

NEW TRADE UNION
STRATEGIES FOR
**NEW FORMS OF
EMPLOYMENT**



This research was written by **Nicola Countouris**, Professor of Labour Law and European Law, Faculty of Laws, University College London and **Valerio De Stefano**, BOF-ZAP Research Professor of Labour Law, Faculty of Law, Katholieke Universiteit Leuven.

The writer and the ETUC want to thank to members of the Steering Committee of the project "New Trade Union Strategies for New Forms of Employment" for their contributions to the research and their work throughout the project.

The organisations members of the Steering Committee were the European Arts and Entertainment Alliance (EAEA), Eurocadres, the European Transport Federation (ETF) and the European Federation of Journalists (EFJ).

When quoting or citing this publication, please consider the following reference:
COUTOURIS, N., DE STEFANO, V. (2019) *New trade union strategies for new forms of employment*. ETUC. Brussels



With the financial support
of the European Commission

NEW TRADE UNION
STRATEGIES FOR
**NEW FORMS OF
EMPLOYMENT**

CONTENTS

Executive summary	07
1. Introduction and presentation of the report	09
2. Analytical framework	12
3. Structure of the report	14
4. Who is a worker – a comparative analysis of the personal scope of application of labour law in Europe	18
5. Beyond employment: quasi-autonomy and the self-employed in a comparative perspective	22
5.1 Protection afforded to quasi-subordinate and economically dependent workers	25
5.2 A full extension of labour protection to quasi-subordinate and economically dependent workers?	28
5.3 The labour and social rights of self-employed persons	29
6. Beyond the binary divide: testing the self-employment monolith	33
6.1 The performance of personal work or services to one main client	34
6.2 The performance of personal work or services to a multitude of clients or customers	35
6.3 The performance of personal work or services to one main client, while also owning some of the 'means of production' necessary to generate those services	35
6.4 The performance of personal work or services in association with others	36
7. Collective rights and the self-employed	37

8. Legal obstacles to collective bargaining of self-employed workers: the anti-trust threat	43
8.1 Legal obstacles to collective standards by the professions and EU free movement rights	46
8.2 Collective bargaining, competition law and the regulation of a 'social market economy': the case for revisiting the European Court's approach	48
9. Current reform proposals and debates: quiet at national level, lively at EU level	55
10. A new concept of 'employing entity'	61
Conclusions	64

FOREWORD

The world of work is changing. Among the changes, self-employment is an increasing challenge for the trade union movement. Sometime misused to bypass the labour protection of employees, self-employment is also a free choice many workers make to enjoy autonomy in their working life. Let's call them "workers" purposely. Whether they remain self-employed or become real entrepreneurs is not the main point. Temporarily or permanently, these people are working people and they deserve rights and protection. And while the usual border between employment legislation and commercial law is blurred, the ETUC has had to tackle this European challenge and seek solutions to protect self-employed workers.

This report is framed on a project which spanned two years of fruitful work in close cooperation with ETUC affiliates, in particular our colleagues of the Alliance.

The trade union movement throughout Europe is working towards improving the working conditions of the self-employed, in particular by seeking to extend collective agreements to them or by allowing them to bargain collectively for specific conditions.

These efforts are often countered by a narrow interpretation by competition authorities that categorises collective agreements for the self-employed as a breach of competition law. The ETUC opposes this, since the "weakly positioned self-employed" (as put by commissioner Vestager herself) trying to improve their lives cannot be decently considered as an "illegal cartel".

The present report provides a proposal for a regulatory framework which may overcome the aforementioned problem: The personal work relationship.

We believe that this research will help the heterogeneous group of workers categorised as self-employed to be granted collective labour rights, in particular the rights to organise and to bargain collectively. The new legal concept proposed here is a key contribution for unions to cope better with the reality of self-employed people, and must help our movement to win the greater battle for the new rights needed in the future of work.

The ETUC would like to thank the authors Nicola Countouris and Valerio Di Stefano for their engagement throughout the implementation of the project and the brilliant work delivered here.

Thiébaut Weber
ETUC Confederal Secretary

EXECUTIVE SUMMARY

The present report explores a number of regulatory, normative, and conceptual dimensions pertaining to work performed in a self-employed capacity. The report was commissioned by the ETUC in 2017 following its call for legal expertise on the topic “**New trade union strategies for new forms of employment**”. In line with that call, the report explores a new legal conceptual framework for the analysis of the normative and regulatory challenges arising from the proliferation of ‘new forms of employment’, and in particular from the growth of forms of work that, by virtue of their being classified as autonomous or quasi-autonomous, fall outside the protective umbrella of labour and social security law.

The main contextual backdrop for the project is the challenge, or set of challenges, arising from the so-called ‘digital economy’, on the one hand, and the opportunities emerging from the ‘**European Pillar of Social Rights**’ initiative, on the other. The report engages with, and offers some answers and possible solutions to, these challenges. It also has a deeper ambition that spans beyond the contingencies generated by particular technological developments or specific EU - or domestic - regulatory agendas. The report seeks to identify a novel analytical framework for reshaping and expanding the personal scope of application of labour law in the 21st century, and to assist the development of a coherent strategy for the ETUC to pursue this expansion on the basis of a set of compelling legal arguments.

From a methodological point of view, the present report was produced on the basis of both original research work carried out by its two authors and on the basis of a number of national reports compiled in respect of a representative sample of national legal systems, namely the Austrian, Belgian, French, Italian, Swedish, Spanish, German, and British systems. These reports were authored by a number of national legal experts and we would like to take this opportunity to express our gratitude to our colleagues Professors Elisabeth Brameshuber, Mathias Wouters, Emmanuel Dockès, Elena Gramano and Giovanni Gaudiolo, Samuel Engblom and Magnus Lundberg, Adrian Todoli, Monika Schlachter-Voll, and Mark Freedland.

The idea of ‘personal work relation’, as originally developed by Professor Mark Freedland and the first author of the present report, sits at the centre of the normative suggestions developed in the present report.¹ The concept of personal work relation captures the fact that in modern labour markets, work can be provided in a variety of ways and through a range of modalities and patterns. These can range from the classic subordinate, bilateral, and continuous provision of employment, to more nuanced and complex forms of work, involving multiple parties and economic entities, and ultimately developing in the realm of autonomy and, in terms of their legal characterisation, self-employment. In developing the present project, one of our main hypotheses was that a concept of worker based on the idea of ‘personal work relation’, could usefully capture a wide range of employment statuses across a number of national (and probably supranational) legal systems. Ultimately, the idea of ‘personal work relation’ can be used to define the personal scope of application of labour law as applicable to any person that is *engaged by another to provide labour*, unless that person is *genuinely operating a business on her or his own account*.

The report begins by exploring the question of the adequacy of existing legal and industrial relation systems grappling with the definition of the personal scope of labour protection legislation. Section 4 explores the

¹ Mark Freedland, ‘Application of labour and employment law beyond the contract of employment’ (2007) International Labour Review 3; Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011).

classic ‘who is a worker?’ question, offering an assessment of the current state of the law in terms of the personal scope of application of standard employment protection legislation in a number of European countries, and in respect of a number of relevant supranational systems of regulation (mainly the EU, the Council of Europe, and the ILO). Section 5, moves the scope of the analysis beyond standard employment in order to offer a clearer taxonomy of the typologies of work relations that prevail and evolve outside the narrower protective coverage of the bulk of employment protection legislation. In doing so it explores the extent to which the (national or supranational) legal systems covered by the project contemplate intermediate categories of quasi-subordinate or semi-dependent workers (as in the case of the UK, Spain, or Italy/Germany/Austria), while exploring the rights and attributions recognised to workers that are not classified as ‘employees’. Section 6 moves on to assess the conceptual boundaries and internal complexities of the notion of self-employment. It argues that this notion has become extremely complex, multifaceted, and conceptually confusing jumbling individual personal work profiles as diverse as that of the Deliveroo cyclist and the owner of the dental practice specialising in prosthetic dentures (both ‘owning’ their own ‘tools’). The category can go as far as including self-employed persons that hire their own employees, and that would be better understood as performing genuine entrepreneurial activities in an employer capacity. Section 7 explores both past and present collective practices seeking to regulate the terms and conditions of employment of a range of personal work providers, both subordinate and autonomous, while section 8 explores the extent to which these collective practices may encounter obstacles arising from a range of area of regulation, including EU Competition Law, EU law on freedom of establishment and free movement of services, and by the growing recognition in CJEU case-law of the fundamental freedom to conduct a business.

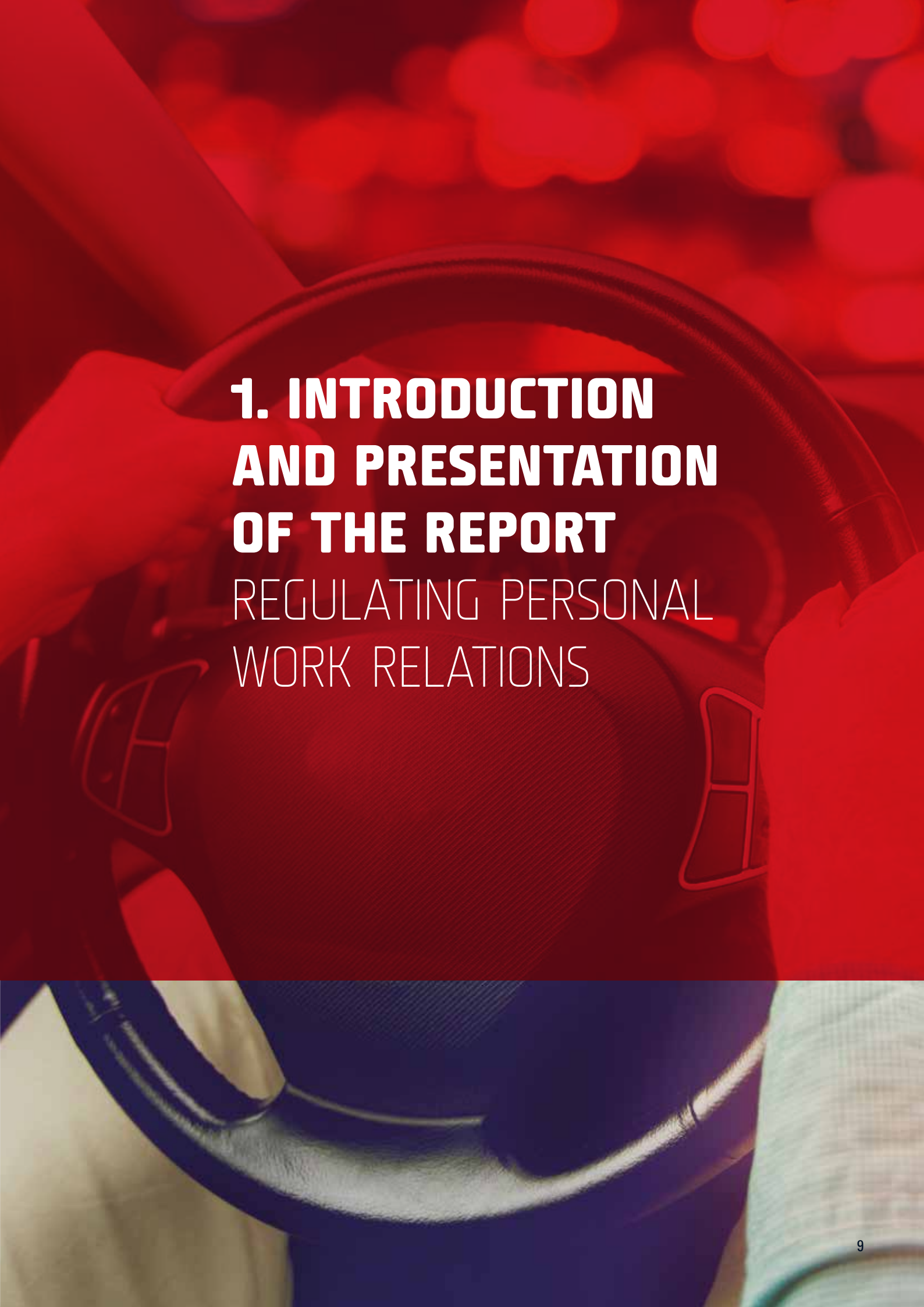
Sections 9 and 10 are more normative in character and explore and assess a number of alternative reform approaches currently developing at a national and supranational level. In particular, they elaborate on a set of reform proposals recently developed by Ewing, Hendy and Jones, in their *Manifesto for Labour Law*, and in their more recent publication *Rolling out the Manifesto for Labour Law* advocating a broader construction of the personal scope of domestic labour rights, by referring to any person ‘engaged by another to provide labour’ and that ‘is not genuinely operating a business on his or her own account’,² and a broad concept of ‘employing entity’. The sections also comment on the proposals recently developed by Emmanuel Dockés and a number of other French academics, seeking to extend the scope of application of domestic labour law by reference to a finer-grained classification of ‘dependent’ employees and ‘autonomous’ or ‘externalised’ salaried workers,³ and on the broad and far reaching personal scope advocated in art 1 of CGIL’s *Carta dei diritti universali del lavoro - Nuovo statuto di tutte le lavoratrici e di tutti i lavoratori* (2016). Section 9 also critically explores the approach suggested by labour economists such as Harris and Kruger⁴ that an intermediate category of ‘independent worker’ or ‘dependent contractor’ ought to be introduced and generalised and become the new regulatory paradigm for the application of some (not all) employment protection legislation.

The concluding section articulates the view that a range of fundamental labour and social rights have a universalistic vocation and ought to be applied to all those providing personal work and services including, under certain circumstances, workers that are currently perceived as self-employed professionals, and that may be availing themselves of a limited and ancillary amount of capital or third-party services as an non-substantial contribution to their pre-dominantly personal labour provision. This requires both an extension of the coverage of these rights and their re-elaboration for the purposes of applying them to particular modalities of personal work (for instance a right to regular working hours for casual and on-call/zero-hours workers as a guarantee to ‘fair and just working conditions’). We believe, and have argued in the present report, that there are sound normative reasons to advocate such extensions. Crucially it is also our view that an extension of the scope of the employment relationship should not result in a watering down of the substantive labour law protections enjoyed by workers.

2 Keith D. Ewing, John Hendy, and Carolyn Jones (eds), *A Manifesto for Labour Law: towards a comprehensive revision of workers’ rights* (IER 2016) 35; and Keith D. Ewing, John Hendy, and Carolyn Jones (eds), *Rolling out the Manifesto for Labour Law* (IER 2018) 36.

3 Emmanuel Dockés (ed), *Proposition de Code du Travail* (Dalloz 2017), arts L. 11-1 - L. 11-18.

4 Seth D. Harris and Alan B. Krueger, ‘A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker”’ (2015) The Hamilton Project, Discussion Paper 2015-10 < http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf > accessed 30 January 2019



1. INTRODUCTION AND PRESENTATION OF THE REPORT

REGULATING PERSONAL
WORK RELATIONS

The present report explores a number of regulatory, normative, and conceptual dimensions pertaining to work performed in a self-employed capacity. The report was commissioned by the ETUC in 2017 following its call for legal expertise on the topic “New trade union strategies for new forms of employment”. In line with that call, the report explores a new legal conceptual framework for the analysis of the normative and regulatory challenges arising from the proliferation of ‘new forms of employment’, and in particular from the growth of forms of work that, by virtue of their being classified as autonomous or quasi-autonomous, fall outside the protective umbrella of labour and social security law.

The main contextual backdrop for the project is the challenge, or set of challenges, arising from the so-called ‘digital economy’, on the one hand, and the opportunities emerging from the ‘European Pillar of Social Rights’ initiative, on the other. The ‘call for tenders’ document expressly noted that ‘the so-called own-account workers are at the growing margin of the labour market in particular in the digital economy. They are not entitled to proper social protection, and even not covered by collective agreements’. It also expressly envisaged ‘a possible extended definition of companies as a way to establish a clear social responsibility of entrepreneurs on workers, whether they are employees or contractors, whether they are linked to the company by labour law or commercial law (i.e. conditions of use on the digital platform)’. Similar preoccupations appear to be shared by the European Pillar of Social Rights document, as proclaimed in 2017,⁵ and the Preamble to the Commission’s Proposal expressly noted that ‘labour markets have undergone far-reaching changes due to... digitalisation leading to the creation of new forms of employment, which... are often not as regular or stable as traditional employment relationships and lead to reduced predictability for the workers concerned’.⁶

Our report engages with, and offers some answers and possible solutions to, these challenges. But the report has a deeper ambition that spans beyond the contingencies generated by particular technological developments or specific EU - or domestic - regulatory agendas. The report seeks to identify a novel analytical framework for reshaping and expanding the personal scope of application of labour law in the 21st century, and to assist the development of a coherent strategy for the ETUC to pursue this expansion on the basis of a set of compelling legal arguments.

From a methodological point of view, the present report was produced on the basis of both original research work carried out by its two authors and on the basis of a number of national reports compiled in respect of a representative sample of national legal systems, namely the Austrian, Belgian, French, Italian, Swedish, Spanish, German, and British systems. These reports were authored by a number of national legal experts and we would like to take this opportunity to express our gratitude to our colleagues Professors Elisabeth Brameshuber, Mathias Wouters, Emmanuel Dockès, Elena Gramano and Giovanni Gaudio, Samuel Engblom and Magnus Lundberg, Adrian Todoli, Monika Schlachter-Voll, and Mark Freedland. These colleagues, as well as being renowned authorities in their own national legal systems are also recognised experts in a number of other legal systems and supranational regulatory regimes, including those stemming from EU labour and social law, the International Labour Organisation, and the Council of Europe. Not only did these experts agree to respond to a detailed questionnaire produced by the two authors, but they generously shared with us their thoughts on the occasionally very complex set of issues that this final report elaborates on, and that cover both questions of national law and questions about the interaction of national and supranational systems of regulation. We also note that our own work benefited extensively from the research assistance provided by Mr Hitesh Dhorajiwala, a doctoral student at the Faculty of Laws of University College London.

5 Commission, ‘The European Pillar of Social Rights in 20 principles’ (*European Commission*), para 9 <https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en> accessed 30 January 2019.

6 Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Transparent and Predictable Working Conditions in the European Union’ COM (2017) 797 final, para 3.

Our own research work has greatly benefited from a number of pre-existing publications and the following sections of the present work elaborate further on some of the current academic and policy debates on the subject of the regulation of new forms of employment in general and of work relations in the gig-economy⁷ in particular. But in this introduction we would like to acknowledge, in particular, the contribution made to the current project by the concept of ‘personal work relation’, as originally developed by Professor Mark Freedland and the first author of the present report.⁸ This concept captures the fact that in modern labour markets, work can be provided in a variety of ways and through a range of modalities and patterns. These can range from the classic subordinate, bilateral, and continuous provision of employment, to more nuanced and complex forms of work, involving multiple parties and economic entities, and ultimately developing in the realm of autonomy and, in terms of their legal characterisation, self-employment. In developing the present project, one of our main hypotheses was that a concept of worker based on the idea of ‘personal work relation’, could usefully capture a wide range of employment statuses across a number of national (and probably supranational) legal systems. ‘Personal work’ could also serve as a watershed concept, leaving outside the scope of labour law (broadly understood as including individual and collective labour law but also employment equality law), work that is not personal, and is mainly (as opposed to occasionally or exceptionally) provided by means of dependents or substitutes, or as an accessory to capitalised and asset intensive (as opposed to labour intensive) business undertakings. Ultimately, the idea of ‘personal work relation’ can be used to define the personal scope of application of labour law as applicable to any person that is *engaged by another to provide labour*, unless that person is *genuinely operating a business on her or his own account*. While this report has taken an open mind in respect of a range of possible legal remedies and solutions to some of the challenges arising from the emergence of ‘new forms’ of employment, it is important to acknowledge that we have particularly benefited from the rich analytical framework that the ‘personal work relation concept’ provided to us.

After this short introduction, the following section 2 goes on to define more clearly the analytical contours of the present research project, and in particular the key legal questions that it sought to address. Section 3 offers a brief overview of the structure of the report. The following sections of the report go on to elaborate on a series of more detailed questions that, having been teased out and discerned in the questionnaire originally developed for our small comparative survey, are reconstructed in order to assess the viability of our approach in a comparative perspective. The last section concludes the report.

7 For the definition of gig economy, see also <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/gig-economy>

8 Mark Freedland, ‘Application of labour and employment law beyond the contract of employment’ (2007) International Labour Review3; Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011).

2. ANALYTICAL FRAMEWORK



The research primarily seeks to establish the extent to which the current legal frameworks shaping, at a national and supranational level, labour and social rights are capable of accommodating, and offer adequate protection to, various forms of non-standard work emerging in particular (but not exclusively) as a consequence of the rise of the so-called 'digital economy'. There is no doubt that the proliferation of working arrangements that are either intermediated or facilitated by the presence of a digital actor, typically operating in the form of an algorithmically regulated digital platform,⁹ are bringing to the fore a number of complex regulatory questions for both national and transnational labour law systems. Already in 2016, the EU Commission noted that 'working arrangements in the context of the collaborative economy are often based on individual tasks performed on an ad hoc basis', that in many ways escape the traditional boundaries of the standard employment relationship, but also acknowledged that these emerging trends are 'part of a more structural shift. There are increasingly blurred boundaries between the self-employed and workers, there is an increase in temporary and part-time work and multiple job-holding'.¹⁰ In a similar vein, one of the two authors of the present report emphasised, in previously published work, that many of the challenges arising from the proliferation of work arrangements in the 'digital-economy', 'such as employment status and the potential misclassification of employment relationships, extend indeed well beyond the boundaries of the gig-economy and, as such, it is preferable to examine them taking into account broader phenomena such as the casualization of the workforce, the informalization of the formal economy and the so-called "demutualization of risk" in modern labour markets', noting that 'forms of work in the gig-economy share several dimensions and issues with other non-standard forms of employment'.¹¹

The present report embraces this analytical perspective. It acknowledges that, as a consequence of economic, technological, and human resource management changes, some new forms of employment are indeed emerging that pose fundamental challenges to many of the established categories and institutions of labour law systems, national and supranational. But it also posits that a considerable share of these challenges is indeed developing in a continuum with other pre-existing and largely unaddressed demands arising from deep-seated changes affecting the organisation of the systems of production in post-industrial economies for a number of decades now. As such, the more normative suggestions presented and explored in the following sections of this report are best understood as broad ranging solutions to vexed regulatory questions that extend beyond the confines of the gig-economy, and seek to address the ability, or lack thereof, of a growing number of non-standard workers to enjoy the right to collective bargaining and decent working conditions.

9 Miriam A Cherry, 'Beyond Misclassification: The Digital Transformation of Work' (2016) 37 *Comparative Labor Law & Policy Journal* 577; Valerio de Stefano, 'Negotiating the Algorithm': Automation, Artificial Intelligence and Labour Protection' (2018) *Comparative Labor Law & Policy Journal* forthcoming.

10 European Commission, 'A European agenda for the collaborative economy' (Communication) COM (2016) 356 final, 11.

11 Valerio De Stefano, 'The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig-Economy' (2016) 37 *Comparative Labor Law & Policy Journal* 471, 473.

3. STRUCTURE OF THE REPORT

The report begins by exploring the question of the adequacy of existing legal and industrial relation systems grappling with the definition of the personal scope of labour protection legislation. The following section explores the classic ‘who is a worker?’ question, offering an assessment of the current state of the law in terms of the personal scope of application of standard employment protection legislation in a number of European countries, and in respect of a number of relevant supranational systems of regulation (mainly the EU, the Council of Europe, and the ILO). This is an exercise that has been performed before by a number of authors and reports,¹² but remains a worthwhile starting point for our present enquiry. In this context, the report offers a clear view of the many mechanisms devised in recent years at a national and supranational level to stretch the scope of application of standard employment legislation in order to cover work relations that, at some point in history, might have been seen as atypical or non-standard to the point of falling through the safety net provided by labour laws (e.g. revisions of the scoping concepts defining standard employment; legal presumptions; new doctrines on sham self-employment; etc.).

Section 5, moves the scope of our analysis beyond standard employment in order to offer a clearer taxonomy of the typologies of work relations that prevail and evolve outside the narrower protective coverage of the bulk of employment protection legislation. In doing so it explores further two key legal questions. Firstly, it considers whether particular (national or supranational) legal systems covered by the project essentially premised on a ‘binary model’ (e.g. employee vs self-employed), or if they contemplate intermediate categories of quasi-subordinate or semi-dependent workers (as in the case of the UK, Spain, or Italy/Germany/Austria). Are these intermediate categories essentially understood as sub-species of the self-employment genus, or are they genuine third categories? What distinguishes them from the legal conceptualisation of standard employees, on the one hand, and genuine self-employed, on the other? Is this distinction primarily based on criteria of economic dependence, or on criteria of attenuated control and subordination? Secondly, section 5 goes on to explore the rights and attributions recognised to workers that are not classified as ‘employees’ (i.e. which labour and social standards, either of statutory or collective origin, already apply beyond the scope of the employment relationship, or ‘*au-delà de l’emploi*’), but instead as ‘genuine self-employed’.

Section 6 moves on to assess the conceptual boundaries and internal complexities of the notion of self-employment. In a number of legal systems (most notably the UK) the notion of self-employment is extremely heterogeneous and, in our view, conceptually confusing. The term is often used as referring to a variety of forms of both personal and non-personal work, jumbling individual personal work profiles as diverse as that of the Deliveroo cyclist and the owner of the dental practice specialising in prosthetic dentures (both ‘owning’ their own ‘tools’). The category can go as far as including self-employed persons that hire their own employees, and that would be better understood as performing genuine entrepreneurial activities in an employer capacity. For instance, Eurostat uses the term self-employed as including both the class of ‘Self-employed persons with employees’ (SELF_S) and that of ‘Self-employed persons without employees (own-account workers)’ (SELF_NS). In fact Eurostat’s glossary section confusingly adds that ‘A self-employed person is the sole or joint owner of the unincorporated enterprise’, but that ‘Self-employed people also include: unpaid family workers; outworkers (who work outside the usual workplace, such as at home); workers engaged in production done entirely for their own final use or own capital formation, either individually or collectively’. A key challenge of this report embraces is to identify an overarching category that can assist with rationalising this extremely fragmented constellation of work relations.

Section 7 explores both past and present collective practices seeking to regulate the terms and conditions of employment of a range of personal work providers, both subordinate and autonomous. From the classic Italian ‘economic collective agreements’ for commercial agents, to the inclusion of terms in UK collective agreements applicable to subordinate and freelance journalists, to the more recent disputes surrounding the collective representation of Irish voice-over actors or Dutch casual orchestra players, there is no shortage of both traditional and innovative approaches for the, national or sectoral, collective regulation of the terms and conditions of employment of non-standard workers. This includes sectoral approaches that seek to restrict or subject to quotas the presence of non-standard forms of work.

12 To name a few, B. Waas, G. Heerma van Voss (eds), *Restatement of Labour Law in Europe: Vol I: The Concept of Employee* (Hart, 2017); ILO, *Non-standard Employment Around the World – Understanding Challenges, Shaping Prospects* (ILO, 2016), 11; G. Davidov, M. Freedland, and N. Kountouris, ‘The Subjects of Labor Law: “Employees” and Other Workers’, in M. Finkin and G. Mundalac (eds), *Research Handbook in Comparative Labor Law* (Edward Elgar 2015), 115; G. Casale (ed.), *The Employment Relationship – A Comparative Overview* (Geneva, ILO).

Section 7 inevitably brings to the fore a number of issues that are explored in greater detail in the following section 8. In particular the extent to which these collective practices may encounter obstacles arising from a range of area of regulation, including EU Competition Law, EU law on freedom of establishment and free movement of services, and by the growing recognition in CJEU case-law of the fundamental freedom to conduct a business. However, this analysis also calls for the identification of the residual mechanisms offered at a national level (and resisting in the shadow of the EU's 'social market economy' model) to preserve some of the products of collective bargaining as applicable to all workers, including those nominally self-employed, either as exceptions to more dominant market integration paradigms or as objectively justified by reference to the public interests pursued by collective agreements (see for instance the recently approved Irish Competition Amendment Act 2017).

Sections 9 and 10 are more normative in character. Drawing heavily on the comparative analysis carried out in the earlier parts of the report, they actively explore the conceptualisation of a new European regulatory and policy framework capable of rectifying the protective gaps emerging in national and supranational systems of regulation, by means of a set of actions including: i) identifying national and supranational legal and industrial relation practices that are conducive to increased inclusivity and protection in the labour market; ii) identifying a European framework for the comprehensive protection, specifically, of self-employed workers that, on account of their status, remain excluded from the bulk of national and supranational employment rights (including those contained in relevant sectoral collective agreements); and iii) identifying a central organising and normative idea capable of justifying a revision of the currently prevailing (but increasingly challenged, including in the analyses and Opinions of CJEU Advocates General) view that the use of technological platforms as 'intermediary entities' for the provision of digital services between service providers (viewed as 'businesses' or alternatively as workers that may be availing themselves of a certain amount of capital to offer a personal service) and paying customers (that may be exercising a certain amount of control on the service provider), effectively excludes the owner or beneficiary of the digital platform from any or most of the liabilities arising in national and European labour laws (including those arising from collective bargaining).

More specifically section 9 explores and assesses five key alternative reform approaches. The first approach is the one currently being pursued by the EU institutions, and it amounts to gradually strengthening and clarifying (without necessarily expanding) the EU 'worker' definition, including by means of judicial interpretation and through the adoption of new regulatory instruments, such as Directives and Recommendation. The second approach is the one developed by Ewing, Hendy and Jones, in their *Manifesto for Labour Law*, and in their more recent publication *Rolling out the Manifesto for Labour Law* advocating a broader construction of the personal scope of domestic labour rights, by referring to any person 'engaged by another to provide labour' and that 'is not genuinely operating a business on his or her own account'.¹³ The third approach is the one recently developed by Emmanuel Dockés and a number of other French academics, seeking to extend the scope of application of domestic labour law by reference to a finer-grained classification of 'dependent' employees and 'autonomous' or 'externalised' salaried workers.¹⁴ The fourth approach is best exemplified by the broad and universalistic aspirations implicit to the broad and far reaching personal scope advocated in art 1 of CGIL's *Carta dei diritti universali del lavoro - Nuovo statuto di tutte le lavoratrici e di tutti i lavoratori* (2016). A more limited fifth approach advocates the extension of a limited number of fundamental labour rights (e.g. equality, freedom of association) to self-employed workers. Finally, section 9 also explores an intermediate approach suggested by labour economists such as Harris and Kruger¹⁵ that an intermediate category of 'independent worker' or 'dependent contractor' ought to be introduced and generalised and become the new regulatory paradigm for the application of some (not all) employment protection legislation.

13 Keith D. Ewing, John Hendy, and Carolyn Jones (eds), *A Manifesto for Labour Law: towards a comprehensive revision of workers' rights* (IER 2016) 35; and Keith D. Ewing, John Hendy, and Carolyn Jones (eds), *Rolling out the Manifesto for Labour Law* (IER 2018) 36.

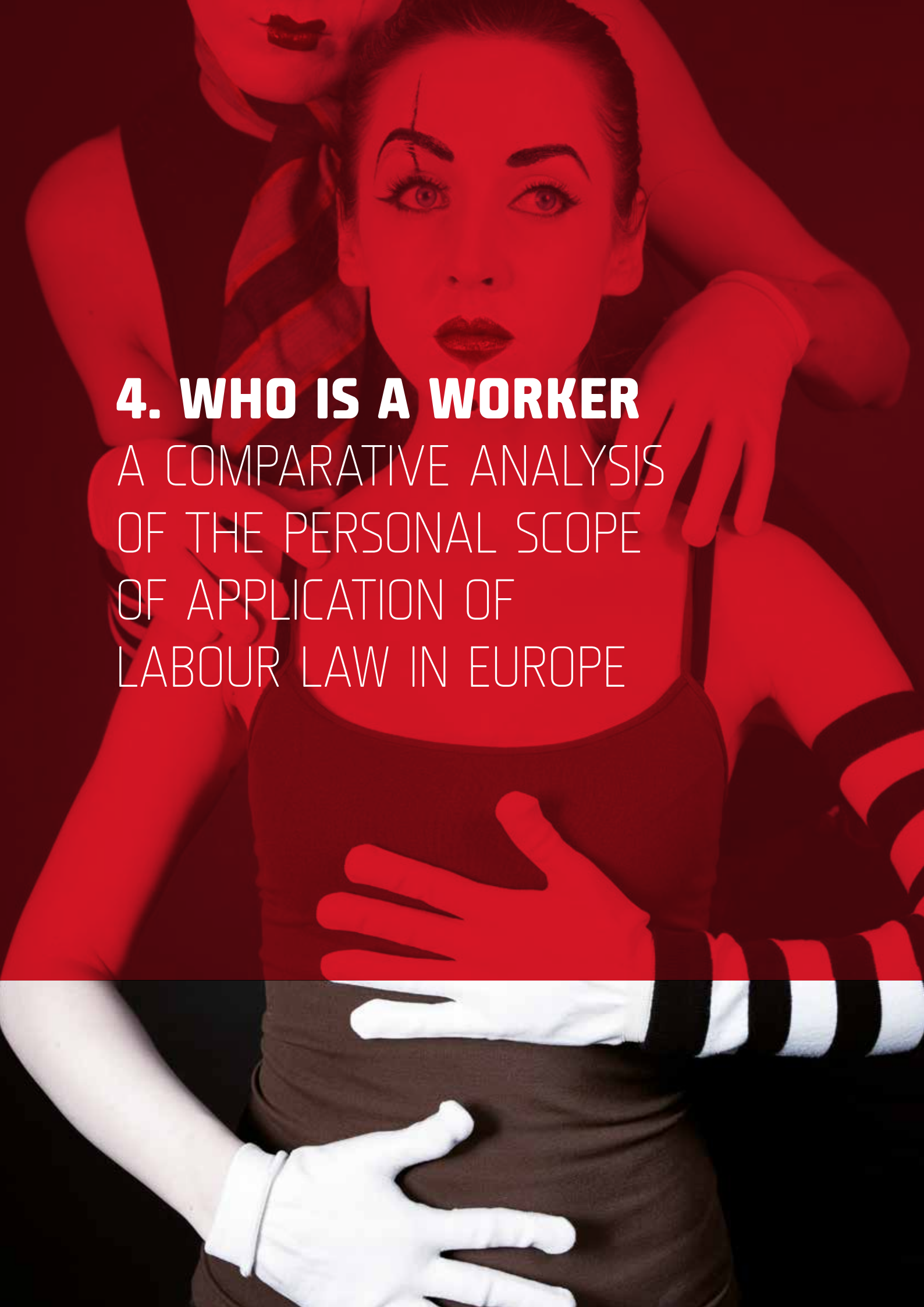
14 Emmanuel Dockés (ed), *Proposition de Code du Travail* (Dalloz 2017), arts L. 11-1 - L. 11-18.

15 Seth D. Harris and Alan B. Krueger, 'A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"' (2015) The Hamilton Project, Discussion Paper 2015-10 < http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf > accessed 30 January 2019

Section 10 offers a normative analysis of the concept of ‘employing entities’. We note that both old and new non-standard working arrangements have often blurred the conceptual and normative lines between the concepts of ‘employer’, ‘client’, and ‘customer’. This conceptual blurring carries a baggage of regulatory confusion and contestation between various legal disciplines, including labour law, competition law, commercial law, and consumer law. This is true of some of the ‘new’ forms of work, such as jobs performed through digital platforms, but it has often been recognised as a problem (albeit not an intractable one) in respect of other (modern and pre-modern) forms of ‘freelance’ or ‘own account’ work. Some more traditional definitions of ‘employer’ are unlikely to be relevant in an increasingly complex labour market, where the various functions traditionally performed by the employer are routinely fragmented and, often artfully, dispersed among a plurality of parties to a work relation. We note however that there have been some important jurisprudential and doctrinal advances in identifying and disentangling the various conceptual, functional, and regulatory limbs of the ‘who is the employer?’ question, and that our conceptual, analytical, and normative framework, premised on the centrality of the ‘personal work relations’ concept, would both assist in clarifying further the answer to this question and, no less importantly, would identify the types of obligations and liabilities (individual and shared) arising in each context. Our suggestion is that it may be useful to introduce a legal presumption of employer status upon the entity, or entities ‘substantially determining’ the terms of engagement and employment of the worker. It is clear to us that where more than one party is so responsible (and regardless of whether one party is more responsible than the other, as long as both are ‘substantially’ responsible), the worker may address a claim against either or both putative employers.

The concluding section recapitulates the main findings of our enquiry and offers a list of possible reform approaches and strategies to the complex challenges arising from the emergence of increasingly diverse and complex new forms of employment in European labour markets. In this concluding section it will become apparent that, in our own view, a range of fundamental labour and social rights have a universalistic vocation and ought to be applied to all those providing personal work and services including, under certain circumstances, workers that are currently perceived as self-employed professionals, and that may be availing themselves of a limited and ancillary amount of capital or third-party services as an non-substantial contribution to their pre-dominantly personal labour provision. This requires both an extension of the coverage of these rights and their re-elaboration for the purposes of applying them to particular modalities of personal work (for instance a right to regular working hours for casual and on-call/zero-hours workers as a guarantee to ‘fair and just working conditions’).

We believe, and have argued in our own published work, that there are sound normative reasons to advocate such extensions, including of unjustified contractual termination. We are also convinced that this approach is further corroborated by reference to a series of national and supranational regulatory trends, including those currently developing at the EU level in the context of the ‘European Pillar of Social Rights’ Agenda and the ‘European Agenda for the Collaborative Economy’, and by a number of Council of Europe and International Labour Organisation instruments and policy debates. Crucially it is also our view that an extension of the scope of the employment relationship should not result in a watering down of the substantive labour law protections enjoyed by workers.

A woman in a black leotard with white gloves is the central figure, looking directly at the camera with a serious expression. Her hands are resting on her hips. Behind her, another person's hands are visible, resting on her shoulders. The background is dark, and the overall lighting is dramatic, with a strong red tint across the top half of the image.

4. WHO IS A WORKER

A COMPARATIVE ANALYSIS
OF THE PERSONAL SCOPE
OF APPLICATION OF
LABOUR LAW IN EUROPE

The definition of the personal scope of application of any labour law system is an intensely and deeply political exercise. This exercise is shaped by fundamental decisions over the distribution of risks, rights, and duties between workers, employers, and society at large. It has implications in terms of the allocation of resources, both private and public, in terms of the organisation of working and business arrangements, and in terms of the operation of systems of production. There is no doubt that it is also a highly technical and even technocratic exercise, but there is nothing ontological about it. ‘Employees’, ‘workers’, the ‘self-employed’ (‘bogus’ or otherwise) do not exist *in rerum natura*. There can no such thing as an ‘elephant test’¹⁶ for the identification of a ‘contract of employment’, or for identifying an ‘employee’ or a ‘self-employed’ contractor. These concepts, unlike elephants, do not exist on their own. They are instead human constructs and ought to be made (and unmade) on the basis of normative choices. Most European countries share some commonalities in the respective definition of their own national personal scopes of application. But national experts participating to this research project have also alerted us to the existence of a number of important differences.

Four main commonalities

1. All legal systems covered by the present project do premise their national labour law systems on a fundamental binary divide between subordinate or dependent employment on the one hand and autonomous or independent self-employment on the other. This binary divide is very much the starting point for all labour law systems, even though we haste to say that it is very rarely the end point, as the following section will further explore. This is so even for systems that encompass intermediate categories of semi-dependent workers, such as Spain, the UK, Italy, and to a certain extent Germany and Austria, that could be best described as embracing a ‘modified binary divide’, premised on the distinction between employees and self-employed but also contemplating variously defined intermediate employment statuses in-between. All our national experts have pointed out to us that functionally equivalent concepts such as (personal) subordination, control, or the performance of work under the direction of an employer, are variably referred to as the key criteria or qualifying elements of the concept of employment. We know that this is also the case as far as the personal scope of application of EU labour law is concerned, premised as it is on the distinction between workers and self-employed, and on the general proposition that ‘the authors of the Treaty did not intend that the term ‘worker [...] should include independent providers of services who are not in a relationship of subordination with the person who receives the services’.¹⁷ The two concepts are separate and juxtaposed, they are binary, and, as we shall see, for most systems this has clear normative implications.
2. Most, though not all, of these systems seem to rely on relatively simple, at times even basic, statutory definitions of the concepts of ‘employment’, or ‘employee’, or ‘contract of employment’, or ‘employment relationship’ to define the domain of work relations that is typically covered by labour law. These are usually concepts that are developed further by courts, on the basis of both pre-existing contract law concepts but also on the basis of autonomous labour law concepts. Our Swedish, UK, French, Italian, Austrian, and Spanish experts have very much emphasised the relative paucity of the national statutory definitions of contract of employment contained in their domestic laws.

Belgian law would appear to offer a more detailed and elaborate definition of the term ‘work relationship’, and in many ways so do the recent 2017 German amendments to the German Civil Code (art. 611a BGB). Art 333 of the 2006 Belgian Law Concerning Work Relations offers a fairly articulate list of general criteria to identify a work relation, and the following art 334 further adds more specific criteria to discern work relations in particular sectors.¹⁸ Both the Belgian and the German experts have emphasised that these definitions in many ways incorporate the case-law developed, over the years, by their respective national courts. And, overall, these tests are not radically different to the ones deployed and relied upon by judges in other legal systems. More broadly, it is possible to appreciate that courts appear to have

¹⁶ Lord Wedderburn, *The Worker and the Law* (Penguin 1986, 3rd edn) 116.

¹⁷ Case C-256/01 *Allonby v Accrington & Rosendale College* [2004] ECR I-873, para 68.

¹⁸ The provision expressly clarifies that these additional criteria ‘ne peuvent consister qu’en des éléments relatifs à la présence ou l’absence d’un lien d’autorité’ – ‘kunnen enkel bestaan uit elementen die al dan niet op het bestaan van een gezag wijzen’, further exemplifying the centrality of the subordination element.

Terms such as ‘worker’, or ‘contract of employment’, or ‘employment relationship’, are indeed referred to in both primary and secondary EU law instruments, but hardly ever defined in any meaningful way.

developed a range of fairly similar tests (sometimes by reference to the use of a ‘multi-factor test’) for the purposes of identifying subordinate employment contracts or relations. Tests such as control and personal performance, economic risk, integration, are unequivocally part of the common core of criteria for identifying subordinate employment across all systems covered by this report.

The relative paucity of national definitions is by and large mirrored by the approach adopted at a supranational level. European lawyers are suitably familiar with the fact that terms such as ‘worker’, or ‘contract of employment’, or ‘employment relationship’, are indeed referred to in both primary and secondary EU law instruments,

but hardly ever defined in any meaningful way. As noted in the previous paragraphs, it is really the Court of Justice of the EU, in cases such as Case C-66/85, *Lawrie-Blum*, Case C-256/01 *Allonby*, and Case C-216/15, *Betriebsrat der Ruhrlandklinik*, that has taken the lead in fleshing out a pan-European notion of worker as applicable to most or all EU labour law instruments, by anchoring it the concept of subordination. Some of the more recent formulation of the ‘EU worker’ concept are noteworthy for being particularly broad and comprehensive, going as far as including workers in non-standard contracts,¹⁹ and even volunteer workers,²⁰ but the requirement to work ‘for and under the direction of another person’²¹ has remained a constant. So as much as one can claim that the definition of the personal scope of application of labour law is a deeply political exercise, there is evidence to suggest that courts decisions and case-law play a dominant role in defining its contours, both nationally and at the EU level.

3. The concept of ‘self-employment’ tends to receive an even lesser degree of attention in terms of its conceptualisation and definition by either law or jurisprudence. A possible reason for this lack of consideration is that most legal systems have traditionally seen self-employment as a residual category: if somebody is engaged in paid work but does not fit the characteristics of an employee working under a contract of employment or employment relationship, then he/she will be most likely be considered, almost by default, a self-employed.
4. Most systems, at least on paper, anchor their notion of employment on contractual principles, but at the same time they accept the idea that an employment relationship, can exist even outside or in the absence of a properly formed contract of employment, or even against express contractual terms that deny its existence when such terms are clearly incongruent with the reality of the relationship itself. Virtually every expert has confirmed that their systems contain doctrines assisting judges with reclassifying sham or false self-employed arrangements. Incidentally, these traits would appear to shape both national and the EU legal systems of labour regulation, with CJEU cases such as *Allonby*²² and *FNV Kunsten*²³ clearly demonstrating both the willingness of the Court to reclassify self-employed persons as workers when their independence is merely notional, thereby disguising an employment relationship, and its ability to instruct national referring court to do the same, where necessary.

19 Case C-428/09 *Union syndicale Solidaires Isère*, [2011 1 CMLR 38]; Case C-316/13 *Fenoll* [2016] IRLR 67.

20 Case C-518/15 *Ville de Nivelles v Rudy Matzak* (21 February 2018, not yet reported).

21 *ibid*, para 28.

22 *Allonby* (n 12) para 71.

23 Case C413/13 *FNV Kunsten Informatie en Media* [2015] 4 CMLR 1, paras 31-42.

Differences between countries

There are however also some important differences. Systems may be using the same or similar terms, tests, and even jurisprudential doctrines of adjudication, including for instance when sham arrangements are orchestrated to misclassify employees as self-employed. But some experts told us that the outcomes of these processes can be quite different in practice. For instance, our Swedish and French experts have expressly suggested that their national systems tend to embrace rather broad concepts of employee. Our Swedish experts noted that ‘from a comparative perspective, the Swedish concept of employee is probably rather wide. In a comparative study published in 2003 one of the present authors found it to be wider than the concepts of employee used in French, US and British labour law, including UK “workers”’.²⁴

Our French expert noted that domestic courts can sometimes apply the concept of subordination rather flexibly and expansively and as effectively amounting to a concept of economic dependence, also pointing out that the French Labour Code contains express provisions seeking to assimilate particular typologies of workers, such as journalists, models, performing artists, etc., to the legal regime applicable to standard employees. The concept of economic dependence, and a number of legal presumptions also appear to be relevant in the Belgian system and, in a more limited way, in Austria. Our Belgian expert pointed us to the existence of a “specific classification test”, introduced by the social partners for the purposes of classifying work relationships in industries susceptible to social fraud. These criteria are generally more orientated towards the assessment of economic dependency between the parties involved (e.g. does the worker receive periodic payments) rather than a narrower view of subordination. Our Spanish expert pointed out that, until a decade or two ago, it was not uncommon for courts to deploy the general presumption that work is typically performed by means of employment contracts, but this practice would appear to be less common these days. It may be worth noting that while the CJEU decision in Case C-255/04 *Commission v France*,²⁵ fundamentally challenged the structure of the French ad hoc presumptions of salaried status, successive amendments of the French Labour Code retained the presumption by excluding from it workers that were expressly ‘recognised’ as independent self-employed workers in their EU country of origin.²⁶

By contrast, it is suggested that the UK notion of ‘employee’ working under a contract of service or contract of employment, as enshrined in section 230 of the Employment Rights Act 1996, emerges as a particularly narrow one, mainly due to the relevance of a particular legal test created by the courts, the ‘mutuality of obligation’ tests, that tends to exclude large groups of intermittent and casual workers from employment rights.²⁷ While other legal systems to consider continuity as a relevant element of employment contracts, none has used this element so as to exclude vast swathes of casual or zero-hours contract workers. Also, presumptions, general or specific, do not exist in UK labour law. These limitations are only partly mitigated by the growing willingness of UK courts and tribunals to reclassify some nominally self-employed workers that are subject to some form of control or dependence vis-à-vis a main client or principal as ‘limb-b workers’, under s 230(3)(b) of the Employment Rights Act 1996, thus guaranteeing to them at least some basic protections in terms of working time and minimum wage rights.²⁸

For a more detailed analysis of the national approaches in defining the concept of standard employee we defer to the very carefully drafted national reports attached to this main report. But it is clear to us that the binary divide between employment and self-employment remains an important, and as we shall see in the following section, normatively relevant consideration.

24 Samuel Engblom, ‘Self-employment and the Personal Scope of Labour Law – Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States’ (2003) Florence, European University Institute, EUI PhD Theses <<http://cadmus.eui.eu/handle/1814/4616>> accessed 30 January 2019.

25 Case C-255/04 *Commission v France* [2006] ECR I-5251.

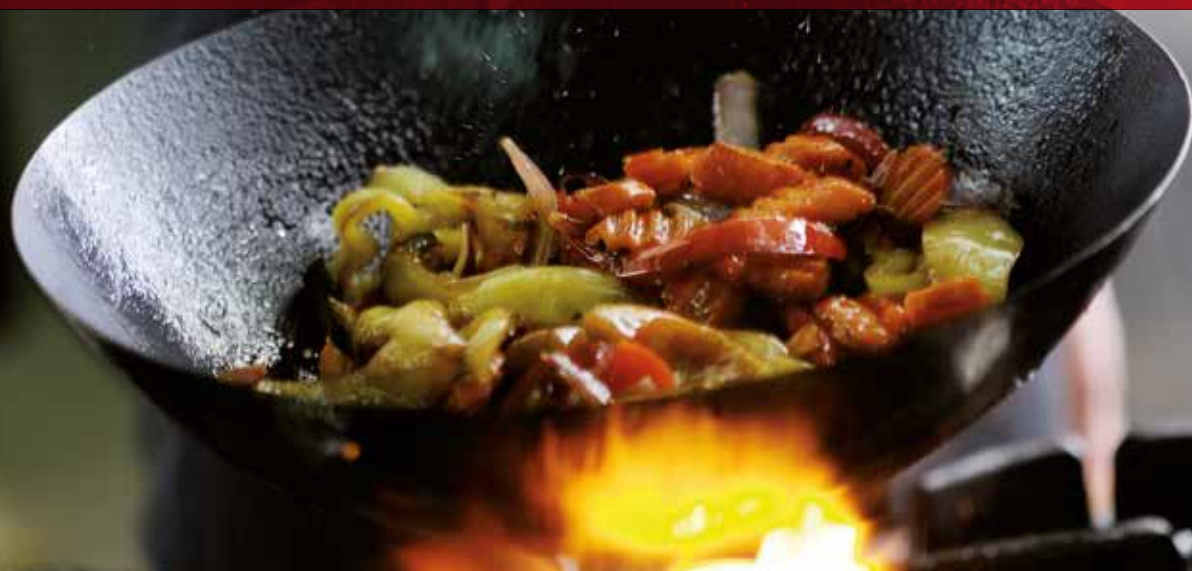
26 See Code du Travail, art L 7121-5.

27 cf Nicola Countouris, ‘Uses and Misuse of Mutuality of Obligations’ in Alan Bogg, Cathryn Costello, ACL Davies, and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart 2015) 169. See also Hitesh Dhorajiwala, ‘Secretary of State for Justice v Windle: The Expanding Frontiers of Mutuality of Obligation?’ (2017) 46 ILJ 268

28 See for instance *Pimlico Plumbers Ltd and another v Smith* [2018] UKSC 29, [2018] ICR 1551 ; *Aslam v Uber* (28 October 2016) Case Numbers 2202551/2015 & Others, [2017] IRLR 4. This judgment was upheld by the Employment Appeal Tribunal and, in late 2018, also by the Court of Appeal (19 December 2018) Case No: A2/2017/3467, [2018] EWCA Civ 2748.

A chef in a kitchen, smiling, with a red overlay. The chef is wearing a dark jacket and is holding a wooden spoon, stirring food in a wok. The background is blurred, showing other kitchen equipment and a bright light source.

5. BEYOND EMPLOYMENT: QUASI-AUTONOMY AND THE SELF-EMPLOYED IN A COMPARATIVE PERSPECTIVE



As mentioned in the previous section, the traditional understanding of the employment relationship/contract of employment concepts has been and remains almost invariably tied to the presence of some degree of subordination of the employee to the employer or of some control of the latter over the former. The consequence of this focus on subordination has been the exclusion from the domain of employment protection legislation of an increasingly large number of work relations that do not conform with these (stereo)typical forms of control of the worker by the employing entity. In some European countries, as well as in other areas of the world,²⁹ lawmakers reacted to this phenomenon by extending, to varying degrees, more or less important portions of labour and social protection rights to some of these workers. It is important to clarify that, in the countries reviewed in this study, these policies did not create an autonomous legal type that would break the binary divide between employment and self-employment. Rather, the intermediate “category” of quasi-subordinate or economically dependent workers is broadly understood as constituting a sub-group of self-employment. Austria, Germany, Italy, Ireland, Spain, and the United Kingdom all fit this ‘modified binary divide’ model.³⁰ However, it is also worthwhile mentioning that other countries, notably France, Sweden and, in several ways, Belgium, have resisted the emergence of intermediate categories of quasi-subordinate employment, and the prevalent approach has been, instead, to include economically dependent workers, and other typologies of semi-autonomous workers, within the scope of employment regulation by extending to them all relevant labour law protections.

Another noteworthy consideration in this context is that national policies and practices in this area vary considerably. It is arduous, if not impossible, to find a sufficiently robust common thread between them other than the fact that labour and social protection was extended beyond the area of employment. In particular, it is clear that the scope of this extension has been and remains exceptionally diverse. This is true at the “objective” level, with the type and extent of the protections extended varying dramatically among countries, and it also occurs at the “subjective” level, with regard to the criteria used to identify the relevant workers.

Starting from this subjective level, it is possible to distinguish between those countries that use a quantitative threshold of income depending on the same principal or a limited number of principals to identify economically dependent workers, and countries that focus instead on the element of coordination between workers and their principals’ organisation. In Germany, for instance, the so-called employee-like persons (“*arbeitnehmerähnliche Personen*”) primarily either provide their services to just one principal or generate more than 50 per cent of their income from only one principal.³¹ In Spain, dependent self-employed workers – “*trabajadores autónomos económicamente dependientes (TRADE)*” – are self-employed persons who work directly and predominantly for a principal and depend on this principal for at least 75% of the income deriving from their economic or professional service.³² It may also be worth mentioning that a recent reform to the Irish Competition Act has similarly introduced a quantitative share category of “fully dependent self-employed workers”, whose collective bargaining and agreements may be immune from competition law in some circumstances, and that are defined as individuals who “perform services for another person” and “whose income in respect of the performance of such services (...) is derived from not more than 2 persons”.³³

Other legal systems focus on criteria based on the personal link of coordination of the worker with the principal’s organisation. In Austria, *freie Dienstnehmer*, or “semi-dependent workers” (“SDW”), perform time-related services for another person. Thus, unlike a self-employed person operating a business under a service contract (“business persons” or “BP”), SDWs do not owe any success, namely they do not bear the organisational and financial risk for the work provided. Therefore, SDWs are paid for the time worked, like employees, and not after successfully fulfilling a specific task, like BPs. Nonetheless, compared to employees, SDWs are less personally dependent from the other party, and to a certain extent, can also make use of substitutes.³⁴ In Italy, *lavoratori parasubordinati* are self-employed workers who collaborate

29 See ILO, *Non-Standard Employment Around the World: Understanding Challenges, Shaping Prospects* (ILO 2016).

30 For the rather complex case of the “worker” in the United Kingdom, see *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] ICR 730. See also Jeremias Prassl, ‘Pimlico Plumbers, Uber Drivers, Cycle Couriers, and Court Translators: Who is a Worker?’ (2017) 33 Law Quarterly Review (Forthcoming).

31 As reported by our German national expert answering to our questionnaire, Prof Monika Schlachter. See § 12a *Tarifvertragsgesetz*.

32 Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo.

33 Competition (Amendment) Act 2017.

34 As reported by our Austrian national expert answering to our questionnaire, Prof Elisabeth Brameshuber.

with a principal under a continuous, coordinated and predominantly personal relationship, even if not of subordinate character. In 2017, lawmakers further specified that workers must autonomously organise their working activities, according to the coordination measures agreed with the principal.³⁵ Starting from 2015, however, legislation aimed at extending the full application of employment protection to some of these workers has been put into place, albeit with limited success (see below). In the United Kingdom, some minimum labour protections, mainly in the areas of working time rules and minimum pay, apply to “workers” as defined by s 230(3)(a)-(b) of the Employment Rights Act 1996, a category that includes both persons under a contract of employment and, crucially, persons who perform personally any work or service under any other contract, excluding those carried out in a professional or business capacity.³⁶ The term ‘worker’ is also used in s 296 (1)(b) TULRCA 1992, for the purposes of UK collective labour rights. To the extent that this term is similar to the ‘worker’ concept deployed in s 230 ERA 1996, it is possible to argue that the scope of application of UK collective labour law is, or ought to be, broader than that of UK individual employment law and that it possibly includes some quasi-autonomous workers. However, the recent decision by the UK Central Arbitration Committee in the *IWGB v Deliveroo* case,³⁷ would appear to interpret the concept of ‘worker’ in the TULRCA 1992 context as essentially equivalent to that attached by UK courts to the ‘worker’ definition under s. 230 ERA 1996.

The recent Irish competition law reforms of 2017 may be worth mentioning more expressly as their adoption introduced two categories of workers, beyond “employees”, that may be allowed to engage in collective bargaining (see below). The first category is the one of “false self-employed worker”, defined as means an individual who (a) performs for a person (‘other person’), under a contract (whether express or implied and if express, whether orally or in writing), the same activity or service as an employee of the other person, (b) has a relationship of subordination in relation to the other person for the duration of the contractual relationship, (c) is required to follow the instructions of the other person regarding the time, place and content of his or her work, (d) does not share in the other person’s commercial risk, (e) has no independence as regards the determination of the time schedule, place and manner of performing the tasks assigned to him or her, and (f) for the duration of the contractual relationship, forms an integral part of the other person’s undertaking. And as noted above, the law also introduced another category of worker, the “fully dependent self-employed worker”, namely an individual “(a) who performs services for another person (whether or not the person for whom the service is being performed is also an employer of employees) under a contract (whether express or implied, and if express, whether orally or in writing), and (b) whose main income in respect of the performance of such services under contract is derived from not more than 2 persons”.³⁸

35 Civil Procedural Code, art 409.

36 See, for instance, Employment Rights Act 1996, s 230.

37 *Independent Workers’ Union of Great Britain (IWGB) v RooFoods Limited T/A Deliveroo* TUR1/985(2016), 14 November 2017

38 Competition (Amendment) Act 2017. In addition to this, some specific categories of self-employed workers were specifically made exempt from competition law under sch 4 of the Act. These are: “(1) Actors engaged as voice-over actors; (2) Musicians engaged as session musicians; (3) Journalists engaged as freelance journalists”.

5.1. PROTECTIONS AFFORDED TO QUASI-SUBORDINATE AND ECONOMICALLY DEPENDENT WORKERS

As already mentioned, the labour and social protections extended to quasi-subordinate and economically dependent workers vary considerably among countries. In many cases, this extension occurred in a piecemeal fashion, with subsequent pieces of regulation being extended or applied to these workers in a stratified way in time, instead of being enacted as a comprehensive regulation governing a specific status of quasi-subordinate and economically dependent workers, with only Spain being a considerable exception among the countries reviewed in this study.

Italy

Italy is an example of this stratified approach. In 1973, Parliament reformed the Civil Procedure Code and established a specific procedure of employment and labour disputes. This procedure was extended to “workers who collaborate with a principal under a continuous, coordinated and predominantly personal relationship, even if not of subordinate character”, which later came to be known in practice as “*lavoratori parasubordinati*”.

No substantial changes to the notion of employment or self-employment were intended, nor any significant change in the regulation of the employment relationship was included in this reform. Nonetheless – as reported by our Italian national expert – with this reform Italian lawmakers nominated and therefore acknowledged that working relationships which were continuous over time, that implied a certain coordination between the worker and the principal, and that were conducted mainly ([or] exclusively) personally by the worker could be carried out [...] by an independent contractor”, i.e. without giving rise to an employment relationship. This had the effect of legitimizing “a relationship of self-employment characterized by some elements that had traditionally been considered to be typical of the model of subordination, such as the coordination between the principal’s business organization and the worker’s activity, the duration over time of the contractual relationship with the principal and the personal nature of the working performance”. In fact, the law sanctioned that self-employment was fully compatible with a long-lasting work relationship and with a situation where the worker had to coordinate with the principal’s organization.

“The effect was disruptive”. After this reform, these collaborations spiked. Employers felt entitled to qualify employees as *parasubordinati* to avoid the costs and obligations deriving from a regular employment relationship, which lead to an “exponential increase in litigation on the matter”. The Italian lawmakers’ reaction to this phenomenon arrived quite late. Starting from the 1990s, social security contributions for parasubordinate workers were progressively increased to approach the cost of contributions for an employment contract.³⁹ These costs were to be borne by workers for one-third, the outstanding contributions to be paid by the other party. Far from discouraging recourse to these forms of work, however, this progressive assimilation of social security treatment was perceived as an additional legislative acknowledgement of parasubordinate work. A substantial legal answer arrived only in 2003, with Decree No 276 of 2003 (known as the “Biagi Decree”), which regulated “work based on a project”. The Decree required that the parasubordinate work had to be executed in the performance of “one or more specific projects determined by the principal and managed independently” by the worker. Specific forms of minimum protection were provided for these workers such as maternity, parental and sickness leave. Contrary to the lawmakers’ expectations, however, the Decree “created a certain level of uncertainty around project work and multiplied the possible contractual means to regulate a working relationship, by adding a new contract that for some [commentators] was a hybrid between self-employment and subordination.”

The Italian regulatory framework was further amended starting from 2015, when lawmakers abolished entirely the regulation of “work based on project” and aimed at re-conducting the Italian system towards a binary model. On the one hand, a legal provision extended the full set of employment protections traditionally

39 To this day, however, social security contributions amount to circa 30% for parasubordinate relations and to more than 40% for employment contracts.

granted to employees to “workers who continuatively cooperate, by providing exclusively personal work, with a principal who organizes the methods of execution of the activity also with reference to the time and place of work (so-called hetero-organised workers)”.⁴⁰ The sought to address a substantial portion of *lavoratori parasubordinati*, by including them in the scope of full labour and employment protection. The practical outcomes of this reform, however, have so far been underwhelming, with courts proving quite attached to the notion and regime of para-subordination and at first even refusing to apply this reform to platform delivery-workers, a case that some commentators had identified as an ideal area of application of the new legislation.⁴¹ On the other hand, lawmakers introduced a regulation aimed at better protecting any self-employed worker, without differentiating between para-subordinate workers and other contractors (see below). A residual differentiation between these groups of self-employed workers remains, however, as the former still have access to labour courts and are subject to higher social security contributions.

Austria

The objective scope of protection of quasi-subordinate and economic dependent workers in Austria is also quite complex. According to the national report by Prof Elisabeth Brameshuber, a differentiation can be made between rights applied to *freie Dienstnehmer* (SDWs) by way of analogy with employees, and “those rights that apply because of the explicit reference to SDWs in some statutes”. The first group of rights that apply to SDW in analogy to employees is provided under the Civil Code. Provisions concerning the termination of the employment contract, such as notice periods for termination, damages for termination without giving the due notice periods, general grounds for premature termination for a substantive reason, apply in analogy because SDWs also perform “time-related services”.⁴² Other statutes that apply to SDW are the Act that limits the payment of damages in case the employee/SDW has caused damages at work,⁴³ and the Act on Equality at Work.⁴⁴ The Maternity Protection Act also applies, albeit partially: since 2016, it is prohibited to employ SDWs two months before and two months after giving birth.⁴⁵

Nonetheless, other employment regulation, such as the Act on working time, the Act on resting periods or the Holidays Act do not apply to SDW. Most importantly, collective bargaining agreements do not apply to SDW. Accordingly, “since there is not universal statutory minimum wage in Austria, there is no specific ‘labour’ protection in terms of adequate wages for SDWs”. The only thresholds that apply are the ones established by general contract law.⁴⁶ In addition to labour law protections, SDWs in Austria are also subject to social security contributions. In this area, in fact, “there is hardly any difference” between employees and SDWs. “Thus, at least from a social security law point of view, economically speaking it has become less attractive over the years for employers” to engage a person as an SDW, this being also reflected in statistical data showing a material decrease of SDWs over the past decade⁴⁷.

40 Decreto Legislativo No 81 of 2015, art 2, para 1. *Disciplina organica dei contratti di lavoro e revisione della normativa in tema di mansioni, a norma dell'articolo 1, comma 7, della legge 10 dicembre 2014, no 183*. Exception to this extension can be agreed in collective agreements signed by the most representative trade unions. The text concerning Italy reported between quotation marks is directly quoted from the national report of Dr Elena Gramano.

41 Tribunale di Torino, judgment of 7 May 2018, no 778. This judgment has now been quashed by a judgment of the Corte d'Appello di Torino, judgment of 11 January 2019, which applied the provision to the case at hand. The motivations of this judgment have not been made public yet. From the operative part of the judgment, which is already public, it appears that the Court applied labour regulation only partially to these workers.

42 The national report, however, also highlights that notice periods for SDWs are still much shorter than the ones that apply to white collar workers.

43 *Dienstnehmerhaftpflichtgesetz* (Employees' Liability Act), DHG.

44 *Gleichbehandlungsgesetz*, GIBG.

45 *Mutterschutzgesetz*, MSchG, § 1 para 5, § 3 and § 5 paras 1 and 3.

46 eg “*bonos mores*”, according to ABGB, § 879, “*Wucher*” (Usury) according to ABGB, § 879 para 4 and “*laesio enormis*” according to ABGB, § 932.

47 “From nearly 24000 in 2009 to around 17.000 in 2015”; cf WKO, ‘Beschäftigungsverhältnisse freier Dienstnehme 2011 - 2017’ (WKO Statistik) <http://wko.at/statistik/bundesland/FreieDienstn.pdf> accessed 30 January 2019. The text concerning Austria reported between quotation marks is directly quoted from the national report of Prof Elisabeth Brameshuber.

Germany

In Germany, some status explicitly extend their scope of application to “employee-like persons”. The most prominent example is the *Tarifvertragesgesetz*, whose definition of “employee-like persons” is used as an indicator “for establishing the status as a member of the third category in general”.⁴⁸ This act extends to these workers the right to collective bargaining and to have their working conditions regulated by collective agreements, which includes the right to participate in collective action. Other protections explicitly extended to employee-like persons by different statutes are the right to 24 days of paid annual leave per year,⁴⁹ regulation concerning occupational safety and health⁵⁰, and anti-discrimination regulation based on EU law.⁵¹

United Kingdom

In the United Kingdom, protections applying to “workers” also derive from a stratification of statutory sources.⁵² Workers have the right to the national minimum wage, paid holidays, maximum working time regulation, and protection against discrimination. Only employees, instead, also enjoy protection against unfair dismissal and in case of redundancy – and only after they accrue a certain length of service. “Workers” also are entitled to collective labour rights. As highlighted in the national report of Prof Mark Freedland, tax and social security regulation in the UK is still based on a binary divide between employment and self-employment, with the consequence that “workers” who do not work under a contract of employment are treated as self-employed persons in this respect.

Spain

Spain is probably the only country included in this study where a single piece of legislation created and generally regulated a status of quasi-subordinate and economic dependent workers. The law extends to “*trabajadores autónomos económicamente dependientes*”, or “TRADE”, the right to collective bargaining (but not the right to strike, reserved to employees in Spain) and the right to annual leave. Nonetheless, according to our national reporter, the law does not specify whether TRADEs have “the right to a paid vacation”. It is also important to mention that the TRADE status failed to meet expectations in terms of numerical extension, with only around 10,000 workers registered under this scheme in Spain.⁵³

48 The text concerning Germany reported between quotation marks is directly quoted from the national report of Prof Monika Schlachter.

49 *Bundesurlaubsgesetz*, BUrlG, art 2 s 2.

50 *Arbeitsschutzgesetz*, ArbSchG, art 2 § 2 no 3.

51 *Allgemeines Gleichbehandlungsgesetz*, AGG, art 6 §1 no 3

52 See. Prassl (n 24).

53 The text concerning Spain reported between quotation marks is directly quoted from the national report of Prof Adrià Todolí Signes.

5.2. A FULL EXTENSION OF LABOUR PROTECTION TO QUASI-SUBORDINATE AND ECONOMICALLY DEPENDENT WORKERS?

Extending only a limited part of labour and social protection to quasi-subordinate and economically dependent workers is by no means the only policy found in comparative practice to protect persons in the “grey area” between employment and self-employment. Some of the countries examined in this study, in fact, have adopted a radically different approach under which all or the vast part of employment regulation would be extended to such workers. As reported by our French national expert, Prof Emanuel Dockès, numerous atypical forms of work characterised by less evident elements of subordination have been the subject of special regulations that provide for the extension of employment and labour law to the relevant workers. These provisions are expressly enacted under Part VII of the Labour Code and concern workers such as journalists, models, artists, homeworkers, sales representatives, and business managers (including some franchisees). The extensions span from complete assimilation to the regime of employees with some additional advantages (e.g. for journalists), to partial assimilation still providing a vast number of basic labour protections, in terms of salary, dismissal or working time (e.g. salaried merchants).

As already noted in the previous section, our Swedish national reporters, Dr Samuel Engblom and Magnus Lundberg, have suggested that the concept of employee “is wider than the concepts of employee used in French, US and British labour law, including UK ‘workers’”. The Employment (Co-determination in the Workplace) Act, the bedrock of Swedish collective rights regulation, includes in the definition of “employee” any person who “performs work for another and is not thereby employed by that other person but who occupies a position of essentially the same nature as that of an employee”. In this case “the person for whose benefit the work is performed shall be deemed to be an employer.”⁵⁴ The background of this provision dates back to the 1940s when Swedish labour law regulated “three types of workers: employees, dependent contractors and independent contractors”, with the consequence that “[the] boundary for the personal scope of labour law thus came to lie between dependent and independent contractors”. For the worker to be a dependent contractor, “the employer had to have some control of the running of her businesses. Besides, the worker’s social and economic status was to be considered, including the worker’s self-perception expressed, for example, through membership in an organisation built “according to the principles of a trade union”.⁵⁵ The two experts also report that the current legal status of dependent contractors is not entirely clear, but that, despite some dissenting voices exist, the “most commonly held view is that the widening of the concept of employee has led to the inclusion of categories of workers previously classified as dependent contractors, and many argue that the dependent contractor category is more or less obsolete.” In a case from 1985, the Labour Court already “questioned whether there still is, due to the extension of the concept of employee, any room left for the dependent contractor category”.⁵⁶

The widening of the concept of employee has led to the inclusion of categories of workers previously classified as dependent contractors, and many argue that the dependent contractor category is more or less obsolete.

54 *Lag (1976:580) om medbestämmande i arbetslivet*, § 1 2st.

55 Prop. 1945:88, 21, cf also AD 1980 nr 24 (salesmen of sewing machines), AD 1969 nr 31 (collective rights of gas station managers).

56 AD 1985 nr 57. The text concerning Sweden reported between quotation marks is directly quoted from the national report of Dr Samuel Engblom and Magnus Lundberg.

5.3. THE LABOUR AND SOCIAL RIGHTS OF SELF-EMPLOYED PERSONS

The traditional binary approach of legal systems differentiating between employment and self-employment does not exclude in all cases that self-employed persons be granted some basic labour and social right. Besides the extension of some protection to quasi-subordinate and dependent workers, various legal systems afford a minimum amount of protection to self-employed persons regardless of their condition of quasi-subordination or economic dependency.

This can be said not only of national legal systems but also of international legal regimes. In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work.⁵⁷ It is well known that this Declaration commits Member States to respect, to promote and to realize, in good faith and in accordance with the ILO Constitution, the principles concerning fundamental labour rights in four categories of subjects: freedom of association and the effective recognition of the right to collective bargaining; the elimination of forced or compulsory labour; the abolition of child labour; the elimination of discrimination in respect of employment and occupation. It is also known that the fundamental rights related to these four categories are universal and applicable to all people and the abovementioned obligation arises from the very fact of membership in the ILO, even for States that have not ratified the Conventions in question.

The rights and principles included in the eight fundamental Conventions of the ILO being universal, also apply to self-employed workers. Only a few categories of workers, in fact, can be excluded from the application of these Conventions. These are the armed forces and the police, with regard to freedom of association,⁵⁸ and also public servants engaged in the administration of the State, with regard to the right to collective bargaining.⁵⁹ The fundamental Conventions, thus, also apply to self-employed persons, as the ILO supervisory bodies often recall.⁶⁰

As a way of example, the ILO Committee on Freedom of Association considers that “by virtue of the principles of freedom of association, all workers – with the sole exception of members of the armed forces and the police – should have the right to establish and join organizations of their own choosing”. Therefore, the criterion for “determining the persons covered by that right” is “not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize.”⁶¹ The Committee of Experts on the Applications of Conventions and Recommendations (CEACR) also repeatedly argued in the same direction.⁶²

Instruments of the Council of Europe are also relevant when examining freedom of association of self-employed persons. The European Court of Human Rights, for instance, has extended protection of freedom of association under art 11 of the European Convention of Human Rights to self-employed persons.⁶³ Very recently, the European Committee of Social Rights also clearly stated that self-employed workers are protected under art 6§2 of the European Social Charter, which grants the right to bargain collectively, and observed that “an outright ban on collective bargaining of all self-employed workers would be excessive as it would run counter to the object and purpose of this provision”.⁶⁴

57 ILO, *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 15 June 2010).

58 ILO, *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No 87), art 9.

59 ILO, *Right to Organise and Collective Bargaining Convention*, 1949 (No 98), arts 5 and 6.

60 ILO, *Giving globalization a human face General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (ILO 2012).

61 See Committee on Freedom of Association, *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association* (ILO 2018, 6th edn) para 387.

62 For instance, see, ILO(n 54) para 53.

63 *Ólafsson v Iceland* (2013) 56 EHRR 21.

64 European Committee of Social Rights, *Irish Congress of Trade Unions (ICTU) v. Ireland* Complaint No.123/2016, adopted 12 September 2018, para. 40.

Despite their recognition in international instruments, however, collective rights of self-employed persons remain fundamentally hindered in law and practice in a vast number of legal systems. On various occasions, the ILO supervisory bodies expressed their concern on the fact that when self-employed persons are generally excluded from the application of employment and labour laws, they might also be excluded from regulation protecting fundamental principles and rights at work.⁶⁵ In 2016, for instance, the International Labour Office has reported on the vast number of comments issued by the CEACR dealing with national legislation that failed to protect self-employed workers against child labour practices and non-discrimination policies.⁶⁶ Issues have also arisen about freedom of association and the right to collective bargaining, some of which will be examined more in detail below, in the following section.

These exclusions are more widespread than what one may imagine, and they are by no means confined to developing countries. The European Union, for instance, adopted several instruments against discrimination of self-employed persons.⁶⁷ These instruments, nonetheless, are still far from ensuring the application of the full range of anti-discriminatory measures to self-employed workers.⁶⁸ The implementation of EU Law by national authorities and courts has sometimes also fallen short of providing a universal protection of self-employed persons against discrimination in employment and occupation, as it is the case of the UK.⁶⁹

Italy

Several national legal systems also provide for protection of some labour and social rights of self-employed workers regardless of their being quasi-subordinated or economically dependent. Italy is an example in this respect. Firstly, freedom of association in trade unions enshrined under art 39 of the Italian Constitution is traditionally deemed to include to self-employed workers, as well as employers. Moreover, Italian case law has clarified that certain types of self-employed workers are also entitled to the right to strike, provided that they are in a weaker position *vis-à-vis* their counterparty. The Italian Constitutional Court held that small-scale entrepreneurs, as self-employed workers, were entitled to the right to strike as guaranteed by art 40 of the Constitution,⁷⁰ “but only provided that they carry out their activity on their own account and they do not employ any employee”.⁷¹

65 Janine Berg, Mariya Aleksynska, Valerio De Stefano, Martine Humblet, ‘Non-standard employment around the world: Regulatory Answers to Face Its Challenges’ in Frank Hendrickx and Valerio de Stefano (eds), *Game Changers in Labour Law: Shaping the Future of Work* (Kluwer Law International 2018).

66 ILO. 2016. *Non-standard employment around the world: Understanding challenges, shaping prospects*. ILO, Geneva.

67 See, for instance, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

68 Catherine Barnard, “Discrimination law, self-employment and the liberal professions”. (2011). 12 *European Anti-Discrimination Law Review*.

69 *Jivraj v Hashwani* [2011] UKSC 40. See Mark Freedland and Nicola Kountouris, ‘Employment Equality and Personal Work Relations – A Critique of *Jivraj v Hashwani*’ (2012) 41 *Industrial Law Journal* 56; Prassl (n 25).

70 Italian Constitutional Court 17 July 1975, No. 222, according to which small-scale entrepreneurs that do not employ any employee fall within the scope of art 40 of the Italian Constitution. The text concerning collective rights of self-employed workers in Italy reported between quotation marks is directly quoted from the national report of Giovanni Gaudio.

71 Italian Constitutional Court 24 March 1986, No 53, according to which small-scale entrepreneurs that employ one or more employees do not fall within the scope of art 40 of the Italian Constitution.

Italian self-employed workers are also protected against discrimination in employment and occupation, pursuant, for instance to legislation implementing EU directives 2000/43⁷² and 2000/78⁷³. Occupational health and safety legislation also applies to self-employed workers, including obligations binding them and obligations of protection binding their principals.⁷⁴ Moreover, in 2017 the Italian Parliament adopted a new law aimed at protecting self-employed workers in general, with the exclusion of small-scale entrepreneurs and entrepreneurs.⁷⁵ This legislation regarded both social rights as well as contractual rights of self-employed persons vis-à-vis their principals.

In Italy, “self-employed women are entitled to maternity allowance for the two months preceding the expected date of birth and for the following three months, irrespective of their actual abstention from work.” In stark contrast with employees, therefore, “self-employed women can choose whether to work or to suspend their activity, as the allowance is paid in both cases”. In case of maternity, moreover, “it is possible for self-employed women, with the prior consent of the principal, to be replaced by other workers who meet the necessary professional requirements, also through forms of co-presence of the replaced worker and her substitute”. Furthermore, “pregnancy, illness or injury of self-employed workers who work continuously for the same principal does not lead to the termination of the contract, the performance of which, at the worker’s request, is suspended, without entitlement to compensation, for a period not exceeding 150 days per year”. Nonetheless, “the principal is entitled to withdraw from the contract if she loses her interest in its continuation”. According to our national expert, Dr Elena Gramano, however, principals must justify their decision by giving evidence of the lack of interest. Finally, self-employed workers are entitled to parental leave of up to six months for both parents during the child’s first three years of age. The relevant indemnity, paid by the National Social Security Body, is equal to 30 per cent of the income from work relative to the contributions paid and is due only if the worker accrues at least three months of contributions.

In addition to these social protections, Italian law also reinforces the contractual position of self-employed workers vis-à-vis their principals by explicitly mandating interests in case of delay in payments due by the counterpart, by providing that contractual clauses allowing principals to pay the workers later than 60 days since invoicing are unfair, and that workers are also entitled to compensation for the costs incurred for the recovery of sums not paid in good time. A principal’s refusal to conclude the contract in writing is also considered *ex-lege* abusive. Other contractual protection include the nullity of clauses allowing principals to unilaterally change the content of the contract, and to withdraw from the contract without notice, when “the contract establishes a continuative working activity”, or to pay the worker after more than 60 days after invoicing. The law also extends to self-employed persons protections against abuse of economic dependence.⁷⁶

France

French law similarly provides some protections for self-employed persons regardless of their quasi-subordinate or dependent status. Self-entrepreneurs have the right to form and join trade unions. As to the right to strike, the issue whether voluntary withdrawal from work from self-employed workers has not reached courts even if – according to our national expert, Prof Emmanuel Dockès – it is possible that, in

72 Decreto Legislativo 9 July 2003, no. 215. *Attuazione della direttiva 2000/43/CE per la parità di trattamento tra le persone indipendentemente dalla razza e dall’origine etnica.*

73 Decreto Legislativo 9 July 2003, no. 216. *Attuazione della direttiva 2000/78/CE per la parità di trattamento in materia di occupazione e di condizioni di lavoro.* It is however worth noting that the French Court of Cassation has recently attentively scrutinized the reality of the work arrangements employed by some platforms in the country. Contrary to the lower courts, that were so far reluctant to consider platform workers AS employees because of their possibility to decide if and when to work (see, for instance, the judgement of the Paris Court of Appeal delivered on 9 November 2018 in a case about Deliveroo), the Court of Cassation, in its judgement no. 1737 of 28 November 2018, reclassified the drivers of a food delivery platform as employees. The Court highlighted that the platform had put in place a complicated disciplinary procedure that could bring to the exclusion of workers from the platform in case of repeated breach of their obligations. It also ruled that this disciplinary mechanism, together with the fact that the application used by the workers “was equipped with a geo-localisation system allowing the company to monitor the position of the rider[s] in real time and to record the total number of kilometers traveled by [them]”, amounted to a level of direction and control sufficient to establish the employment status of the workers. Significantly, after this judgement, on 11 January 2019, the Court of Appeal in Paris accepted the claim of an Uber driver to be reclassified as an employee.”

74 Decreto Legislativo 9 April 2008, No. 81.

75 Law 6 June 2017 No. 81.

76 The text concerning Italy reported between quotation marks is directly quoted from the national report of Dr Elena Gramano.

case of litigation, the Court of Cassation would grant the right to strike to self-employed workers. In addition to this, some labour regulation on compliance with occupational health and safety rules apply to self-employed workers (particularly on construction sites). In 2016, the French lawmakers also introduced a special protection regime for platform workers. This regime, however, does not go as far as other special regimes extending protection to workers whose subordination would be difficult to prove in court, discussed above. The 2016 reform only grants to these workers the right to join trade unions and to exert collective action as well as social security contributions in some limited cases.⁷⁷

Spain

Spanish law provides for social security protections to self-employed workers, including rights such as “unemployment (benefits), retirement pension, [and] paid sick leave”.⁷⁸ In Sweden, some occupational health and safety regulation such as the Work Environment Act also “can include self-employed workers”, according to the report of our national experts.

Austria

In Austria, the national report highlights that “a certain strengthening of ‘social’ protection for [self-employed workers] has taken place in recent years, although not in labour, but rather in social security law”. The Act on the Retirement Provisions for Employees and Self-Employed Persons⁷⁹ applies to “any person generating income from work”, thus also to self-employed persons operating a business (“business persons” or “BP”), who, however, “have to pay and bear all contributions”. Since 2008, BPs must pay 1.83 % of their monthly income to a ‘retirement fund’ (*Vorsorgekasse*), so that, when retiring, “they are entitled to the payment of a lump-sum or of monthly payments related to their contributions”. Moreover, since 2013, “provisions on health insurance establish that BP employing less than 25 persons are entitled to daily allowances in case of long-term sickness”.⁸⁰

Belgium

In Belgium, some specific occupational health and safety regulation apply to self-employed workers.⁸¹ In addition to this, laws against discrimination in employment and occupation also apply to self-employed persons, since the term “employment relationship” under this legislation explicitly includes self-employed workers.⁸² These workers, moreover, enjoy freedom of association under Belgian law, but according to the national report, the regulation governing and protecting collective bargaining does not apply to the collective bargaining of self-employed workers *vis-à-vis* their principals.

More generally, it would appear that the vast majority of self-employed workers in Europe are typically entitled to fundamental right to equal treatment and non-discrimination. A comprehensive overview of EU equality legislation conducted in 2012 by the European Network of Legal Experts in the Field of Gender Equality, also confirmed that ‘the majority of the states covered by the survey (possibly with the exceptions of Estonia, Lithuania, Slovakia and Turkey, who do not seem to engage with the protection of self-employed workers) prohibit discrimination against the self-employed’, albeit in different ways and degrees of intensity.⁸³

77 The Labour Code, arts L. 7341-1 et seq.

78 The text concerning Spain reported between quotation marks is directly quoted from the national report of Prof Adrià Todolí Signes.

79 *Betriebliches Mitarbeiter- und Selbständigen-Vorsorgegesetz*, BMSVG.

80 The text concerning Austria reported between quotation marks is directly quoted from the national report of Prof Elisabeth Brameshuber.

81 *Code penal social*, arts 43, 44, 46, 47, 48 and 49, and chs IV and V.

82 *Loi tendant à lutter contre certaines formes de discrimination*, 2007; *Loi tendant à lutter contre la discrimination entre les femmes et les hommes*, 2007; *Loi tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*, 1981 (amended in 2007).

83 Nicola Countouris and Mark Freedland, *The Personal Scope of the EU Sex Equality Directives* (European Network of Legal Experts in the Field of Gender Equality 2012), 4. In respect of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, repealing Council Directive 86/613/EEC, that report also noted that ‘its implementation is at best patchy and often convoluted, and the coverage of self-employed persons (let alone their spouses or partners) less than satisfactory’, *ibid.* page 11.

A full-page background image featuring a worker in safety gear (hard hat, earmuffs, and a respirator mask) crouching and operating a large floor buffer. The image is overlaid with a semi-transparent red filter. The worker is wearing a red long-sleeved shirt and dark overalls. The floor buffer is a large, industrial-grade machine with a black and silver body and a rotating disc at the bottom. A flexible grey hose is connected to the side of the machine. The worker's hands are on the handles of the machine, and they are focused on the task.

6. BEYOND THE BINARY DIVIDE: **TESTING THE SELF-EMPLOYMENT MONOLITH**

As noted already in section 4 above, all the legal systems covered in this report are affected by a very peculiar trait: the concept and definition of ‘self-employment’ receives little or no attention by the law and only a limited degree of elaboration at a judicial level. Self-employment is almost invariably seen as the residual or default category of the binary divide: if one is not a subordinate employee, if his/her work is not subject to the control or performed under the direction of an employer, if it is not integrated in a business, or does not engender any particular business risk, then most legal systems will simply assume that person to be self-employed.

The initial hypothesis formulated in our project was that, by being a sort of conceptual dumping ground where all those work relations that do not fit the (often tight) mould of subordinate employment are discarded, the concept of self-employment has ended up embracing a vast and heterogeneous range of economic activities and relations where the provision of work, even personal work, may well be present, albeit not always in an obvious or even predominant way. With the assistance of our national experts we have sought to challenge this ‘false unity’ of the concept of self-employment, by exploring the relevance of various forms and manifestations of personal work relations typically located within the domain of autonomy. Our main intention was that of identifying possible criteria or elements that might help, in particular, with disentangling nominally self-employed personal workers from genuine businesspersons engaging in entrepreneurial activities on their own account. This inquiry was obviously clear to the Italian expert Dr Gramano, noting that ‘This might be one of the unclear aspects of [Italian] Law. In fact, it might not be easy to distinguish a self-employed worker from a small entrepreneur’.

So we asked our national experts to share with us their views on how different legal systems would conceptualise the provision of personal work or services by self-employed workers operating i) for a single client; or ii) without a link of economic dependence vis-à-vis a particular employing entity (e.g. a nominally self-employed person offering personal work or services to a multitude of ‘clients’ or ‘customers’, which could be natural or legal persons); iii) with the contribution of capital ownership (e.g. a nominally self-employed person mainly offering personal work or services, while also owning some of the ‘means of production’ generating the service offer, these could be tools, a bicycle, a music instrument, or something more substantial); and iv) with the contribution of personal work or services offered by a third party (a self-employed person that is linked by a relationship of association⁸⁴ with other workers and coordinates and organises their work for one or more ‘clients’, either through an informal arrangement or in a more structured way, e.g. through a small, non-capitalised, umbrella company, whether incorporated or not).

6.1. THE PERFORMANCE OF PERSONAL WORK OR SERVICES TO ONE MAIN CLIENT

By and large our experts confirmed that the performance of personal work for a single or main client would typically involve a strong inference that the relationship in question be seen as one of employment, rather than self-employment. This could suggest that, in most systems, economic dependence can operate as a proxy for subordination and personal dependence, whether implicitly or explicitly. Even in British law, it seems, personal work provided to one single client would typically point to the existence of an employee-employer relationship, but then again much would depend on the terms of the contract, and lack of continuity or the presence of substitution clauses could point in the opposite direction.

In France, performing work for a single principal will normally imply that even a very attenuated link of subordination or even one of economic dependence (as in the case of a self-employed driver with a single client, per Soc. 12 janv. 2011, n° 09-66982) would in and of itself reclassify that relationship as one of employment, rather than self-employment. Belgian law appears to approach the fact that work is performed exclusively for one client as a specific indicator likely pointing to the existence of an employment

84 The presence of a ‘relationship of association’ between dock workers, for instance, has not been understood as characterising them as self-employed/undertakings by the CJEU, see Case C-179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889 and Case C22/98 *Criminal Proceedings against Becu* [1999] ECR I-5665.

relationship. Other factors would also be taken into account, but our national expert notes that exclusive performance may, in practice, facilitate the application of those other factors as also classifying that work relation as one of economically dependent employment.

Our Austrian expert noted how the classification of personal work provided to a client as self-employed work, will depend mainly on whether the performance occurs in a framework of personal dependence. The degree of personal dependence would also assist with establishing whether that worker is an employee or a quasi-dependent worker. The German report noted that national courts would still want to apply all the usual tests, but that there could be a strong inference that working exclusively for one sole or main client could suggest being in an employee-like situation. Swedish law would probably lean in that direction as well.

6.2. THE PERFORMANCE OF PERSONAL WORK OR SERVICES TO A MULTITUDE OF CLIENTS OR CUSTOMERS

The Belgian report notes that a multitude of clients or customers can be a strong indicator of autonomy, but also that judicial authorities might still look at other factors, for instance the extent to which one of the parties in the relationship might avail itself of specific disciplinary powers that go beyond simply expecting the professional to comply with professional standards or legal requirements.

Spanish law has notably sought to resolve this type of scenario by means on identifying a main employer providing at least 75% of the income of an economically dependent self-employed worker. But our expert rightly noted that this would apply on the assumption that the person was a self-employed worker in the first place, requiring the judge to first ascertain the lack of subordination in the performance of work.

In French labour law, the provision of work or services to multiple clients or customers will not in itself exclude the possibility that such work be treated as employment thus tying the worker to a multitude of employers. Our national experts helpfully pointed out that the French Labour Code, at L 7231-1 C. trav., includes a list of workers providing personal work and services (e.g. domestic workers, nannies, domestic carers) that would typically be seen as employees of multiple employers, rather than service providers of multiple clients (as it would seemingly be the case when more highly skilled services are offered, for instance by a specialised nurse visiting multiple patients/clients).

6.3. THE PERFORMANCE OF PERSONAL WORK OR SERVICES TO ONE MAIN CLIENT, WHILE ALSO OWNING SOME OF THE ‘MEANS OF PRODUCTION’ NECESSARY TO GENERATE THOSE SERVICES

While the ownership of tools or equipment can be a significant factor in identifying work as self-employment, all our national experts actually pointed out if capital is provided in a way that is marginal or ancillary to the mainly personal provision of labour, then national law would typically draw the conclusion that the person is not really genuinely self-employed.

Our French expert also confirmed that *‘Ownership of tools, materials and even the workplace do not exclude the qualification of employee’*⁸⁵. It was helpfully pointed out to us, for instance, that the status of ‘home worker’ is not affected by the fact that such worker may own even a substantial amount of capital,

85 “La propriété des outils, matériaux et même du lieu du travail n’excluent pas la qualification de salarié”

for instance in the form of sawing equipment. What may be relevant however to the classification of home-workers as self-employed is their ability to choose and purchase the fabric and other materials used to produce finished goods, suggesting that at some point the ownership of capital does tilt the balance towards autonomy, even in the (ancillary, we would say) presence of personal labour.

Belgian law is acutely aware of the challenges posed by the ownership of some tools or equipment,⁸⁶ but its judges do keep an open mind about the relevance of only minimal capital ownership as a decisive test. For instance, in a case on the status of Deliveroo bikers, the administrative commission for the employment relationship ruled that both the specific criteria had indicated a rebuttable presumption in favour of the employment contract, as well as the matrix of facts as arranged pursuant to the general criteria, which indicated an employment relationship. Among the criteria considered by the Commission was the lack of real autonomy for the worker in managing the working time and the execution of the work.

The Austrian report clarified for us that personal dependence would be the main criterion to decide if the person was really providing services or labour. But the report also pointed out that if personal dependence is present only to a minor extent, then the question whether the working person owns some means of production can be decisive, and that the criterion of substantial (*wesentliche*) 'means of production' is decisive under Austrian social security law as well, when a person provides time-related personal services for an employer and is economically dependent from the latter. In this context it was helpfully pointed out to us the national precedent in *VwGH 2004/08/0101* where an aerobics trainer owning means of production deemed not to be substantial (CDs, a CD-player, gym balls, rubber bands) was classified as an employee for the purposes of social security contributions.

6.4. THE PERFORMANCE OF WORK AND SERVICES IN ASSOCIATION WITH OTHERS

This was a hypothetical form of work that really challenged even the most sophisticated systems of protection. Our Belgian expert expressly told us that it 'would, ... come close to a work relationship [that] the judge no longer feels obliged to reclassify' though some assistance may be available under the Belgian joint-employment doctrine. French law would see such a network as amounting to a proper undertaking in the presence of any hierarchical structures, and would expect relational parity between the parties, or the establishment of the network as an 'employment cooperative' under art. L. 7331-2 of the Labour Code, to exclude the qualification of the work-coordinator as a proper entrepreneur.

⁸⁶ Article 334(3) of the Belgian 2006 Law expressly refers to the criterion of '*investissement personnel et substantiel dans l'entreprise avec du capital propre / persoonlijke en substantiële investering in de onderneming met eigen middelen*'.



7. COLLECTIVE LABOUR RIGHTS AND THE SELF-EMPLOYED

An important, even fundamental aspect, of our enquiry was to establish whether the self-employed could benefit, or indeed might already benefit from collective arrangements, including collective agreements, shaping or dictating their terms and conditions of engagement or provision of work. This is a timely period for leading such an enquiry especially in consideration of the growing number of cases evidencing a willingness on the part of some national competition authorities and the CJEU to stigmatise such collective arrangements as inherently irreconcilable with various strands of competition and, at times, with free movement law. This latter point is further explored in the following section 8.

It is worth reiterating a point already mentioned above in section 5. Several international and regional fundamental labour standards, from ILO Conventions 87 and 98 to Article 6 of the European Social Charter, clearly recognise the self-employed as entitled, in principle, to a variety of collective labour rights, from the right to freedom of association to the right to bargain collectively.⁸⁷

ECHR rights are very broadly phrased usually by reference to the term ‘everyone’. The Strasbourg Court has interpreted and applied this term generously. In the case of *Vöðdur Ólafsson v Iceland*, for instance, it did not hesitate to recognise a self-employed craftsman as a beneficiary of the protection to freedom of association granted by art 11 of the Convention.⁸⁸ In *Sindicatul Pastoral cel Bun v Romania* the Court included members of the Romanian clergy within the scope of art 11(1) of the Convention, thus allowing them to form and join a union, and, importantly, did so by reference to ILO R-198, on the grounds that “the duties performed by the members of the trade union in question entail many of the characteristic features of an employment relationship”,⁸⁹ noting that ILO Convention 87 provides, in art 2, that “workers and employers, without distinction whatsoever” have the right to establish organisations of their own choosing.⁹⁰

Given the growing recognition granted by the ECHR to “elements of international law other than the Convention, the interpretation of such elements by competent organs”,⁹¹ including ILO instruments and their interpretation by ILO mechanisms, it is worth recalling that in interpreting the scope of application of Conventions 87 and 98, the ILO Committee on Freedom of Association has long established that “The criterion for determining the persons covered by that right... is not based on the existence of an employment relationship, which is often non-existent, for example, in the case of agricultural workers, self-employed workers in general or those who practice liberal professions, who should nevertheless enjoy the right to organize”.⁹² More recently the Committee requested the Korean Government

“to take the necessary measures to: (i) ensure that “self-employed” workers, such as heavy goods vehicle drivers, fully enjoy freedom of association rights, in particular the right to join the organizations of their own choosing; (ii) to hold consultations to this end with all the parties involved with the aim of finding a mutually acceptable solution so as to ensure that workers who are self-employed could fully enjoy trade union rights under Conventions Nos 87 and 98 for the purpose of furthering and defending their interest, *including by the means of collective bargaining*; and (iii) in consultation with the social partners concerned, to identify the particularities of self-employed workers that have a bearing on collective bargaining so as to develop specific collective bargaining mechanisms relevant to self-employed workers, if appropriate”⁹³

87 Valerio de Stefano and Antonio Aloisi, ‘Fundamental Labour Rights, Platform Workers and Human-Rights Protection of Non-Standard Workers’ in Janice R Bellace and Beryl ter Haar (eds) *Business and Human Rights Law* (Edward Elgar forthcoming)

88 Ólafsson (n 57).

89 *Sindicatul Pastoral cel Bun v Romania* (2014) 58 EHRR 10, para 143.

90 *ibid* para 142. This is contrasting with the narrower approach expressed in the concurring but partly dissenting opinion by Judge Wojtyczek, that Article 11 ECHR ‘applies to all those who carry on a gainful occupation involving a relationship of subordination vis-à-vis the person they are working for’ (para 3).

91 See most famously para 85 of the Court’s decision in *Demir and Baykara v Turkey* (2009) EHRR 5. See KD Ewing and John Hendy, ‘The Dramatic Implications of *Demir and Baykara*’ (2010) 39 Industrial Law Journal 2.

92 ILO Committee on Freedom of Association (2001) Report no 326, Case no 2013, para 416. See also Camilo Rubiano, *Collective bargaining and competition law: a comparative study on the media, arts and entertainment sectors* (International Federation of Musicians 2013). See also the report of the discussion held within the Conference Committee on the Application of Standards (CAS) on the application of C-98 to Irish freelance journalists, held in the 2016 International Labour Conference: ILO, ‘Right to Organise and Collective Bargaining Convention, 1949 (No 98) - Ireland (Ratification: 1955)’ (ILO, 2016) <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13101:0::NO::P13101_COMMENT_ID:3082151> accessed 30 January 2019

93 ILO Committee on Freedom of Association (2012) Report no 363, Case no 2602, para 461. See further in the same report the recommendations in paras 508 and 1085 - 1087.

The Committee of Social Rights, in the recent decision *on Irish Congress of Trade Unions (ICTU) v Ireland* (Complaint No 123/2016) affirmed that it “has constantly held that in principle the provisions of Part II of the Charter apply to the self-employed except where the context requires that they be limited to employed persons. No such context obtains in a generalised way for Article 6§2” (para 35 of the decision) and that “an outright ban on collective bargaining of all self-employed workers would be excessive as it would run counter to the object and purpose of this provision” (para 40). It is our view that this decision ought to inform the reading and interpretation of art 28 of the Charter of Fundamental Rights of the EU in a similar direction, as also guaranteeing the right to bargain collectively to all workers, including self-employed workers. We elaborate further on this point below, in subsection 8.2.

Our comparative enquiry has evidenced the presence of significant variations across national systems, but has nonetheless showed that some form of collective activity exist in all the countries examined in this study, with a high concentration of cases in the media and journalism sector. In Germany, for instance, there are “some collective agreements governing the terms and conditions of employee-like persons”. This option “is mostly used for persons working in the broadcasting sector”, even if the law alleviates the burden for being included in the collective bargaining entitlement for a broader group of workers. Although “persons providing artistic or journalistic or writer’s services and persons responsible for technically implementing such tasks” are considered to be “employee-like”, and thus entitled to bargain collectively, if they receive at least a third of their income from one contracting partner,⁹⁴ this provision “has not been put into practice for other services than the broadcasting branch”.

In Austria, a collective bargaining agreement exists in the journalism sector that applies to both employees and freelancers and has been concluded between “the (free) association of Austrian papers and media [...] and the Austrian Trade union Federation. The agreement only provides for “some very specific rules regarding the wages” of freelancers. Any other provision applies to employees only. Moreover, the “Law for journalists (*Journalistengesetz*)” allows collective bargaining of freelancers who work mainly personally “for a media-corporation” without owning an autonomous business organization. The current agreement includes provisions “regarding salaries (with *minima* for a certain amount of keystrokes, e.g.)” as well as notice periods “provided that the contractual relationship has lasted for more than one year”.⁹⁵

In Sweden, freelance journalists are covered in the “collective agreement for employed journalists regarding representative structures”. Complementing this, there is a specific “freelance agreement” that “covers certain issues such as incurred costs and intellectual property, if this has not been agreed separately”. The Swedish Union of Journalists also established a “freelance calculator”, which is used by freelance journalists “to calculate what they should charge for their assignments as freelancers”. In the acting sector, some collective agreements deal with copyright issues also in favour of the freelancers; a specific agreement on audiobooks covers remuneration for self-employed actors.

Furthermore, some of the member unions of the Swedish Confederation of Professional Employees (TCO) are organising self-employed workers, and have established “guidelines for what to demand in terms of wages and other material conditions when accepting a temporary job as self-employed contractor”. The unions also provide support to self-employed contractors beyond collective bargaining, by offering “legal advice, income insurances, professional development etc.”, and “have also themselves established billing or invoice services, to ensure that their members are treated fairly”.⁹⁶

In France, the situation is particularly complex. Our national expert, Prof Emmanuel Dockès, recalled that freelance journalists, musicians and artists are assimilated to employees by operation of law and have their working conditions regulated by specific collective agreements. Regulators also tried to promote collective bargaining in the franchising sector, even if this initiative is too recent to evaluate its outcomes fully.⁹⁷ Also, some professional bodies set minimum or “recommended” remuneration for workers who

94 As opposed to the 50% threshold applicable to all other professions. *Tarifvertragesgesetz*, art. 12a §3. The text concerning Germany reported between quotation marks is directly quoted from the national report of Prof Monika Schlachter.

95 This kind of agreement is called “*Gesamtvertraege*”, as opposed to the “*Kollektivvertraege*” governing employees. The text concerning Austria reported between quotation marks is directly quoted from the national report of Prof Elisabeth Brameshuber.

96 The text concerning Sweden reported between quotation marks is directly quoted from the national report of Dr Samuel Engblom and Magnus Lundberg.

97 Decree No 2017-773 of 4 May 2017

are legally self-employed, but who are in reality in a condition of economic dependence, such the rules on the “*rétrocession minimale d’honoraire*” for associate lawyers set out by the Lawyers’ Bars. The remuneration of self-employed doctors is instead governed by a “medical agreement” concluded between representatives of self-employed doctors and health insurance bodies.

Economically dependent self-employed workers (TRADE) are the only self-employed persons allowed to bargain collectively in the Spanish legal system. Even so, collective bargaining is extremely limited in practice, and occurs only at the company-level. This is both because the number of TRADEs is minimal (around 10,000 workers) and because “there is no reason for a sectoral employer association to bargain with them”, since they do not have the right to strike.⁹⁸ This does not mean, however, that industrial conflict does not occur in practice, as it has been the case for TRADEs engaged as truck drivers for a company in the food sector.⁹⁹ In a survey produced for the ETUC in 2018, Lionel Fulton also reports the concern of trade unions regarding abuses in the negotiation of agreements between firms and associations representing self-employed persons, with detrimental consequences on the working conditions of the workers, who are also pressured into accepting new and worse terms and conditions of work.¹⁰⁰

In Belgium, as discussed below, collective bargaining agreements can only be concluded in favour of employees. Nevertheless, there are examples of collective activities in favour of some self-employed workers. When, at the end of 2017, the platform Deliveroo declared it would cease previous arrangements with food-delivery workers that provided for some social protection and payment by the hours, and it would start to only engage them as self-employed persons paid on a task-basis, trade unions offered assistance to these workers during collective negotiations (with unions also providing legal aid in some of the relevant litigation).

In addition, a report issued on 4 October 2017 by the social partners, with the support of the National Labour Council and the Central Economic Council, stated that there was no need to create a new intermediate employment status, “being it rather necessary to think of ways of adapting current statuses to the platform economy”.¹⁰¹

In 2018, the Danish trade union 3F signed a collective bargaining agreement with Hilfr.dk, a Danish platform providing domestic work such as cleaning services in private households. This agreement grants workers a minimum compensation, sick pay, holiday allowance and a contribution to their pension. It also introduces a new category of arrangement in parallel with the existing freelance arrangements. “This means users of the platform can chose between two groups of [workers] – *freelance Hilfrs* and *Super Hilfrs* which will be covered by the collective agreement.”¹⁰² A domestic worker can always apply to become a *Super Hilfr* and be covered by the collective agreement. After 100 hours of work, workers will be considered to be *Super Hilfr* covered by the collective agreement, unless they actively opt out from this status.

Fulton also reports that numerous collective agreements cover freelance journalists in Denmark. Other agreements protect freelancers in the entertainment sector, translators and workers in graphic design and IT; also the Dansk Metal signed agreements covering their freelance members.¹⁰³

In Ireland, where efforts to unionise self-employed workers and conclude collective agreements were hurdled by the national antitrust authority since the early 2000s, following a recent reform that made limitations based on competition law less restrictive (see below, Section 8.2), it is the intention of the trade unions to restart negotiations in the areas of the art, entertainment and media as well as other areas.¹⁰⁴

98 The text concerning Spain reported between quotation marks is directly quoted from the national report of Prof Adrià Todolí Signes.

99 See Eduardo Baybona, ‘Los repartidores de Bimbo fuerzan el primer ‘ERE’ de autónomos en España’ (*Publico*, 01 March 2017) <<https://www.publico.es/economia/repartidores-bimbo-fuerzan-primer-ere.html>> accessed 30 January 2019

100 Lionel Fulton, *New Trade Union Strategies for New Forms of Employment* (ETUC 2018).

101 Conseil National du Travail et Conseil Central de L’Economie, *Diagnostic des partenaires sociaux concernant la digitalisation et l’économie collaborative – Exécution de l’accord interprofessionnel* (2017) <<http://www.cnt-nar.be/RAPPORT/rapport-107-FR.pdf>> accessed 30 January 2019.

102 HILFR, ‘Historic Agreement: First Ever Collective Agreement for the Platform Economy Signed in Denmark’ (*HILFR*) <<https://blog.hilfr.dk/en/historic-agreement-first-ever-collective-agreement-platform-economy-signed-denmark/>> accessed 30 January 2019

103 Lionel Fulton, *New Trade Union Strategies for New Forms of Employment* (ETUC 2018)

104 *ibid.*

In Italy, the category of para-subordinate workers has long been in place and gathered importance both in numbers and social and legal relevance during the past few decades; trade unions and lawmakers, therefore, took numerous steps towards the collective regulation of these workers.¹⁰⁵ Three years before the regulation of “work based on project” was repealed in 2015, for instance, lawmakers had passed regulation under which “project workers” were entitled to a minimum wage that could not be lower than the one set by collective bargaining agreements applicable to comparable employees. The 2015 regulation (discussed above Section 5.1) also allows collective bargaining to regulate some kinds of self-employed work.

Commercial agents are another prominent example of a category of self-employed workers for which legislation has expressly recognised the existence of collective bargaining agreements. For instance, art 1751-*bis* of the Italian Civil Code expressly provides that the indemnity to be paid to a commercial agent by its principal, when a non-compete clause is agreed, “shall be determined according to the criteria set by the relevant collective bargaining agreements applicable to the parties”. In addition, these collective bargaining agreements extensively set the terms and conditions applicable to these self-employed workers, ranging from the rights and duties of the parties to the criteria to calculate the fees and the termination indemnity as well as the notice to be given in case of termination.¹⁰⁶

Besides commercial agents, other categories of self-employed workers are covered by collective agreements. For instance, a collective bargaining agreement entered into force on 1 March 2018, grants call centre workers, who are classified as self-employed persons, some labour rights, including minimum compensation.¹⁰⁷ In other cases, however, regulation is not as clear. For instance, in 2006, to spur competition in the provision of services and to protect consumers, lawmakers repealed regulations that fixed minimum fees for professional self-employed workers.¹⁰⁸ However, under legislation enacted in 2017, clauses establishing a remuneration for professional services that is not fair (“*equo*”) are null and void. The law also specifies the criteria to determine a fair remuneration.¹⁰⁹

In the United Kingdom, collective bargaining agreements in favour of self-employed workers have been concluded chiefly in the areas of journalism and the media, arts and entertainment. For instance, Fulton reports the union BECTU reached with the BBC a memorandum of understanding whereby the BBC will negotiate on the pay, hours and holidays of freelance staff in areas where BECTU can show at least 35 per cent membership. The same union signed another agreement that regulates various working conditions, including payment of overtime and night work, of freelance technicians working on major films with a budget of over £30 million. In addition to this, the union Equity, organising performers such as actors, dancers, singers and variety artists, “has agreements with all major entertainment industry employers, including both individual organisations and employers’ associations”. These agreements “cover pay and other terms and conditions including rest breaks, working hours, overtime, parental rights, additional payments and other entitlements, such as pension contributions”.¹¹⁰

Other collective agreements concerning self-employed persons were concluded by the Musicians’ Union, with over 60 orchestras; these agreements cover rates for concert performances and non-concert work as well as such as overtime, travel costs, payment for overnight stays and payments for transporting large instruments. In the journalism sector, instead, only a few agreements covering freelancers exist and were concluded by the National Union of Journalists.

¹⁰⁵ See detailed information in Fulton (n 93)

¹⁰⁶ The text concerning commercial agents in Italy reported between quotation marks is directly quoted from the national report of Giovanni Gaudio. The most important collective bargaining agreements applicable to self-employed commercial agents are the ones for the trade and manufacturing industries. The relevant collective bargaining agreement for the trade industry has been entered into on 16 February 2009, and amended on 29 March 2017, and can be found at the following links: *Accordo economico collettivo per la disciplina del rapporto di agenzia e rappresentanza commerciale del settore del commercio* (2009) <http://www.confcommerciomilano.it/export/sites/unione/doc/contratti_lavoro/contrattazione_collettiva/agenti_rappresentanti/AEC-definitivo.pdf> accessed 30 January 2019; and <http://www.confcommerciomilano.it/export/sites/unione/doc/contratti_lavoro/lavoro_news/2017/lavoronews_n_26/AEC-allegato-con-firme.pdf> accessed . The relevant collective bargaining agreement for the manufacturing industry has been entered into on 30 July 2014 and can be found at the following link: <http://www.uiltucs.it/wp-content/uploads/2015/09/AEC-Industria-30.07.2014-con-firme-2.pdf>

¹⁰⁷ *Accordo Collettivo Nazionale per i Collaboratori Telefonici dei Call Center* <https://www.eclavoro.it/wp-content/uploads/2018/03/rinnovo_Ccnl_call_center_010318.pdf> accessed 30 January 2019

¹⁰⁸ Decreto Legge 4 July 2006, no 223.

¹⁰⁹ Law 27 December 2017, no. 2017, art 1, paras 488 – 489.

¹¹⁰ The text in quotation is quoted from Fulton (n 94) 59

It is also worth noting that the Independent Workers Union of Great Britain (IWGB), a small union not affiliated to the TUC, which organizes low-wage workers, including allegedly self-employed workers, attempted to challenge the employment status of food-delivery workers riders for Deliveroo in order to obtain recognition for collective bargaining, but the Central Arbitration Committee rejected the claim, a decision recently confirmed by the High Court.¹¹¹

The analysis above inevitably brings to the fore the extent to which these collective practices may encounter obstacles arising from a range of area of regulation, including EU Competition Law, EU law on freedom of establishment and free movement of services, and by the growing recognition in CJEU case-law of the fundamental freedom to conduct a business. However, this analysis also calls for the identification of the residual mechanisms offered at a national level (and resisting in the shadow of the EU's 'social market economy' model) to preserve some of the products of collective bargaining as applicable to all workers, including those nominally self-employed, either as exceptions to more dominant market integration paradigms or as objectively justified by reference to the public interests pursued by collective agreements. In light of the above, with the essential assistance of the national experts, we dealt with the questions below.

111 [2018] EWHC 3342 (Admin).

8. LEGAL OBSTACLES
TO COLLECTIVE
BARGAINING OF
SELF-EMPLOYED WORKERS:
**THE ANTI-TRUST
THREAT**

In spite of the spread of collective bargaining practices beyond the area of the employment relationship in many of the jurisdictions involved in this study, practically all our national reports highlighted the presence of material obstacles in this area in the legislation of their respective countries. A common problem reported in this respect, in fact, concerns the application of competition law.¹¹²

In Austria, even if some collective bargaining agreements exist that also cover freelance workers in media and journalism, collective labour law still follows a binary approach, as “rights and obligations of collective labour law are linked to the status of either employer or employee”. Collective bargaining agreements, in fact, “are defined as agreements between collective bargaining partners for the employer’s side on the one hand and for the employee’s side on the other”.¹¹³ Moreover, to be admitted to conclude collective agreements, trade unions and employers association must fulfil various criteria, “including the representation of the interests of ‘employees’ or ‘employers’”.¹¹⁴ Accordingly, it is unlikely that the administrative body in charge of authorizing associations to conclude collective bargaining agreements (*Bundeseinigungsamt*) would allow an association that represents *freie Dienstnehmer* (“semi-dependent workers” or “SDWs”) to conclude collective bargaining agreements.

Nor is the Labour Constitution Act open to a broad interpretation under which already existing organisations that represent “employees” would be allowed to engage in collective bargaining for the self-employed, due to abovementioned explicit binary approach. In fact, the possibility to conclude collective agreements depends on the official recognition from the above-mentioned administrative body.¹¹⁵ This recognition is only given if certain criteria established by the Labour Constitution Act are fulfilled.¹¹⁶ On the employees’ side, the Austrian Trade Union Federation fulfils these criteria, but “it has hardly been discussed in academia” – and the national expert expressed serious doubts as to – whether the Federation “could conclude collective bargaining agreements for SDWs and other self-employed as well and whether this would be possible under the Labour Constitution Act”.¹¹⁷

In Germany, the Constitution has a broad formulation under which “freedom of association is principally guaranteed to all persons and all professions”.¹¹⁸ However, “the established legal opinion [...] considers this clause nevertheless non-applicable to self-employed persons”. Moreover, even if it were possible “to change this approach”, competition law “would mostly be hindering collectively negotiated conditions”. It is however worth recalling that the *Tarifvertragsgesetz* expressly extends the right to collective bargaining to “employee-like persons”, namely economically dependent self-employed workers.

Also concerning Spain, the national report highlights that except for economically dependent self-employed workers (TRADE), collective bargaining is not allowed for self-employed persons.

In the Netherlands, the well-known case of the substitute orchestra players whose collective bargaining was declared in breach of competition law by the national antitrust authority reached the Court of Justice of the European Union, which stated that national courts (see, extensively, below Q6) had to determine whether the concerned musicians were “false self-employed”, allowed to bargain collectively, in contrast to genuine self-employed workers.¹¹⁹ The national court decided that, in the case at hand, workers had to be deemed false self-employed.¹²⁰

As reported by Fulton, in 2017 the national competition authority issued a document stating that “collective agreements on rates for the solo self-employed are generally forbidden”, except for the case of false

112 Fulton (n 94) 62

113 *Arbeitsverfassungsgesetz*, ArbVG, § 2 para 1

114 *ibid* § 4.

115 The national expert also recalled: “the Austrian Economic Chambers and the Chambers of Labour are *ex-lege* allowed to conclude collective bargaining agreements, automatically binding all members, i.e. all employees that are *ex-lege* mandatory members of the Chambers of Labour and all employers that are *ex-lege* mandatory members of the Chambers of Commerce.”

116 “These are: i) a certain power within the groups of the employees represented, ii) representation of interests of employees according to the articles of association, iii) independence of interest of the opposite party, i.e. the employer’s side”.

117 The text concerning Austria reported between quotation marks is directly quoted from the national report of Prof Elisabeth Brameshuber.

118 *Grundgesetz*, GG, art 9, § 3. The text concerning Germany reported between quotation marks is directly quoted from the national report of Prof Monika Schlachter.

119 *FNV Kunsten* (n 18).

120 Hof Den Haag. (2015). ECLI:NL:GHDHA:2015:2305 FNV KIEM/Staat der Nederlanden

self-employed workers.¹²¹ The authority also stated that it is the responsibility of the signatories to estimate whether a collective agreement covering self-employed persons would be exempted from competition law.

The authority also “suggests four approaches that the parties should adopt in deciding whether a collective agreement would be lawful: they should distinguish between the particular work situation of the solo self-employed to see whether in fact they are false self-employed, in which case a collective agreement would be lawful; they should collect concrete information about the work situation of the solo self-employed, possibly through labour market surveys or an analysis of contractual arrangements in the sector, with the aim of establishing how far the position of the solo-self-employed is comparable with that of employees; they should be clear and transparent, setting out, possibly through job descriptions, which solo self-employed are considered to be false self-employed and therefore covered by the agreement and which are not; and they should consider other issues that indicate that individuals are false self-employed, such as whether individuals are switched from being employees to solo self-employed but continue to do the same work. If the tax authority considers that an individual does not have an employment relationship, it is unlikely that the competition authority will consider that that individual as false self-employed”.¹²² The position of the competition authority is clear in the sense that the parties who want to sign the collective agreement have the burden of proving that the workers concerned are false self-employed. As discussed below, however, this approach is at odds with the recognition of freedom of association and collective bargaining as fundamental and human rights, and it conflicts with the approach recently taken by the European Committee of Social Rights in a case regarding antitrust restrictions to the collective bargaining of self-employed persons, as reported in the previous sections.

In Italy, as discussed above, the right to collective bargaining has traditionally been exercised both by trade unions solely representing self-employed workers and by trade unions chiefly representing employees and bargaining in favour of some categories of self-employed workers, and in particular para-subordinate ones. The Italian lawmakers also refer to these practices in legislation, also allowing these collective agreements to derogate from legal regulation in some cases.¹²³

As reported in the Belgian report, in this country collective bargaining agreements are defined as agreements governing the individual and collective relations between employees and employers, and the elements of this definition “are interpreted strictly”. Only the collective organisations of employers and employees who are part of the Central economic council and of the National labour council can conclude collective bargaining to which the law attaches a particular binding effect, including the fact of superseding the terms of individual employment contracts deviating from them. Collective bargaining agreements that do not meet these criteria would also have a significant chance of being considered “in breach of EU anti-trust law”.¹²⁴

The Swedish national experts observe that people not covered by the Employment Co-Determination Act “cannot form a trade union” or “conclude collective agreements”. Moreover, trade unions representing employees as defined under the Act¹²⁵ cannot engage in collective bargaining “that covers also freelancers etc”, despite, as reported above, this has occurred and has not been challenged in practice.¹²⁶

In France, it is recalled by our national expert, Prof Emmanuel Dockès, the Labour Code extends labour protection, including collective rights such as the right bargain collectively, to various categories of workers whose subordination would be difficult to prove in court. In addition to this, platform workers have recently been granted the right to join trade unions and the right to strike; the law, however, remained silent on the right to collective bargaining of these workers. The report also recalls, however, how issues concerning the collective bargaining of self-employed person could arise under competition law, as a consequence of the case law of the Court of Justice of the EU on the matter.¹²⁷

121 Fulton (n 94) 53

122 The text here is directly quoted from Fulton (n 94).

123 See Decreto Legislativo No. 81 of 2015, art 2. *Disciplina organica dei contratti di lavoro e revisione della normativa in tema di mansioni, a norma dell'articolo 1, comma 7, della legge 10 dicembre 2014, n. 183.*

124 The text concerning Belgium reported between quotation marks is directly quoted from the national report of Mathias Wouters.

125 This definition also includes “dependent contractors”; see above (Q2 and Q3).

126 The text concerning Sweden reported between quotation marks is directly quoted from the national report of Samuel Engblom and Magnus Lundberg.

127 FNV *Kunsten* (n 18).

The case law of the Court of Justice, and in particular the *FNV Kunsten* judgment, was also taken into account by the Irish lawmakers when introducing an amendment to the national competition law in 2017, to allow collective bargaining for the categories of “false self-employed workers” and “fully dependent self-employed workers”,¹²⁸ discussed in the previous sections.

It is worth mentioning that EU competition law has also been deployed by the EU Court of Justice to question the compatibility with Article 101 TFEU of ‘minimum fee’ arrangements unilaterally set by organisations representing liberal professions in a number of Member States. Cases such as C-136/12, *Consiglio nazionale dei geologi* and C-427/16 and C-428/16, *CHEZ Elektro Bulgaria AD*, have established that these minimum fee arrangements will fall under the prohibition laid out in Article 101 (1) unless they can be justified by being ‘necessary for the implementation of the legitimate objective of providing guarantees to consumers of geologists’ services’,¹²⁹ or ‘to ensure the implementation of legitimate objectives’.¹³⁰

8.1. LEGAL OBSTACLES TO COLLECTIVE STANDARDS BY THE PROFESSIONS AND EU FREE MOVEMENT RIGHTS

We note that, on occasion, EU law regulating the functioning of the single market, and in particular the operation of free movement rights, has clashed with the collective standards unilaterally set by the organised professions. The point is of course conceptually different from genuine collective agreements signed by representatives of the two sides of industry, but a further indication of the possible obstacles that self-employed workers can face when setting collectively their terms and conditions of service.

The Cipolla Case

This clash has mostly arisen, and has thus been mostly addressed by the CJEU, in a ‘free movement of services’ context (i.e. when a professional was established in its country of origin and sought to provide *temporary* services in the Host member state) rather than in a ‘freedom of establishment of (natural) persons’ (FES/NP) context. A suitable starting point for our enquiry ought to be the Court’s judgment in *Cipolla*,¹³¹ which is in fact a case decided in a ‘free movement of services’ context rather than in a FES/NP one. The dispute in question arose due to the expectation by a number of Italian lawyers to be paid by their (Italian) clients the minimum fees set by the *Consiglio Nazionale Forense* tariffs. This dispute led to a reference to the ECJ seeking to ascertain whether “the principle of free movement of services... also appl[ie]d to the provision of legal services [and] if so, [whether] that principle [was] compatible with the absolute prohibition of derogation from lawyers’ fees”,¹³² or, rather, had “the consequence of hindering other lawyers’ access to the Italian services market”.¹³³ The Court had no doubts that “the prohibition of derogation... from the minimum fees set by a scale such as that laid down by the Italian legislation [was] liable to render access to the Italian legal services market more difficult for lawyers established in [another member state]... [and] therefore amount[ed] to a restriction within the meaning of” what is now art 56 TFEU (then art 49 TEC), the key ‘free movement of services’ Treaty provision,¹³⁴ unless, of course, the Host member state could justify that restriction as an ‘overriding requirement relating to the public interest’.¹³⁵

¹²⁸ Competition (Amendment) Act 2017

¹²⁹ Case C-136/12, *Consiglio nazionale dei geologi*, para 57.

¹³⁰ C-427/16 and C-428/16, *CHEZ Elektro Bulgaria AD*, para 55 and 55-58.

¹³¹ Joined Cases C-94/04 and C-202/04 *Cipolla and others v Fazari and others* [2006] ECR I-11421

¹³² *ibid* para 15.

¹³³ *ibid* para 14.

¹³⁴ *ibid* para 58 of the judgment. It is worth mentioning that the Opinion of AG Maduro in this case made a lot of the convergence of the four freedoms in respect of the ‘market access test’, also by reference to the case of *Caixa Bank v France*, which is a FES case, however one where the establishment of a company rather than that of a self-employed natural person, was at stake (*Cipolla* (n 116), Opinion of AG Maduro, para 64).

¹³⁵ *ibid* paras 64-69.

This was an important precedent in respect of the application of the market access test to the free provision of services by self-employed professionals although, we would maintain, a non-conclusive one in respect of the field of ‘freedom of establishment of (natural) persons’. In fact, we would argue that the rationale advanced by the ECJ to justify the restriction of ‘free movement of services’ (FMS) by a minimum fee regime¹³⁶ could hardly apply to a situation where ‘foreign’ legal service providers are *permanently* established in the Host MS, in that the newly established foreign provider would be on a par with a newly established national provider, say, a young solicitor trying to make himself known in the local national market.

However, in contrast with *Cipolla*, the subsequent case of C-565/08, *Commission v Italy* (‘lawyers maximum fees tariffs’)¹³⁷ engaged with the issue of fees set by national legal professional bodies in respect of *both* ‘free movement of services’ and ‘freedom of establishment of (natural) persons’, with the Commission explicitly arguing that Italy had “adopted, in breach of arts 43 EC and 49 EC, provisions requiring lawyers to comply with maximum tariffs for the calculation of their fees”.¹³⁸ In this case, the Court ultimately ruled that the maximum fee tariffs were actually compatible with both ‘freedom of establishment’ and ‘free movement of services’, but it is important to follow the Court’s reasoning to appreciate what kind of principles are guiding its action.

In paragraphs 45-51 of the judgment, the Court relied on a number of its precedents in the areas of FMS and FES of legal persons (FES/LP), including *Cipolla*, to suggest that while “measures taken by a Member State which, although applicable without distinction, [could] affect access to the market for economic operators from other Member States”,¹³⁹ it was also important to bear in mind

“that rules of a Member State do not constitute a restriction within the meaning of the EC Treaty *solely by virtue of the fact that other Member States apply less strict, or more commercially favourable, rules to providers of similar services established in their territory*”¹⁴⁰

and that therefore the Commission’s argument that

“[maximum tariffs] constitute a restriction within the meaning of the abovementioned articles in that they are liable to subject lawyers established in Member States other than the Italian Republic, who provide services in Italy, to additional costs resulting from the application of the Italian system of fees, as well as to a reduction in profit margins and therefore a loss of competitiveness”¹⁴¹

had no automatic purchase, and could only apply if those rules were demonstrable, such as to deprive foreign service providers from accessing the market under conditions of ‘effective competition’,¹⁴² which could not be suggested in that particular case as the Italian fees were sufficiently flexible to allow adequate remuneration for the various types of services provided by lawyers.

So to summarise this part of our analysis, the Court established in *Cipolla* that minimum fees for legal services set by a competent national body result in a restriction of free movement of services, and that – unless that restriction can be *justified* – foreign legal service providers ought to be allowed to charge *lower* fees for the sake of market penetration. The analysis in the ‘maximum fees tariffs’ case, however, clarified that while the *Cipolla* reasoning applied beyond the FMS context to the FES (presumably ‘freedom of establishment of (natural) persons’ and ‘freedom of establishment of (*legal*) persons’) context, maximum tariffs that did not impede effective competition, but simply produce ‘a reduction in profit margins’¹⁴³ for foreign service providers, do not necessarily conflict with EU law. We note that according to the Court ‘the provisions of the FEU Treaty on freedom to provide services, it should be observed that they are not applicable in a situation all the elements of which are confined within a single Member State’.¹⁴⁴

136 *ibid*, para 59: ‘that [the] prohibition deprives lawyers established in a Member State other than the Italian Republic of the possibility, by requesting fees lower than those set by the scale, of competing more effectively with lawyers established on a stable basis in the Member State concerned and who therefore have greater opportunities for winning clients than lawyers established abroad’. (Emphasis added.)

137 Case C-565/08 *Commission v Italy* [2011] ECR I-2101.

138 *ibid* para 23.

139 *ibid* para 46.

140 *ibid* para 49 (emphasis added).

141 *ibid* para 48.

142 *ibid* paras 51 - 53.

143 *ibid* paras. 40 and 48.

144 Joined Cases C-427/16 and C-428/16, *CHEZ Elektro Bulgaria AD*, of 23 November 2017, para. 34.

8.2. COLLECTIVE BARGAINING, COMPETITION LAW AND THE REGULATION OF A ‘SOCIAL MARKET ECONOMY’: THE CASE FOR REVISITING THE EUROPEAN COURT’S APPROACH

The potential threat of competition law and internal market freedoms looming over the collective bargaining practices involving self-employed workers has been a common concern in the national reports, both in countries where these practices are well rooted in the tradition of the relevant industrial relations systems and in countries where this has not been the case yet. The question of antitrust limits to collective bargaining has continuously accompanied the collective initiatives aimed at bettering the conditions of self-employed and platform workers.¹⁴⁵

In late 2014 the CJEU issued a key judgment on this matter in Case C413/13, *FNV Kunsten Informatie en Media*.¹⁴⁶ The Dutch union FNV had negotiated a collective agreement in favour of both employed and self-employed substitute orchestra players, also regarding their compensation. The Dutch antitrust authority had issued an opinion under which a collective bargaining agreement negotiated in favour of self-employed workers would not be excluded from antitrust law. The collective agreement of the orchestra player was then terminated, and the relevant employers’ association refused to negotiate a new agreement. FNV started judicial proceedings to claim the legitimacy of such collective agreements, which led to a referral to the CJEU.

The Court of Justice held that collective bargaining agreements in favour of self-employed persons could not have immunity from competition law such as the one granted to collective bargaining in favour of employees under its 1999 *Albany* judgment.¹⁴⁷ It also ruled, nonetheless, that both employees and the ‘false-employed’ are allowed to bargain collectively over their compensation under EU law.

It is essential, however, to clarify the meaning of ‘false self-employed’ workers in this context. The CJEU referred to the “false self-employed” as those “service providers in a situation comparable to that of employees”. The judgment also stated that that “the term ‘employee’ for the purpose of EU law must itself be defined according to objective criteria that characterise the employment relationship” and recalled that under the CJEU’s case-law, “the essential feature of that relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration”.¹⁴⁸

Reference to the “direction” criterion may be misread as limiting the right to bargain collectively only to workers in an employment relationship defined under a strict test of control and subordination. If the notion of “false self-employment” were to be construed accordingly, the exemption would apply only to blatant cases of employment misclassification, leaving outside the protection of collective labour rights multitudes of workers defined as self-employed workers under national legislations, including in countries like Austria, Germany, Italy and Spain where – as discussed above – the law has long allowed some categories of self-employed persons to bargain collectively.

¹⁴⁵ This section draws on de Stefano and Aloisi (n 80) <<https://ssrn.com/abstract=3125866>> accessed 30 January 2019. See also, Camilo Rubiano, ‘Precarious Workers and Access to Collective Bargaining: What Are the Legal Obstacles?’ (2013) 5(1) *International Journal of Labour Research* 133; Shae McCrystal, ‘Organising Independent Contractors: The Impact of Competition Law’, in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart 2012); Valerio De Stefano, ‘Labour is not a technology – Reasserting the Declaration of Philadelphia in Times of Platform-Work and Gig-Economy’ (2017) 2 *IUSLabor* 1.

¹⁴⁶ *FNV Kunsten* (n 18). See also, Tonia Novitz, ‘The Paradigm of Sustainability in a European Social Context: Collective Participation in Protection of Future Interests?’ (2015) 31 *International Journal of Comparative Labour Law and Industrial Relations* 243; Valerio De Stefano, ‘Non-Standard Work and Limits on Freedom of Association: a Human-Rights Based Approach’, (2017) 46(2) *ILJ* 185; Nicola Kountouris, ‘The Concept of ‘Worker’ in European Labour Law: Fragmentation, Autonomy and Scope’ (2018) 47(2) *ILJ* 192.

¹⁴⁷ Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751

¹⁴⁸ *FNV Kunsten* (n 18), paragraph 34..

To avoid this detrimental scenario, it is firstly important to reiterate the point that the test of “direction”, in the CJEU’s case-law, may also refer to tenuous elements of control and subordination.¹⁴⁹ It is furthermore essential to concentrate on other paragraphs of *FNV Kunsten* and, in particular, on the one in which the CJEU considers that, under its case-law on antitrust cases, a subject cannot be considered as an undertaking

“if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter’s activity and operates as an auxiliary within the principal’s undertaking”¹⁵⁰

This notion of direction is based on independence from the market, as it focuses on the genuine financial and business autonomy of a subject rather than on the employment tests of control and subordination in the execution of work. Indeed, this is a more appropriate notion, suited to encompass workers that are dependent on their principals even if they do not qualify as employees under national laws. The need to look beyond these strict criteria is confirmed by a subsequent paragraph of *FNV Kunsten* where the Court states:

“the status of ‘worker’ within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that person acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work, does not share in the employer’s commercial risks, and, for the duration of that relationship, forms an integral part of that employer’s undertaking, so forming an economic unit with that undertaking.”¹⁵¹

Arguably, these two paragraphs refer not only to the situation of workers formally classified as “employees” according to the law of the respective Member States, but also to many workers that national laws may consider as self-employed. This is particularly relevant for many platform workers who are (correctly or wrongly) classified as self-employed workers.

In this regard, it is useful to refer to the decision of the CJEU in its *Uber* case.¹⁵² The Court found that Uber acts as a transportation service provider rather than a mere technological intermediary between customers and independent service providers. To reach this conclusion, the Court observed:

“Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion.”

In a situation like this, it is clear that Uber drivers – as many (bogus or genuine) self-employed workers do – only operate “as an auxiliary within the principal’s undertaking” and therefore, in *FNV Kunsten*’s terms, do not “determine independently (their) own conduct on the market, but (are) entirely dependent on (their) principal”. They are, therefore, “an integral part of (the) employer’s undertaking, so forming an economic unit with that undertaking”. As such, they fall into the definition of “worker” sanctioned by *FNV Kunsten* and should, among other things, be allowed to bargain collectively under EU competition law.

The term “false self-employed” used by the CJEU, therefore, must be read broadly, and as extending beyond the national definitions of “employee”. The exemption from antitrust law does not only cover cases of employment misclassification. Instead, it encompasses many workers that are dependent on their principals, even if they do not fully meet the tests of employment status under the relevant national legislations. It is the same CJEU that recalls that “the classification of a ‘self-employed person’ under national law does not

149 Case C-232/09 *Dita Danosa v LKB Līzings SIA* [2011] 2 CMLR 2.

150 *KNV Kunsten* (n 18) para 33.

151 *ibid.*

152 C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain* [2018] 2 CMLR 20.

prevent that person being classified as an employee within the meaning of EU law if his independence is merely notional". Moreover, it is the same Court of Justice that defines 'false self-employed' workers as persons in a situation "comparable" – and therefore not "identical" – to employees. This recalls some of the types of quasi-subordinate and economically dependent workers found in national jurisdictions, such as "employee-like" persons in Germany or "dependent contractors" in Sweden.

We are of the view that this approach is also underpinning part of the analysis of the Advocate General's Opinion in *FNV Kunsten*. Advocate General Nils Wahl persuasively argued that "that provisions designed to prevent *social dumping*, which are negotiated and included in a collective agreement on behalf of and in the interests of workers, are in principle to be regarded as improving directly their employment and working conditions, within the meaning of the *Albany* line of cases". He noted that the purpose of collective bargaining is "[t]he elimination of wage competition between workers [which] implies that an employer can under no circumstances hire other workers for a salary below that set out in the collective agreement" (para 76 of his Opinion), and "that the possibility for employers to replace workers with other individuals in respect of whom they do not have to apply the working conditions laid down in the relevant collective agreement may significantly weaken the negotiating position of workers" (para 77 of his Opinion). On the basis of this analysis he further commented that "from the perspective of a worker, there is really no difference if he is replaced by a less costly worker or by a less costly self-employed person" (para 76 of his Opinion) and that should that be possible, workers could not "credibly ask for a salary increase if they knew that they could be easily and promptly replaced with self-employed persons who would probably do the same job for a lower remuneration" (para 77 of his Opinion). As such, the Advocate General concluded that:

"For all those reasons, I take the view that preventing social dumping is an objective that can be legitimately pursued by a collective agreement containing rules affecting self-employed persons and that it may also constitute one of the core subjects of negotiation" (para 79 of his Opinion)

But subject to the necessity and proportionality tests, and following Advocate General Wahl's Opinion, it is arguable that self-employed person who genuinely compete with employees in a "sector of the economy and the type of industry to which the collective agreement applies" should also be covered by collective bargaining and benefit from an exception from competition law. This exclusion could be justified by taking into account the collective benefit of ensuring that the protective scope of labour legislation cannot be easily escaped.

In this respect, it is significant that when Ireland introduced an amendment to the national antitrust regulation to allow collective bargaining beyond the scope of "employment" *sensu stricto*, also considering the reasoning in *FNV Kunsten*, it did not only refer to "false self-employed" persons, i.e. persons merely misclassified as employees. It also referred to "fully dependent self-employed workers", namely individuals who "perform services for another person" and "whose income in respect of the performance of such services (...) is derived from not more than 2 persons".¹⁵³ To benefit from this exemption, the union must prove that a collective bargaining agreement in favour of these workers "will have no or minimal economic effect on the market" in which the workers operate and that the requirement of competition law and EU law are not contravened.¹⁵⁴

Despite this opening to collective bargaining of self-employed persons, the Irish Act adopts a rather cautious view in respect of the typologies of self-employed work it seeks to shelter from competition law. For instance, the reference to an income derived from not more than two persons would be rather problematic in a 'platform economy' context, where workers often work for multiple platforms, clients or employers at the same time, and where the earnings derived from each single platform are often insufficient to make ends meet,¹⁵⁵ and it can be hard to establish who is actually paying the remuneration to the worker, with both platform and customers being potentially liable in that respect.¹⁵⁶

¹⁵³ Competition (Amendment) Act 2017. Some specific categories of self-employed workers were specifically made exempt from competition law under Schedule 4 of the Act. These are: (1) Actors engaged as voice-over actors; (2) Musicians engaged as session musicians; (3) Journalists engaged as freelance journalists". See above Section 5..

¹⁵⁴ Michael Doherty, "Trade Unions and the Gig-Economy" in Frank Hendrickx and Valerio de Stefano (eds), *Game Changers in Labour Law: Shaping the Future of Work* (Kluwer Law International 2018).

¹⁵⁵ Ursula Huws, Neil H Spencer, Dag S Syrdal, and Kaire Holts, *Work in the European Gig-Economy* (FEPS 2017).

¹⁵⁶ Jeremias Prassl and Martin Risak, "Uber, Taskrabbit, & Co: Platforms as employers? Rethinking the legal analysis of crowd-work" (2016) 37(3) Comparative Labor Law and Policy Journal 619.

As such, this provision may be at odds with international standards on collective rights and, in particular, with ILO standards, that are much more openly and broadly formulated. Commenting on the Irish restrictions to collective bargaining in 2015, the CEACR had recalled that “the right to collective bargaining should also cover organizations representing the self-employed” and invited the Government and the social partners to identify “the particularities of self-employed workers that have a bearing on collective bargaining, so as to develop specific collective bargaining mechanisms relevant to them”.¹⁵⁷ The Committee later welcomed the introduction of a bill in Parliament in this field;¹⁵⁸ nonetheless, the final legislation adopted in the country still poses very high obstacles to collective bargaining and risk to impair the very essence of this right. The ILO supervisory bodies have consistently observed that these standards apply to all workers with the sole possible exception of those explicitly excluded by the text of Convention No 87 and No 98.¹⁵⁹ Self-employed workers are not among those excluded and, therefore, the Conventions are deemed as fully applicable to them.¹⁶⁰

When considering the Irish case in 2017, for instance, the CEACR recalled its previous comments “emphasizing the importance of promoting full and voluntary collective bargaining for all workers covered by the Convention, including self-employed workers”. The recently published Compilation of Decisions of the Committee on Freedom of Association also recalls a case in which “the Committee requested a Government to take the necessary measures to ensure that workers who are self-employed could fully enjoy trade union rights for the purpose of furthering and defending their interest, including by the means of collective bargaining”.¹⁶¹ When the Irish case was discussed in 2016 before the tripartite Committee on Application of Standards, however, some of the employers’ members raised doubts on the application of Convention No 98 to self-employed persons, since art 4 of the Convention, in laying down the right to collective bargaining, only refers to “conditions of *employment*”.¹⁶² Arguably, however, the term “employment” in this context must be interpreted as a synonymous of “occupation”. Art 1 of the Convention, for instance, prohibits to “make the employment of a worker subject to the condition that he shall not join a union (...)”. A restrictive interpretation of “employment” in this context would therefore directly impinge not only on the right to collective bargaining but also on the right to organise, opening the door to unacceptable discrimination of union members. Moreover, it would have disastrous consequences on the possibility of the most vulnerable workers, for instance, informal workers who may find impossible to claim the existence of a formal employment relationship, to fully accede to collective rights.

The first instrument concerning freedom of association and the right to collective bargaining ever adopted by the ILO, the Right of Association (Agriculture) Convention, 1921 (No 11) mandates to “secure to all those engaged in agriculture the same rights of association and combination as to industrial workers, and to repeal any statutory or other provisions restricting such rights in the case of those engaged in agriculture”. This instrument, which has been ratified by 123 countries, has long been intended as protecting the right of self-employed agricultural workers to unionise and engage in collective bargaining.¹⁶³ A restrictive interpretation of the term “employment” under Convention No 98 would have deprive workers, and particularly vulnerable workers, of the right to collective bargaining in all sectors excluding agriculture, generating a paradoxical disparity of treatment in the area of one of the fundamental principles and rights at work of the ILO. The Committee on Application of Standards, in fact, concluded in agreement with the invitation of the CEACR to identify the self-employed persons relevant for collective bargaining.¹⁶⁴

¹⁵⁷ CEACR – *Ireland*, Observation, C.98, published 2016.

¹⁵⁸ CEACR – *Ireland*, Observation, C.98, published 2017.

¹⁵⁹ ILO, *Giving globalization a human face: General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (ILO 2012). See also Committee on Freedom of Association (n 54).

¹⁶⁰ B. Creighton and S. McCrystal, “Who is a worker in international law?”. (2016) 37(3) *CLLP* YJ 691.

¹⁶¹ Committee on Freedom of Association (n 54) para 387. The Committee also requested “to identify, in consultation with the social partners concerned, the particularities of self-employed workers that have a bearing on collective bargaining so as to develop specific collective bargaining mechanisms relevant to self-employed workers, if appropriate.”

¹⁶² Emphasis added. See CEACR (n 140).

¹⁶³ See for instance CEACR – *Zambia*, direct request, C.11, published 1991. More recently, in 2017, the CEACR requested a Government “to ensure including through legislative measures that self-employed workers in the agricultural sector, in particular agricultural workers working on medium-sized and smallholder farms, enjoy the same rights of association and combination as industrial workers, including the rights to form and join trade unions and to conclude collective agreements” – see CEACR – *Mauritius*, direct request, C.11, published 2017.

¹⁶⁴ ILO, *Third item on the agenda: Information and reports on the application of Conventions and Recommendations. Report of the Committee on the Application of Standards* (2016) International Labour Conference 105th Session, Geneva, Provisional Record., May–June 2016 16(Rev) Part 2.

A restrictive interpretation, besides going against the long-standing position of the ILO supervisory bodies, would also be incompatible with foundational ILO principles and, in particular with the principle that “labour is not a commodity”, enshrined in the Declaration of Philadelphia¹⁶⁵. The origins of this principle are well known and so is its direct relation with the Clayton Antitrust Act of 1914 in the US that firstly provided that: “the labor of a human being is not a commodity or article of commerce” with the explicit purpose of excluding trade unions and collective bargaining from antitrust law.¹⁶⁶ If labour is not a commodity, unions and collective agreements are not cartels or acts of restraint of trade, is the direct implication of this provision. Reference to the “labour of a human being” is crucial in this context. As it was recently noted, nothing in the Clayton Act restricts the scope of this principle to the sole labour of ‘employees’. A distinction in collective rights based on employment status was not introduced in the legislation of the United States until the 1940s, with the revision of the National Labour Relations Act passed by Congress with the purpose of countering a judicial precedent of the US Supreme Court that had liberally interpreted the scope of application of the NRLA. This, however, it is convincingly claimed, should bear no consequence on the application of the statutory exemption provided in the Clayton Act, which can be still applied beyond the scope of the federal definition of “employees” found in the NRLA and based on the control test. The consequence, it is argued, is that (allegedly) self-employed drivers of platform-based businesses can be allowed to bargain collectively and that a city ordinance passed to provide them with this right is not in conflict with federal antitrust legislation.¹⁶⁷

Arguably, the same expansive interpretation should be given to the Declaration of Philadelphia, and ILO standards on collective rights read in line with the Declaration that seeks “to ensure a just share of the fruits of progress to all”. “Labour” cannot concern only the work of ‘employees’ and labour law must ensure a just share of the fruits of progress to all workers, including self-employed workers. Also in light of the categorisation of collective rights as fundamental and human rights,¹⁶⁸ “labour” should be granted a “universal” meaning and deemed to cover all human work activities where the personal character of the work is not dwarfed by the existence of a material business organisation that an individual independently manages to provide a service. It goes without saying that a vast number of self-employed persons do not fall outside this notion of labour, read in coherence with the universal character of the human rights to freedom of association and collective bargaining.

Going back to the CJEU rulings, despite the gesture of allowing collective bargaining beyond a strict definition of “employee”, the Court’s approach still falls short of a real valorisation of freedom of association and collective bargaining as fundamental and human rights. It is clear that the CJEU’s approach remains in many ways anchored to its earlier *Albany* decision. That judgement treated the recognition of collective bargaining of employees as an exception to the general antitrust principles, an approach arguably followed also by *FNV Kunsten*. *Albany*, however, was decided when collective bargaining was not yet recognised as a fundamental right under art 28 of the Charter of Fundamental Rights of the EU, and a decade before the same Charter acquired the same legal values of the Treaties in 2009. Importantly, given the relevance that the Treaty of Lisbon also assigns to the European Convention on Human Rights, the *Albany* ‘exception-to-rule’ approach does not seem compatible with the case-law of the Court of Strasbourg that treats the right to collective bargaining as an essential element of freedom of association under art 11 of the ECHR and the importance assigned by this latter Court to the opinions of the ILO supervisory bodies when the Court determines the scope of the ECHR protection of collective right.¹⁶⁹ This is all the more relevant since the Court of Strasbourg also recognises the freedom of association of self-employed as protected under the Convention,¹⁷⁰ and since the Charter of Fundamental Rights of the EU, in art 52(3) also provides that “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention”.

165 In its “Declaration of Philadelphia” of 10 May 1944, the ILO restated its traditional objectives with two new directions: the centrality of human rights to social policy and the need for international economic planning. See also: <https://www.ilo.org/legacy/english/inwork/cb-policy-guide/declarationofPhiladelphia1944.pdf>

166 Clayton Antitrust Act 1914 15 US Code § 17

167 Samuel Estreicher, “Brief of Amicus Curiae Professor Samuel Estreicher in support of Defendant-Appellees in the case *Chamber of Commerce of the United States et al. v City of Seattle et al.* on appeal from the United States District Court For the Western District of Washington” (2017) No 17-35640.

168 For a broader discussion of this point see Valerio de Stefano, ‘A Tale of Oversimplification and Deregulation: The Mainstream Approach to Labour Market Segmentation and Recent Responses to the Crisis in European Countries’ (2014) 43 (3) *Industrial Law Journal* 253.

169 Filip Dorssemont, “How the European Court of Human Rights gave us Energy to cope with Laval and Viking” in Marie-Ange Moreau (ed), *Before and after the economic crisis: what implications for the ‘European Social Model’?* (Edward Elgar 2011).

170 Nicola Kountouris, ‘The Concept of ‘Worker’ in European Labour Law: Fragmentation, Autonomy and Scope’ (2018) *ILJ*, 192.

It is also worth noting that the Preamble to the Charter also “reaffirms [...] the rights as they result, in particular, from [...] the Social Charters adopted by the Union and by the Council of Europe” noting that “[i]n this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention”. The explanations prepared by the Praesidium confirm that “Article 28 — Right of collective bargaining and action [...] is based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers”.¹⁷¹

These elements should not be ignored in treating future potential clashes between antitrust regulation and collective rights. It is worth reminding ourselves that, with the entry into force of the Lisbon Treaty in 2009, a new art 9 TFEU was introduced, a provision with no direct predecessor in the earlier Treaties, this inclusion being particularly relevant in the context of the new model of ‘social market economy’ enshrined in art 3(3) TEU. Judgments such as Case C201/15, *AGET Iraklis*, have already pointed out that both art 9 TFEU and art 3(3) TEU can play a fundamental role in expanding the Court’s understanding of the relationship between market rights and fundamental rights (see paras 76 and 78 of *AGET Iraklis*).

Given these important developments, and the unequivocal recognition of these rights as fundamental and human rights – at least in European law and under ILO sources – these rights should be restricted only when they conflict with other human rights or, in ECHR terms, when a restriction is “necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others”. The burden of proof should, therefore, be placed accordingly.

In light of what has been argued above, only self-employed individuals that do not provide ‘labour’, but provide services by means of an independent business organisation that they actually own and manage, and whose relevance in the provision of the service in terms of capital and work of other persons is considerably superior to the relevance of the individual’s personal work, should be restricted in the enjoyment of the right to bargain collectively. We would suggest that a similar approach also ought to be adopted in respect of collectively set professional standards and tariffs, at least in respect of those self-employed professionals that provide services in a predominantly personal capacity and are not operating a business in their own account.¹⁷²

The burden of proof on the presence of these elements and the material impact of collective bargaining of these independent self-employed providers on the relevant market should be borne by those who propose the restriction, be it antitrust authorities or other parties.

The European Committee on Social Rights has now followed a similar approach in a case concerning the Irish restrictions to the collective bargaining of self-employed persons, which lead to the revision of the national antitrust legislation mentioned above. After observing that there is no reason to exclude self-employed persons in a generalised way from the scope of art 6§2 of the European Social Charter, protecting collective bargaining, the Committee highlighted that the only restrictions allowed in this respect are the ones provided for by art 6 of the Charter. Accordingly, “the right to bargain collectively [...] may be restricted by law where this pursues a legitimate aim and is necessary in a democratic society”. In this respect, according to the Committee, restrictions following from competition law or commercial law may pursue a legitimate aim and be necessary in a democratic society, “for example to protect the rights and freedoms of others”.

However, the Committee also importantly observed: “the world of work is changing rapidly and fundamentally with a proliferation of contractual arrangements, often with the express aim of avoiding contracts of employment under labour law, of shifting risk from the labour engager to the labour provider”. This “has resulted in an increasing number of workers falling outside the definition of a dependent employee, including low-paid workers or service providers who are de facto “dependent” on one or more labour engagers”, something that “must be taken into account when determining the scope of art 6§2 in respect of self-employed workers”.

171 Cf. Urfan Khaliq, ‘The EU and the European Social Charter: Never the Twain Shall Meet?’ (2014) 15 *Cambridge YB Eur Leg Stud*, 169; Colm O’Cinneide, ‘The European Social Charter and EU labour law’, in Alan Bogg, Cathryn Costello, A.C.L. Davies (eds), *Research Handbook on EU Labour Law* (Edward Elgar, 2016), p. 191.

172 Nicola Countouris and Samuel Engblom, “Protection or protectionism?” – A legal deconstruction of the emerging false dilemma in European integration’ (2015) *ELLJ* 20.

The Committee also highlighted that “collective mechanisms in the field of work are justified by the comparably weak position of an individual supplier of labour in establishing the terms and conditions of their contract”. This is a different context from competition law “where the grouping of interests of suppliers endanger fair prices for consumers”. To counter “the lack of individual bargaining power the anti-cartel regulations are considered inapplicable to labour contracts”, as also “generally accepted by the CJEU” in *Albany*. In light of this, when establishing the type of collective bargaining that is protected by art 6§2 of the Charter “it is not sufficient to rely on distinctions between worker and self-employed”. Instead, “the decisive criterion is [...] whether there is an imbalance of power between the providers and engagers of labour”.

Therefore, “providers of labour [who] have no substantial influence on the content of contractual conditions, [...] must be given the possibility of *improving the power imbalance through collective bargaining*”(emphasis added). It follows that “an outright ban on collective bargaining of all self-employed workers would be excessive as it would run counter to the object and purpose” of art 6§2 of the Charter.

After laying down these general principles, the Committee declared that the ban on the collective bargaining of self-employed voice-over actors, freelance journalists and certain musicians imposed in Ireland before the 2017 reform was contrary to the Charter. In reaching this conclusion, it observed that “[although] the restriction was provided for by law and could be said to pursue a legitimate aim of ensuring effective and undistorted competition in trade with a view to protecting the rights and freedoms of others”, the ban was, however, “excessive and therefore not necessary in a democratic society in that the categories of persons included in the notion of “undertaking” were overinclusive”. The self-employed workers “[could not] predominantly be characterized as genuine independent self-employed meeting all or most of criteria such as having several clients, having the authority to hire staff, and having the authority to make important strategic

decisions about how to run the business”. Instead, the workers concerned were “obviously not in a position to influence their conditions of pay once they have been denied the right to bargain collectively”. Moreover, the Committee did not believe that “permitting the self-employed workers in question to bargain collectively and conclude collective agreements, including in respect of remuneration, would have an impact on competition in trade that would be significantly different from the impact on such competition of collective agreements concluded solely in respect of dependent workers (employees)”.

For the restriction to be allowable, therefore, it would have to be proved that the self-employed workers concerned were actually independent and able to run their business autonomously, also with regard to setting their compensation, and that any collective agreement concluded in their favour would have a material impact

on competition and trade. It is logical to conclude that it is the party who wants to impose a restriction, be it a Government, an independent antitrust authority or others, who must prove the existence of these conditions. The decision of the Committee, therefore, goes in the direction of shifting the burden of proof on the party who wants to restrict collective bargaining of self-employed workers.

Indeed, this approach upends the traditional functioning of antitrust regulation, in particular with regard to the burden of proof. However this seems to be an inevitable conclusion if the recognition of collective rights as fundamental and human rights must be given significance and the spread of non-independent workers who do not meet entirely traditional strict control and subordination tests accompanied by a consequent expansion of collective protection of those workers.

Instead, “the decisive criterion is [...] whether there is an imbalance of power between the providers and engagers of labour”. Therefore, “providers of labour [who] have no substantial influence on the content of contractual conditions, [...] must be given the possibility of improving the power imbalance through collective bargaining”(emphasis added).

It is logical to conclude that it is the party who wants to impose a restriction, be it a Government, an independent antitrust authority or others, who must prove the existence of these conditions. The decision of the Committee, therefore, goes in the direction of shifting the burden of proof on the party who wants to restrict collective bargaining of self-employed workers.



9. CURRENT REFORM PROPOSALS AND DEBATES:

QUIET AT NATIONAL LEVEL,
LIVELY AT EU LEVEL

A further question explored by the present report is the extent to which the subject matter of the regulation of the employment relationship in general, and of newly emerging forms and patterns of employment linked to the growth of on-line platforms in particular, is currently the subject of national reform debates. All our national experts reported to us that while particular and contingent reform questions continue to emerge from time to time, there are no visible signs of an emerging strategic approach towards the identification of more structural solutions to the problems identified in their papers, as well as in the previous sections of the present report. It would also appear that, in recent years, some Member States have indeed experienced the introduction of some new legal provisions that sought to address, at least in part, some of the concerns arising from the changes affecting the employment relationship.

Germany

Our German expert, Professor Schlachter-Voll, noted that the relative silence surrounding these issues in Germany may indeed partly be due to the provision defining the employment contract, i.e. art 611a *BGB*, only coming into force a year ago. In the course of the debates preceding its introduction, policy makers grappled with three fairly distinct approaches to resolve the regulatory conundrum before them. The most prominent approach, followed by the federal labour court, was based on the idea that the ‘employee’ is much rather a sociological type instead of a legal term, with the consequence that all the so called elements of the employment relationship were, in reality, mere indicators for the existence or otherwise of such relationship, and that the absence of one or two of even the most prominent indicators could be overcome by the combined weight of several other indicators. Another, second, approach supported in some quarters of German legal academe, sought relying on the allocation of the economic risks and chances criterion as the main element for establishing the employment status of a working person, but this approach has not been included in the new provision. Instead, the new statutory provision operates on a slightly different dogmatic approach. It takes on board the “indicators” most regularly applied in case law but establishes them as *legal conditions* for the existence of an employment contract; lacking one of these features would then prevent the contract from being an employment contract. However, as legislature indicated the goal of merely codifying existing case law it might be possible that courts simply continue following their overall flexible approach despite the established provision.

France

Our French expert noted that questions surrounding the regulation of workers providing their services through on-line platforms continue to occupy policy discourse in spite, or possibly because of the introduction of *loi du 8 août 2016*, and of arts 7341-1 of the French Labour Code, referred to above in section 5 of the present report. However there seem to be no major reform proposals pending before the French parliamentary bodies, and the proposal to introduce an intermediate category of economically dependent workers explored a decade ago by the ministerial report *Le travailleur économiquement dépendant : quelle protection?*, authored Paul-Henri Antonmattei and Jean Claude Sciberras, would appear to have been abandoned for the time being.

United Kingdom

Similarly, the report commissioned in 2017 by the UK Government to Matthew Taylor, *Good Work: The Taylor Review of Modern Working Practices*, a report that among other suggestions, advocated the idea of introducing a new intermediate category of ‘dependent contractor’ (substituting the ‘worker’ category), would appear to have lost traction for the time being.

Belgium

In Belgium no current discussions on a fundamental reform of the scope of application of labour law exist. The Belgian Minister of Employment Kris Peeters recently emphasized that even though an intermediate worker category has been considered, the consensus generally seemed to be that this was not warranted and would not clarify the scope of labour law under Belgian law. The Belgian social partners, in a report

from 4 October 2017, reached under the auspices of the *Conseil National du Travail and Conseil Central de l'Economie* came to the same conclusion, although it is worth noting that Belgian judicial and administrative authorities have developed a fairly robust line of precedents that .

Austria

Our Austrian colleague noted that the relative silence in Austrian policy quarters is likely also attributable to the fact that intermediate categories of employment-like work relations are already both recognised and receiving some protections, including in terms of equality legislation, contractual termination notice periods, redundancy payments and even unemployment insurance and benefits.

Sweden

Our Swedish experts reported that the operation and scope of unemployment benefit schemes are now looked into by a governmental committee, and one of the objectives of the committee is to investigate how the legal framework for the unemployment benefit schemes can be made neutral when it comes to employment forms and similar (i.e. how to ensure that self-employed, freelancers etc. are covered by these schemes).

European Union

This relative quiet at a national policy level can be usefully contrasted with the more lively debate currently taking place at the EU level, and surrounding the draft Directive on Transparent and Predictable Working Conditions in the European Union.¹⁷³ A number of the provisions contained in the proposal have been drafted with the express intention of applying to platform workers. Paragraph 7 of the draft instruments Preamble notes that:

“In order to ensure effectiveness of the rights provided by the Union law, the personal scope of Directive 91/533/EEC should be updated. In its case law, the Court of Justice of the European Union has established criteria for determining the status of a worker which are appropriate for determining the personal scope of application of this Directive. The definition of worker in Article 2(1) is based on these criteria. They ensure a uniform implementation of the personal scope of the Directive while leaving it to national authorities and courts to apply it to specific situations. Provided that they fulfil those criteria, domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices could come within the scope of this Directive”.

Art 2(1) a) defines the term ‘worker’ as ‘a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration’. art 3 (Obligations to provide information) of the Directive proposal would also appear to have been drafted with the same preoccupation in mind.¹⁷⁴ It is arguable that the key merit of the draft instrument is chiefly that of incrementally strengthening and clarifying (without necessarily expanding) the EU ‘worker’ definition, for the express policy goal of covering some of the newly emerging, and under protected, forms of work. Whether the wording of the definitions contained in art 2 of the instrument can genuinely assist it in pursuing this policy goal remains an unanswered question. Clearly, as also noted by ETUC,¹⁷⁵ the directive itself would have to be interpreted in the light of its stated purpose, ‘which is to provide protection for the widest categories of workers and in particular the most vulnerable workers’. And an important dimension of the CJEU’s case law in the context of non-standard work is that ‘Member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness’,¹⁷⁶ as evident from cases such as Case C-393/10 *O’Brien*.

173 European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Transparent and Predictable Working Conditions in the European Union’ COM (2017) 797 final.

174 *ibid* 12.

175 ETUC position on the draft Transparent and Predictable Working Conditions Directive, adopted at the Executive Committee Meeting of 7-8 March 2018.

176 *ibid*.

ILO

The ILO Global Commission on the Future of Work released an independent report advancing numerous proposals to tackle the challenges of the current and future world work, including the call to adopt a Universal Labour Guarantee for all workers.¹⁷⁷ This Guarantee would include the ILO fundamental principles and rights at work, discussed above: “freedom of association and the effective recognition of the right to collective bargaining and freedom from forced labour, child labour and discrimination”; and a set of basic working conditions: (i) “adequate living wage”; (ii) limits on hours of work; and (iii) safe and healthy workplaces. Importantly, the ILO Commission expressly called for the Universal Labour Guarantee to apply to all workers “regardless of their contractual arrangement or employment status”, therefore also covering the self-employed.

As discussed above, the ILO supervisory bodies already consider the fundamental principles and rights at work to be universal and to apply to all workers, including self-employed workers. The Global Commission calls now to regard a new set of protections as universal, and applicable to all workers without distinctions based on employment status, namely those related to occupational safety and health as well as to working time and living wages.¹⁷⁸

The proposals of the Report of the Global Commission will need to be discussed and endorsed by the ILO tripartite constituents to be implemented, and it is not clear whether a tripartite consensus will be found on the Universal Labour Guarantee. The Report of the Global Commission, however, is a very authoritative source, which already deserves attention in the context of this report since it advocates for extending essential labour protection to the self-employed, by also expressly providing that the Guarantee is aimed at supplementing, and not replacing, current legal protections of those who already are in an employment relationship.

But the policy reform debate has also reached a noteworthy level of maturity in some quarters of the labour movement and of academic discourse. One such approach is embodied in the recent works by Ewing, Hendy, and Jones, and in particular in their *Manifesto for Labour Law*,¹⁷⁹ and in their 2018 publication *Rolling out the Manifesto for Labour Law*.¹⁸⁰ In their works the editors of these publications have strongly argued in favour of a broader construction of the personal scope of domestic labour rights, by referring to a worker definition including any “person... engaged by another to provide labour and is not genuinely operating a business on his or her own account”.¹⁸¹ This definition is broader than the existing concept of employee in that it does not require the existence of mutual obligations of a contractual character, “as long as a personal work relation can be ascertained from the existence of the reality of the situation”.¹⁸² “The definition is, however, specifically intended to exclude those operating a genuine business and providing services to a plurality of clients or customers by means of substantial tangible or intangible assets”.¹⁸³ In this respect the definition re-institutionalises the classic binary divide but does so by reference to the concept of personal work (rather than personal subordination or dependence), only excluding genuine undertakings and strongly positioned entrepreneurs genuinely operating businesses on their own account. Crucially, the effectiveness of this set of proposals rests on the parallel adoption of a general presumption that “anyone providing their labour to another will be presumed to fall within the scope of” labour law “unless the other party to the arrangements establishes that the only possible construction of the engagement is that the individual was not providing labour as a ‘worker’”.¹⁸⁴

177 Global Commission on the Future of Work, *Work for a Brighter Future* (ILO 2019)

178 Importantly, the Preamble of the ILO Constitution already calls for advancing working conditions in these areas without making any distinction between employees and self-employed workers.

179 KD Ewing, John Hendy and Carolyn Jones (eds), *A Manifesto For Labour Law: towards a comprehensive revision of workers' rights* (IER 2016)

180 Ewing, Hendy and Jones (eds), *Rolling Out the Manifesto for Labour Law* (n 8)

181 *ibid* 35. Ewing, Hendy and Jones (eds), *Rolling Out the Manifesto for Labour Law* (n 8) 36.

182 Ewing, Hendy and Jones (eds), *Rolling Out the Manifesto for Labour Law* (n 8) 37.

183 *ibid*.

184 *ibid* 37.

A further noteworthy approach is the one recently developed by Emmanuel Dockés and a number of other French academics, seeking to extend the scope of application of domestic labour law by reference to a finer-grained classification of ‘dependent’ employees and ‘autonomous’ or ‘externalised’ salaried workers, the latter receiving a set of labour rights that mirrors the protective regime applying to home workers.¹⁸⁵ The crux of their reform proposals amounts to the inclusion with the ambit of application of employment protection legislation of all workers that while not strictly speaking subordinate to an employer are however (economically) dependent on an employing entity for their livelihood. In a commentary to these proposals, Alain Supiot noted that ‘Adopting this criterion would simplify labour law while linking the degree of protection enjoyed by workers to their dependence’.¹⁸⁶

Another approach is best exemplified by the broad and universalistic aspirations implicit to the broad and far reaching personal scope advocated in art 1 of CGIL’s, *Carta dei diritti universali del lavoro - Nuovo statuto di tutte le lavoratrici e di tutti i lavoratori* (2016) providing that ‘The provisions of Title I of this law apply to all workers who hold contracts of employment and self-employment’¹⁸⁷. Title 1 of the Charter contains a broad list of fundamental social and labour rights, including, in art 19, a provision that seeks to offer a basic set of protections to all workers whose respective contracts for work or services can be terminated by their employer or principal only ‘for a valid reason, or a specific justification provided by legislation, collective contracts or agreements stipulated by the associations of autonomous workers, where applicable, or by an individual contract’. Arts 83 and 84 of the CGIL Charter do however introduce heightened procedural and substantive protections against the unfair dismissal of standard employees.

While ideas suggesting a more fundamental reconfiguration of the binary divide between employment and self-employment, along the lines discussed in the previous paragraphs, are currently gaining traction, more traditional proposals seeking to identify intermediate categories, or sub-categories, of quasi-dependent workers, only benefiting from a limited range of fundamental labour rights, remain popular in some quarters of the academic and policy debate. For instance the adoption of an intermediate category of ‘independent worker’ has been suggested in the works by Seth Harris and Alan Krueger.¹⁸⁸ The authors have argued that since several emerging work relationships “do not resemble [those of] independent contractors or employees with respect to their most fundamental characteristics”,¹⁸⁹ and since, particularly in the context of triangular work relationships in the gig-economy, concepts such as ‘work’, employment, and working hours, are harder to define and grasp with the traditional analytical tools defining traditional categories, it would be appropriate to introduce a ‘new category’ of ‘independent workers’ enjoying the protections afforded by freedom of association and collective bargaining, civil rights protections (and anti-discrimination law in particular), wage and working time protections, and an ad hoc fiscal and social security regime.¹⁹⁰ Similar policy rationales would appear to underpin the suggestions made in the 2017 report commissioned by the UK Government to Matthew Taylor, *Good Work: The Taylor Review of Modern Working Practices*¹⁹¹ advocating that “Government should retain the current three-tier approach to employment status as it remains relevant in the modern labour market, but rename as ‘dependent contractors’ the category of people who are eligible for worker rights but who are not employees”.¹⁹²

While it could be argued that, to a certain extent, proposals such as those put forward by Harris and Krueger, and Taylor may partly rest on some genuine worker-protective aspirations, they also present a number of important deregulatory pitfalls. In particular, in most systems where ‘intermediate categories’ have come to exist, their appearance has typically facilitated the ability of employers to structure their work needs and arrangements through contractual forms that departed from the employee/contract of employment classification. It is easier to persuade a court that a worker is not an employee with a

185 Dockés (n 8) arts L. 11-1 - L. 11-18.

186 Alain Supiot, ‘A Labour code for the 21st century’ (*Le Monde Diplomatique*, May 2018) <<https://mondediplo.com/2018/05/17-la-bourcode>> accessed 30 January 2019

187 *Le disposizioni del Titolo I della presente legge si applicano a tutte le lavoratrici e a tutti i lavoratori titolari di contratti di lavoro subordinato e di lavoro autonomo*

188 Harris and Krueger (n 10).

189 *ibid* 8.

190 *cf* 15 - 21.

191 Matthew Taylor, *Good work: The Taylor Review of Modern Working Practices* (2017) <

192 *ibid* 35.

contract of employment, but rather (and legitimately) a quasi-subordinate worker, than to argue that she or he is a self-employed. Quasi-subordinate/dependent worker contracts retain, in all systems, an important set of contractual characteristics borrowed from the contract of employment model. So disguising employment relations as 'quasi-subordinate' ones is typically easier than trying to fit them into a 'bogus self-employment contract'. In most systems para-subordination has simply offered a new, easier opportunity for misclassifying employees, without paying any significant worker protective dividends. Harris and Krueger themselves acknowledge that it is "important that businesses do not organize themselves to move workers into independent worker status in order to gain an unfair advantage over other employers by skirting legal protections and required benefits".¹⁹³ But the reality is that such proposals tend to lead precisely to this kind of mischief.

¹⁹³ *ibid* 14.

A person is riding a bicycle on a city street. The image is overlaid with a semi-transparent red filter. The person is wearing a light-colored cap, a dark backpack, and light-colored pants. They are riding a silver-colored bicycle. In the background, there are buildings and a parked car. The text '10. A NEW CONCEPT OF 'EMPLOYING ENTITY'' is written in white, bold, sans-serif font across the middle of the image.

10. A NEW CONCEPT OF 'EMPLOYING ENTITY'

Identifying the role and responsibilities of the employing entity, and in fact identifying the employing entity in itself, has become another important vexed question for labour law systems. The question is in many ways intimately intertwined, and to a certain extent a reflection, of the challenges arising from the fragmentation processes affecting the standard employment relationship, but it also retains its own specificities, both at a conceptual level and at a normative one. As already noted by Jeremias Prassl in his seminal work on *The Concept of the Employer*, ‘the received unitary concept of a single-entity employer is an increasingly salient factor in workers’ falling outside the personal scope of employment law, as individuals employed in multilateral work arrangements can no longer satisfactorily identify the relevant counterparty to bear employment law obligations’.¹⁹⁴ This is so both as far as work relationships located in the ‘old’ economy are concerned, and in respect of those constantly emerging in the so-called ‘new’ economy.

The 2017 Proposal for a Directive on ‘transparent and predictable working conditions in the European Union’, in the explanatory notes pertaining to the ‘employer’ definition contained in art 1(5), acknowledged the “the function of employer for the purpose of the proposed Directive may be fulfilled by more than one entity”,¹⁹⁵ and art 1(5) goes as far as providing that implementing Member States ‘may also decide that all or part of these obligations shall be assigned to a natural or legal person who is not party to the employment relationship’ (as long as all stated obligations are ultimately fulfilled).

In preparing the present report we approached our national experts to enquire about their own domestic understanding of the concept of employer, and to test a particular proposition, advanced in our questionnaire, that it may be possible to work towards an extended concept of employing entity by developing in a worker protective, and employment law relevant, sense the concept of ‘joint employment’, a concept that is known to labour scholarship,¹⁹⁶ and already present in a number of jurisdictions, especially outside Europe.¹⁹⁷ Our suggestion sought, in particular, to explore the viability of an employing entity definition that would attach employment law obligations upon whichever party, in practice, substantially determines the terms of engagement or employment of a worker.

This is an approach that draws upon a fairly established, and generously interpreted, statutory provision contained in s 43K(1)(a) of the UK Employment Rights Act 1996, albeit limitedly to the issue of identifying an employer for the purposes of ‘whistleblowers’ protection. In that context, the provision effectively establishes that the employer is the party that substantially determines the terms of engagement or employment of a worker. English courts have correctly understood that provision to require that where more than one party is so responsible (and regardless of whether one party is more responsible than the other, as long as both are ‘substantially’ responsible),¹⁹⁸ the worker may address a claim against either or both putative employers. So this definition of employer is not an ‘exclusive’ definition, and can in effect result in a ‘joint employer’ status arising in respect of multiple employing entities.

Our suggestion sought, in particular, to explore the viability of an employing entity definition that would attach employment law obligations upon whichever party, in practice, substantially determines the terms of engagement or employment of a worker.

194 Jeremias Prassl, *The Concept of the Employer* (OUP2015) 1.

195 European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Transparent and Predictable Working Conditions in the European Union’ COM (2017) 797 final, 11.

196 Luca Ratti, ‘Agency Work and the Idea of Dual Employership’ (2009) *Comparative Labor Law & Policy Journal* 835; Lusja Corazza and Orsola Razzolini, ‘Who is an Employer?’, in Matthew Finkin and Guy Mundlak, *Comparative Labor Law* (Edward Elgar 2015) 132.

197 Luca Ratti, ‘Online Platforms and Crowdwork in Europe: A Two Step Approach to Expanding Agency Work Provisions?’ (2018) *Comparative Labor Law & Policy Journal* 477, 486 - 487.

198 *Day v Health Education England & Ors* [2017] EWCA Civ 329.

Our national experts confirmed that, by and large, most legal systems covered in the present report embrace a unitary concept of employer. While, as in the case of Belgian case law on the liability of subsidiary companies, or in the case of para. 34 of the UK National Minimum Wage Act 1998 presumptions for the payment of wages, they may depart from this classic vision, these tend to be the exceptions to a fairly established rule. It would also appear that in a number of important legal systems, such as the Italian or the German one, for instance, the concept of employer does not attract any substantial legal or conceptual definition, whereas in Austria the debate appears to have largely stalled for the past half century. By and large, our experts have understood our proposed definition as an improvement on the status quo.

We also received some words of caution and advice. Our Spanish expert correctly noted that the definition we propose should also be used for the purposes of identifying the relevant collective agreement if separate employing entities operated in different sectors or industries or were covered by distinct collective agreements. This is a valid point. He suggested to us that, as an alternative approach, one may consider appointing employers' responsibilities upon the entity that derives (most of the) profits from the labour exchange - possibly a complex but not wholly unattractive proposition. Our French expert noted that by relying on the idea of substantial responsibility for setting the terms of the relationship, our definition may end up privileging the notion of subordination over that of economic dependence.

CONCLUSIONS

TIME FOR A 'PERSONAL WORK RELATION'

The central objective pursued by this report was to identify a new legal conceptual framework for the analysis of the normative and regulatory challenges arising from the proliferation of 'new forms of employment', and in particular from the growth of forms of work that, by virtue of their being classified as autonomous or quasi-autonomous, fall outside the protective umbrella of labour and social security law. Our analysis, based on a number of reports produced by national experts and respected authorities in their respective fields of labour and industrial relations, begun by exploring the breadth and malleability of the various worker and employee definitions utilised to shape domestic, and to a certain extent supranational, labour law systems.

On the basis of these reports three key observations became quickly apparent:

1. National worker definitions tend to be shaped by reference to a relatively common core of criteria and indicators, mainly revolving around the concept of subordination or control in the provision of paid employment for a (unitary) employer. There are some occasional national deviations from this common core, that can sometimes result in the expansion or narrowing of the scope of application of domestic employment protection legislation. But by and large it still remains the case that the bulk of labour law protections remains confined to employees working under the direction and control of an employer.
2. The concept of self-employment does not receive much attention by domestic labour law systems, at least in terms of its conceptual and definitional elements. The self-employed category has become, as noted in section 8 of the report, a sort of default category for all those work relations that do not fit the occasionally very narrow definition of subordinate, bilateral, and continuous employment. It is thus increasingly populated by a vast and heterogeneous array of economic activities and relations where the provision of work, even personal work, may well be present, albeit not always in an obvious or even predominant way, and where the reliance on capital and non-capital, tangible or intangible, assets may be minimal, thus placing large numbers of self-employed persons in an extremely weak position in the labour market.
3. From all the national studies examined by the authors of this report it emerges quite clearly that the current binary approach based on the distinction between employment and self-employment, which still constitutes the backbone of labour (and social) protection systems is increasingly under strain. The spread of business models based on the recourse of forms of employment that depart from the standard open-ended full-time employment relationship had the effect of pushing a growing number of workers outside the scope of employment regulation and labour protection. These workers, as noted by the European Committee of Social Rights, are often classified as self-employed persons, without any form of strong organisational autonomy or independence on the market that, in the past, justified their exclusion from labour protection.

Many legal systems reacted to these dynamics by extending some labour and social protection to some self-employed workers, typically those in a situation of quasi-subordination or economic dependence *vis-à-vis* their principals. At the same time, trade unions attempted to broaden their organising activity beyond the area of employees, by reaching out towards self-employed workers and, in several instances, also by negotiating collective bargaining agreements in their favour, particularly in the sectors of media, arts and entertainment.¹⁹⁹

Our analysis, however, shows that these efforts were not sufficient to face all the challenges generated by the spread of new forms of employment (and self-employment). Legal extension of labour rights to the quasi-subordinate and economically dependent self-employed occurred, in most of the cases, in an uneven fashion, with a stratification of legislation that does not allow an easy identification of the protections reserved or extended to these workers. In some countries, notably in Italy and in the United Kingdom, this extension also spurred further litigation around the question of the correct classification of workers, often with the result of confining workers that could have had access to fully-fledged protection as employees into the far less protective quasi-subordinate statuses.

Union efforts, while more promising, were often frustrated by lack of legal clarity around the access of self-employed workers to the full enjoyment of labour rights, and by obstacles represented by the activism of antitrust authorities that categorized collective bargaining activity on behalf of these workers as a breach of competition law.

We note that while national experts have expressed different views in respect of the relative strengths and ability of their domestic systems to deal successfully with these emerging dynamics, none of them has suggested that their current legal framework provides a definitive, or even acceptable, solution to the many challenges arising from the proliferation of new forms of work. In light of this, our hypothesis concerning the need to find a more structural and comprehensive analytical approach to the scope of labour protection seems to be validated. Even the proponents of alternative viewpoints on how to achieve a new recalibration of labour rights by reference to, for instance, the concept of economic dependence,²⁰⁰ or the, incomplete in our view, extension of some fundamental labour rights beyond the realm of subordinate employment,²⁰¹ explicitly acknowledge the need to move beyond the status quo.

We remain of the view that the idea of the personal work relationship can provide a valid normative paradigm in this respect, by leaving outside the scope of labour law (broadly understood as including individual and collective labour law but also employment equality law), work that is not predominantly personal, and is mainly (as opposed to occasionally or exceptionally) provided by means of dependents or substitutes, or as an accessory to capitalised and asset intensive (as opposed to labour intensive) business undertakings.

Ultimately, the idea of 'personal work relation' can be used to define the personal scope of application of labour law as applicable to any person that is engaged by another to provide labour, unless that person is genuinely operating a business on her or his own account.

The idea of personal work relation is, as argued in greater detail in section 9, also compatible with both the original rationale underpinning labour law in general - and collective bargaining in particular - and, no less importantly, with the regulatory purposes underpinning other areas of regulation, including competition law. The idea departs from the traditional view that the binary divide between what falls within the protective domain of labour law and what falls outside it ought to be defined by reference to the concepts of subordination and control. It suggests instead that a person is a worker if she mainly provides personal labour and is not genuinely operating a business on her own account (in which case competition law would naturally apply). If labour law and the right to collective bargaining are premised

199 FIA report, Fulton Report CAN WE LEAVE THESE REF LIKE THIS ?

200 Dockes

201 CGIL, *Carta dei diritti universali del lavoro - Nuovo statuto di tutte le lavoratrici e di tutti i lavoratori* (2016).

on redressing the weak bargaining position of workers vis-à-vis their employers, then surely the fact of earning a living mainly off their personal labour, as opposed to living mainly off other people's labour and through the organisation of capital assets, is a better indicator of somebody's relative strength in the labour market than, say, their providing such work under the direction, or otherwise, of a specific employer. Personal work is also a better indicator than the criterion of economic dependence from a main user or employer. It is often the case, and increasingly so in the gig-economy context, that workers can offer their labour services to a multiplicity of users through a number of separate platforms without being genuinely independent in any meaningful way, either in terms of their economic independence (they might often need to take up as many jobs as possible to make ends meet) or in terms of their ability to operate as free market operators by setting, independently and individually, the price for their labour services.

This is a point worth elaborating further in these concluding paragraphs. When it comes to collective bargaining, labour law systems provide strong justifications for allowing workers to combine with each other and agree with employers basic terms and conditions of employment, including pay and working time. These justifications typically revert around the inability of workers to extract a fair price for their labour on an individual bargaining basis: by the very fact of being labourers, and in consideration of their need to constantly sell their personal labour in order to make a living, workers are ultimately not in a position truly to negotiate terms of employment, that are therefore typically imposed on them by the superior 'buying power' of employers. Workers, who typically cannot rely on any substantial savings or capital, or other means to spread the risks inherent to their operating in labour markets, inevitably sell their labour from a position of weakness. By protecting the right to collective bargaining, and by granting specific labour rights, labour law seeks to redress this imbalance of power and achieve fair outcomes for workers.

By contrast, competition law is normally seen as applying to 'undertakings', not to workers. At a basic level, competition law seeks to ensure that undertakings continue to compete with each other for the purposes of fostering innovation, offering more choice at affordable prices to consumers, and benefitting the economy in general. As put by Commissioner Vestager in a speech delivered in 2017 'If our businesses aren't challenged, if they don't have to compete, then they don't have any reason to work to serve people better. Competition is the motor that drives businesses to do better for consumers. To cut prices. To offer more choice. To produce innovative products'.²⁰² None of these policy objectives conflict with the idea that collective agreements concluded by workers ought to be exempt from competition law. However when such agreements are concluded by or on behalf of self-employed workers operating outside a 'subordinate employment' relationships, they are typically perceived as falling under the scope of anti-trust legislation.²⁰³ Competition law automatically assumes that economic activities performed outside the strict and narrow confines of subordinate employment do not merit an exemption from anti-trust prohibitions. Implicitly, it assumes that the justifications that workers rely upon to bargain collectively – e.g. their weak position in the labour market due to the need of constantly selling their labour, their lack of capital assets and savings, the superior buying power of employers – do not apply to self-employed persons, that are therefore to be treated on a par with genuine 'undertakings'.

However, our research suggests that the category of self-employment, far from being a unitary category comprising of fairly homogenous and strongly positioned market actors, includes a very diverse range of highly heterogeneous economic activities and relations. Some of these activities amount to genuine entrepreneurial activities, provided by suitably capitalised companies or by entities that employ their own labour force or that, by virtue of their ability to spread market risks across a broad range of customers or clients, are in a genuine position of strength while operating on the market. These activities have no reason to be included within the scope of labour law or collective bargaining and will rightly be caught by anti-trust law. On the other hand, it is increasingly clear that other actors operating outside the traditional realm of 'subordinate' employment will not necessarily enjoy a comparable strong position, and their being characterised as 'self-employed', or not subordinate, is certainly no guarantee of relative strength

202 M. Vestager, 'How competition can build a better market', speech delivered at the American Enterprise Institute, Washington, 18 September 2017 (https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/how-competition-can-build-better-market_en)

203 See, for instance, Joined Cases C-180–4/98, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451.

in the (labour) market. We would suggest that this is so, in particular, if they mainly or exclusively live off their labour, and in doing so they do not rely on the organisation of capital assets, other than in a manner that is marginal or ancillary to the provision of their personal work.

It is very important for both labour law and competition law to begin to acknowledge that the concept of autonomy that underpins the traditional self-employment label is not a necessary reflection of the actual market strength of its bearer. And this, we would suggest, by contrast to our concept of 'personal work' that does reflect on the fact that workers (regardless of any particular label that might apply to them) will be weakly positioned in the labour market vis-à-vis the superior buying power of their employers, for the very basic fact that they can only make ends meet by relying on their personal labour as a means of subsistence.

We think this approach is preferable to the alternatives experienced in the last decades in various systems around Europe. The concept of 'personal work relation' can also usefully underpin an idea of universality of fundamental labour rights in the workplace, enshrined in numerous international and supranational legal systems, that goes beyond the mere scope of waged employment, where it is often, and at times unlawfully, constrained at the national level. The recent experience of collective bargaining activities being hurdled or invalidated by administrative bodies shows that a renewed approach to the universality of rights would indeed benefit from the adoption a wider framing concept for defining the personal scope of labour law. The idea, as every idea, is open to debate and criticism. But we remain of the view, supported in this paper, that the idea of the 'personal work relation' is now an idea whose time has come.

The ETUC is the voice of workers and represents 45 million members
from 89 trade union organisations
in 39 European countries,
plus 10 European Trade Union Federations.



5, Bld du Roi Albert II - B- 1210 Brussels
Tel. 00-32-2/224 04 11
Fax 00-32-2/224 04 54/55

www.etuc.org