

1. Precarious work and labour regulation in the EU: current reality and perspectives

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1. INTRODUCTION

Deindustrialization, digital revolution and increased globalization of trade and finance have resulted in a profound reconfiguration of European labour markets. Research into the structure of the globalization seen in recent years has often led to the conclusion that one of the largest and fastest growing problems in Europe is labour market dualization, that is, an increasing divide between insiders in permanent employment and outsiders in precarious work or unemployment.¹ One of the key factors affecting the dynamic development of the internally heterogeneous new class of workers – the precariat² – is undeniably labour market regulation, and more specifically the prevailing SER (Standard Employment Relationship)-centric regulatory model, which rests upon ‘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’.³ According to the European Parliament’s 2016 briefing document ‘Precarious Employment in Europe: Patterns, Trends and Policy Strategies’, many of the Member States with the highest proportion of standard contracts counterintuitively have the highest risks of precariousness.⁴ At the same time, this precarity, as evidenced

¹ Patrick Emmenegger et al, *The Age of Dualization: Structures, Policies, Politics* (Oxford University Press, 2012).

² Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury Academic, 2011).

³ Gerhard Bosch, ‘Towards a new standard employment relationship in Western Europe?’ (2004) *British Journal of Industrial Relations* vol 42, issue 4, 618.

⁴ Valeria Pulignano, Holm-Detlev Köhler, Paul Stewart, *Employment Relations in an Era of Change. Multi-Level Challenges and Responses in Europe* (ETUI, 2016) 236.

inter alia in Part III of the book, seems to be very closely tied to the ever evolving phenomena of digitalization and the ‘gig economy’.⁵

Despite the significant social and economic implications of the precarization of working conditions within the European labour market, and a rather self-evident lack of adequate responses to the new world of precarity at national level, ‘precarious work’ still does not stand as an autonomous legal concept in the EU labour law architecture, and references to precariousness in both EU legislation and in the case law of the Court of Justice are rather rare. The inclusion of the prohibition of abuse of employment relationships leading to precarious working conditions, including abuse of atypical contracts, in the recently adopted European Pillar of Social Rights is undeniably a step forward in acknowledging the importance of the issue for the preservation of the European social model;⁶ however, due to the rather ambiguous legal status of the document,⁷ it may not *per se* suffice to induce the effective development of more adequate norms of protection for precarious workers in Europe.

This chapter provides an overview of the underlying normative and structural causes of the development of the precarious work phenomenon in Europe and analyses the policy and judicatory answers to it at EU level, in order to discuss the perspectives for, and potential trajectories of, the development of an adequate institutional framework against precarity in the EU. It provides a link to Parts II and III of the book, which are concerned with examples in several EU Member States, for comparative analysis, and with the challenges of the gig economy as a new feature of precariousness.

2. PRECARIOUS WORK AND THE TYPOLOGY OF EMPLOYMENT RELATIONS UNDER EU LABOUR LAW

EU labour law sets the grounds for different types of employment relationships, yet precarious work as such still lacks a precise legal definition. The available definitional framework of specific terms related to employment enables the

⁵ See also Eurofound (2017) ‘Aspects of nonstandard employment in Europe’. Eurofound, Dublin.

⁶ European Commission (2016a) Communication from the European Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Launching a Consultation on a European Pillar of Social Rights. COM(2016) 127 final. Strasbourg.

⁷ The Pillar was introduced both in the form of a Recommendation from the Commission and an interinstitutional proclamation. See generally Zane Rasnača, ‘Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-level policymaking’, ETUI Working Papers (2017.05) 14–16.

delimitation of the legal parameters for individual types of employment and the extraction of such categories as typical/standard and atypical employment. Still, the boundary between particular types of employment seems to be rather fluid, as in practice it is often difficult, if not impossible, to set rigid confines between them. This is mainly related to the fact that the characterization of the employment relationships, according to the properties that classify them into specific categories, is often not determined by the relevant legal qualification connected with its name. Rather, it is the specificity of the work itself, or the organizational conditions in which it is performed, that determines whether a given work is performed in typical or atypical conditions. In principle, 'work', as a process of actions, is only a product of the employment relationship. Conducting considerations from the perspective of 'work as an action' would make it necessary to analyse the circumstances of different types of performance of work. Since those circumstances are derived from the regulations related to employment conditions, more attention should be paid to these regulations than to their practical aftermath. Due to the fact that there are important national differences throughout the EU countries in qualifying what is considered to be a 'typical working arrangement',⁸ as a result of which legal bonds can be qualified as 'typical employment', the subsequent considerations will focus on EU legislation, without referring to the specific legal regulations in Member States – these will be subject to analysis in Part II of the book.

Within the EU, as Öberg and Schauman aptly observe, typical work 'is increasingly becoming a normative reference point, infused within both regulation and social conception'.⁹ Under EU labour law, the definition of atypical/nonstandard work is derivative of the term 'typical employment',¹⁰ which in practice is often used interchangeably with 'standard employment' or 'traditional employment'. The use of the term 'typical' with regard to the employment relationship may, however, be misleading. Often something commonly referred to as 'typical' possesses itself the attribute of universality or generality. However, in practice, employment classified as 'typical' does not have to be a universal, general type of employment. The term 'typical employment' should therefore be treated merely as a reference point for determining atypical employment (also called 'nonstandard employment') and/or precarious employment. The typical model of employment is based on full time, regular, opened employment with a single employer over a long

⁸ Ulf Öberg, Magnus Schmauch, 'Precarious work and European Union law: Legal opinion' (Stockholm, 2016) 17.

⁹ *Ibid* 5.

¹⁰ Joint Committee on the Public Service. Fifth Session. Geneva 1994. ILO Sectoral Activities Programme. Report II, Terms and Conditions of Employment of Part-time and Temporary Workers in the Public Sector, 7.

time span.¹¹ As such, the typical employment relationship is derivative of full time permanent contracts with the same employer, which guarantee the worker a regular income, pension payments after retirement, and other employment related benefits.¹²

The primacy of the permanent employment contract has been directly or implicitly recognized in the legislation of Member States of the EU,¹³ as well as in EU secondary law. According to Directive 99/70/EC,¹⁴ employment contracts of an indefinite duration constitute the general form of employment relationship, which contributes to the quality of life of the workers concerned and to their improved performance. The literal construction of this basis of employment as ‘general’ confirms the overriding role of the indefinite term employment attributed to it by the European legislator. Likewise, the European social partners to the framework agreement on fixed term work, annexed to Directive 99/70/EC, recognized that contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers. The relevant normative recognition of an employment relationship, created on the basis of an employment contract for an indefinite period as a ‘general form of employment relationship’, makes it reasonable to conclude that typical employment, whose main feature is the permanent duration of the employment relationship, is considered as fundamental at the level of EU legislation.

In the Framework Agreement on Part-Time Work, annexed to Council Directive 97/81/EC,¹⁵ instead of relying on the terms ‘typical’ or ‘atypical’ employment, the term ‘flexible work’ is introduced. Notably, flexibilization, in principle, is a feature not of an employment relationship, but rather of its practical organizational framework (‘work as an action’). Consequently, as a general rule, working time should be excluded as a decisive factor in qualifying the given employment relationship as typical/atypical or precarious. In

¹¹ Eurofound, ‘Atypical work’, www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/atypical-work, 3 March 2018.

¹² Cristina Tealdi, *Typical and Atypical Employment Contracts: The Case of Italy* (Lucca, 2011) 22.

¹³ Agata Ludera-Ruszel, ‘“Typical” or “atypical”? Reflections on the atypical forms of employment illustrated with the example of a fixed-term employment contract – a comparative study of selected European countries’, (2016) *Comparative Labor Law & Policy Journal* 407.

¹⁴ Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, *Official Journal of the European Communities*, L 175, 10.7.1999.

¹⁵ Council Directive 1997/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by ETUC, UNICE and CEEP, *Official Journal of the European Communities*, L 14, 10.1.1998.

practice, however, working time often determines qualification of an employment as 'flexible' in the case of part time work.

In a similar vein, in order to, *inter alia*, cope in a flexible manner with the diversity of labour markets and industrial relations, Member States, on the grounds of Directive 2008/104/EC,¹⁶ may allow the social partners to define working and employment conditions of temporary agency workers, provided that the overall level of protection set in the relevant Directive is respected. Temporary agency work cannot be classified as a typical employment relationship. First and foremost, in temporary employment the criterion of unity with regard to the beneficiary of the performed work is not fulfilled. Although a temporary employee may work for one temporary employment agency for a relatively long period, the essence of this type of employment rests upon meeting periodic work needs of various employers who, in turn, use the services of temporary employment agencies. It is, therefore, an example of a *sui generis* rupture/schism with the typical, two-subject nature of the employment relationship. The relevant triangulation of the temporary employment justifies qualifying this type of employment as 'atypical employment'.

In light of the lack of an autonomous legal definition of precarious work at the EU level, the question remains whether atypical employment *per se* is interrelated with precariousness.¹⁷ If each employment which is uncertain or insecure is classified by the term 'precarious employment', then most relations classified as 'atypical employment' will indeed be precarious. As a general rule, atypical employment does not provide a worker with a sense of financial stabilization or social security. Due to the fact that such an employment relationship is usually established for a specified, short period of time, it lacks certainty. However, it has to be indicated that typical employment *per se* also does not create a legal bond which will last forever and cannot be changed or terminated. The sense of stability lies in the limitations concerning the termination of the legal relationship, rather than its organizational abnormality. In this regard, virtually all forms of employment can be seen as precarious, yet they differ in the type/form and degree of precarity. Since, as a general rule, employees working in atypical relationships should not be treated less favourably than typical employees¹⁸ – which also applies to the terms of terminating contracts (such as the need to justify dismissal or provide an equal length of

¹⁶ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, Official Journal of the European Communities, L 327, 5.12.2008.

¹⁷ See Carole Lang, Isabelle Schömann, Stefan Clauwaert, *Atypical Forms of Employment Contracts in Times of Crisis* (ETUI, 2013) 5.

¹⁸ Clause 4 point 1 of Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

notice period¹⁹) – the employment of such employees should not be automatically qualified as precarious. In essence, such equalization often entails a visible conflict of values. On the one hand, in the contemporary world of work it is necessary to make employment more flexible to fulfil the employer's needs. On the other, it is crucial to provide adequate protection of employees (*vide* the so-called flexicurity concept²⁰). To date, however, the persistent lack of a right balance between flexibility and security has resulted in the precarization of atypical employment's working relations.

Notably, the EU Directives mentioned *infra* do contain relevant restrictions on the use of atypical employment. As an example, clause 5 of Council Directive 99/70/EC can be indicated.²¹ Yet, the employer's economic needs and the inherent asymmetry of the bargaining powers in the employment relationship have led to the use of atypical employment in a way that makes it possible to qualify it as precarious. Moreover, it should be noted that more and more often, typical employment can be considered as precarious if it is for low reward and does not give a sense of such important features as social security, for example on the basis of pension rights. Thus, in essence, when making a conceptual qualification of precarious work, one should go beyond the scope of the worker–employer relationship itself – delineation of which may, incidentally, lead to incoherent results due to the longstanding practice of the EU legislator to largely rely in this regard on national law²² – and refer also to other

¹⁹ See e.g. Judgment of the Court (Eighth Chamber) of 13 March 2014 (request for a preliminary ruling from the Sąd Rejonowy w Białymstoku – Poland) – *Małgorzata Nierodzik v Samodzielny Publiczny Psychiatryczny Zakład Opieki Zdrowotnej im. dr. Stanisława Deresza w Choroszczycy* (Case C-38/13), OJ C 141.

²⁰ See e.g. Communication from the Commission, Green Paper, Modernising labour law to meet the challenges of the 21st century, Adapting labour law to ensure flexibility and security for all (COM/2006/0708 final). See generally: Dany Lang, 'The Danish model of "flexicurity": An example to be followed?' (2005) *Problemy Polityki Społecznej. Studia i Dyskusje* 47–58; Ton Wilthagen, Frank Tros, 'The concept of "flexicurity": A new approach to regulating employment and labour markets', www.nvf.cz/assets/docs/80401adfb0953f74d581d0c0a71ff37/359-0/youth-flexicurity.pdf, accessed 10 March 2018.

²¹ According to this clause, to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures: (a) objective reasons justifying the renewal of such contracts or relationships; (b) the maximum total duration of successive fixed-term employment contracts or relationships; (c) the number of renewals of such contracts or relationships.

²² The EU, in its own measures, typically leaves the definition of employee and employer to national law (see section 5). Yet the draft Directive on transparent and

benefits related to employment, including social security entitlements. The latter often constitute an important component of broadly understood security, which in principle is not offered by precarious employment.

3. TOWARDS A NEW POLICY ORIENTATION ON PRECARIOUS WORK IN THE EU

The lack of a precise legal definition of precarious work in EU law, along with the *sui generis* centralization of the legislative model around the standard/nonstandard forms of employment, has sidelined the concept of precarious work – which was present in academic debate as early as the 1960s²³ – in EU policy orientation. The European social policy agenda from the 1990s focused, instead of the observable general precarization of working conditions, rather on mitigating the negative consequences of the alleged rigidity of European employment regulation in the European labour market by facilitating more contractual diversity through the increase of flexibility ‘on the margins’ (i.e. introducing more flexible forms of employment with less protection against dismissal to promote the entry of newcomers to the labour market and to instil more choice over the employment pathways).²⁴ This idea was presented in the 2006 European Commission Green Paper on modernizing labour law to meet the challenges of the twenty-first century. The latter, having diagnosed that the rigidity of the standard employment relationship contributed to diversification of nonstandard employment relationships, encapsulated the concept of precariousness of work in the ‘insider–outsider’ rhetoric.²⁵ Within the Green Paper, those in precarious work were portrayed as ‘occupy[ing] a grey area where basic employment or social protection rights may be significantly reduced, giving rise to a situation of uncertainty about future employment prospects and also affecting crucial choices in their private lives’.²⁶ In the aftermath of the 2008 economic and job crisis, the policy of deregulation of employment protection has been strongly reaffirmed. Accordingly, the perception of high employment protection as harmful for labour markets, and responsible for an increase in precarious jobs and further social costs, pushed the European

predictable working conditions, which in Article 2.1 defines ‘worker’ and ‘employer’, points to emerging EU definitions.

²³ Paolo Sylos-Labini, ‘Precarious Employment in Sicily’ in Nicola Countouris (eds) *Strengthening the Protection of Precarious Workers: The Concept of Precarious Work* (ILO, 2011).

²⁴ COM (2006) 708 final, 5. See also Presidency Conclusions of the European Council meeting on 9 and 10 December 1004 in Essen, 5.

²⁵ *Ibid* 3.

²⁶ *Ibid*.

Commission into promoting labour market reforms centred on further reduction of employment protection legislation.²⁷ The latter was expected to induce the revival of ‘job creation in sclerotic labour markets while tackling segmentation and adjustment at the same time’.²⁸ In practice, however, as Piasna and Myant aptly observe, ‘post-crisis changes have led to increases in precarious employment and hence more pronounced, rather than reduced, labour market segmentation’,²⁹ in particular in those countries that were most enthusiastic in their deregulatory efforts (e.g. Italy, Spain).³⁰

It is only recently that the language of EU public policy and discourse has seemed to shift slightly from ‘employment security’ towards emphasizing the need for ‘better quality’ jobs, leading ‘precariousness’ to gradually acquire proper significance. In its latest Annual Growth Survey 2017, for instance, the 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’.³¹ Consequently, in the view of the Commission, employment creation via more flexible labour markets should be accompanied by instruments enabling transitions towards more permanent contracts. In principle – and as expressly stressed for the first time in the EU policy discourse – such development should not result in more precarious work.³²

Likewise, the European Parliament, in its most recent resolutions, has tended to emphasize the negative impact on the living conditions of EU citizens of the measures implemented to address the current economic and financial crisis in some Member States, in particular with regard to increasing levels of unemployment, poverty, inequality and precarious working conditions.³³ In the view of the Parliament, improvement of the relevant living conditions in

²⁷ See also T. Hastings and J. Heyes, ‘Farewell to flexicurity? Austerity and labour policies in the European Union’ (2016) *Economic and Industrial Democracy*, March, 1–23, 2, 4–5.

²⁸ European Commission (2012) *Employment and Social Developments in Europe 2012*, Luxembourg: Publications Office of the European Union, 4.

²⁹ Agnieszka Piasna, Martin Myant, *Myths of Employment Deregulation: How It Neither Creates Jobs nor Reduces Labour Market Segmentation* (ETUI, 2017) 7.

³⁰ *Ibid* 8, 17, 38.

³¹ 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.

³² Annual Growth Survey (2016) Strengthening the recovery and fostering convergence, COM(2015) 690 final.

³³ European Parliament resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013–14) (2014/2254(INI)), OJ C 316, 22.9.2017, 2–36.

the EU calls for extension of the existing minimum standards to new kinds of employment relationships, improved enforcement of EU law, increased legal certainty across the single market and complementarity of the existing EU law (including the revision of the so-called Written Statement Directive³⁴) to ensure for every worker a core set of enforceable rights, regardless of the type of contract or employment relationship.³⁵ Interestingly enough, in the view of the Parliament, precarious employment denotes ‘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’. As such, precariousness is essentially a multidimensional phenomenon, dependent not only upon the type of contract but also on the following factors:

little or no job security owing to the non-permanent nature of the work, as in involuntary and often marginal part-time contracts, and, in some Member States, unclear working hours and duties that change owing to on-demand work;

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.³⁶

Notably, the focus on reducing labour market segmentation has also been emphasized in the new Council of EU guidelines, which outline common priorities and targets for employment policies for all Member States,³⁷ as well

³⁴ Directive 91/533/EEC on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ L 288, 18.10.1991, 32–5.

³⁵ European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights, European Parliament resolution of 4 July 2017 on working conditions and precarious employment (2016/2221(INI)). Cf the preamble to European Pillar of Social Rights, paras 9, 12, 15 (‘Where a principle refers to workers, it concerns all persons in employment, regardless of their employment status, modality and duration’).

³⁶ European Parliament resolution of 4 July 2017 on working conditions and precarious employment (2016/2221(INI)).

³⁷ Council of the European Union Joint Employment Report 2015, 9 March 2015: Addressing the Challenge of Segmented Labour Markets, Ensuring a Proper Balance between Flexibility and Security, Annex.

as the Europe 2020 strategy. The latest Integrated Guideline 7 of the ‘Europe 2020’ agenda suggests that ‘measures to enhance flexibility and security should be both balanced and mutually reinforcing’.³⁸ Progress towards the Europe 2020 targets is encouraged and monitored throughout the European Semester.³⁹

Finally, and most recently, the EU’s ‘institutional ethos’ with regard to social rights of precarious workers seems to have been enhanced with the adoption of the ‘European Pillar of Social Rights’. The latter *expressis verbis* recognizes precariousness as a social and economic problem in the EU official public discourse. The adopted ‘foundation of minimum social rights’/‘a safety net to protect the labour market’ represents a clear departure from the persistent regulatory competition paradigm and as such raises hopes for a new general optics and priorities on employment, in particular regarding the implementation of adequate policy and legislative measures against precarious work in the EU.⁴⁰

4. THE EUROPEAN PILLAR OF SOCIAL RIGHTS: BETWEEN A NORMATIVE RIGHT AGAINST PRECARIOUS WORK AND A POLICY DISCRETION

On 17 November 2017, the European Parliament, the Council and the Commission proclaimed the European Pillar of Social Rights, which establishes 20 key principles and rights enclosed in three categories (i.e. equal opportunities and access to the labour market, fair working conditions and social protection and inclusion), with the aim to support fair and well-functioning welfare systems and labour markets,⁴¹ by promoting *inter alia* a high level of employment, education training and adequate social protection. In essence, the Pillar reaffirms some of the rights of EU citizens and third country nationals with legal residence already present in the Union *acquis* and gives foundation to the new ones, which should be implemented by dedicated measures or legislation. Its purpose is to combat social exclusion and discrimination and promote social justice and equality between women

³⁸ Recommendation for a Council Recommendation of 27.4.2010 on broad guidelines for the economic policies of the Member States and of the Union Part I of the Europe 2020 Integrated Guidelines, COM(2010) 193 final, 21.

³⁹ European Commission (2015c) 2015 European Semester: Country-specific recommendations. COM(2015) 250 final.

⁴⁰ Ulf Öberg, Magnus Schmauch, *supra* note 8, 33.

⁴¹ Commission Staff Working Document issued in Brussels, 26.4.2017 (SWD(2017) 201 final), 2.

and men, solidarity between generations, dialogue between management and labour and protection of the rights of the child and human health.⁴² Notably, the underlying rationale of the introduction of the Pillar was the perceived inadequacy of the existing regulations for new business models and the new realities of the workplace. The current labour law *acquis* unevenly covers changing employment patterns, resulting in precarious working conditions and higher risk of circumvention or abuses. Flexibility in conditions of employment may offer more opportunities for workers, including in part time work, self-employment and entrepreneurship – and in particular those engaged in the platform/gig economy – but it may also expose them to greater insecurity and vulnerability. For instance, independent and temporary workers are generally unable to access the same level of benefits enjoyed by company workers when it comes to unemployment benefits, health insurance, pensions and maternity leave, to mention but a few, or can access them only at very high costs.⁴³

Together, the principles and rights encapsulated in the Pillar set out an ambitious agenda for better performing economies and more equitable and resilient societies within the EU. The goal is to foster a renewed process of convergence towards better working and living conditions across Member States, and in particular those which have joined the euro area. In this context, the Pillar is about addressing emerging social challenges and the changing world of work in the light of, notably, emerging new types of employment deriving from new technologies and the digital revolution. The Pillar is at the same time the first official EU document that explicitly addresses the issue of the precariat, thus officially adding it to the agenda of challenges to be faced by the modern world of work in the EU. In the subsequent paragraphs the Pillar will be analysed both in relation to the resolutions which concern the precariat directly as well as those which can be seen as an implicit policy against precarization of employment in the EU.

Chapter II of the Pillar, ‘Fair working conditions’, opens with the principle of ‘Secure and adaptable employment’. In terms of employment regarded as precarious, several provisions of the principle seem particularly worthy of attention. The final sentence of point a) states that the transition towards opened forms of employment shall be fostered. This principle is novel inas-

⁴² Commission Recommendation of 26.4.2017 on the European Pillar of Social Rights, Brussels, 26.4.2017 C(2017) 2600 final.

⁴³ Commission Staff Working Document. Key economic, employment and social trends behind a European Pillar of Social Rights Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Launching a consultation on a European Pillar of Social Rights (COM(2016) 127 final) (SWD(2016) 50 final), Strasbourg, 8.3.2016 SWD(2016) 51 final, 31.

much as it diverges from the great support for flexible employment evidenced *supra*, in favour of permanent, openended employment, which is apparently viewed as more secure. The latter stipulation is of utmost importance, as in practice nonpermanent employment can incur risks of precariousness through lower levels of protection against dismissal, low wages, limited access to social protection and training.⁴⁴ Given the abovementioned it seems obvious therefore that the provision emphasizes support for transitions towards secure forms of openended employment relationships. This is further confirmed by point d) of the principle, according to which 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. The provision can be seen as a turning point in EU social policy-making as it is the first time that the term ‘precarious working conditions’ has been used by the European policymakers, though not yet defined. As the term remains open to interpretation, its understanding might differ between the legal systems of Member States and the EU institutions. Therefore, reservations as to whether consistent compliance with the provision within the EU is possible seem valid. It is difficult to counteract ‘precarious working conditions’ without a clear specification at the EU level of what they involve. The accompanying Commission Staff Working Document only clarifies that the Pillar reflects the challenges posed by the changing world of work and new forms of employment, endorsing diversity of employment relationships, entrepreneurship and self-employment, and establishing safeguards to prevent abuse of employment relationships that can lead to precariousness, and certain guarantees to ensure workers can access training and social security throughout the course of their career.⁴⁵ The clarification seems far from sufficient as it still does not explain what precarious conditions are, thereby hampering any action against them. The principle underlines merely the necessity to provide equal treatment as a measure to combat precarious work. Yet, it needs to be stressed that the presence of unequal treatment is not tantamount to the development of precarious employment, just as precarious employment is not always a consequence of unequal treatment. Without a precise definition of precariousness at EU level, neither preventive nor counteractive measures, such as differential taxation of employment relationships leading to precariousness or the establishment of *bonus malus* systems for the social security contributions,⁴⁶ can be fully applied.

⁴⁴ Klaus Lörcher, Isabelle Schömann, *The European Pillar of Social Rights: Critical Legal Analysis and Proposals* (ETUI, 2016) 40.

⁴⁵ Commission Staff Working Document . . . 2017, 23.

⁴⁶ Commission Staff Working Document . . . 2017, 23–4.

The issue of precariousness is also indirectly addressed by other principles of the Pillar. According to point a) in the principle ‘Wages’, workers have the right to fair wages that provide for a decent standard of living. Comparable rights to those which derive from the ‘Wages’ principle were already included in the 1989 Community Charter of the Fundamental Social Rights of Workers.⁴⁷ Yet, they are absent from the Charter of Fundamental Rights and, most importantly, in accordance with Article 153 of TFEU, they lie beyond the scope of EU competence. Analysis of the interrelationship between the wage principle and secure and adaptable employment, covering explicitly precarious work, is presented in the introductory chapter, which contains definitions of the phenomenon of precariousness through the prism of the concept of the nondecent standard of living. The latter may be viewed as an inherent part of precariousness, but only on the assumption that precariousness extends beyond the form of employment towards conditions of employment *per se*, which in turn affect other areas of life. Regardless of the accepted understanding of the term, decent standards of living resulting from enforcing adequate pay are certainly one of the conditions that cause employment to be classified as nonprecarious. Therefore, wherever pay is nondecent and consequently affects the standard of living, the term ‘precariousness’ is applicable. The abovementioned point is inextricably linked with the content of point b) of the principle in question, according to which adequate minimum wages shall be ensured, in a way that provides for the satisfaction of the needs of the worker and his/her family in the light of national economic and social conditions, while safeguarding access to employment and incentives to search for work. As a general rule, in-work poverty shall be prevented. It is therefore the degree of satisfaction of the needs of the worker and his/her family that indicates whether precariousness occurs. In relation to the principle in question, it is the satisfaction of financial needs that appears as the key indicator, yet in a broader sense precariousness is present also when other needs, such as the need to derive job satisfaction or the need to rest, are left unsatisfied. Finally, similarly important for effectively addressing precariousness of work in Europe is the principle of ‘social protection’. According to the latter, regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed, have the right to adequate social protection.⁴⁸ Social protection should therefore, as a matter of principle, be granted also to precarious workers. The aim of this proposed measure is to cover the whole range of nonstandard contracts for the provision of work which are

⁴⁷ The Community Charter of Fundamental Social Rights of Workers, 9 December 1989.

⁴⁸ Cf art. 34 of the Charter of Fundamental Rights of the European Union.

increasingly prevalent in today's labour market.⁴⁹ The material scope of the right to social protection covers both social assistance and social security. Social security, which covers both contributory and non-contributory schemes, is defined in Regulation (EC) No 883/2004 of the European Parliament and of the Council,⁵⁰ and includes: (a) sickness benefits; (b) maternity and equivalent paternity benefits; (c) invalidity benefits; (d) old age benefits; (e) survivors' benefits; (f) benefits in respect of accidents at work and occupational diseases; (g) death grants; (h) unemployment benefits; (i) preretirement benefits; and (j) family benefits. Protection should be provided to all workers with regard to all of the mentioned social security dimensions. Pursuant to Article 153 of the TFEU, the Union shall support and complement the activities of the Member States in the fields of, among others, social security and social protection of workers. In this field, the Council of the EU shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the relevant Committees.

At this juncture, it is hard to predict the future of the Pillar. Time alone will tell if it will be possible to use its principles as universal, transnational ones and whether and to what extent they will be implemented at both national and EU level. In practice, the national implementation of the Pillar will be supported by both an online social scoreboard to track trends and performances across the EU and the Semester analysis and recommendations, which should continue to put emphasis on social considerations and follow up accordingly on the Pillar.⁵¹ Especially with regard to reducing the size of the precariat, it will be important to monitor whether the legislative and policy actions taken by the EU and Member States in connection with the enforcement of the Pillar contribute to the reduction of this phenomenon and to what extent they will be translated into normative positive rights (e.g. right to security, right to decent wages, right to social protection), or rather remain in the rhetoric of policy discretion.

The first step towards concretization of the principles enshrined in the Pillar is the Commission's Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the EU.⁵² The proposal aims *inter alia* at addressing insufficient protection for workers in more precarious jobs, while limiting burdens on employers and maintaining

⁴⁹ Commission Staff Working Document . . . 2017, 50.

⁵⁰ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p.1).

⁵¹ Social Summit for Fair Jobs and Growth, https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-factsheet_en.pdf, accessed 31 March 2018, 2.

⁵² Brussels, 21.12.2017, COM(2017) 797 final, 2017/0355(COD).

labour market adaptability. According to the Explanatory Memorandum of the proposal, the noticeable decentralization of employment (in 2016 a quarter of all employment contracts were for 'nonstandard' forms of employment and in the past ten years more than half of all new jobs were 'nonstandard', i.e., permanent part time and temporary full time and part time) has not only led to instability and an increased lack of predictability in some working relationships, but also induced a tangible risk of competition between Member States based on undercutting social standards. The latter has harmful consequences for employers, who are subject to unsustainable competitive pressure, as well as for Member States, who forego tax revenue and social security contributions. In this context, the Pillar, in the view of the European Commission, should serve as 'a compass for the renewed upwards convergence in social standards in the context of the changing realities of the world of work'. Notably, the proposed Directive contributes primarily to the implementation of the Pillar's Principle 5 on 'Secure and adaptable employment' and Principle 7 on 'Information about employment conditions and protection in case of dismissals'. Unlike the existing social policy directives, which address a particular type of employment, the proposed Directive aims to ensure a basic level of universal protection across existing and future contractual forms and introduces *expressis verbis* definitions of worker, employer and employment relationship.

Particularly worthy of attention from the perspective of the main issue discussed herein is recital 25 of the proposed Directive, according to which, where employers have the possibility to offer full time or opened labour contracts to workers in nonstandard forms of employment, a transition to more secure forms of employment should be promoted. Workers should be able to request another more predictable and secure form of employment, where available, and receive a written response from the employer, which takes into account the needs of the employer and of the worker. The above assumption is an important step towards the introduction of specific mechanisms to counteract the use of nonstandard employment, often leading to the improvement of working conditions. The relevant purpose is to be achieved, *inter alia*, by imposition on the Member States of the obligation to ensure that workers with at least six months' seniority with the same employer may request a form of employment with more predictable and secure working conditions where available (e.g. transition to full time working relationship, or a working relationship with a higher number of guaranteed paid hours or a less variable work schedule).⁵³ Partial regulation of the principles resulting from the Pillar at the level of the Directive is a meaningful step towards achieving its goals.

⁵³ Ibid art. 10.

The relevant provision, by giving the employees a more tangible chance for a change towards less precarious/more predictable work, might contribute to reducing the phenomenon of precarization of working conditions in Europe and the resultant segmentation of European labour market. The formulation of the provision should be, however, amended to limit the possibility of the employer evading their obligations and leaving workers without this much needed protection. Thus, in principle, the employer's refusal of the requested conversion should be possible only if based on certain and limited objective business needs.

5. PRECARIOUS WORK IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

It is not only the Commission, the Council and the Parliament that seem to have acknowledged the existence of the phenomenon of precarization of the working conditions in Europe. In recent years the term precariousness has increasingly been recognized in the CJEU's decisions, predominantly in the area of social policy, yet isolated cases of explicit mention of the term appear also in the domains of nondiscrimination,⁵⁴ freedom of movement of workers,⁵⁵ and social security.⁵⁶ The more frequent, albeit still limited, use of the term in the area of social policy has emerged in the interpretation of key legislative measures in the field of atypical work, namely Directive 99/70/EC on Fixed-term Work,⁵⁷ as well as the so-called Written Statement Directive 91/533 (to be replaced by the proposed Directive on transparent and predictable working conditions in the EU).⁵⁸ To date, the Court has recognized that atypical employment contracts are a feature of employment in certain

⁵⁴ Joined Cases C-250/09 and C-268/09, *Vasil Ivanov Georgiev v Tehnicheski universitet – Sofia*, EU:C:2009:549, para 34.

⁵⁵ Opinion of Advocate General Kokott, 18 July 2007 Case C-294/06, *Burhan Akyuz and Birol Ozturk v Secretary of State for the Home Department*, EU:C:2007:455, para 44.

⁵⁶ Case C-103/13, *Snezhana Somova v Glaven direktor na Stolichno upravlenie 'Sotsialno osiguruyavane'*, EU:C:2014:2334, para 43.

⁵⁷ C-238/14, *Commission v Luxembourg*, ECLI:EU:C:2015:128, Joined Cases C-302/11 to C-305/11, *Valenza v Autorità Garante della Concorrenza e del Mercato* ECLI:EU:C:2012:646, C-250/09, *Vasil Ivanov Georgiev v Tehnicheski universitet – Sofia, filial Plovdiv*, EU:C:2010:699.

⁵⁸ Case C-306/07, *Ruben Andersen v Kommunernes Landsforening*, EU:C:2008:743, paras 50–3.

sectors (e.g. public higher education⁵⁹) or in respect of certain occupations and activities (e.g. occasional staff in the health service,⁶⁰ as well as in the entertainment arts⁶¹). Yet, it has refrained from explicitly reiterating the statement expressed in the opinion of Advocate General Kokott that ‘at a time when an increasing number of workers are subjected to precarious employment relationships, the political and social importance of this issue [i.e. the protection of fixed-term workers against abuse and discrimination] should not be underestimated’.⁶² Providing adequate safeguards against precarious work and precarious working conditions by the CJEU in practice is, indeed, difficult due to the inherent limits to the applicability of the main scheme of fundamental social rights in the EU, namely the Charter of Fundamental Rights. The latter, although vested with primary law status by the Lisbon Treaty,⁶³ as a general rule may not itself ‘extend in any way the competences of the Union as defined in the Treaties’ and, pursuant to Article 51 of the Charter, applies primarily to ‘the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law’. Thus, in principle, as evidenced in the *Poclava* case, where the Court declined jurisdiction to answer preliminary questions regarding probationary periods in atypical employment contracts, ensuring protection against precarious work under the Charter requires legislation in the field of labour law that is sufficiently clear and precise so as to create rights for individuals.⁶⁴

Similarly troublesome, with regard to the potential of establishing a ‘judiciary shield’ against precarious work at EU level, appears the rather ambiguous scope of application of the social *corpus legi* of the EU. Whereas in the context of Article 45 TFEU on the free movement of workers, the CJEU has established through its case law an autonomous definition of ‘worker’ at the EU level,⁶⁵ in the context of the EU social *acquis* the TFEU’s Article 151(2)

⁵⁹ Joined Cases C-250/09 and C-268/09, *Vasil Ivanov Georgiev v Tehnicheski universitet – Sofia*, EU:C:2009:549, para 34.

⁶⁰ Case C-16/15, *María Elena Pérez López v Servicio Madrileño de Salud (Comunidad de Madrid)*, EU:C:2016:679, para 19.

⁶¹ See Case C-238/14, *European Commission v Luxembourg*, para 32, Case C-173/99, *Secretary of State for Trade and Industry v Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)*, EU:C:2001:356, para 63.

⁶² Opinion of Advocate General Kokott, 20 December 2017 (1) Case C-574/16, *Grupo Norte Facility SA v Angel Manuel Moreira Gómez*, EU:C:2017:1022, para 1.

⁶³ Art. 6(1) TEU.

⁶⁴ Case C-117/14, *Grima Janet Nisttahuz Poclava v Jose María Ariza Toledano*, EU:C:2015:60, paras 40–4.

⁶⁵ Catherine Barnard, *EU Employment Law* (4th ed, Oxford University Press 2012) 144. See also: Case C-66/85, *Lawrie-Blum v Land Baden-Württemberg*, EU:

obliges the EU ‘to take account of the diverse forms of national practices, in particular in the field of contractual relations’. Thus, although some categories of precarious workers – the self-employed⁶⁶, trainees,⁶⁷ on-call workers⁶⁸ – fall within the concept of ‘worker’ in EU law according to the established case law of the Court, the application of the potentially most relevant Part-Time and Fixed Term Directives to others, as confirmed in the *Wippel* case (concerning particularly precarious zero hours contracts), may be dependent upon the relevant national legal definitions and practices.⁶⁹ Such an interpretation of the concept of ‘worker’, as aptly observed by Koukiadaki and Katsaroumpas, ‘creates an employment protection gap for individuals engaged in [those] non-standard forms of employment’ which under national law do not satisfy the criteria for being a ‘contract or employment relationship’.⁷⁰ Especially problematic nowadays is the status of workers on a digital platform as well as ‘itinerant or mobile workers’ and occasional service providers, who, due to the very atypical nature of their employment, run the risk of being trapped in a vicious cycle of precarious work. In this context, the introduction of the definition of ‘worker’ in the already mentioned proposal for a Directive on transparent and predictable working conditions in the EU may constitute a significant addendum.

C:1986:284, paras 16, 17; Case C-138/02, *Collins v Secretary of State for Work and Pensions*, EU:C:2004:172, para 26; Case C-456/02, *Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* EU:C:2004:488, para 15; Case C-337/10, *Neidel v Stadt Frankfurt am Main*, EU:C:2012:263, para 23; Case C-544/11, *Petersen v Finanzamt Ludwigshafen*, EU:C:2013:124, para 30.

⁶⁶ See e.g. Case C-256/01, *Debra Allonby v Accrington & Rossendale College and Others*, EU:C:2004:18, para 71; Case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA*, EU:C:2006:784, paras 43 and 44.

⁶⁷ See e.g. Case C-66/85, *Lawrie-Blum v Land Baden-Württemberg*, 66/85, EU:C:1986:284, paras 19–21; Case C-3/90, *Bernini v Minister van Onderwijs en Wetenschappen*, EU:C:1992:89, paras 15 and 16; Case C-188/00, *Bilent Kurz, né Yüce v Land Baden-Württemberg*, EU:C:2002:694, paras 33 and 34, Case C-109/04, *Karl Robert Kranemann v Land Nordrhein-Westfalen*, EU:C:2005:187, para 13.

⁶⁸ Case C-143/16 *Abercrombie & Fitch Italia Srl v Antonino Bordonaro*, EU:C:2017:566, paras 20–3.

⁶⁹ Case C-313/02, *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG*, ECLI:EU:C:2004:607, para 40.

⁷⁰ Directorate General for Internal Policies, Policy Department C: Citizens Rights and Constitutional Affairs, Temporary contracts, precarious employment, employees’ fundamental rights and EU employment law, 2017, 68.

6. CONCLUDING REMARKS

As the present analysis has revealed, the social policy directives essentially designed to provide for equal treatment of nonstandard workers while at the same time preventing the misuse of nonstandard types of contracts have not sufficed to preclude the ongoing precarization of working conditions within the European labour market. At the present juncture, the rather ambiguous scope of application of the social *corpus legi* of the EU, along with the inherent limits to the applicability of the Charter of Fundamental Rights of the EU, considerably hinder the establishment of a ‘judiciary shield’ against precarious work and precarious working conditions at EU level. A way to address this could be, as Garben, Kilpatrick and Muir suggest, the adoption of a “Protection Against Precarious Work Directive” modelled on the Fixed-Term and Part-Time Work Directives with reference to an equal treatment clause and protection against abuses and facilitation of access to typical forms of employment.⁷¹ Article 153(1)(b) TFEU, in combination with (2)(b), allows for the adoption of such a directive. In addition, in support of this, other measures could be envisaged (*vide* Article 153(2)(a) and Article 156 TFEU). Implementing this idea in practice seems problematic as it would involve reaching particularly challenging political compromises. The measures could be enforced through relevant engagement of the social partners, yet again it remains questionable whether, given the internal fragmentation (heterogeneity) of the precariat, collective action in pursuit of mutual interests is feasible. From this perspective, the most worthy consideration seems the possibility of the legislative incorporation at the national level of the principle encapsulated in the Pillar of flexible and secure employment. The inclusion of the prohibition of abuse of employment relationships leading to precarious working conditions, including abuse of atypical contracts, in the European policymaking discourse is undeniably a step forward in acknowledging the importance of the issue for the preservation of the European social model. However, due to the rather ambiguous legal status of the document,⁷² as well as the rather modest formulation of the relevant principle, which falls short of a ‘right to protection against precarious work’,⁷³ it may not *per se* suffice to induce the effective legislative development of more adequate norms of protection for precarious workers in Europe.

⁷¹ Sacha Garben, Claire Kilpatrick and Elise Muir, ‘Towards a European Pillar of Social Rights: Upgrading the EU social acquis’, Theorising the ENP – Conference Report, CEPOB # 1.15 (2015) 5.

⁷² See generally Zane Rasnača, *supra* note 7, 14–16.

⁷³ Klaus Lörcher, Isabelle Schömann, *supra* note 44, 43.

The recent *sui generis* EU policy recalibration should be read, however, in conjunction with the global policy developments in which the EU takes part.

On 27 September 2011 the UN Human Rights Council adopted – cosponsored by the EU – ‘the first global policy guidelines focused specifically on the human rights of people living in poverty’. According to paragraph 84 of the ‘Guiding Principles on extreme poverty and human rights’, States should, *inter alia*, ‘ensure that legal standards regarding just and favourable conditions of work are extended to and respected in the informal economy, and collect disaggregated data assessing the dimensions of informal work’.⁷⁴ Despite not mentioning explicitly the issue of precarious work, by recognizing the systemic and structural obstacles in the employment context to the enjoyment of human rights faced by those living in poverty, the guidelines *de facto* constitute an important benchmark for building robust policy measures countervailing this phenomenon. On 20 December 2012, the UN General Assembly adopted a resolution on human rights and extreme poverty which ‘takes note with appreciation of the guiding principles on extreme poverty and human rights, adopted by the Human Rights Council in its resolution 21/11 as a useful tool for States in the formulation and implementation of poverty reduction and eradication policies, as appropriate’.⁷⁵ As such, the relevant UN mandate implicitly strengthens the rationale for the effective legislative development of more adequate norms of protection for precarious workers in Europe. A *sui generis* legislative response to the phenomenon of precarization of working conditions in Europe is constituted by the recent proposal for an EU Directive on transparent and predictable working conditions. Although the current wording of the proposal does not seem to be robust enough to provide a guaranteed pathway at the national level through which particularly precarious workers (e.g. zero hour workers, platform workers and self-employed workers) could convert their contracts into more secure/predictable forms of employment, it demonstrates that it is possible and realistic to introduce, at the EU level, mechanisms aimed at counteracting the phenomenon of the dualization of the European labour market, within which precarious workers are perceived as outsiders with significantly reduced basic employment and social protection rights.

⁷⁴ Draft A/HRC/21/L.20, adopted without a vote on 27 September 2012.

⁷⁵ A/RES/67/164, para 17.