: Zero hours employment contracts, available at:
 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/267634/bis-13-1275-zero-hours-employment-contracts-FINAL.pdf.
- Dorsemmont, F. (2012) Values and Objectives in Bruun, N., Lörcher, K. and Schömann, I. (eds.), *The Lisbon Treaty and Social Europe*, Oxford: Hart Publishing.
- Dorsemmont F. (2013) Changing ownership patterns in transnational hotel and restaurant chains and their impact on workers' information and consultation rights: A lawyer's perspective, EFFAT Dublin Seminar (copy with the author).
- Dupré, C. (2014) Article 1- Human Dignity Peers, S., Harvey, T., Kenner, J. and Ward,
 A. The EU Charter of Fundamental Rights: A Commentary, Oxford: Hart.
- Ebisui, M. (2012) Non-standard Workers: Good Practices of Social Dialogue and Collective Bargaining, *E-Journal of International and Comparative Labour Studies*, 1(3-4), 211-246.
- Economic and Social Council, Committee on Economic, Social and Cultural Rights (ECOSOC) (2016) General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/23, 27 April 2016 available at:

http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQfoUYY19kME5pOqRbao%2bukB1Kzn1MMnQL24FFvtIIdk%2f6d5JS6iny2Y48V%2bDNznkpKPXqUnawFd5qpKn3kA%2bOxq.

- Elmore, A. (2018) Franchise Regulation for the Fissured Economy, *Washington Law Review*, 86 (forthcoming).
- EU Network of Independent Experts on Fundamental Rights (2006) Commentary of the Charter of Fundamental Rights of the European Union available at: http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf.
- Eurofound (2017), *In-work poverty in the EU*, Publications Office of the European Union: Luxembourg.
- European Commission (2006) Staff Working Document, Report by the Commission services on the implementation of COUNCIL Directive, 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-Term Work concluded by ETUC, UNICE and CEEP (EU-15) Brussels, 11.08.2006, SEC 1974.
- European Commission (2011) '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.
- European Commission (2012) *Employment and Social Developments in Europe 2012,* Luxembourg: Publications Office of the European Union.
- European Commission (2013) 'Fitness check' on EU law in the area of Information and Consultation of Workers, Brussels SWD (2013) 293.
- European Commission (2016a) Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank: Annual Growth Survey 2017, Brussels, 16.11.2016, COM(2016) 725 final.
- European Commission (2016b) First Preliminary Outline of a European Pillar of Social Rights Accompanying to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Launching a Consultation on a European Pillar of Social Rights, COM(2016) 127 final: http://eur-lex.europa.eu/resource.html?uri=cellar:bc4bab37-e5f2-11e5-8a50-01aa75ed71a1.0004.02/DOC_2&format=PDF
- European Commission (2017a) Commission Staff Working Document, Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time Accompanying the document Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee Report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time, SWD(2017) 204 final, 26 April 2017.
- European Commission (2017b) Commission Staff Working Document, Analytical Document accompanying the document Consultation Document 'Second phase consultation of Social Partners under Article 154 TFEU on a possible revision of the Written Statement Directive (Directive 91/533/EEC) in the framework of the European Pillar of Social Rights, C(2017) 6121 final.
- European Foundation for the Improvement of Living and Working Conditions (Eurofound) (2015) New Forms of Employment, Dublin: Eurofound.

European Franchise Federation, (2012) European Franchise Report available at http://www.eff-franchise.com/Data/PUBLICATION%202012%20EFF%20FRANCHISE%20REPORT.pdf.

- European Parliament, (2010) Report on Precarious Women Workers, 2010/2018(INI)), A7-0264/2010.
- European Parliament, (2016a) *Precarious Employment in Europe Part 1: Patterns, Trends and Policy Strategy*, Study for the EMPL Committee, IP/A/EMPL/2014-14, PE 587.285.
- European Parliament, Committee on Petitions (2016b), Petition No 0020/2016 by Yvon De Jonge (Belgian) on behalf of ABBV Horval, on working conditions in Belgian restaurants, particularly in McDonald's (24.11.2016) PE594.206v01-00 available at http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-594.206&format=PDF&language=EN&secondRef=01.
- European Parliament, Committee on Petitions (2016c) Petition No 0021/2016 by Ian Hodson (British) on behalf of the BFAWU, on working conditions at McDonald's in the UK (30.11.2016) PE595.542v01-00 available at http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-595.542&format=PDF&language=EN&secondRef=01
- European Parliament Resolution of 12 September 2017 (2017) on the functioning of franchising in the retail sector, 2016/2244(INI)) available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0322
- Eurostat (2017a) Europe 2020 Indicators Employment, http://ec.europa.eu/eurostat/statistics-explained/index.php/Europe 2020 indicators-employment#cite note-12
- Eurostat (2017b) *Employment Statistics*, http://ec.europa.eu/eurostat/statistics-explained/index.php/Employment statistics#Fixed term contracts
- Evans, J. and Gibb, E. (2009) *Moving from Precarious Employment to Decent Work,* Global Union Research Newtork, Discussion Paper no 13, Geneva: International Labour Office.
- Everson, M. and Correia Gonçalves, R. (2014) Article 16 Freedom to Conduct a Business in Peers, S., Hervey, T., Kenner, J. and Ward, A. (eds.) *The EU Charter of Fundamental Rights, A Commentary*, Oxford: Hart Publishing.
- Ewing, K.D. and Hendy, J. (2012) *Trade Union Rights: The Short Story*, Liverpool: Institute of Employment Rights.
- Farrell, S. (2015) McDonald's UK boss defends company's use of zero-hours contracts for staff, *The Guardian*, 26 August 2015.
- Felstead, A. (1991) The Social Organization of the Franchise: A Case of 'Controlled Self-Employment', *Work, Employment & Society*, 5(1), 37-57.
- Felstead, A. (1993) *The Corporate Paradox: Power and Control in the Business Franchise,* London: Routledge: 1993.
- Felstead, A. and Jewson, N. (1999) Flexible Labour and Non-Standard Employment: An Agenda of Issues in Felstead, A. and Jewson, N. (eds.), *Global Trends in Flexible Labour*, Houdmills, Basingstoke and London: Macmillan.
- Fin-Langer, L. and Bazin-Beust, D. (2017) L'instance de dialogue social du réseau de franchise, *LA SEMAINE JURIDIQUE- Edition Spéciale*, 1095(12).

- Fredman, S. (2004) Women at Work: The Broken Promise of Flexicurity, *Industrial Law Journal*, 33(4), 299-319.
- Freedland, M. and Kountouris, N. (2011) *The Legal Construction of Personal Work Relations*, Oxford: Oxford University Press 2011.
- Freedland, M. (2013) Burying Caesar: What Was the Standard Employment Contract? in Stone, K.W.V. and Arthurs, H. (eds). *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment*, New York: Russell Sage Foundation.
- Freedland, M. (2016) General Introduction, in Freedland, M., Bogg, A., Cabrelli, D., Collins, H., Countouris, N., Davies, A.C.L., Deakin, S. and Prassl, J. (2016) *The Contract of Employment*, Oxford: Oxford University Press.
- Fudge, J. (2006). Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation. *Osgoode Hall Law Journal* 44(4):609-648.
- Fudge, J. (2017) The Future of the Standard Employment Relationship: Labour Law, New Institutional Economics and Old Power Resource Theory, *Journal of Industrial Relations*, 59(3), 374 392.
- Fudge, J. and McCann, D. (2017) Unacceptable Forms of Work: A Multidimensional Model, *International Labour Review*, 156(2): 147-184.
- Fudge, J. and Owens, R. (2006) Precarious Work, Women, and the New Economy: The Challenge to Legal Norms, in Fudge, J. and Owens, R. (eds) *Precarious Work, Women, and the New Economy*, Oxford: Hart Publishing.
- Garben, S., Kilpatrick, C. and Muir, E. (2017) *Towards a European Pillar of Social Rights: Upgrading the EU Social Acquis*, Bruges: College of Europe.
- Garben, S. (2017) Competence Creep Revisited, *Journal of Common Market Studies*, DOI: 10.1111/jcms.12643.
- Grimshaw, D., Marchington, M., Rubery, J. and Wilmott, H. (2004a) Introduction: Fragmenting Work Across Organisational Boundaries, in Marchington, M. Grimshaw, D., Rubery, J., and Wilmott, H. (eds) *Fragmenting Work: Blurring Organizational Boundaries and Disordering Hierarchies*, Oxford: Oxford University Press.
- Grimshaw, D., Marchington, M., Rubery, J. and Wilmott, H. (2004b) Conclusion: Redrawing Boundaries, Reflecting on Practice and Policy, in Marchington, M. Grimshaw, D., Rubery, J., and Wilmott, H. (eds) *Fragmenting Work: Blurring Organizational Boundaries and Disordering Hierarchies*, Oxford: Oxford University Press.
- Grimshaw, D., Johnson, M., Rubery, J. and Keizer, A. (2016) Reducing Precarious Work: Protective Gaps and the Role of Social Dialogue in Europe, http://www.research.mbs.ac.uk/ewerc/Portals/0/Documents/Comparative-Report-Reducing-Precarious-Work-v2.pdf.
- Guastaferro B., (2017) The unexpectedly talkative 'dumb son': the Italian Constitutional Court's dialogue with the European Court of Justice in protecting temporary workers' rights in the public education sector, European Constitutional Law Review, 13(3), 493-524.
- Gumbrell-McCormick, R. (2011) European trade unions and 'atypical' workers', *Industrial Relations Journal*, 42(3), 293-310.
- Hare I. (2003) Social Rights as Fundamental Human rights in Hepple, B. (ed.), *Social and Labour Rights in a Global Context*, Cambridge: Cambridge University Press.

 Horemans, J., & Marx, I. (2013) Should We Care about Part-Time Work from a Poverty Perspective? An Analysis of the EU15 Countries, in Koch, M. and Fritz, M. (eds.), Non-Standard Employment in Europe: Paradigms, Prevalence and Policy Responses, Houndmills: Palgrave Macmillan.

- Hunt, J. (2003) Fair and Just Working Conditions in Hervey, T. and Kenner, J. (eds.), Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective, Oxford: Hart.
- Hunt, S. and Nevin, J. (1974) Power in a Channel of Distribution: Sources and Consequences, *Journal of Marketing Research*, 11(2), 186-193.
- Hyman R. (1975) industrial Relations: A Marxist Introduction, Basingstoke: Macmillan.
- International Labour Organisation (2010), Employment Policies for Social Justice and a Fair Globalization, Geneva: ILO.
- International Labour Organisation (2014) World of Work Report 2014: Developing with Jobs, Geneva: ILO.
- International Labour Organisation (2016) *Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects*, Geneva: International Labour Office.
- Iossa, A. (2017) Collective Autonomy in the European Union: Theoretical, Comparative and Cross-border Perspectives on the Legal Regulation of Collective Bargaining, Lund: Lund University.
- Institute of Employment Rights (2016) Ewing K., Hendy J. and Jones C. (eds), *A Manifesto for Labour Law: towards a comprehensive revision of workers' rights,* London: Institute of Employment Rights.
- Jagodzinski, R. (2008) Review, revision or recast? The quest for an amended EWC Directive in Degryse, C. (ed.), *Social developments in the European Union 2008,* Brussels: European Trade Union Institute
- Jagodzinski, R. (2009) Recast Directive on European Works Councils: Cosmetic Surgery or Substantial Progress?, *Industrial relations Journal*, 40(6), 534-545.
- Ji, M.W. and Weil, D. (2015) The Impact of Franchising on Labor Standards Compliance, *ILR Review (Cornell University)*, 68(5), 977-1006.
- Jimena Quesada, L. (2017) Social Rights in the Case-law of the Court of Justice of the European Union: The Opening of the Turin Process, *Conference on Social Rights in Today's Europe: The Role of Domestic and European Courts*, Nicosia, 24 February 2017.
- Jones, A. (2012) The Boundaries of an Undertaking in EU Competition Law, *European Competition Journal*, 8(2), 301-331.
- Kahn-Freund, O. (1977) Labour and the Law, 2nd edn, London: Stevens & Sons.
- Katsaroumpas, I. (2017) De-Constitutionalising Collective Labour Rights: The Case of Greece, *Industrial Law Journal* (advance article online, forthcoming)
- Keller, B., and Seifert, H. (2013) Atypical Employment in Germany. Forms, Development, Patterns, *Transfer: European Review of Labour and Research*, 19(4): 457 474.

- Kellner, A., Townsend, K. and Wilkinson, A. (2011) Franchise Firms: Changing Employment Relations in Wilkinson, A. and Townsend, K. (eds.), The Future of Employment Relationships: New Paradigms, New Developments, Basingstoke: Palgrave Macmillan.
- Kellner, A., Peetz, D., Townsend K. and Wilkinson, A. (2016) 'We are very focused on the muffins': Regulation of and compliance with industrial relations in franchisees, *Journal of Industrial Relations*, 58(1), 25-45.
- Kenner, J. (2003) Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility in Hervey, T. and Kenner, K. (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective*, Oxford: Hart.
- Kenner, J. (2009) New Frontiers in EU Labour Law: From Flexicurity to Flex-security, in Dougan, M. and Currie, S. (eds.) *50 Years of the European Treaties: Looking Back and Thinking Forward*, Oxford: Hart.
- Kenner, J. (2014) Article 30 Protection in the Event of Unjustified Dismissal, in Peers, S., Hervey, T., Kenner, J. and Ward, A. (eds) The EU Charter of Fundamental Rights – A Commentary, Oxford: Hart Publishing.
- Kenner, J. (2017) Inverting the Flexicurity Paradigm: The United Kingdom and Zero Hours Contracts, in Ales, E., Deinert, O. and Kenner, J. (eds) *Core and Contingent Work in the European Union*, Oxford: Hart Bloomsbury 2017.
- Kerkovic, T. (2010) The Main Directions in Comparative Franchising Regulation Unidroit Initiative and Its Influence, *European Research Studies*, 13(1), 103-118.
- Khaitan, T. (2012) Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea, *Oxford Journal of Legal Studies*, 32(1), 1-19.
- Koukiadaki A., Tavora I. and Lucio M.M. (2016) Continuity and change in joint regulation in Europe: Structural reforms and collective bargaining in manufacturing, *European Journal of Industrial Relations*, 22(3), 189-203.
- Kountouris, N. (2016) EU Law and the Regulation of 'Atypical Work' in Bogg, A., Costello, C. and Davies, A. (eds.), Research Handbook on EU Labour Law, Cheltenham: Edward Elgar.
- Kountouris, N. (2017) The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope, *Industrial Law Journal* (advance online, forthcoming)
- Krueger, A. (1991) Ownership, Agency and Wages: An Examination of Franchising in the Fast-Food Industry, *The Quarterly Quarterly Journal of Economics*, 106, 75-101.
- Labour Party (2014) Zeroed Out: The Place of Zero-Hours Contracts in a Fair and Productive Economy: An Independent Report by Norman Pickavance, London: The Labour Party.
- Lang, C., Schömann, I. and Clauwert, S. (2013) Atypical forms of employment contracts in times of crisis, Working Paper 2013.03, Brussels: European Trade Union Institute.
- Laulom, S. (2010) The Flawed Revision of the European Works Council Directive, *Industrial Law Journal*, 39(2), 202-208.
- Layard, R. (2004) *Good jobs and bad jobs*. CEP Discussion Papers 19. London School of Economics and Political Science, Centre for Economic Performance, LSE.
- Leidner, R. (2002) Fast food work in the United States in Royle, T. and Towers, B. (eds.), Labour Relations in the Global Fast-Food Industry, London and New York: Routledge.

• Leonardi, S. (2008) Union Organisation of Employees in Atypical and Precarious Work in Italy, *International Journal of Action Research*, 4(3), 203-224.

- Lewis Silkin (2013), Zero Hours Contracts: Understanding the Law, CIPD Guide, available at http://www.cipd.co.uk/hr-resources/guides/zero-hours-contracts-understanding-law.aspx.
- Lindbeck A. and Snower D. J. (1988) *The Insider-Outsider Theory of Employment and Unemployment*, Cambridge: MIT Press.
- London Economics (2011) McDonald's economic footprint in Europe: Report to McDonald's Europe, London: London Economics available at http://www.mcdpressoffice.eu/downloads/Economic footprint Report.pdf.
- Lörcher, K. and Schömann, I. (2016) *The European Pillar of Social Rights: Critical Legal Analysis and Proposals*, Brussels: European Trade Union Institute.
- Maduro, M.P (2003) The Double Constitutional Life of the Charter of Fundamental Rights of the European Union in Hervey, T. and Kenner, J. (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective*, Oxford: Hart.
- Mantouvalou, V. (2014) Democratic Theory and Voices at Work in Bogg, A. and Novitz, T. (eds.), Voices at Work, Oxford: OUP.
- Marginson, P. (2016) Trade Unions and Multinational Companies: A multi-level challenge, Warwick Paper in Industrial Relations (Number 103).
- Marshall, T.H. (1950) Citizenship and Social Class, Camrbidge: Cambridge University Press.
- McCann, D. (2014) Equality through Precarious Work Regulation: Lessons from the Domestic Work Debates in Defence of the Standard Employment Relationship, *International Journal of Law in Context*, 10(4): 507–521.
- McCrudden, C., (2008) Human Dignity and Judicial Interpretation of Human Rights, *The European Journal of International Law*, 19(4), 655-724.
- McKay, S., Jefferys, S., Paraksevopoulou, A., Kels, J. (2012) Study on Precarious work and Social Rights, Report produced for the European Commission, ec.europa.eu/social/BlobServlet?docId=7926&langId=en
- McKee, M., Reeves, A., Clair, A. and Stuckler, D. (2017) Living on the edge: precariousness and why it matters for health, *Archives of Public Health*, 75(13).
- Ménard C., (2012) Hybrid Modes of Organization Alliances, Joint Ventures, Networks, and Other Strange Animals in Gibbons, R. and Roberts, J. (eds.), *The Handbook of Organizational Economics*, Princeton: Princeton University Press.
- Moscone, F., Tosetti, E. and Vittadini, G. (2016) The impact of precarious employment on mental health: The Case of Italy, *Social Science & Medicine*, 158, 86-95.
- Muchlinski, P. (2007) *Multinational Enterprises and the Law,* 2nd edn, Oxford: Oxford University Press.
- Murray, J.B. (1987), The Critical Source of Uncertainty and the Dominant Sentiments of Marketing Channel Dyads: A Bargaining Simulation (Ph.D Dissertation), Blacksburg: Virginia Polytechnic Institute and State University.
- Neville, S. (2013) Burger King and Domino's Pizza also Using Zero-Hours Contract., *The Guardian*, 6 August 2013.

- Öberg, U. and Schmauch, M. (2016) Legal Opinion: Precarious Work and European Union Law, http://endprecariouswork.eu/assets/Legal opinion Precarious Work and European Union Law EN final.pdf
- O'Cinneide, CP. (2015) The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground. *Maastricht Journal of European and Comparative Law*, 22(3): 370-395.
- OECD (1994) *Competition Policy and Vertical Restraints: Franchise Agreements* available at https://www.oecd.org/competition/abuse/1920326.pdf.
- Olsthoorn, M. (2014) Measuring Precarious Employment: A Proposal for Two Indicators of Precarious Employment Based on Set-Theory and Tested with Dutch Labor Market-Data, Social Indicators Research, 119(1), 421-441.
- Organisation for Economic Cooperation and Development (OECD) (2012), *Economic Policy Reforms 2012: Going for Growth*, Paris: OECD Publishing.
- Organisation for Economic Cooperation and Development (OECD) (2014) All on Board: Making Inclusive Growth Happen, Paris: OECD.
- Osterman, P. (1994) Internal Labour Markets: Theory and Change in Kerr, C. and Staudohar, P.D. (eds.), Labour Economics and Industrial Relations: Markets and Institutions, Cambridge: Harvard University Press.
- Palier, B. and Thelen, K. (2010) Institutionalizing Dualism: Complementarities and Change in France and Germany, *Politics & Society* 38(1): 119–148.
- Peers, S. (2013) Equal Treatment of Atypical Workers: A New Frontier for EU Law? *Yearbook of European Law*, 32(1): 30-56.
- Pennycock, G Cory and V Alakeson, (2013) A Matter of Time: The Rise of Zero-hours Contracts, Resolution Foundation, 3, see:
 www.resolutionfoundation.org/publications/matter-time-rise-zero-hours-contracts/
- Pettersson, H. (2015) Discrimination against Part-Time and Fixed-Term Workers: A Critical Legal Positivist Analysis, *International Journal of Comparative Labour Law and Industrial Relations* 31(1): 47–66.
- Pinarbasi, A. (2017) Stop Hamburglaring our Wages: The Right of Franchise Employees to Union Representation, *The University of the Pacific Law Review*, 47(1), 139-166.
- Pitrou, A., (1978) *La Vie Précaire, des Familles face à leurs Difficultés*, Paris: Études CNAF (in French).
- Prassl, J. (2015) The Concept of the Employer, Oxford: Oxford University Press.
- Quinlan, M. (2012) The 'pre-invention' of precarious employment: The changing world of work in context, *The Economic and Labour Relations Review*, 23(4), 3-24.
- Quinlan M., (2015) *The effects of non-standard forms of employment on worker health and safety* (Geveva: ILO Office) available at http://www.ilo.org/wcmsp5/groups/public/---ed protect/---protrav/---travail/documents/publication/wcms 443266.pdf.
- Quinn, B. and Doherty, A.M (2000) Power and control in international retail franchising-Evidence from theory and practice, *International Marketing Review*, 17(4/5), 354-372.
- Ramboll Management Consulting (2016) *Refit Study to Support Evaluation of the Written Statement Directive (91/533/EC)*, Brussels: European Commission.

- Ramsay, H. (1997) Fool's gold? European Works Councils and Workplace Democracy, Industrial Relations Journal, 28(4), 314-322.
- Reeders, E., (1988) The fast food industry in Willis, E. (ed.), *Technology and the Labour Process*, Allen and Unwin: Sydney.
- Regulatory Policy Committee (2015) Providing a Route of Redress for Individuals on Zero Hours Contracts who Suffer a Detriment due to Taking a Second Job, RPC-3071(2)-BIS.
- Riley, J. (2012) A Blurred Boundary between Enterpreneurship and Servitude: Regulating Business Format Franchising in Australia in Fudge J., McCrystal S. and Sankaran K. (eds.), Challenging the Legal Boundaries of Work Regulation, Oxford: Hart.
- Rodgers, G. (1989) Precarious Work in Western Europe: The State of the Debate in Rodgers, G. and Rodgers, J. (eds), Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe, Brussels: International Institute for Labour Studies.
- Rodgers, L. (2016) *Labour Law, Vulnerability and the Regulation of Precarious Work,* Cheltenham/Northampton: Edward Elgar.
- Rodriguez Philippe-André, (2015) 'Human dignity as an essentially contested concept' Cambridge Review of International Affairs, 28:4, 743-756.
- Roper, A. (2013) Who controls the room keys? Study on business models of transnational hotel chains in Europe, Effat Project 'Changing ownership patterns in transnational hotel and restaurant chains and their impact on workers' information and consultation rights, Grant Agreement VS/2011/0463 (copy with the authors).
- Royle, T. (2000) Working for McDonald's in Europe: The Unequal Struggle?, London and New York: Routledge.
- Royle, T. (2002) Just vote no! Union-busting in the European fast-food industry: the case of McDonald's, *Industrial Relations Journal*, 33(3), 262-278.
- Royle, T. (2010) 'Low-road Americanization' and the global 'McJob': a longitudinal analysis
 of work, pay and unionization in the international fast-food industry, *Labor History*, 51(2),
 249-270.
- Royle, T. and Towers, B. (2002a) Introduction in Royle, T. and Towers, B. (eds.), *Labour Relations in the Global Fast-Food Industry'*, London and New York: Routledge.
- Royle, T. and Towers, B. (2002b) Summary and conclusions: MNCs, regulatory systems and employment rights in Royle, T. and Towers, B. (eds.) *Labour Relations in the Global Fast-Food Industry*, London and New York: Routledge.
- Rubery, J. (1978) Structured Labour Markets, Worker Organisation and Low Pay, *Cambridge Journal of Economics* 2(1): 17-36.
- Rubery, J. (2007) Developing Segmentation Theory: A Thirty-year Perspective, *Économies et Sociétés*, 28(6): 941-964.
- Rubery, J. (2015) Re-regulating for Inclusive Labour Markets, *Conditions of Work and Employment Series* No. 65, Geneva: International Labour Organization.
- Rubery, J. and Grimshaw, D. (2014) *New Forms of Employment Zero Hours Contracts in the UK*, unpublished report for Eurofound, Dublin: European Foundation for the Improvement of Living and Working Conditions (copy with the authors).
- Rubery, J. and Grimshaw, D. (2015) The 40-year pursuit of equal pay: a case of constantly moving goalposts, *Cambridge Journal of Economics*, 39(2): 319-343.

- Rubery, J. and Koukiadaki, A. (2016) Closing the Gender Pay Gap: A Review of the Issues, Policy Mechanisms and International Evidence, Geneva: International Labour Office.
- Ruckelshaus, C., Smith, R., Leberstein, S. and Cho E. (2014) Who's the Boss: Restoring Accountability for Labour Standards in Outsourced Work, National Employment Law Project available at: http://www.nelp.org/content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf.
- Ruddick, G. (2017) McDonald's Offers Fixed Contracts to 115,000 UK Zero-Hours Workers, *The Guardian*, 25 April 2017.
- Sanders, A. (2013) The changing face of 'flexicurity' in times of austerity?' in Countouris,
 N. Freedland, M. (eds.), Resocialising Europe in a Time of Crisis, Cambridge: Cambridge University Press.
- Schlosser, E. (2002), Fast food nation, London: Penguin.
- Shamir, H. (2016) Unionizing Subcontracted Labour, *Theoretical Inquiries in Law*, 17, 229-255.
- Stone K. (2006) Legal Protection for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers, *Berkeley Journal of Employment & Labor Law*, 27(2), 253-286.
- Stone, K. and Arthurs, H. (2013) The Transformation of Employment Regimes: A Worldwide Challenge, in Stone, K. and Arthurs, H. (eds). *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment*, New York: Russell Sage Foundation.
- Strauss, G. (1984) Industrial Relations: Times of Change, *Industrial Relations* 23(1), 1-15.
- Streeck, W. (1987) The Uncertainties of Management in the Management of Uncertainty: Employers, Labor Relations and Industrial Adjustment in the 1980s, *Work, Employment and Society* 3(1): 281-308.
- Streeck W. (2001) Citizenship under Regime Competition: The Case of the 'European Works Councils' in Eder, K. and Giesen B. (eds.), *European Citizenship between National Legacies and Postnational Projects*, Oxford: Oxford University Press.
- Tannock, S. (2001) *Youth at Work: The Unionised Fast-food and Grocery Workplace*, Philadelphia: Temple University Press.
- Taylor Wessing (2017), *Franchise & Distribution Networks Alert* (Taylor Wessing) available at taylorwessing.com.
- Teron, J. (2011) *Non-standard workers, collective bargaining and social dialogue: The Case of South Africa*, Working Paper No 28., Geneva: Industrial and Employment Relations Department, International Labour Office.
- Teubner, G. (2009) *Coincidentia Oppositorum:* Hybrid Networks Beyond Contract and Organisation in Amstutz, M. and Teubner, G. (eds) *Networks: Legal Issues of Multilateral Cooperation*, Oxford: Hart Publishing.
- Teubner, G. (2011) Network as Connected Contracts, Oxford: Hart Publishing.
- Theron, J. (2011) Non-standard Workers, Collective Bargaining and Social Dialogue: The case of South Africa, DIALOGUE Working Paper No. 28, Geneva: ILO.
- Thompson, S. (1994) The franchise life cycle and the Penrose effect, *Journal of Economic Behavior and Organization*, 24(2), 207-218.

• Toumieux, C. (2016) Directive 91/533/EEC and the Development of New Forms of Employment, in Blanpain, R. Hendrickx, F. and Waas, B. (eds) *New Forms of Employment in Europe*, Zuidpoolsingel: Kluwer Law International.

- Treib, O. (2014) Implementing and complying with EU governance outputs, *Living Reviews in European Governance*, 9(1), http://www.livingreviews.org/lreg-2014-1, doi:10.12942/lreg-2014-1.
- Trif, A., Koukiadaki, A. and Kahancova, M. (2016) The Rise of the Dual Labour Market:
 Fighting Precarious Employment in the New Member States through Industrial Relations
 (PRECARIR) Comparative Report,
 http://www.dcu.ie/sites/default/files/dcubs/comparative report precarir 2016 final.pdf
- Visser, J., Hayter, S. and Gammarano, R. (2015) Collective Bargaining Trends: Erosion, Stability or Decline?, *Labour Relations and Collective Bargaining Issue Brief*, No. 1 Geneva, International Labour Office.
- Vives, A., Amable, M., Ferrer, M., Moncada, S., Llorens, C., Muntaner, C., Benavides, F. and Benach, J., (2013) Employment Precariousness and Poor Mental Health: Evidence from Spain on a New Social Determinant of Health, *Journal of Environment and Public Health* [accessed on 29.09.2017] available at: https://www.hindawi.com/journals/jeph/2013/978656/.
- Vosko, L. (2010) Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment, Oxford: Oxford University Press.
- Voss E., (2016) Results of a survey of EWC Coordinators prepared in the context of the project "ETUC Action on Workers Participation" (VS/2014/0490), ETUC available at https://www.etuc.org/sites/www.etuc.org/files/publication/files/europeanworks councilscent-bulber-10.pdf
- Weil, D. (2014) The Fissured Workplace: Why Work Became so Bad for so Many and What Can be Done to Improve It, Cambridge MA: Harvard University Press.
- Weiss, M. (2011) Re-inventing Labour Law? in Davidov, G. and Langille, B. (eds.), *The Idea of Labour Law*, Oxford: Oxford University Press.
- Whittall, M., Lücking, S. and Trinczek, R. (2008) Understanding the European Works Council deficit in German multinationals, *Transfer: European Review of Labour and Research*, 14(3), 453-467.
- Williams, A. (2010) *The Ethos of Europe: Values, Law and Justice in the EU,* Cambridge: Cambridge University Press.
- Working Party (1995) 'Information and Consultation', Working Papers, V/9643/95/en.

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