Chapter 14

Moving Towards Secure Flexibility – Development of the Social Dimension of the European Union

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Abstract

Access to decent working conditions and social protection is crucial for the economic and social security of the workforce and for well-functioning labour markets that create jobs and sustainable growth. At the same time, there is a growing number of people who do not have sufficient access to labour and social protection due to the type of employment or self-employment. In the development of the social dimension of the European Union, I consider the pursuit of employment security for workers in the labour market to be a major achievement. What does employment security mean? Who are the workers who need protection? These are the two fundamental questions of this study, which, since the adoption of the Maastricht Treaty, have lent a new dimension to our views on security and flexibility. I am convinced that we are no longer talking *about flexicurity* but *about secure flexibility.* At least, this is what the European Commission's efforts, the case law of the European Court of Justice and individual (Member) State decisions on employment status are leading us to believe.

Keywords: fair working conditions, information directive, minimum rights, labour and social law protection, social dimension, secure flexibility

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1. Changes in the labour market

Over the last 25 years, since Maastricht, we have seen an increase in labour market flexibility. In 2016, a quarter of all new contracts were for "non-traditional" forms of employment, and over half of all new jobs in the last ten years were of "non-traditional" forms.[1] Digitalisation has facilitated the emergence of new forms of employment and demographic changes have led to a more diverse active population. The flexibility provided by new forms of employment has contributed significantly to job creation and labour market growth. More than five million jobs have been created since 2014, of which almost 20% correspond to new forms of employment. Their ability to adapt to economic change has allowed new business models to emerge, also in the social economy, and has enabled previously excluded people to enter the labour market.[2] The EU currently has 236 million women and men in employment, which means that the EU has the highest employment rate ever. Self-employment and atypical forms of employment together account for a significant share of the labour market. In 2016, 14% of workers in the EU were self-employed, 8% were temporary full-time employees, 4% were temporary part-time employees, 13% were permanent part-time employees and 60% had a full-time contract of indefinite duration.[3]

In recent years, the labour market has undergone fundamental changes, influenced by the rise of subcontracting and outsourcing of business and personal services activities, as well as the digitalisation of production processes and the spread of the online platform economy. The share of self-employment in the EU is relatively high and has increased significantly in recent years, especially in the online platform economy. While these developments have increased the flexibility and accessibility of the labour market, in some cases they have also led to difficult working conditions in the online platform economy and beyond. Some self-employed workers, even if not fully integrated into their employer's business as employees are, may not be entirely independent of their employer or have sufficient bargaining power to shape their working conditions. In addition, the COVID-19 crisis has made many self-employed

1 Non-traditional forms include permanent part-time and temporary full-time and part-time employment. COM (2017) 797: Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Brussels, 21.12.2017.

2 Here I note, among other things, the entry of the recipients of equal opportunities policy, which strongly discourages labour law from applying flexible rules.

3 Council Recommendation on access to social protection for employed and self-employed workers, COM(2018) 132 final, p. 1.

workers even more vulnerable, as their loss of income has been exacerbated by weak or non-existent national social security systems and targeted support measures.[4]

The self-employed are also a heterogeneous group. Most people voluntarily choose to become self-employed with or without employees, taking the risk of becoming self-employed, while around 20% become self-employed because they cannot find a job as an employee. Some enjoy good quality jobs and autonomy; others, less than 10% of self-employed workers, experience economic dependence and financial vulnerability. Among the new businesses set up each year in the EU, the share of self-employment is between 15% and 100% in Member States where data allowed analysis.[5] For newly launched businesses established by self-employed people, the survival rate is typically between 30% and 60% after the first five years.[6]

In the labour market, *interdependence (on the part of both parties)* is implicit in the relationship when working for someone else, whether independently or not. The *pacta sunt servanda*, the assumption of rights and responsibilities, obliges both contracting parties to comply with the contract. At the same time, when the *partnership moves away from a state of interdependence*, there is need for *transparency, predictability, security: protection*. Since Maastricht, this protection has increasingly involved the definition of fair working conditions, the organisation of collective bargaining to improve working conditions and the extension of social protection to workers in the labour market.

2. Employee or worker?

I use the term *worker*: the extension of the concept of worker can be observed in the case law of the European Court of Justice. Regarding the definition of worker, it is interesting to note the relationship between Community and national law, which needs to be seen through the lens of the free movement of workers. In an early ruling, the European Court of Justice stated that the concept of worker is a Community concept, since if it were left to the Member States to define it, they could

4 See: Report of the European Parliament of 13 October 2021 on the situation of artists and cultural regeneration in the EU (2020/2261(INI)) Committee on Culture and Education [Online]. Available at: https://www.europarl.europa.eu/doceo/document/A-9-2021-0283_EN.html (Accessed: 16 October).
Commission Communication – Guidance on the application of EU competition law to collective agreements on working conditions for self-employed individuals [Online]. Available at: file:///G:/DOCUMENTS/Competition%20vs%20collective%C3%ADv%20t%C3%A1rgyal%C3%A1s/C_2021_8838_1_HU_annexe_acte_autonome_part1_v1.pdf (Accessed: 16 October).

5 Belgium, Cyprus, the Czech Republic, Estonia, Finland, France, Greece, Hungary, Ireland, Lithuania, Luxembourg, Malta, Poland, the United Kingdom and Cyprus.

6 Council Recommendation on access to social protection for employed and self-employed workers, COM, 2018, pp. 3–4.

discriminate against workers, contrary to the principle of free movement of persons. At the same time, it was noted that the Court of Justice gave a broad interpretation of the concept.[7] Moreover, the criteria for the status of worker had to be defined. In the *Levin* case[8], the Court ruled that the concept of worker must be interpreted by reference to generally accepted principles and based on the generally accepted meaning of the term, taking account of the context and the objectives of the basic Treaty. The Levin case was followed by the *Lawrie-Blum* case[9], according to which the status of worker must be defined according to objective criteria which distinguish the employment relationship from other activities by reference to the rights and obligations of the persons concerned. On this basis, an employment relationship is one in which a person performs work of economic value for another person, under the latter's instructions, for which he/she receives remuneration in return for the work. It should be seen that this formulation covers a wider range of employment relationships. Thus, the *Lawrie-Blum* definition essentially promotes the free movement of workers, not just employees. The EU legal concept of "worker" must be defined according to objective criteria which characterise the employment relationship in the context of the rights and obligations of the persons concerned. In this regard, it is settled case-law that the essential characteristic of an employment relationship is the fact that a person provides services for a specified period of time for the benefit

7 Judgment of the Court of 19 March 1964 – Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses) - Reference for a preliminary ruling: Centrale Raad van Beroep - Netherlands - Case 75/63. '*Articles 48 to 51 of the treaty, by the very fact of establishing freedom of movement for "workers", have given community scope to this term. If the definition of this term were a matter within the competence of national law, it would therefore be possible for each member state to modify the meaning of the concept of "migrant worker" and to eliminate at will the protection afforded by the treaty to certain categories of person.*' See also Gyulavári, 2014, pp. 62–64.

8 Judgment of the Court of 23 March 1982 – D.M. Levin v Staatssecretaris van Justitie – Reference for a preliminary ruling: Raad van State – Netherlands – Right of residence – Case 53/81. 'The answer to be given to the first and second questions must therefore be that the provisions of community law relating to freedom of movement for workers also cover a national of a member state who pursues, within the territory of another member state, an activity as an employed person which yields an income lower than that which, in the latter state, is considered as the minimum required for subsistence, whether that person supplements the income from his activity as an employed person with other income so as to arrive at that minimum or is satisfied with means of support lower than the said minimum, provided that he pursues an activity as an employed person which is effective and genuine...' See also Gyulavári, 2014, pp. 38–41, 61–66.

9 Judgment of the Court of 3 July 1986 – Deborah Lawrie-Blum v Land Baden-Württemberg. Reference for a preliminary ruling: Bundesverwaltungsgericht – Germany – Worder – Trainee teacher – Case 66/85: 'The term "worker" in Article 48 has a community meaning. It must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that a person performs services of some economic value for and under the direction of another person in return for which he receives remuneration. The sphere in which they are provided and the nature of the legal relationship between employee and employer are immaterial as regards the application of article 48.'

and under the direction of another person in return for remuneration.[10] In this light, the Court of Justice has already ruled that being a "self-employed person providing services" under national law does not preclude a person from being an "employed person" within the meaning of EU law if his/her self-employment is only apparent and thus in reality disguises an employment relationship.[11]

The ILO framework offers the best definition of the self-employed: the value of the self-employed worker's labour depends directly on the benefits of the goods or services he/she produces. He/she is solely responsible for the operation of the business, working for one or a small number of clients. The self-employed worker differs from the employee in that the latter has a stable employment relationship, with possible interruptions in its continuity.[12] Some self-employed workers, even if not fully integrated into their employer's business as employees are, may not be fully independent of their employer or have sufficient bargaining power to influence their working conditions. In addition, the COVID-19 crisis has made many self-employed workers even more vulnerable, as their loss of income has been exacerbated by weak or non-existent national social security systems and targeted support measures.[13]

The Court ruled that a collective agreement for self-employed service providers could be considered to be the result of a dialogue between the social partners if the service providers were in a similar situation to that of employees[14], and confirmed that 'in today's economy, it is not always possible to determine simply the status of self-employed service providers'. The Court also stated that

> a service provider may lose the status of an independent economic operator and thus its status as an undertaking[15] if it does not determine its market conduct autonomously but is wholly dependent on its principal, since it does not bear any of the

10 Judgment in Case C46/12, EU:C:2013:97, paragraph 40 and the case law cited; Judgment in Case C270/13, EU:C:2014:2185, paragraph 28.

11 See, to that effect, Allonby judgment – C256/01 – EU:C:2004:18, paragraph 71.

12 Resolution concerning the International Classification of Status in Employment (ICSE), adopted by the Fifteenth International Conference of Labour Statisticians (January 1993).

13 Report of the European Parliament of 13 October 2021 on the situation of artists and cultural regeneration in the EU (2020/2261(INI)) Committee on Culture and Education [Online]. Available at: https://www.europarl.europa.eu/doceo/document/A-9-2021-0283_EN.html (Accessed: 16 October). The possibility of self-employed people accessing job-search schemes is also of interest. While in Germany, statistics show that self-employed people made little use of job-search subsidies during COVID-19, in Hungary, this was not even statistically measurable. In order to receive a job-search allowance, a self-employed person has to cease self-employment.

14 Judgment of the Court of 4 December 2014, FNV Kunsten Informatie en Media v Staat der Nederlanden, C-413/13, ECLI:EU:C:2014:2411, paragraph 31.

15 Judgment of the Court of 4 December 2014, FNV Kunsten Informatie en Media v Staat der Nederlanden, C-413/13, ECLI:EU:C:2014:2411, paragraph 32.

financial and commercial risks arising from the principal's activities and acts as an auxiliary body integrated into the principal's undertaking.[16]

Within the group of the vulnerable self-employed, however, we need to make further distinctions. This is because vulnerability is not necessarily the same as being in a situation comparable to that of employees. For example, self-employed individuals may be in *a weak bargaining position vis-à-vis their partners* and therefore may *not be able to significantly influence their working conditions*, but this does not mean that they are in a similar position to that of employees. In some cases, however, they may be considered as apparently self-employed and may be reclassified as workers by national authorities/courts. This may be the case for self-employed individuals who provide their services exclusively or predominantly to a business partner, possibly in a situation of economic dependence on that business partner. Such self-employed individuals are generally not independent in determining their behaviour in the market and are highly dependent on their business partner and are an integral part of the business partner's enterprise. They are also more likely to receive instructions on how to carry out their work.[17] Alternatively, they may be self-employed individuals working "alongside" employees, who are "alongside" employees of the same business partner, performing the same or similar tasks to those of the business partner, are in a similar position to that of employees in that they provide their services under the direction of their business partner, do not bear the commercial risks associated with the business partner's activities and do not have any independence in the conduct of the economic activity concerned.[18] They may also be self-employed individuals working through digital labour platforms. The emergence of the online platform economy and digital platform work has created a new reality for some self-employed individuals who are in a similar position to employees vis-à-vis the digital work platforms through which or for which they perform their work. Self-employed individuals can become dependent on digital platforms, especially for access to clients, and are often forced into a situation of being offered work with little or no room for negotiating their terms of employment, including their remuneration. Digital job platforms can usually impose the terms of their contractual relationship unilaterally, without prior information of or consultation with individual self-employed workers.

16 Judgment of the Court of 4 December 2014, FNV Kunsten Informatie en Media v Staat der Nederlanden, C-413/13, ECLI:EU:C:2014:2411, para 33; Judgment of the Court of 14 December 2006, Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA, C217/05, ECLI:EU:C:2006:784, paras 43–44.

17 Communication from the Commission: Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons, point 243 [Online]. Available at: file:///G:/DOCUMENTS/Competition%20vs%20collective%C3%ADv%20t%C3%A1rgyal%C3%A1s/C_2021_8838_1_HU_annexe_acte_autonome_part1_v1.pdf (Accessed: 16 October).

18 Ibid., point 26.

Recent case law and legislative developments at national level provide further guidance on the comparability of such self-employed and employees. In the context of reclassification cases, national courts are increasingly recognising the dependence of service providers on certain types of platforms or even the existence of an employment relationship. Based on Christina Hiessl's collection[19], the following statistics on the employment status of platform workers are presented.

Country	Number of cases	Employee (UK: worker)
AT	10	8
BE	9	3
CH	12	10
DE	5	1
DK	3	1
ES	66	53
FI	6	5
FR	87	37
IE	3	1
IT	20	8
LU	2	0
NL	12	6
NO	2	2
SE	9	2
UK	21	17

From the above data, it can be concluded that in most cases, the dependency/vulnerability has led to the extension of labour law and thus social protection to platform workers. This certainly represents a move towards more secure flexible employment in the European labour market.

19 Christina Hiessl, 2022.

3. In search of fundamental values

The question arises as to what protection is afforded to workers on the new platform and vulnerable workers in general.[20] *Bellice* himself argues that the answer for labour law may be to return to its core values.

In the time since Maastricht, it can therefore be said that the *fundamental value of labour law is that it provides* economic *security* and thus *predictability*: both internally, by means of rules that protect the worker, and externally, by the state, by providing a social safety net in case the worker is unable to work in a situation of disruption. Another very important value is a healthy and safe working environment.

In 1998, the ILO set out the fundamental rights that all states must respect:

a) freedom of association and the effective recognition of the right to collective bargaining;
b) the elimination of all forms of forced and compulsory labour;
c) the effective abolition of child labour;
d) the elimination of discrimination in respect of employment and occupation.[21]

20 Mangan refers to a Uber ruling in North Carolina, which found that Uber is not a technology company. According to the ruling, just because someone uses a technology, does not mean they are a technology company. Mangan warns that this argument ignores the changes that have taken place. For more on this, see O'Connor et al. v Uber Technologies, Inc., C.A. No. 13-03826-EMC (N.D. Cal.), and Mangan, 2018, p. 70. See also Prassl and Risak, 2016, pp. 619–651; Davidov, 2017.

21 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised on 15 June 2010).
'... The International Labour Conference ... (2.) Declares that all Member States, even if they have not ratified the Conventions in question, are bound by their membership of the Organization, in good faith and in conformity with the Constitution, to respect, promote and fulfil the fundamental rights to which these Conventions refer. These principles are: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the abolition of forced and compulsory labour in all its forms; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. ...'

These rights should be fundamental rules of the game, regardless of the playing field.[22] Security is therefore the preservation of core values within labour law.[23] However, core values have been further concretised with the development of the social dimension. In what way?

In the second half of the 20th century in Europe, changes occurred essentially at two levels: on the one hand, employers modified the terms of the agreement in ways that the efficient functioning of the business required. On the other hand, the modified agreements transformed the workforce, and new legal categories emerged: casual worker, part-time worker, temporary agency worker, bogus self-employed worker, person with a status similar to that of an employee, etc.[24] Two distinct strategies for managing changes in the employment relationship have appeared at national and supranational level. One of the re-regulatory strategies aims to extend the scope of labour law. This strategy is based on the theory that there is a grey area between subordination and self-employment, where subordination and autonomy are more nuanced. The redefinition has sought to extend labour law to as many new forms of agreement as possible.[25]

The second re-regulatory strategy aspired to regulate and protect new atypical forms of employment through ad hoc legislation. This approach assumed that legal relationships which had some elements of contingent work (e.g. continuity, full-time work) deserved some level of protection. This view does not focus on the subject matter of employment relationships, but rather on taxonomy and classification.[26]

But in the 21st century, *the idea of* a predominantly *secure labour market* is gaining ground in Europe. In this, the European Pillar of Social Rights is of fundamental importance. Since I believe that the interpretation of flexibility and security at European level must be implemented within the social dimension of the

22 Mangan also refers to what Bellice pointed out in the case of algorithms. Namely, that algorithms can lead to inequalities, i.e. discrimination. Mangan, 2018, p. 72.

23 I do not analyse Freedland and Countouris' theory of personal work relations in this research, as I do not consider the concept feasible. However, there are several elements in the concept that deserve to be highlighted. One of these is about values in work. It is pointed out that, rightly, the normative basis of labour law is the balancing of the positions of parties in unequal situations. Human dignity is a first-generation right with which we are all familiar and which is enshrined in many international documents. Freedland and Countouris complement this thinking on dignity with the concept of autonomy and equality. Autonomy means that a person makes decisions about his or her own life (work life) autonomously, without any constraints. This is complemented by equality, which, like human dignity, is also one of the oldest first-generation human rights. However, equality is thought of in terms of Amaryta Sen's concept of equality, which is equality based on ability, which is considered the most appropriate for labour and social law. Dignity is closely linked to the person of the worker, based on personal work. Freedland and Countouris, 2011, pp. 372–376.

24 On self-employment, see Szekeres, 2018, pp. 472–484; Countouris, 2007, p. 4.

25 Similarly, Act I of 2012 on the Labour Code sought to extend labour law to as many atypical jobs as possible.

26 Countouris, 2007, p. 5. Mark Freedland and Nicola Countouris therefore propose a new taxonomy by introducing the concept of personal employment relationships. See in detail Freedland and Countouris, 2011, pp. 190–208; Deakin and Morris, 2012, pp. 200–202, pp. 219–224.

European Union, I will now examine this and also analyse the relationship between the social dimension of the Union and European labour law, in particular decent working conditions.

On 26 April 2017, the Commission published its proposal[27] on the European Pillar of Social Rights. The Pillar was finally launched at the Social Summit on Fair Jobs and Growth in Gothenburg on 17 November 2017, further strengthening the social dimension of the Union in cooperation with the European Parliament and the Council. The Pillar sets out what the European Union considers to *be the minimum level of social protection to* maintain and enhance competitiveness, as Member States can promote social rights in a more ambitious way than the rights set out in the Pillar. The Pillar states that economic and social development can be pursued together with the following principles: *equal opportunities and the right to work, decent working conditions, social protection and social inclusion*. These can be seen as the pillars underpinning the employment relationship in the development of the employment model. *The section on decent working conditions describes the basic rules of the game of labour law and, in my opinion, defines a minimum level of security*, in which the following principles and rights are the pillars: safe and flexible employment, wage protection, information on the terms and conditions of employment, protection against dismissal, social dialogue and employee participation, work-life balance, a healthy, safe and properly designed working environment and data protection.

27 The Pillar was born out of the combination of several documents. Communication from the Commission to the European Parliament, The Council, The European Economic And Social Committee and the Committee of the Regions: Establishing a European Pillar of Social Rights, Brussels, 26.4.2017 COM(2017) 250 final;
Commission Recommendation of 26 April 2017 on the European Pillar of Social Rights, Brussels, 26.4.2017 C(2017) 2600 final; Proposal for an Interinstitutional Proclamation on the European Pillar of Social Rights, Brussels, 26.4.2017, COM(2017) 251 final;
Commission Staff Working Document accompanying the document Communication from the Commission to the European Parliament, The Council, The European And Social Committee and the Committee of the Regions: Establishing a European Pillar of Social Rights, Brussels, 26.4.2017 SWD(2017) 201 final;
Commission Staff Working Document: Report of the public consultation 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: Establishing a European Pillar of Social Rights, Brussels, 26.4.2017, SWD(2017) 206 final.
The first preliminary draft of the Pillar covered three main areas:
'Equal opportunities and access to the labour market, including skills development, lifelong learning and active support for employment to increase employment opportunities, facilitate employment transitions and improve the employability of individuals;
Fair working conditions that ensure an appropriate and reliable balance between the rights and obligations of employers and workers, and between flexibility and security of employment, in order to promote job creation, employment and subsequent career changes, and to encourage social dialogue;
Adequate and sustainable social protection and access to high-quality basic services, including childcare, health and long-term care, to ensure decent living conditions and protection against risks, and to enable individuals to participate fully in employment and society in general.'

4. Recent results relating to the social dimension

György Kiss writes that the dogmatics and historical development of labour law proves that labour law can only be represented in a unified view of individual and collective relations. These two parts of labour law are not loosely connected but are correlatively related.[28] This is indeed the case. The protection of the working person in Europe means the protection of the EU worker against vulnerability. The future of the social dimension in relation to decent working conditions could be shaped by rethinking the working conditions directives through the lens of the protection of the EU worker and the new employment relationship. I believe that this has been achieved in the revision of the Information Directive. And the latest Commission guidelines confirm that an essential element of protection in the case of work done for others in the labour market is the possibility of collective bargaining with a view to improving working conditions. In other words, the correlative relationship between individual and collective labour law is also strongly manifested in the case of new types of work. If we look at the case law[29] in the European (Member) States, we see that new types of workers claim certain protections, one of the most important of which is the right to organise and to improve working conditions through collective bargaining.

5. Transparent and predictable working conditions

The aim of this section is to examine how the Information Directive has changed since 1991. The question is whether the legislator has managed to respond to changes in employment.

The Pillar provides guidance for *a renewed upward convergence of* social standards in the face of the changing realities of the world of work, and for a hypothetical balance between flexible and secure employment. One major manifestation of this is the Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, which contributes in particular to Pillar principles 5 (Secure and adaptable employment) and 7 (Information about employment conditions and protection in case of dismissals).

28 Kiss, 2005, p. 313.

29 See in particular: Uber BV and others (Appellants) v Aslam and others (Respondents), Case ID: UKSC 2019/0029. [Online]. Available at: https://www.supremecourt.uk/cases/uksc-2019-0029.html (Accessed: 27 December 2023).
Judgement of The Revenue Commissioners v Karshan Midlands t/a Domino's Pizza. [Online]. Available at: https://www.courts.ie/acc/alfresco/e4ee7c3d-0e02-4a33-82b7-26458d895138/2023_IESC_24.pdf/pdf#view=fitH (Accessed: 27 December 2023), Cour du travail de Bruxelles - 2022/AB/12 - 2022/AB/43 - 2022/AB/118.

Principle 5 states that irrespective of the nature and duration of the employment relationship, workers have the right to fair and equal treatment in terms of working conditions, social protection and access to training, and that the shift to permanent forms of employment should be promoted; that employers should be given the flexibility to adapt quickly to changes in the economic environment, in accordance with the law and collective agreements; the need to promote innovative forms of work that ensure quality working conditions, to encourage entrepreneurship and self-employment and to facilitate occupational mobility; it also states that employment relationships that lead to precarious working conditions should be prevented, *inter alia* by prohibiting abuse through atypical contracts, and that any probationary period should be of a reasonable duration. Principle 7 states that workers have the right to be informed in writing of their rights and obligations arising from their employment relationship, including during the probationary period, at the beginning of the employment relationship, and that they have the right to be informed of the reasons for dismissal and to a reasonable period of notice before dismissal, as well as access to effective and impartial dispute resolution and to remedy, including appropriate compensation, in the event of unfair dismissal. I assume that the Pillar has and will have a considerable impact on the change in European labour law rules. Indeed, the Directive, in connection with the Pillar, expands the scope of information, thereby strengthening the protection of the worker. The Directive also contributes to the implementation of the following principles set out in the European Pillar of Social Rights: *education, training and lifelong learning*, *gender equality*, *secure and flexible employment*, *gender equality*, *information on employment conditions and protection in the event of dismissal*, *social dialogue and worker participation.*[30]

The Directive replaces the Directive on the obligation to provide written information with a new instrument to ensure transparency of working conditions for *all*

30 Article 31 of the Charter of Fundamental Rights of the European Union provides that every worker has the right to working conditions which respect his or her health, safety and dignity, to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid holidays. In its Resolution on working conditions and precarious employment of July 2017, the European Parliament called on the Commission to review the Directive on the obligation to provide written information to take account of new forms of employment. In their opinions on the Pillar, the European Economic and Social Committee and the Committee of the Regions highlighted the shortcomings in the area of worker protection and stressed the need for action at EU level to define a framework for decent working conditions and to strike a balance between flexibility and security. The general objective of the proposed directive was to promote more secure and predictable employment while ensuring the adaptability of the labour market and improving living and working conditions. The specific objectives that enabled the general objective to be achieved were: *improving workers' access* to information on their working conditions; *improving working conditions* for all workers, in particular for new and non-traditional forms of employment while leaving room for adaptation and labour market innovation; improving compliance with working conditions standards through *better enforcement;* and improving transparency in the labour market *without imposing excessive burdens on businesses of all sizes*. See on this Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Preambles (4) and (6).

workers, as well as new substantive rights to improve the predictability and security of working conditions, *especially for people in precarious employment.*[31] This is to be achieved through the provision in Chapter II requiring updated basic information on the employment relationship for all EU workers, including the estimated 2–3 million people who are currently not covered by the Written Information Directive, which leaves the definition of "worker" and "employment relationship" to national legislation. In order to clarify the scope of the Directive, the definition of "worker" is based on the settled case law of the Court of Justice of the European Union (CJEU) concerning the determination of the status of workers[32] and limits the possibility for Member States to exclude workers with short-term or casual contracts to extend the scope of the Directive. This is a very important provision. It is about determining the level of protection for new types of employment.

> In view of the increasing number of workers excluded from the scope of Directive 91/533/EEC on the basis of exclusions made by Member States under Article 1 of that directive, it is necessary to replace those exclusions with a possibility for Member States not to apply the provisions of this Directive to an employment relationship with predetermined and actual working hours that amount to an average of three hours per week or less in a reference period of four consecutive weeks. The calculation of those hours should include all time actually worked for an employer, such as overtime or work supplementary to that guaranteed or anticipated in the employment contract or employment relationship. From the moment when a worker crosses that threshold, the provisions of this Directive apply to him or her, regardless of the number of working hours that the worker works subsequently or the number of works hours provided for in the employment contract. Workers who have no guaranteed working time, including those on zero-hour and some on-demand contracts,

31 Article 2 – Definitions This Article lays down the criteria to be used to determine the status of worker for the purposes of this Directive. These criteria are based on the case-law of the CJEU, as developed since Case C-66/85 Lawrie-Blum, and most recently referred to in Case C-216/15 Ruhrlandklinik. The definition of these criteria is necessary because the REFIT evaluation has shown that the scope of the Written Information Directive differs between Member States, based on their understanding of "worker", "employment relationship" and "employment contract", with the risk that an increasing number of non-traditional workers such as domestic workers, on-call workers, seasonal workers, voucher workers and platform workers are excluded from the scope of the Directive. The proposed Directive would also cover these workers, provided they meet the criteria set out above.
Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union. SWD(2017)205 final, pp. 21 and 25 and footnote 50. See also 'A European Agenda for the Community Economy', Commission Communication (COM(2016) 356 final) 2.4. SWD(2017)205 final, p. 24.

32 Judgment of 3 July 1986, Deborah Lawrie-Blum, Case 66/85; 14 October 2010, Union Syndicale Solidaires Isère, Case C-428/09; 9 July 2015, Balkaya, Case C-229/14; 4 December 2014, FNV Kunsten, Case C-413/13; and 17 November 2016, Ruhrlandklinik, Case C-216/15.

> are in a particularly vulnerable situation. Therefore, the provisions of this Directive should apply to them regardless of the number of hours they actually work.[33]

Directive 91/533/EEC contains a list of essential aspects of the employment contract or employment relationship on which workers must be informed in writing. To take account of changes on the labour market, in particular the spread of atypical forms of employment, it was necessary to recast this list, which could be extended by the Member States.

If the nature of the work, *for example in the case of a call-in contract,* does not allow for fixing a specific working time, the employer must inform workers of the way in which their working time will be determined, including the periods when they may be called in and the minimum notice period before the work is ordered to start.[34]

Among the complementary measures regarding on-call work contracts, where Member States allow the use of on-call or similar contracts, they should take one or more of the following measures to prevent abusive practices: (a) restrictions on the use and duration of on-call or similar employment contracts; (b) a rebuttable presumption of the existence of an employment contract which determines the minimum number of hours paid on the basis of the average number of hours worked in a given period; (c) other equivalent measures to ensure effective prevention of abusive practices.[35]

The information on social security schemes should include details of the social security institutions receiving social security contributions, where applicable, in respect of sickness, maternity, paternity and parental benefits, occupational accident and occupational disease benefits, old-age, invalidity, survivors' and unemployment benefits, early retirement benefits and family benefits. Employers are not obliged to provide this information if the employee chooses the social security institution. Information on the social protection provided by the employer should include, where applicable, the fact of coverage by a supplementary pension scheme within the meaning of Directive 2014/50/EU of the European Parliament and of the Council or Council Directive 98/49/EC.[36]

Given the increasing use of digital means of communication, the *written information* required by this Directive *may also be provided by electronic means*. In order to assist employers in providing timely information, Member States should be able

33 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Preambles (11) and (12) and Article 1 (3).

34 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Preamble (21), Article 4.

35 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Article 11.

36 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Preamble (22), Article 4.

to provide templates at national level which provide relevant and sufficient information on the relevant legal framework. National authorities and social partners may further develop these templates at sectoral or local level. The Commission will support Member States in developing templates and models and will make them widely available where appropriate.[37]

Workers employed on a mostly or totally unpredictable schedule should be guaranteed a minimum degree of predictability, where the employer determines the working hours in the first instance, either directly, for example by ordering work, or indirectly, for example by asking the worker to respond to requests from clients.[38]

The reference hours and days, i.e. the periods during which the employer can ask the employee to work, must be set out in writing at the beginning of the employment relationship. A reasonable minimum notice period, i.e. the time between the employee's notification of the new assignment and the start date of the assignment, is another necessary element of job predictability in employment relationships where the work schedule is not or mostly not predictable. The length of the prior notification period may vary depending on the needs of the sector concerned, but it should provide adequate protection for the worker. The application of the minimum notice period is without prejudice to Directive 2002/15/EC of the European Parliament and of the Council.[39] Workers should be given the possibility to refuse to carry out an assigned activity if it falls outside the reference hours and days or if they have not been informed of it within the minimum period of notice, without adverse consequences for them. In addition, workers should be able to accept the working time ordered if they so wish.[40] In the case of a worker whose work schedule is not at all or mostly not predictable, where the worker has agreed with his or her employer on a specific pattern of working time, the worker should be able to plan accordingly. The worker should be protected against loss of earnings resulting from late cancellation of agreed mandated work by providing adequate compensation.[41]

On-call or similar contracts, including zero-hours contracts, where the employer asks the worker to do the work flexibly and when it is needed, are particularly unpredictable for workers. Member States which allow such contracts should ensure that effective measures are in place to prevent abuse of such contracts. Such measures may limit the use and duration of such contracts, apply a rebuttable presumption of the existence of an employment contract or employment relationship guaranteeing

37 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Preamble (24).

38 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Preamble (30).

39 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Preamble (31).

40 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Articles 33 and 10.

41 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Preamble (34).

the number of hours paid based on the number of hours worked in the previous reference period, or may be other equivalent measures to ensure effective prevention of abuse. The implementation of this Directive should not constitute grounds for restricting existing rights in this area under existing Union law or national law, nor should it constitute a legal basis for reducing the general level of protection afforded to workers in the field covered by this Directive. In particular, it should not justify the use of zero-hour contracts and similar employment contracts. [42]

The new forms of employment are covered by this Directive. In addition to the efforts made by workers and employers to facilitate employment, a minimum level of security must be ensured in labour law. The minimum rights for EU workers are therefore as follows:

a) information on the employment relationship,
b) the maximum duration of the probationary period,
c) the possibility of parallel employment,
d) minimum predictability of work, even if a worker's work schedule is totally or mostly unpredictable,
e) prevention of abusive practices in the case of on-call or similar employment contracts by taking measures,
f) applying for a more predictable form of employment with more secure working conditions,
g) guarantees for compulsory training,
h) the possibility to derogate from minimum rights in collective agreements in favour of the worker.

I believe all this is very important because it sets the framework for decent work in the European Union. The persons covered by the Directive may therefore include workers on zero-hour contracts, such as fast-food workers, logistics centre workers, supermarket shelf–stockers, domestic or voucher workers[43], and platform workers, such as on-call drivers or couriers, provided that the above criteria for the definition of worker are met.[44]

In my view, this means that European labour law is clearly moving towards safer employment. Provided that workers meet the definition of an EU worker, domestic workers, on-call workers, seasonal workers, voucher workers, platform workers, trainees and apprentices are all covered by this Directive.

42 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Preambles (35), (47).

43 The employer receives a voucher from a third party (usually a government authority) used as payment to a worker providing the service instead of cash. [Online]. Available at: https://eur-lex.europa.eu/EN/legal-content/summary/transparent-and-predictable-working-conditions-in-the-eu.html (Accessed: 19 December 2023).

44 [Online]. Available at: https://eur-lex.europa.eu/EN/legal-content/summary/transparent-and-predictable-working-conditions-in-the-eu.html (Accessed: 19 December 2023).

6. Concluding thoughts

Some of the new forms of employment that have emerged since Maastricht can differ significantly from traditional employment relationships in terms of predictability, creating uncertainty for the workers concerned about their rights and social protection. Consequently, in this changing world of work, there is an increasing need for workers to be fully informed of basic working conditions, in a timely manner and in a written form that is easily accessible to them. Therefore, this study analysed the revised Information Directive in terms of its responsiveness to changes in the labour market and the economy since the adoption of the Maastricht Treaty.

To provide an appropriate response to the emergence of new forms of employment, I have attempted to define *new minimum rights* for EU workers, aimed at increasing the security and predictability of employment relationships.

It is therefore of great importance in the development of the social dimension of the European Union that the desire for employment security for labour market workers is becoming more and more evident in the light of the documents of the European Commission, the case law of the Court of Justice of the European Union and the examination of (Member) State decisions on the issue of employment status. For the purpose of this study, it was important to clarify what is meant by employment security, what the values that constitute the minimum level of protection under labour law are, and how this is complemented by social protection. In this trajectory since Maastricht, the definition of the vulnerable worker who needs protection is very important. All this has lent a new dimension to our views on security and flexibility since the adoption of the Maastricht Treaty. I am convinced that we are no longer talking about *flexicurity*, but about *secure flexibility*. The worker who is vulnerable in this new type of employment therefore has a legitimate claim to protection under labour and social law. Of course, each case is different, but the discourse on protection and the classification of employment status remain key factors in the advancement of the social dimension.

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